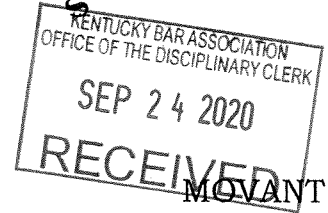


Supreme Court of Kentucky

2020-SC-0227-KB



KENTUCKY BAR ASSOCIATION

V.

IN SUPREME COURT

THOMAS STEVEN POTEAT

RESPONDENT

OPINION AND ORDER

This disciplinary case involving Thomas Steven Poteat came before the Kentucky Bar Association (KBA) Board of Governors as a default case pursuant to Supreme Court Rule (SCR) 3.210. Poteat, KBA Member No. 55363, was admitted to practice in Kentucky on April 23, 1980. His bar roster address is 611 Frederica Street, Owensboro, Kentucky 42301.

The Board of Governors recommends that Poteat be found guilty of violating five Supreme Court Rules as charged in KBA File No. 19-DIS-0089, and in consideration of prior discipline, aggravating factors, and no known applicable mitigating factors, be permanently disbarred from the practice of law in Kentucky. The Board also recommends that Poteat be assessed \$1,181.45, the total cost of this disciplinary proceeding. For reasons stated below, we follow the Board's recommendations.

FACTUAL AND PROCEDURAL BACKGROUND

A. KBA File No. 19-DIS-0089

Poteat was suspended from the practice of law on January 23, 2014, for failure to comply with Continuing Legal Education (CLE) requirements. He has not since been restored to practice. The Notice of Suspension required Poteat to “notify all Courts in which he . . . has matters pending, and all clients for whom he . . . is actively involved in litigation and similar matters, of his . . . inability to continue representation and of the necessity and urgency of promptly retaining new counsel.”

Nevertheless, Poteat continued to represent John Ford in Ohio Circuit Court, 10-CI-00530, in a property dispute. Poteat failed to inform Mr. Ford he was suspended and was unable to continue representation.

As part of that representation, Poteat and opposing counsel discussed entering into an agreed order to determine the property ownership. Poteat represented to his client, Mr. Ford, the agreement would determine the property ownership in his favor, and Mr. Ford consented to the agreement. Poteat signed the agreed order on behalf of Mr. Ford in December 2014, and the circuit court entered it on January 26, 2015. The agreed order referenced a survey dated September 2, 2004, which was previously entered into the record, and provided, “[t]he Counterclaim of Defendant, John B. Ford, including all claims contained therein that assert any ownership rights with respect to any of the property owned by Plaintiffs, as described in the above-referenced survey, is dismissed with prejudice.”

Poteat sent a letter dated April 23, 2015, to the KBA requesting to be restored to active status.

Approximately two years after the Ohio Circuit Court entered the agreed order, Poteat's client, Mr. Ford, learned that the survey referenced in the agreed order was not what Poteat represented to him, and the property ownership was decided to Mr. Ford's detriment. Mr. Ford contacted Poteat, who explained he believed the agreed order referenced a different survey that was to Mr. Ford's benefit and said he would take care of it. Poteat took no further action.

Mr. Ford then consulted another attorney, Cheryl Spalding, who first informed Mr. Ford of Poteat's suspension. On February 15, 2017, Spalding filed a motion to set aside the agreed order. On May 2, 2017, as part of that proceeding, Poteat testified he was not aware he was suspended when he signed the agreed order.

The Ohio Circuit Court entered an order on September 29, 2017, denying the motion to set aside the agreed order, and Spalding filed a notice of appeal on October 27, 2017. On April 12, 2019, the Court of Appeals affirmed the Ohio Circuit Court's order denying the motion to set aside the agreed order.

The Inquiry Commission filed a five-count Charge against Poteat on November 14, 2019. The Charge asserted violations of:

SCR 3.130(1.4)(a)(5): "A lawyer shall: . . . (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the

client expects assistance not permitted by the Rules of Professional Conduct or other law.”

SCR 3.130(5.5)(a): “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”

SCR 3.130(8.4)(c): “It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

SCR 3.130(3.4)(c): “A lawyer shall not: . . . (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.”

SCR 3.130(8.1)(b): [A] lawyer in connection . . . with a disciplinary matter, shall not: . . . knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority.”

Poteat was personally served with the Charge on December 10, 2019. He did not file an answer or respond otherwise. After due deliberation, the Board of Governors voted to find Poteat guilty of violating the five Supreme Court Rules as charged, the vote being 18-0 for each count.

After making the preceding findings and considering Poteat’s disciplinary record, seven known applicable aggravating factors, and no known applicable mitigating factors, fourteen (14) Board members voted in favor of permanent disbarment and payment of costs in this action and four (4) Board members voted in favor of a five-year suspension and payment of costs in this action.

B. Prior Discipline

Poteat's disciplinary history consists of five actions between 1995 and 2017. In November 1995, Poteat received a private admonition for violating SCR 3.130(8.3)(c) (now SCR 3.130(8.4)(c)) for misrepresenting to his client that he had refiled a civil action and for denying that he had made the misrepresentation when questioned by the KBA. In October 2009, Poteat received a private admonition for violating 1) SCR 3.130(1.3) (diligence and promptness), 2) SCR 3.130(1.4)(a) (failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information), and 3) SCR 3.130(8.3)(c) (now SCR 3.130(8.4)(c)) for failing to file a workers' compensation claim on behalf of a client, and for making misrepresentations to a client about the status of a civil action.

More recently, and as mentioned earlier in relation to the charges in the instant disciplinary action, on January 23, 2014, Poteat was suspended from the practice of law for failing to comply with CLE requirements.

In April 2015,¹ Poteat sent the Office of Bar Counsel a letter accompanying his application for reinstatement. The letter was on his firm's letterhead. On February 16, 2017, in 2016-SC-000482-KB, Poteat received a private admonition as a negotiated sanction for violations of 1) SCR 3.130(5.5)(b)(2) (falsely holding out that he is admitted to the practice of law)

¹ The confidential order states that the letter was sent to the Office of Bar Counsel three months after his January 2014 suspension, which would be April 2014. The findings of fact here state the letter to the KBA requesting to be restored to active status was dated April 23, 2015.

and 2) SCR 3.130(8.4)(c) for failing to inform the other members of his law firm of his suspension, keeping his name on the firm's letterhead as an attorney, and being listed as an attorney on the firm's Facebook page and his personal LinkedIn page. *Burden v. Kentucky Bar Ass'n*, 487 S.W.3d 448 (Ky. 2016), *Smith v. Kentucky Bar Ass'n*, 250 S.W.3d 601, 602 (Ky. 2008), and *Wright v. Kentucky Bar Ass'n*, 169 S.W.3d 858 (Ky. 2005), were cited in support of the private admonition.² In contrast to *Burden*, *Smith*, and *Wright*, cases in which the attorneys received a public reprimand, at the time 2016-SC-00482-KB was decided, there were no charges that Poteat was involved in the active practice of law during his suspension.

On March 23, 2017, in 2016-SC-000664-KB, a default case, Poteat was suspended from the practice of law for one year, running consecutively to his current suspension, for violating 1) SCR 3.130(1.4)(a)(5), 2) SCR 3.130(5.5)(a), 3) SCR 3.130(5.5)(b)(2) (falsely holding out that he is admitted to practice law), 4) SCR 3.130(8.4)(c), and 5) SCR 3.130(8.1)(b) in relation to representation of clients during his suspension. Shortly before Poteat was suspended in January 2014, he filed a suit for clients who alleged that the prior homeowners had fraudulently hidden various defects in the home. Once suspended, Poteat did not advise the clients of his suspension and he continued to represent them in court. At or near the time of the settlement, Poteat asked the clients to execute a "Release of All Claims" relieving him of liability for any damages they

² In *Smith* and *Wright*, the Court also required the attorneys to undergo remedial ethics education. However, no such requirement was imposed in *Burden*.

may have suffered as a result of his representation. The clients refused to sign the release, but nevertheless, Poteat paid them \$47,000. The clients' bar complaint resulted in a six-count Charge being issued by the Inquiry Commission, to which Poteat did not respond. *Kentucky Bar Ass'n v. Poteat*, 511 S.W.3d 909, 909-10 (Ky. 2017).

Kentucky Bar Ass'n v. Carter, 986 S.W.2d 448 (Ky. 1999) (attorney suspended for CLE requirement noncompliance received consecutive 180-day suspension for practicing law for several months with a suspended license and failing to respond to the Inquiry Tribunal Complaint); *Kentucky Bar Ass'n v. McDonner*, 367 S.W.3d 603 (Ky. 2012) (attorney suspended for CLE requirement noncompliance received consecutive 181-day suspension for practicing law for several months with a suspended license, failing to respond to the Inquiry Tribunal Complaint, and other violations); and *Hipwell v. Kentucky Bar Ass'n*, 267 S.W.3d 682 (Ky. 2008) (in-house counsel for a health insurer suspended for failure to pay bar dues received one-year suspension after continuing to practice for several years with a suspended license), provided guidance for sanctioning Poteat. Poteat received the more severe one-year suspension for practicing law while suspended, failing to inform his clients of his suspension, misrepresenting facts to his clients regarding their case, attempting to induce them into waiving any potential legal malpractice claims without advising them they could and should seek counsel, and the apparent longstanding, but infrequent, pattern of misrepresenting facts to his clients.

Poteat, 511 S.W.3d at 911 (VanMeter, J., dissented as to the sufficiency of the sanction).

ANALYSIS

The Board of Governors requests this Court to permanently disbar Poteat from the practice of law in Kentucky. Poteat has not participated in this disciplinary proceeding and accordingly has not disputed the facts set forth above. Furthermore, Poteat has not filed a SCR 3.370(7) notice for the Court to review the Board's decision. Therefore, we agree with and adopt the Board's findings that Poteat is guilty of violating the following five Supreme Court Rules: SCR 3.130(1.4)(a)(5), SCR 3.130(5.5)(a), SCR 3.130(8.4)(c), SCR 3.130(3.4)(c), and SCR 3.130(8.1)(b) by failing to advise Mr. Ford of his suspension, continuing to practice law despite his suspension, by misrepresenting to Mr. Ford that the agreed order's contents were in Mr. Ford's favor, and not answering the Charge.

This conduct apparently overlapped to some extent the conduct for which Poteat was held to account in his last disciplinary action before this Court, *Kentucky Bar Ass'n v. Poteat*, 511 S.W.3d 909 (2016-SC-000664-KB). At that time, we found the Board's recommended sanction of a one-year suspension to be consistent with *Carter, McDonner, and Hipwell*. Here, the Board's recommended sanction is consistent with *Kentucky Bar Ass'n v. Burgin*, 493 S.W.3d 370 (Ky. 2016), and *Kentucky Bar Ass'n v. Pendleton*, 452 S.W.3d 607 (Ky. 2015), cases in which the attorney continued to represent multiple clients while being suspended, whose representation failed ethically in

additional ways, and whose misconduct included dishonesty, deceit and misrepresentations.

In *Burgin*, the Court permanently disbarred Burgin for his misconduct in three separate disciplinary files. Burgin was suspended for his failure to comply with CLE requirements on November 21, 2013. His conduct in the three files included his practice of law while suspended, falsely representing to the court that he had been reinstated to practice, and failure to participate in the disciplinary process.³ When considering KBA File No. 22727 and Burgin's disciplinary history involving a private admonition in 2011 and five cases decided between 2012 and 2015 which resulted in orders imposing temporary suspension, fifteen members of the Board of Governors voted in favor of a five-year consecutive suspension, and three voted in favor of permanent disbarment. When considering KBA File No. 22727 and Burgin's disciplinary history in conjunction with KBA File Nos. 23233 and 23250, which involved Burgin's conduct of lying to a judge in open court when Burgin's membership status was questioned by the judge and Burgin intimidating an opposing party

³ In KBA File No. 22727, Burgin was charged with violating SCR 3.130-1.3 (requiring reasonable diligence); SCR 3.130-1.4(a)(3) and (4) (requirement to promptly provide the client with necessary information and promptly respond to the client's reasonable requests for information); SCR 3.130-8.1(b) (failing to respond to lawful demands for information from a disciplinary authority); SCR 3.130-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and SCR 3.130-5.5(a) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.").

Across KBA File Nos. 23233 and 23250, Burgin was charged with two counts of violating SCR 3.130-5.5(a) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."); and one count of violating SCR 3.130-8.4(c) (prohibiting an attorney "from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation").

in a divorce proceeding, fourteen members voted for permanent disbarment and five voted for a consecutive suspension. 493 S.W.3d at 371-72.

This Court stated:

In light of [Burgin's] failure to answer any of the pending charges as well as his extensive disciplinary history resulting from a sundry of violations, each of which warranted temporary suspension, we agree with the majority of the Board that permanent disbarment is appropriate here. Our decision is further fortified by the fact that one of Respondent's most current offenses involved him lying to a judge in open court when Respondent's membership status was questioned by the judge. This behavior demonstrates a complete disregard for the Court of Justice and the rules of ethics that is unlikely to be remedied by yet another order of suspension.

Id. at 372.

In *Pendleton*, which was also authority relied upon when finding permanent disbarment appropriate for Burgin, the Court permanently disbarred Pendleton for his misconduct in three separate disciplinary files. Notably, unlike in *Burgin*, there is no reference to Pendleton's disciplinary history apart from the original suspension.

Pendleton was originally suspended on January 23, 2013, for nonpayment of bar dues. In the first file, because Pendleton continued to practice law in Fayette and Woodford Counties and represented three clients in court, and failed to respond to the resulting disciplinary process, Pendleton was charged with violating SCR 3.130-5.5(a) for practicing law on a suspended license; SCR 3.130-3.4(c) for knowingly disobeying an obligation under the rules of a tribunal; and SCR 3.130-8.1(b) for knowingly failing to respond to a lawful demand for information by the KBA. 452 S.W.3d at 608.

In the second file, Pendleton represented yet another client, but his misconduct resulted in additional charged violations relating to diligence, communication and termination of representation. Pendleton failed to respond after the filing of the complaint and charges. Pendleton was charged with violating SCR 3.130-1.3 for failing to act with reasonable diligence and promptness in representing a client; SCR 3.130-1.4 for failing to keep a client reasonably informed about the status of the case and to promptly comply with reasonable requests for information; SCR 3.130-1.16(d) for failing to promptly return his client's file; SCR 3.130-5.5(a) for practicing law in violation of the applicable Supreme Court and KBA rules; and SCR 3.130-8.1(b) for failure to respond to the KBA's lawful demand for information. *Id.* at 608-09.

In the third file, Pendleton's inadequate representation of another client included further charges of misrepresentations. Pendleton failed to file a dissolution petition to initiate an uncontested divorce, but then gave his client an order purportedly granting the divorce, but which was actually an order relating to an entirely different divorce case. Pendleton then later filed a falsified divorce petition, reflecting that it had been prepared and filed by another attorney. Pendleton failed to respond to the disciplinary process. He was charged with violating SCR 3.130-5.5(a) for practicing law while his license was suspended; SCR 3.130-3.3 for making a false statement to a tribunal; SCR 3.130-3.4(b) for falsifying a court filing; SCR 3.130-8.1(b) for failing to respond to the KBA's request for information; and SCR 3.130-8.4(c) for engaging in

conduct involving dishonesty, fraud, deceit or misrepresentation. *Id.* at 609-10.

Similar to *Burgin* and *Pendleton*, Poteat continued to practice law while suspended, failed to tell his client he was suspended as the Court ordered, represented to his client that he was admitted to practice, and failed to respond to requests for information from the KBA. Like in *Pendleton*, Poteat made a material misrepresentation to his client, and like in *Burgin*, Poteat has prior disciplinary history inclusive of a suspension case for the continued practice of law.

In addition, the recommended discipline of permanent disbarment is appropriate under Rule 9 of the American Bar Association's *Standards for Imposing Lawyer Sanctions*. Seven of Rule 9's aggravating factors are present in Poteat's case, including: (1) a prior disciplinary offenses; (2) dishonest or selfish motive; (3) a pattern of misconduct; (4) multiple offenses; (5) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (6) vulnerability of victim, which here, Mr. Ford trusted Poteat to complete the work Poteat was hired to perform and to inform Mr. Ford of any limitations on Poteat's ability to perform that work; and (7) substantial experience in the practice of law, which here, Poteat has been practicing law since 1980.⁴ While remoteness of prior offenses may

⁴ Other aggravating factors listed under Standard 9 are: submission of false evidence, false statements, or other deceptive practices during the disciplinary process; refusal to acknowledge wrongful nature of conduct; indifference to making restitution; and illegal conduct, including that involving the use of controlled substances.

be considered in mitigation, we reiterate our observation in *Poteat*, 511 S.W.3d at 911, that Poteat has an apparent longstanding pattern of misrepresenting facts to his clients, even if infrequent. Because Poteat's early offenses in conjunction with these more recent offenses reflect a pattern of misconduct, we do not view it as a mitigating factor here. Consequently, there are no known mitigating factors.⁵

We agree with the majority of the Board that Poteat's permanent disbarment is appropriate here in order to protect the public and the administration of justice. Poteat has failed to answer any of the current charges, has a disciplinary history showing a pattern of dishonesty in communication with clients, and has repeated violations of the unauthorized practice of law. We believe, as similarly expressed in *Burgin* and reflected in *Pendleton*, that Poteat's conduct shows a disregard for the Court of Justice and rules of ethics that is unlikely to be remedied by ordering a five-year suspension.

⁵ Standard 9 mitigating factors are: (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical disability; (i) mental disability or chemical dependency including alcoholism or drug abuse when: (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability; (2) the chemical dependency or mental disability caused the misconduct; (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely; (j) delay in disciplinary proceedings; (k) imposition of other penalties or sanctions; (l) remorse; (m) remoteness of prior offenses.

ORDER

Neither the KBA's Office of Bar Counsel nor Poteat has sought review of the Board's decision under SCR 3.370(7), and this Court declines to undertake review pursuant to SCR 3.370(8).

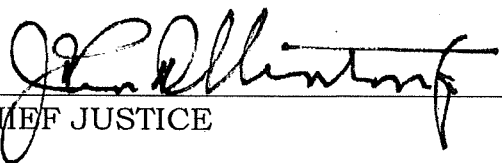
It is accordingly ORDERED that:

1. Thomas Steven Poteat is adjudged guilty of violating SCR 3.130(1.4)(a)(5), SCR 3.130(5.5)(a), SCR 3.130(8.4)(c), SCR 3.130(3.4)(c), and SCR 3.130(8.1)(b) as charged in KBA File No. 19-DIS-0089;
2. Poteat is permanently disbarred from the practice of law in Kentucky;
3. Pursuant to SCR 3.390, within 10 days of the issuance of this order, Poteat, if he has not already done so, shall notify, by letter duly placed with the United States Postal Service, all courts or other tribunals in which he has matters pending of his disbarment, and all clients of his inability to represent them and of the necessity and urgency of promptly retaining new counsel. Poteat shall simultaneously provide a copy of all such letters of notification to the Office of Bar Counsel. Further, Poteat shall immediately cancel any pending advertisements, to the extent possible; and
4. In accordance with SCR 3.450, Poteat is directed to pay all costs associated with the disciplinary proceedings against him, said sum being

\$1,181.45, for which execution may issue from this Court upon finality of this Opinion and Order.

All sitting. All concur.

ENTERED: September 24, 2020.



CHIEF JUSTICE