UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 12-8004

IN RE: SEAN A. RAVIN, MEMBER OF THE BAR

Before DAVIS, *Chief Judge*, PIETSCH, *Judge*, and HAGEL, *Senior Judge*.[1]

ORDER

On September 28, 2012, then-General Counsel for the Department of Veterans Affairs, William Gunn, filed a complaint against attorney Sean Ravin. Mr. Gunn alleged that Mr. Ravin engaged in professional misconduct by "knowingly making a false statement of fact" by which "he attempted to intentionally mislead the Court" about VA's handling of his client's claims in *Irwin v. Shinseki*, Case No. 11-0683. On November 8, 2012, the Court ordered the matter to be referred to the Standing Panel, after the Chief Judge made a finding of prima facie validity, pursuant to Rule 6(a) of the Court's Rules of Admission and Practice (Rules).

On May 31, 2013, the Court ordered Mr. Ravin to show cause as to why the grievance should not be referred to the Court's Committee on Admission and Practice (Committee) for action under Rule 2. In August 2013, Mr. Ravin filed a timely response to the show cause order and contested the charges in the grievance. In August 2014, he filed a supplemental response to the show cause order. After reviewing these responses, on February 10, 2015, the Court referred the matter to the Committee for action under Rule 2. The Committee conducted an investigation and filed with the Court a report of its findings and recommendations on November 12, 2015 (Committee Report).

In its Report, the Committee discussed in detail the facts and procedural history of this matter, which are somewhat complicated. The Court adopts the Committee Report and incorporates it herein by reference. The Court further notes that Mr. Ravin also received, through counsel, a copy of the Committee Report, and that Mr. Ravin did not file with the Court a rebuttal, as was his right under Rule 2(d)(8).

The Committee recommended that the Court publicly reprimand Mr. Ravin for his conduct related to this matter. Committee Report at 11. Model Rule 3.3(a)(1) of the ABA Model Rules of Professional Conduct ("Model Rules") prohibits attorneys from "knowingly mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of

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1 Judge Hagel is a Senior Judge acting in recall status. *In Re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 11-17.

material fact or law previously made to the tribunal by the lawyer." An attorney who misleads the Court about facts relevant to his or her case may violate this rule. *See, e.g., Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 145-146 (Tex. App. Texarkana 2000) (declining to impose sanctions when an attorney made misleading statements in a brief because the attorney did not act in bad faith– but noting that rule prohibiting false statements of fact to a tribunal would include misrepresentations because the rule requires "compliance with both the spirit and express terms"); *AIG Hawai'i Ins. Co. v. Bateman,* 923 P.2d 395, 402 (Haw. 1996) (finding a violation of the rule requiring candor toward the tribunal when both sides failed to disclose a settlement agreement to appellate court); *In re Fee*, 182 Ariz. 597, 898 P.2d 975, 979 (Ariz. 1995) (noting that failure to disclose a separate fee agreement to the settlement judge to avoid jeopardizing a settlement proceeding violated disciplinary rule prohibiting lawyers from knowingly making false statements of material fact to a tribunal because the "system cannot function as intended if attorneys, sworn officers of the court, can . . . mislead judges in the guise of serving their clients").[2]

In furtherance of the axiom that practitioners should not engage in conduct that is prejudicial to the administration of justice, misrepresentations to the Court must be treated seriously. As the U.S. Court of Appeals for the Ninth Circuit explained in *In re Boucher*: "The vice of misrepresentation is not that it is likely to succeed but that it imposes an extra burden on the court. The burden of ascertaining the true state of the record would be intolerable if misrepresentation was common. The court relies on the lawyers before it to state clearly, candidly, and accurately the record as it in fact exists." 837 F.2d 869, 871 (9th Cir. 1988) (referring to an attorney making misrepresentations about evidence contained in the record when the record did not support his assertions). The complications and burdens these misrepresentations place on the Court are fully evident here. As the Committee pointed out, in the spirit of Model Rule 3.3, all parties must be candid in their representations to the Court about any developments that could affect the Court's decision or jurisdiction, and this Court has expressed a similar sentiment in the context of petitions for extraordinary relief. *See Solze v. Shinseki*, 26 Vet.App. 299, 301 (2013) ("In all cases before this Court, the parties are under a duty to notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision.").

The Court agrees with and accepts the Committee's recommendation that Mr. Ravin should be publicly reprimanded. Further, the Court intends to impose sanctions in the amount of $500, pursuant to its authority under 38 U.S.C. § 7265(a).

The Court notes that Mr. Ravin was provided with a preliminary, non-public version of this order on March 11, 2016, wherein he was notified of his right to file a motion for

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[2]"Any differences between 'false' and 'misleading' statements are irrelevant for Rule 3.3(a)(1) purposes." Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 REV. LITIG. 301, 310 (2004) (relying, *inter alia*, on *Daniels v. Alexander*, 818 A.2d 106, 110-11 (Conn. App. Ct. 2003) and *In re Kalal*, 643 N.W.2d 466, 471-75 (Wis. 2002)).

reconsideration pursuant to Rule 5(d). On March 23, 2016, Mr. Ravin timely filed a motion for reconsideration, in which he generally reiterated the arguments he had previously expressed to the Court and to the Committee. Thus, the Court denied his motion for reconsideration.

The Court also notes that in his motion for reconsideration, Mr. Ravin requested that the Court delay any sanction or censure "prior to the issuance of mandate in order to permit [him] the opportunity to determine whether he will seek review by the United States Court of Appeals for the Federal Circuit." On October 4, 2016, the Court granted Mr. Ravin's request to stay execution of this public reprimand and sanction to permit the opportunity for review. Mr. Ravin did appeal to the Federal Circuit, where this Court's public reprimand was affirmed on July 12, 2017 (Federal Circuit Case No. 17-1112). Mandate in Federal Circuit Case No. 17-1112 now having issued, this Court shall impose the public discipline and sanction as described herein.

Accordingly, it is

ORDERED that Mr. Ravin is publicly reprimanded and sanctioned in the amount of $500 for his conduct in *Irwin v. Shinseki*, Case No. 11-0683, as described in the Committee Report, incorporated herein by reference.

DATED: October 19, 2017 PER CURIAM.

Copy to:
Kenneth M. Carpenter, Esq.

Attachment:
Committee Report, November 12, 2015

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

U.S. COURT OF APPEALS FOR VETERANS CLAIMS
Committee on Admission and Practice
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

COMMITTEE ON ADMISSION AND PRACTICE REPORT AND RECOMMENDATION IN THE MATTER OF SEAN A. RAVIN, ESQ., ATTORNEY-RESPONDENT, CAVC No. 12-8004

The Committee's Panel assigned to this matter has completed its investigation of a grievance (hereinafter "Grievance") filed by the VA General Counsel against Sean A. Ravin, Esq., a member of the Court's bar (hereinafter "Respondent"), concerning his representation of William Irwin (hereinafter, "Veteran"). The Panel's investigation included providing the Respondent the opportunity to respond to the Grievance, which he did through a Response to Committee filed on August 26, 2015. The Respondent did not ask for a hearing under U.S. VET.APP. R. ADM. & PRAC. R. 2(d)(3). The Panel did not exercise its discretion to hold a hearing under U.S. VET.APP. R. ADM. & PRAC. R. 2(e).

The Panel has considered the allegations set forth in the Grievance and reviewed the documents submitted. Based on that review, the Panel submits the following report and recommendations.

Procedure

The Grievance, filed on September 27, 2012, alleges the Respondent engaged in professional misconduct in the course of his representation of the Veteran in *Irwin v. Shinseki*, CAVC No. 11-0683. He did so, according to the Grievance, when the Respondent attempted to mislead the Court by arguing the Veteran had a claim for total disability rating based upon individual unemployability (TDIU) pending within VA's adjudication system without action, thus warranting remand by the Court and expeditious handling by the Secretary. The Grievance maintains the Respondent knew when he filed the reply brief that the Secretary had adjudicated the TDIU claim and that he had filed a Notice of Disagreement with the Agency, thus initiating administrative appellate review. The Grievance also alleges the Respondent declined to correct the misinformation in the reply brief, despite the opportunity to do so. In doing so, the Grievance alleges violation of Rule 3.3(a) of the Model Rules of Professional Conduct.

By an Order dated November 8, 2012, the Court referred the Grievance for consideration to the Standing Panel on Admissions and Discipline. On May 31, 2013, the Court directed the Respondent to show cause why the Grievance should not be referred to the Court's Committee on Admission and Practice for action under U.S. VET.APP. R. ADM. & PRAC. R. 2(b). The Respondent filed a response on August 15, 2013, asking the Court to dismiss the grievance. He filed a paginated Appendix in support of the response. (Hereinafter, "Resp. Appx.") A year later, on August 1, 2014, the Respondent filed a supplement to his August 15, 2013, response, which informed the Court of a decision of the U.S Court of Appeals for the Federal Circuit in the underlying matter. *See Irwin v. Gibson*, 572 Fed. Appx. 974, 2014 WL 3611238 (Fed. Cir. Jul. 23, 2014) (reversing and remanding *Irwin v Shinseki*, No. 11-0683, 2013 WL 627001 (Vet. App. Feb.21, 2013)).

By an Order dated February 10, 2015, the Court referred the Grievance to the Committee on Admission and Practice for action under Rule 2(b)(4), which appointed this Panel to review the facts and make recommendations. By a letter dated August 7, 2015, the Panel informed the Respondent of the Panel's investigation and provided him with 30 days to respond. On August 26, 2015, Kenneth M. Carpenter, Esq., representing the Respondent, filed a response to the Panel.

Factual Background

The relevant facts in this matter reach back to June 2004, to a VA Regional Office rating decision that denied the Veteran's claim for an evaluation in excess of 10 percent for right knee synovitis. The Veteran sought review, and in an August 24, 2006, decision the Board denied his claim. He sought further review before the Court, which by an Order dated September 10, 2008, vacated the Board's decision and remanded the matter to the Board for further development. Resp. Appx., 3.

By a letter dated December 15, 2008, the Respondent, acting for the Veteran, asked the Board to remand the matter for a medical examination and for consideration of a TDIU claim. Resp. Appx., 19. The Board remanded the claim to the Regional Office in December 2008, which again denied the claim after further development. Resp. Appx., 3. By a November 2, 2010, decision, the Board concluded the criteria for an evaluation in excess of 10 percent for right knee synovitis had not been met. Resp. Appx., 1-18. The Veteran then filed an appeal with the Court.

In the Veteran's merits brief to the Court, the Respondent argued in part the Board failed to address the Veteran's entitlement to TDIU. In doing so, the Respondent pointed to his December 15, 2008, letter to the Board and the Board's lack of acknowledgement of or response to the argument for individual unemployability. Resp. Appx., 22, 25, 29, 36.

In a responsive brief, the Secretary argued the Board's denial of an increased rating was appropriate. The Secretary, noting the Board's failure to acknowledge the argument the Veteran was entitled to individual unemployability, contended such error was not prejudicial to the claimant because the VA Regional Office was at that time adjudicating the issue. Attached to the Secretary's brief was an affidavit of the Assistant Veterans Service Center Manager of the cognizant VA Regional Office, attesting that the development process for a TDIU claim had been initiated and that claims processing and rating actions for that claim would be completed on an expedited basis. Resp. Appx., 54. (The Secretary subsequently moved without opposition for leave to file an amend brief, specifically to remove personal identifiable information from the affidavit. Resp. Appx., 56-74.)

Then, on January 13, 2012, the Respondent moved to strike the attachment to the Secretary's brief, and any related arguments related, arguing the Court was prohibited from considering any material not contained in the record of proceedings before the Board at the time the Board issued its decision. Resp. Appx., 74-75. In electronic mail messages on January 27 and February 1, 2012, the Respondent and the Secretary's counsel discussed the motion to strike the attachment. Resp. Appx., 187-88. On January 26, 2012, the Secretary responded in opposition, contending the attachment was not intended to influence the Court's review of the Board's decision, but to ensure the Court had full information regarding the status of the TDIU adjudication then proceeding at the VA Regional Office. The Secretary noted that without that information, the Court would most likely remand the issue of TDIU for adjudication for a remedy (adjudication) that might already have occurred. Resp. Appx., 76-77.

Finding it was precluded from considering any material not contained in the record of proceedings before the Board, the Court by an Order dated March 22, 2012, granted the motion to strike the attachment to the Secretary's brief and any arguments relying upon that attachment. Resp. Appx., 81-82. The Secretary filed an amended brief thereafter excluding the attachment. Resp. Appx., 83-95.

While the Court considered the question of whether to strike the attachment to the Secretary's brief, adjudication of the TDIU claim proceeded at the Agency level. The VA Regional Office on February 23, 2012, denied the Veteran's TDIU claim, and informed the Veteran of that decision by letter dated February 27, 2012; the Respondent was copied on that letter at an address on Quebec Street in Washington, D.C. Resp. Appx., 171-78. On March 21, 2012, the Respondent filed a notice of disagreement on behalf of the Veteran. Resp. Appx., 180. In that notice, the Respondent specifically mentioned the TDIU claim and sought appellate review of that portion of the rating decision. By a letter dated March 28, 2012, the VA Regional Office notified the Veteran of the receipt of the notice of disagreement and the action that would be forthcoming. Resp. Appx., 183-84. The Respondent was also copied on that letter, this time at his current address on 17th Street, N.W., in Washington, D.C. Resp. Appx., 184.

In a reply brief filed on April 26, 2012, Appellant argued in part that the Board's failure to address the Veteran's TDIU claim required remand. Resp. Appx., 96-109. The Respondent noted the Secretary conceded in his responsive brief that the Board erred by failing to address the unemployability claim.

> [T]he Secretary has not cited to any document in the Record which supports his contention that the Regional Office is presently adjudicating the issue of entitlement to a total disability rating based on individual unemployability ("TDIU"). The Secretary provides no such citations because he cannot; nothing in the record indicates that the Regional Office is in the process of adjudicating [the Veteran's] entitlement to a TDIU. While he does not impugn the honesty of the Secretary, [the Veteran] is not inclined to accept the Secretary's bare assertion.

Resp. Appx., 105. The Respondent further argued that

> [a]lthough [the Veteran] does not wish to challenge the credibility of the Secretary's assertion, he is compelled to note that were the Court to simply accept the Secretary's assertion, there is no guarantee that VA would adjudicate his entitlement to a TDIU. Without a decision from the Court on this issue, there would be nothing, except perhaps the desire to avoid discipline in the Court for lack of candor, to prevent VA from stating that [the Veteran]'s December 2008 correspondence did not reasonably raise entitlement to a TDIU.

Resp. Appx., 105. Finally, the Respondent maintained that:

> [m]ore than three years have elapsed since [the Veteran] argued to the Board that his right knee disorder causes marked interference with employability. Yet the

> Record does not indicate that VA has taken any action on [the Veteran]'s claim. Thus, contrary to the Secretary's argument, the effect of a remand would be to afford [the Veteran] expeditious handling of the issue of entitlement to a TDIU, a claim which should have been acknowledged and adjudicated over three years ago. Therefore, even accepting the Secretary's assertion that the Regional Office is presently adjudicating entitlement to a TDIU, a remand from the Court would benefit [the Veteran] because it would result in expeditious handling of a claim which has been pending without Secretarial action for a matter of years.

Resp. Appx., 106 (record cites omitted).

On April 27, 2012, after receiving the reply brief, the Secretary's counsel reminded the Respondent that the TDIU claim had been adjudicated, that he was sent a copy of the rating decision, and that he had filed a notice of disagreement with that action. The Respondent stood by the reply brief and pointed to the Court's March 22, 2012, striking of the attachment to the Secretary's brief. Resp. Appx., at 186-87.

In response to the assertions made in the reply brief, the Secretary filed an opposed motion to file a sur-reply brief, which the Court granted. Resp. Appx., 147-48. The Secretary noted the Respondent was aware the Regional Office had issued a rating decision denying the TDIU claim because at the time he filed the reply brief he had filed an NOD with the rating decision, thereby initiating appellate review. Although informed of this by VA counsel, and of the need to provide accurate information to the Court as to the status of an issue relevant to the claim, the Respondent stood by the reply brief because his argument was based on the record before the agency at the time of the Board's decision. Resp. Appx., 110-11.

In its sur-reply brief, the Secretary argued that the assertions made with respect to the TDIU claim by the Respondent in the reply brief

> are a deliberate attempt by Appellant to mislead this Court. Appellant and his counsel were fully aware at the time of the filing of his reply brief that the adjudication of the claim of entitlement to TDIU was not "pending without Secretarial action" but had already been completed. In fact, the RO issued a rating decision denying Appellant's claim on February 23, 2012, with notice being sent to him and his counsel, [the Respondent], on February 27, 2012. *See* Exhibit A. In the cover letter, the RO informed Appellant that a copy of the letter was sent to his attorney, whom he could contact if he had any questions or needed assistance. *Id.* The Secretary notes that the address listed on the letter for Appellant's counsel is not counsel's current address and may not have been received by Appellant's

> counsel. However, Appellant's counsel's awareness of the denial is evinced by his written Notice of Disagreement (NOD) filed on behalf of Appellant in March 2012. *See* Exhibit B. In a letter to Appellant dated March 28, 2012, the RO informed him that it received his NOD with the February 27, 2012 rating decision and a copy of this letter was also sent to Appellant's counsel, [the Respondent], at his current mailing address. *See* Exhibit C.

Resp. Appx., 113-17. Attached to the sur-reply brief as Exhibits A, B, and C, were copies of the February 2012 rating decision, the March 21, 2012, Notice of Disagreement, and March 28, 2012, VA letter, respectively. Resp. Appx., 118-34. Although the Respondent moved to strike these attachments, the Court denied the motion to strike. In doing so, the Court noted: "Because the parties have presented a chronology that suggests that a matter previously before the Court may now be moot, the Secretary's motion will be granted in order that the Court can fully consider the parties' respective arguments."

In a Memorandum Decision of February 21, 2013, the Court affirmed the Board's November 10, 2010, decision denying an evaluation in excess of 10 percent for right knee synovitis. *Irwin v Shinseki*, No. 11-0683, 2013 WL 627001 (Vet.App. Feb.21, 2013); Resp. Appx., 149-52. In doing so, the Court noted the Respondent's argument and the Secretary's recognition the Board failed to address the TDIU claim. However, because the Secretary submitted documentation that the Regional Office had already adjudicated TDIU claim, the Court found the Board's error to be not prejudicial and thus remand was not warranted.

On July 23, 2014, the U.S. Court of Appeals for the Federal Circuit reversed the Court's decision and held the Court erred by considering evidence of the VA TDIU adjudication. *Irwin v. Gibson*, 572 Fed.Appx. 974, 2014 WL 3611238 (Fed. Cir. Jul. 23, 2014) (reversing and remanding *Irwin v Shinseki*, No. 11-0683, 2013 WL 627001 (Vet. App. Feb.21, 2013)).

Grievance Allegation

The Grievance alleges the Respondent knowingly made a false statement to the Court and intentionally misled the Court when he filed the reply brief on April 26, 2012. He did so, according to the Grievance, when he alleged a TDIU claim was pending at a VA Regional Office without action, despite his knowledge that the Regional Office had adjudicated the TDIU claim and that he (the Respondent) had already filed a notice of disagreement to initiate appellate review. In support, the Grievance provided copies of a February 23, 2012, rating decision sent to

the Respondent and of a March 21, 2012, Notice of Disagreement signed and filed by the Respondent acting on the Veteran's behalf. *See* Resp. Appx., 171-81. As the Respondent had received the rating decision and filed the notice of disagreement prior to the filing of the reply brief, the Grievance alleges that the Respondent knew before his assertions in the reply brief that the VA had adjudicated the TDIU claim and that he had initiated appellate review. The Grievance also alleges that the Respondent declined to correct the misinformation in the reply brief, despite the opportunity to do so. *See* Resp. Appx., 186-88.

In light of this, the Grievance maintains that the Respondent acted contrary to the Model Rules of Professional Conduct and cites specifically to Model Rule 3.3(a) (candor toward the tribunal). The Grievance alleges that the Respondent, by filing a reply brief arguing that remand was necessary to confer a right to adjudication, when that attorney knew such adjudication had already taken place and been appealed, knowingly made a false statement of fact. The Grievance also alleges that the Respondent's refusal to correct the misstatement when offered an opportunity to do so is further illustration of his intent to mislead the Court.

Respondent's Defense

In an August 2013 response to the Court, the Respondent argues he did not attempt to mislead the Court. He contends that the Grievance "relies upon selective quotation in an attempt to portray a particular phrase as misleading when a full reading demonstrates no intent to mislead." Response to Court (August 13, 2013), at 11. He maintains that a broad reading of the grievance does not demonstrate professional misconduct. Finally, he suggests that actions by the Regional Office on an issue under the Court's exclusive jurisdiction should not have an effect on the outcome of litigation on the issue presented.

In an August 2015 response to this Panel, the Respondent argues he was under no professional or ethical obligation to inform the Court in the reply brief that VA had acted *sua sponte* to adjudicate the TDIU claim because that action occurred after the Board's decision. He maintains the Court could not lawfully consider post-Board decision actions, even if those actions had favorably disposed of the TDIU claim. He asserts that any failure to reference the Secretary's post-Board decision TDIU adjudication was proper because such agency action and the evidence it was based upon was not in the record at the time of the Board decision on appeal. Response to Panel (August 26, 2015), at 9-11. The Respondent contends this interpretation of his duties is validated by the Federal Circuit's holding on appeal that the Court erred by

considering evidence concerning the VA adjudication of the TDIU claim.

As such, the Respondent asserts he was not under an ethical obligation to reference the post-Board decision action in his reply brief. Response to Panel (August 26, 2012), 6-7. The Respondent also argues that his actions were not contrary to *Solze v. Shinseki*, 26, Vet. App. 299 (2013), which on the one hand he asserts is limited to the facts of that case and on the other hand are distinguishable from his actions here. Response to Panel (August 26, 2012), 7-8.

Panel Analysis

Counsel are prohibited from actively misleading the Court. *See* MODEL RULES OF PROF'L CONDUCT 3.3(a) (2007) (candor toward the tribunal); *see also* U.S. VET.APP. R. ADM. & PRAC. R. 4(a) (adopting the Model Rules of Professional Conduct); *Barela v. Peake*, 22 Vet.App. 155, 159 (2008) (attorney appearing before this Court is expected to comply with Model Rules of Professional Conduct). Model Rule 3.3(a)(1) provides that a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

As the commentary to Rule 3.3 notes, lawyers have a special obligation as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. In balancing the obligation to advocate persuasively, a lawyer also has a duty of candor to the tribunal. Thus, "the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false." Comment 2. While an advocate is generally not charged with personal knowledge of matters discussed in pleadings, an "assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." Comment 3.

There is little doubt in the view of this Panel that the Respondent, when he filed his April 26, 2012, reply brief, knew of the inaccuracy of his assertion that the Secretary had not taken action on a TDIU claim. On February 27, 2012, well before the reply brief, the Regional Office mailed to the Respondent a copy of the VA rating decision that denied TDIU. Even though the Regional Office sent this notice to the Respondent at an address that he no longer used, on March 21, 2012 – again, well before filing the reply brief – the Respondent nonetheless filed a notice of disagreement specifically with that decision. In doing so, the Respondent

demonstrated he knew the Regional Office had taken action on the TDIU claim. Thus, the chronology of events in the course of litigation flatly contradicts the Respondent's assertion in the reply brief that the Secretary had not taken action.

The chronology of the litigation underlying the Grievance also supports the supposition that the Respondent took action prior to filing the reply brief to shape the litigation environment so he could assert that the TDIU claim had not been adjudicated. When the Secretary filed an attachment to its responsive brief, which stated the Regional Office was taking action to process and adjudicate the TDIU claim, the Respondent moved successfully to strike the attachment. Doing so, while consistent with limiting the record on appeal to the evidence considered by the Board, had the effect of hiding the processing of the TDIU claim, which was contrary to his assertion that the Regional Office had received but taken no action on the claim. As the Court discussed in its March 22, 2012, Order, such an attachment had not been before the Board when it made its decision and thus could not be before the Court on review. The significance of that action, though, is highlighted by the subsequent reply brief, in which Respondent emphasized that the Secretary could not cite to any document in the Record to support a contention that the Agency was adjudicating the claim. Within the confines of the record on review (absent the attachment to the Secretary's brief), that may have been technically correct. Yet in doing so, the Respondent hid from the Court the fact that he had received a rating decision denying the TDIU claim, as well as his own initiative in filing a notice of disagreement to initiate appellate review at the Board.

This Panel is compelled to conclude that the Respondent actively sought to suppress from the Court's view the Secretary's adjudication of the TDIU claim and the initiation of administrative appellate review. In addressing the duty of candor, the Court has emphasized "[a]lthough counsel has a duty to represent the client diligently, counsel also has a duty, as an officer of this Court, to weigh and consider carefully the propriety of the response to be given the Court." *MacWhorter v. Derwinski*, 2 Vet.App. 655, 57 (1992). "[T]he Court must be able to rely upon the representations of those who practice before it and there is an inherent professional obligation imposed upon attorneys to correct misstatements." *Jones v. Derwinski*, 1 Vet.App. 596, 607 (1991). More recently, in *Solze v. Shinseki*, 26 Vet. App. 299, 301 (2013), the Court emphatically stated that all parties in all cases, but particularly in cases involving petitions for extraordinary relief, "are under a duty to notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision."

The Respondent asserts it would have been improper for him to refer to a VA rating decision or to any evidence not of record before the Board. He contends this course was validated by the Court's March 22, 2012, Order striking the attachment, as well as Federal Circuit's vacatur of the Court's Memorandum Decision because the Court considered evidence (i.e., the VA rating decision and the notice of disagreement) not before the Board when it made its decision, and thus not properly before the Court.

The Respondent's defense here would narrowly confine the duty of candor by joining it with the litigation record. Parties in all cases "are under a duty to notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision." *Solze*, 26 Vet. App. at 301. Although *Solze* arose in the context of a petition for extraordinary relief, and the Court emphasized this duty was particularly significant in such cases, it did not restrict the duty to such cases. *See id.*, at 303 ("[C]ounsel in this case – and all parties to every case before the Court – are now on notice of their continuing responsibility to apprise the Court of significant developments, particularly for cases filed pursuant to Rule 21."). Such an obligation would be meaningless if the duty of candor were restricted to the litigation record. Indeed, the lack of candor highlighted in *Solze* – the failure to notify the Court of an administrative adjudication – directly parallels the failure here to alert the Court to the Regional Office's TDIU adjudication that would have affected its decision. It was not the Respondent's responsibility to determine whether such disclosure was warranted, but the Court's. *See id.*, at 302 (noting it is irrelevant whether the parties believed an agency adjudication might affect the Court's action "as that was not a question within the parties' power to decide."). The discussion in *Solze* serves then as an explication of the spirit of Model Rule 3.3 – that all parties must be candid with the Court about any developments that could conceivably affect its jurisdiction or its decision.

Moreover, the Respondent's failure to correct his misstatement only aggravates the lack of candor. Counsel are "under a duty to correct the record, and to not decide for themselves whether subsequent developments were sufficient to justify after the fact a statement which was wrong when it was made." *Jones*, 1 Vet.App. at 606. After receiving the reply brief, the Secretary's counsel made the Respondent aware it was inaccurate with respect to the TDIU adjudication. Resp. Appx., 186-87. Rather than correcting the inaccuracy, the Respondent chose to rely on his successful effort to strike information about the TDIU adjudication, which effectively disguised the agency adjudication proceeding outside the Court's view. By continuing to assert here that he was constrained in disclosing anything not within the record before the Board, the Respondent affirms the failure to correct the lack of candor to the Court.

Conclusion and Recommendations

The Committee recommends that the Court find the Respondent violated Model Rule 3.3(a)(1). The Respondent is an officer of the Court, and is thereby responsible for representations made to the Court. He has a duty of candor to the Court, which includes a prohibition on actively misleading the Court and a continuing duty to correct relevant and material misstatements. The duty of candor is broader than the duty to zealously advocate on behalf of a client. By filing a reply brief asserting that no action had been taken on a TDIU claim at the agency level, when he had already received notice of a rating decision on that issue and indeed had filed a notice of disagreement initiating administrative appellate review, the Respondent failed to abide by the duty of candor to the Court. By failing to remedy this misstatement when offered the opportunity to do so, he further compounded the failure to abide by the duty of candor.

Pursuant to Rule 5 of the CAP, the Panel recommends the Court publicly reprimand the Respondent. A public reprimand (either through an Order posted on the Court's website for public viewing and/or published in the Veterans Appeals Reporter) would re-inforce the Court's policy discussion in *Solze* regarding the seriousness of the duty of candor and its expectation that the bar do likewise. The public nature of such a reprimand would thus have the potential for multiple effects: of punishing the Respondent for past actions; of encouraging a change in Respondent's future conduct (to avoid further embarrassment or adverse effects on his reputation); of encouraging candor by the Court's bar; and of demonstrating to the public the Court's commitment to enforcing the standards of conduct.

The Panel considered other possible disciplinary options, though concluded none would correspond to the nature or severity of the offence in this case. Given that the Respondent denies the existence of a violation of the duty of candor, the absence of any discipline would effectively minimize the meaning of that violation. On the other hand, more severe discipline – such as disbarment, suspension, or monetary fines – would likely overly punish the Respondent for what appears to be a first instance of discipline. The Panel does not recommend a private admonition, though an unpublished or non-public order, as such discipline would be hidden from the public and the Court's bar, thus reducing the deterrent effect of such discipline on the Respondent and the bar.

Submitted for the Panel:

November 12, 2015

Jeffrey J. Schueler
Panel Chair, Member
Hearing Office Chief Administrative Law Judge
Social Security Administration
Roanoke, Virginia

James Alfini
Panel Member
Professor of Law, South Texas College of Law
Houston, Texas

Mark W. Foster
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Zuckerman Spaeder LLP
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