

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**OFFICE OF DISCIPLINARY COUNSEL,
Petitioner**

vs) No. 11-1402 (Original Proceeding)

**KENNETH E. CHITTUM, a member
of The West Virginia State Bar, Respondent**

FILED

June 7, 2012

released at 3:00 p.m.

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Chief Lawyer Disciplinary Counsel Rachael L. Fletcher Cipoletti for Petitioner.

David L. White for Respondent.

MEMORANDUM DECISION

In this original proceeding the Office of Disciplinary Counsel (“ODC”) requests this Court to hold the respondent, attorney Kenneth E. Chittum (“Mr. Chittum”), in contempt of this Court for failing to comply with one of the conditions set forth in this Court’s prior opinion reprimanding Mr. Chittum. *See Lawyer Disciplinary Board v. Chittum*, 225 W.Va. 83, 689 S.E.2d 811 (2010). The ODC further requests that the Court immediately suspend Mr. Chittum’s license to practice law as a result of such noncompliance.

The Court has carefully considered the petition, the response, the document tendered by Mr. Chittum on the day of argument, and the oral arguments of the parties. This case does not involve a novel issue or a substantial question of law and therefore a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure. We agree with the recommendations of the ODC, and we hold Mr. Chittum in contempt for his failure to comply with our prior decision; we immediately suspend his license to practice law in this State; and we remand this matter for further investigation relating to Mr. Chittum’s misrepresentations and delay in complying with this Court’s directives.

In this Court’s prior opinion, we determined that Mr. Chittum violated four of the Rules of Professional Conduct, and after considering the appropriate standard of review and mitigating factors we imposed six sanctions:

For the foregoing reasons, we adopt the recommendations, as moulded, set forth by the Board and impose the following sanctions: (1) that Mr. Chittum be reprimanded

pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; (2) that Mr. Chittum sign and follow a plan of supervised practice for a period of two years with a supervising attorney, consistent with the specifications set forth by the ODC; (3) that Mr. Chittum complete an additional 9 hours of CLE by July 1, 2011, in the area of ethics and office management over and above that already required; (4) that Mr. Chittum have a certified public accountant audit his office accounting records for two consecutive years, consistent with the specifications set forth by the ODC; (5) that Mr. Chittum deliver, at his own expense, Ms. Stevenson's personal items to a place designated by the ODC within thirty days of receiving notification from the ODC; and (6) that Mr. Chittum pay the costs incurred in this disciplinary proceeding.

Lawyer Disciplinary Board v. Chittum, 225 W.Va. 83, 93, 689 S.E.2d 811, 821 (2010)(footnote omitted). The Court's opinion became effective when the mandate was issued on March 1, 2010.

In this case ODC asserts that Mr. Chittum has not complied with the fourth condition, which requires him to "have a certified public accountant audit his office accounting records for two consecutive years, consistent with the specifications set forth by the ODC." *Id.* On June 10, 2010 Mr. Chittum and his supervising attorney signed an agreement that contained the specifications by ODC for the audit of Mr. Chittum's office accounting records. Mr Chittum was required to hire a certified public accountant to audit his office's accounting records for two years and provide quarterly reports to the ODC. The specific requirements for the quarterly reports were also set forth in the agreement. Within sixty days Mr. Chittum was also obligated to provide verification to the ODC that he had retained an accountant to perform the first quarterly report. Mr. Chittum complied with this obligation when his supervising attorney indicated to the ODC that he had retained Jeffrey S. Hollifield, CPA ("Mr. Hollifield") to assist him with the audit.

In November 2010 the supervising attorney informed the ODC that Mr. Chittum had suffered a myocardial infarction and had been hospitalized. In December 2010 the supervising attorney informed the ODC that Mr. Chittum would be cleared to return to work in early 2011. By letter dated February 2, 2011, the ODC informed the supervising attorney that Mr. Chittum's first audit report (which was due on or about August 10, 2010) was delinquent and should be provided immediately. The supervising attorney responded that he was unaware that the audit had not been provided and would follow-up with Mr. Chittum and Mr. Hollifield. On March 22, 2011 the supervising attorney submitted a report stating that Mr. Chittum had advised him that Mr. Hollifield would have "proper correspondence prepared for the Office of Disciplinary Counsel within the next two weeks." After no audit report was filed, both the ODC and the supervising attorney contacted Mr. Chittum in July 2011 once again requesting that the report be filed.

On October 12, 2011, having still not received the required report, the ODC filed the petition for a rule to show cause that is the subject of this proceeding. Pursuant to our scheduling order, Mr. Chittum filed a response to the petition on November 10, 2011. The response did not contain an audit report. Instead, the response contained a one-page letter from Mr. Hollifield to ODC, dated July 7, 2011. The letter indicated that Mr. Chittum's tax records appeared to be in order, but it also stated

in part that “I have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.” Mr. Chittum further cited his health problems and other personal issues, and urged that he has “made a good faith effort to comply with the accounting requirement, that he has fully disclosed his accounts, books and records to said accountant, and stands ready to direct said accountant to provide whatever other information may be required in a timely manner.”

On November 22, 2011 this Court issued a rule to show cause in contempt. The rule to show cause commanded Mr. Chittum to show cause why he should not be held in contempt of this Court “unless sooner mooted by the filing of audit reports as set forth and required by the Court’s March 1, 2010 order.” The rule to show cause was made returnable on April 10, 2012. In other words, Mr. Chittum had over four more months to file the appropriate audit reports and this proceeding would have become moot. Clearly, that did not happen.

Despite the fact that Mr. Chittum hired an accountant right away, Mr. Chittum did not file any quarterly audit reports with the ODC. Despite the fact that this Court issued a scheduling order requiring Mr. Chittum to respond to the petition for contempt, he still did not file any quarterly audit reports. It was not until April 10, 2012 — the very day of oral argument in this matter — and twenty-two months *after* Mr. Chittum signed the supervised practice agreement, that he submitted a report by Mr. Hollifield.

The report is not a quarterly report. It also states that the report is not an audit and that no audit opinion is being provided. However the report does contain a review of office accounts between July 1, 2010 and December 31, 2011, which may partially comply with the requirements set by the ODC. The report also contains information that appears to conflict with other statements by Mr. Chittum. For example, the report states that work was begun when Mr. Chittum made the petition available to the accountant on March 27, 2012 “and asked that testing be performed to aid Mr. Chittum is [sic] complying with said order.”

In the case of *Office of Disciplinary Counsel v. Niggemeyer*, 221 W.Va. 59, 650 S.E.2d 158 (2007) this Court held a lawyer in contempt for failing to comply with a similar quarterly audit requirement. We found that Mr. Niggemeyer “blatantly disregarded this Court’s order and refused to cooperate with the ODC’s efforts to compel his compliance [. . .] until the wee morning hours of the day on which this Court was scheduled to hear arguments in the instant matter [.]” *Id.* 221 W.Va at 64, 650 S.E.2d at 163. Our conclusions regarding Mr. Niggemeyer’s case apply equally here: “While we appreciate Mr. [Chittum’s] apparent attempts to comply with our orders by tendering documentary evidence on the day of the case’s submission, such efforts have been half-hearted, untimely, and suggest desperate attempts to mitigate the damage that has already been done by his noncompliance.” *Id.* 221 W.Va at 65, 650 S.E.2d at 164.

Accordingly, we must conclude that Mr. Chittum is contempt of this Court for his failure to comply with the mandate of this Court issued on March 1, 2010, and we immediately and indefinitely suspend Mr. Chittum’s license to practice law in West Virginia until such time as he has

demonstrated full compliance with the all the conditions set forth in the mandate of this Court issued on March 1, 2010, including that Mr. Chittum have a certified public accountant audit his office accounting records for two consecutive years, consistent with the specifications set forth by the ODC. Moreover, we are concerned by the conflicting nature of the various statements and documents tendered to the Court, and we believe that this matter should be remanded to the ODC for further investigation regarding possible misrepresentations by Mr. Chittum in the course of attempting to comply with this Court's directives.

For the foregoing reasons, we hereby impose the following sanctions upon Mr. Kenneth E. Chittum: (1) Mr. Kenneth E. Chittum is hereby held in contempt of this Court for his failure to comply with this Court's mandate entered March 1, 2010; (2) the law license of Mr. Kenneth E. Chittum to practice law in the State of West Virginia is immediately and indefinitely suspended until such time as he can demonstrate full compliance with this Court's mandate entered March 1, 2010, and this Court's opinion herein, including that Mr. Chittum have a certified public accountant audit his office accounting records for two consecutive years, consistent with the specifications set forth by the ODC; and (3) this matter is hereby remanded to the ODC for further investigation regarding possible misrepresentations by Mr. Chittum in the course of attempting to comply with this Court's directives. The Clerk of the Court is directed to issue the mandate contemporaneously with this decision.

License Suspended, Remanded for Further Investigation.

ISSUED: June 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh