



KANE v. COMMISSIONER OF SOCIAL SECURITY

2013 | Cited 0 times | D. New Jersey | December 18, 2013

1 NOT FOR PUBLICATION

United States District Court for the District of New Jersey

Katharine S. Hayden, U.S.D.J. After plaintiff prevailed in this Social Security appeal, Langton & Alter, her attorneys, filed a motion for fees under the Equal Access to Justice Act (EAJA, 28 U.S.C. § 2412(d)). [D.E. 20.] The Commissioner of Social Security opposes this motion [D.E. 23], but does not contend that the amount requested by Langton & Alter is unreasonable fee calculations are incorrect justified. Rather, the Commissioner [the] sole issue before this Court is whether

Plaintiff is entitled to compensation for hours worked by her Counsel when her Counsel simultaneously was declared by the New Jersey State Supreme Court to be administratively 2.)

I. Background

Although this case arose ed on the interplay of several New Jersey Court Rules which, in turn, procedures for DANIELLE KANE, ON BEHALF OF DAVID KANE, Plaintiff, v. COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Civil No.: 12-1899 (KSH)

Opinion

2 licensing, registering, and assessing attorneys. As such, a brief overview of the relevant New Jersey rules and procedures is in order.

A) New Jersey Annual Registration and Assessment

Lawyers admitted to the bar in New Jersey must file an annual attorney registration statement. See, e.g., N.J. Ct. R. 1:20-1(c). They must also pay a single, annual assessment that is divided among four recipients: the Lawyers Fund for Client Protection , the Lawyers Assistance Program (LAP), the New Jersey state attorney disciplinary system, and the Board on Continuing Legal Education. See 2013 Instructions, <http://www.judiciary.state.nj.us/attyreg/cpfinstructions.pdf> (last visited Dec. 8,



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2013); see also Frequently Asked Questions, Annual Assessment New Jersey Attorneys Rule 1:28-2, <http://www.judiciary.state.nj.us/cpf/annual.htm> (last visited Dec. 8, 2013). The amount to be paid by an attorney is determined by year of bar admission:

2013 Fee Schedule - New Jersey Attorneys Admitted: Fee if received on or before

April 26, 2013

Fee if received after April 26, 2013 but before Ineligible List 1964 or prior to 1964

Exempt from payment Exempt from payment - No late fee 1965 - 2009 \$199 \$239 2010 or 2011 \$170 \$210 2012 \$35 \$75 2013 Exempt from payment Exempt from payment - No late fee Annual Assessment, <https://www.judiciary.state.nj.us/cpf/fee.htm> (last visited Dec. 8, 2013). An obligation to update registration and pay the required assessment is enforced, in the breach, by Order of the Supreme Court deeming him/her administratively ineligible to practice law in New Jersey. Although placement on this status is not a disciplinary action akin to suspension or disbarment the names of the affected attorneys go on an Ineligible

3 List that is published both on the website of the New Jersey Courts and in the New Jersey Law Journal. See N.J. Ct. R. 1:20-1(b), (d); N.J. Ct. R. 1:28-2(a); N.J. Ct. R. 1:28B-1(e); Frequently Asked Questions Annual Assessment, <http://www.judiciary.state.nj.us/cpf/billing.htm> (last visited Dec. 8, 2013). The most recent list, from September 2013, contains 44 pages of in-state New Jersey attorneys and 189 pages of out-of-state attorneys. See Supreme Court of New Jersey, Attorney Ineligibility Order Pursuant to Rule 1:28-2(a), <http://www.judiciary.state.nj.us/notices/2013/n131003a.pdf> (last visited Dec. 8, 2013). In practice, the provisions of the disciplinary system, the Fund, and LAP work in tandem because each is based

on a single assessment, so the published list covers all three categories of ineligibility.

ed requires payment of the past-due amount plus late fees and penalties. Once that is done, the attorney the Court. See, e.g., N.J. Ct. R. 1:28-2(a). T is then published on one of the

See, e.g., <http://www.judiciary.state.nj.us/notices/2013/n131031f.pdf> (last visited Dec. 8, 2013). Extreme delay in compliance brings additional penalties, including revocation of the license to practice law in New Jersey upon seven consecutive years of nonpayment. See, e.g., N.J. Ct. R. 1:28-2(c).

B) Interest On Lawyers Trust Accounts (IOLTA)

New Jersey lawyers in private practice are required to set up business and trusts accounts that conform to New Jersey Court Rule 1:21-6, the recordkeeping rule. Relevant here is the provision that client funds be held in trust accounts at approved New Jersey banks, and that at least one of the trust



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accounts be for the benefit of the IOLTA program (which will be explained below). with the recordkeeping rule and with New Jersey Court Rule 1:28A-2, which requires that any

4 IOLTA fund trust account be registered, i.e., that banking information about it (institution and account number) be sent to the IOLTA Trustees. According to the Commissioner, the instant oversight in failing to provide this information in a timely manner disentitles them to an award of fees under the EAJA.

IOLTA is a law-related public service program, enacted in various forms throughout the United States and Canada, that creatively transforms an unremarkable aspect of legal practice into a fund that underwrites law-related public programs.

IOLTA accounts grew out of an insight, first recognized in Australia, that quirks in the banking system would allow for the generation of funds for a worthy social cause, specifically legal assistance for the poor, without noticeable financial sacrifice by anyone. Attorneys commonly hold their accounts, which, in theory, might bear interest. However, often the sums held for an individual client are so small, or are held for so short a time, that the interest earned is less than the transaction costs of establishing and administering the account. . . . If these small sums, however, were aggregated into a single account, and the costs of allocating interest to each individual client were eliminated, that account would generate some net interest. . . . The creators of the IOLTA concept . . . realized that . . . the interest could be diverted toward a program to help fund legal assistance for low-income clients. In this modern version of alchemy, a public good could be funded without depriving individuals of anything that they had or reasonably expected to obtain. Donald L. Beschle, Mrs. Frothingham, 30 Seton Hall L. Rev. 846, 848 49 (2000) (footnote calls omitted); see also

Awala v. Fed. Pub. Defender, 176 F. App x 334, 335 (3d Cir. 2006) (nonprecedential per curiam). IOLTA programs have been deemed constitutional by the United States Supreme Court. See *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 240 41 (2003). New Jersey Court Rule 1:28A mandates that every attorney who practices in this State shall maintain -related, public- -1(a), A-2(a). The Rule also establishes the penalties for noncompliance:

5 The accounts required by this Rule shall be registered annually with the IOLTA Fund in the manner prescribed by the IOLTA Fund Trustees. The Trustees shall annually report the names of all attorneys failing to comply with the provisions of this Rule to the Supreme Court for inclusion on a list of those attorneys deemed ineligible to practice law in New Jersey by Order of the Court. An attorney shall be removed from the Ineligible List without further Order of the Court on submission to the Trustees of the prescribed forms. N.J. Ct. R. 1:28A-2(d) (emphasis added.) Although facially similar to the ineligibility process for the assessment provisions discussed above, the IOLTA obligation differs in several important respects. First, only attorneys engaged in private practice are affected, and they are not obliged to pay money, but rather simply to pave the way for the collection of interest generated from eligible trust accounts by giving the IOLTA Trustees their banking



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information. Second, should an attorney fail to do this in a timely fashion, thereby winding up ineligible to practice, on submitting the information the attorney is immediately reinstated; there are no fees associated with reinstatement or enumerated penalties for consecutive terms of noncompliance. Third, the IOLTA Ineligible List is its own discrete entity, which is published separately from the assessment Ineligible List. Its most recent iteration, from October 2013, contains about 950 names, a sum whittled down by See Notice to the Bar Re: IOLTA Ineligible List, <http://www.judiciary.state.nj.us/notices/2013/n131030b.pdf> (last visited Dec. 8, 2013).

C)

The basis for the , which it has taken in several pending cases in this District one of which, *Correra v. Commissioner of Social Security*, No. 12-5493, is currently pending before this Court le to practice law in the State of New Jersey from October 22, 2012, through June 26, 2013,

6 because they had been sanctioned for failing to comply with IOLTA requirements. 1 Consequently, relying on a specific Local Rule in this District, the Commissioner contends that the attorneys may be ineligible to receive compensation under the EAJA for 28.8 hours of their work in this case. 2

D)

Langton & Alter admit that they were on the IOLTA Ineligible List, stating that they

their IOLTA account. (Reply 1 [D.E. 24].) But they argue that their New Jersey administrative ineligibility did not affect their ability to practice in this District, and hence should not affect their EAJA fee eligibility.

II. Discussion

A) Fees Under the EAJA

allow individuals and small businesses to fight back against unjustified government action man Servs., 677 F.3d 144, 145 (3d Cir. 2012) 1 attorneys are listed as administratively ineligible to practice in New Jersey based on their failure to fulfill their IOLTA obligations. The Court also takes judicial notice, cf. *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 598 n.2 (3d Cir. 2000), that the October 26, 2012 edition of the New Jersey Law Journal Online contains a lengthy Ineligible List while the July 29, 2013 edition of the Law Journal Online reports their removal from the list [-] 2 In proposing this calculation, the Commissioner is probably wrong. As indicated, publication Journal, does not accurately reflect when an attorney is actually cured of his/her administrative ineligibility, because proper submission of IOLTA information automatically removes the sanction.

7 inhibit citizens from contesting government decisions in contexts such as social security Grossberg



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v. Barnhart, No. 04-2397, 2005 WL 703736, at *3 (3d Cir. Mar. 29, 2005) (nonprecedential). The fees, costs, and expenses covered by the EAJA, and thus those , party other than the United 2412(d)(1)(A), (2)(A); see also Newmark v.

Principi, 283 F.3d 172, 174 79 (3d Cir. 2002) (discussing the EAJA statutory fee structure). The statute imposes several restrictions on both the amount of a potential award and the parties to whom costs are to be tendered. For example, a litigant of great means might not be eligible to recoup fees, see 28 U.S.C. § 2412(d)(2)(B)(i), and attorneys cannot (without special dispensation) seek an amount calculated on an hourly rate higher than that specified by the statute, see 28 U.S.C. 28 U.S.C. § 2412(d)(2)(A)(ii). Further, requests for attorney fees must be backed up by an itemized statement. 28 U.S.C. § 2412(d)(1)(B). And a district court may the position of the United States was substantially justified or if ; see also Taylor v. United States, 815 F.2d 249, 253 (3d Cir. 1987) (discussing special circumstances as a discretionary decision of the district court). the court discretion to deny awards where equitable considerations dictate an

award should not be made r of Soc. Sec., 651 F.3d 299, 303 (2d Cir. 2011) (quoting Scarborough v. Principi, 541 U.S. 401, 422 23 (2004)).

The EAJA does not cabin what kind of attorney activities may be reimbursed. Reimbursable activity is thus not limited to court appearances or brief writing; nor, for that matter, are awards restricted to the work of See, e.g., Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 581 (2008) prevailing s other

8 requirements may recover its paralegal fees from the Government at prevailing market rates , 426 F. App x 116, 119 n.7 (3d Cir. 2011) Work

conducted by associate attorneys, like that of experts, paralegals and other support staff, is recoverable under the EAJA.

In Priestley v. Astrue, 651 F.3d 410 (4th Cir. 2011), a Social Security case, victorious plaintiffs sought reimbursement of fees that included work performed by out-of-state attorneys were not admitted to the South Carolina State bar and therefore did not qualify for admission to the bar of the district court [for the District of South Carolina], otherwise admitted pro hac vice. Id. at 413 limited their involvement to submitting, in draft form, briefs and papers file, the Commissioner argu[ed] that because [the attorneys] were neither licensed in South Carolina, nor admitted pro hac vice, they had engaged in the unauthorized practice of law when assisting in these cas Id. There, as here, the Commissioner in the District of Id. at 114 n.*. The district court substantially denied reimbursement for the nonadmitted attorneys. With regard to one of the lawyers contained in 28 U.S.C. § 2412(d)(1)(A), in light of both the public policy in favor of attorney licensure Id. at 414. On appeal, the Fourth Circuit reversed in light of EAJA. The expansive statutory language, the Fourth Circuit indicated,



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authorizes the plaintiffs to receive reimbursement for work performed by an attorney, regardless of whether the attorney performing the work is admitted to practice or not Id. at 416

9 improperly linked the requirements for the practice of law in the district court with the requirements of the EAJA, thus limiting the scope of fees that the EAJA otherwise authorizes - was so attenuated and technical that it would not affect the plaintiffs claims for fee awards under the EAJA, which does not condition eligibility for reimbursement on whether an attorney is admitted Id. at 416. the use of nonadmitted lawyers for brief writing services does not present a special circumstance sufficient to deny a fee award as unjust under the EAJA, vacating in part the decision of the district court and remanding. Id. at 413, 419.

The reasoning in Priestley demonstrates that eligibility to practice is not, in itself, totally dispositive under the EAJA statutory scheme. For example, work performed summer associates . . . not admitted to practice reimbursable under the EAJA Id. at 418. That said, Priestly is not all on point. The out-of-state attorneys there did not technically district court; at most, they prepared only drafts of briefs and papers their names were sometimes included on briefs as attorneys for the plaintiffs and they stated in their EAJA affidavits that they were attorneys for plaintiffs, the nature of their brief-writing function . . . never changed Id. at 417. And their ineligibility related simply to their not being admitted to practice before the district court in which their briefs were filed. The Fourth Circuit made it clear that it was not confronting the indicating further that it might yet be unjust to compensate [attorneys] who, without proper licensure, directly represent clients and, on their behalf, file papers and appear before the court Id. at 417 18.

10 Here, by c actively represented the plaintiff, filing papers and appearing in Court on her behalf. According to the Commissioner, the sanction imposed under New Jersey Court Rules for failure to submit information about their IOLTA accounts rendered their work in this case the unauthorized practice of law, which must be taken into account when the Court considers their application for fees under the EAJA. See Vincent, in the context of Social Security appeals, which predominate among the cases in which EAJA awards are mad

In Abdallah v. Pileggi, 914 F. Supp. 1115 (D.N.J. 1996) (Hedges, Mag. J.), an attorney failed to timely make payment to the Fund. Id. at 1116. As a result, the attorney became ineligible to practice law in New Jersey pursuant to New Jersey Court Rule 1:28-2(a). Id. Construing then-General Rule 4B for the District of New Jersey ink between [the federal] Bar and that of the State eing on the Ineligible List does not [a]ffect licensure but, instead, ability to practice Id. at 1116 17. In effect, the court held that running afoul of Fund obligations, and incurring an administrative suspension under Rule 1:28-2(a), did not render an attorney ineligible to practice in this District. See id. at 1117 20. The context of the decision was not a fee award, the case at all in the District of New Jersey.

In 1996, then-Rule 4B was amended to overturn the result in Abdallah. That amendment is preserved in the present Local Rule 101.1(b), which New Jersey Attorney deemed ineligible to practice law by



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order of the New Jersey Supreme Court entered pursuant to New Jersey Court Rule 1:28-2(a) shall not be eligible to practice law in this Court during the R. 101.1(b); see also Allyn Z. Lite, New Jersey

11 Federal Practice Rules, Comment 3 to D.N.J. L. Civ. R. 101.1, at 420 (2013) (discussing the rule revision as a reaction to Abdallah). Similar language was added to the rule governing pro hac vice admissions and practice. See D.N.J. L. Civ. R. 101.1(c)(2).

The Commissioner asks the Court to consider whether this rule change tethering compliance with Fund contributions to eligibility to practice in this District extends further to IOLTA compliance, even though Rule 101.1(b) is silent on what should occur if an attorney duly admitted to practice in this District is placed on other kinds of New Jersey administrative ineligibility. The Commissioner points out that the ineligibility portions of the IOLTA and Fund rules are substantially the same. Compare N.J. Ct. R. 1:28- The treasurer shall annually report the names of all attorneys failing to comply with the provisions of this Rule to the Supreme Court for inclusion on the list of those attorneys deemed ineligible to practice law in New Jersey by order of the Court. with N.J. Ct. R. 1:28A- The Trustees shall annually report the names of all attorneys failing to comply with the provisions of this Rule to the Supreme Court for inclusion on a list of those attorneys deemed ineligible to practice law in New Jersey by Order of the Court. Hence, arguing by analogy, the Commissioner proposes that Langton & Alter fall under the reciprocal sanction imposed under Local Rule 101.1(b) and should be deemed ineligible to practice law in this District during the relevant period. The Court disagrees.

C) District of New Jersey Rule 101.1(b) Does Not Affect IOLTA-Noncompliant Attorneys Local Rule 101.1(b) specifically addresses only those attorneys deemed administratively ineligible to practice pursuant to New Jersey Court Rule 1:28-2(a). It does not cover those attorneys incurring non-licensure-related administrative restrictions under any other New Jersey Court Rules, even though those New Jersey Court Rules existed prior to the 1996 revision of

12 what is now Local Rule 101.1(b). See, e.g., Sylvia Pressler & Peter Verniero, Rules Governing the Courts of the State of New Jersey 403 (2013) (recounting legislative history of N.J. Ct. R. 1:28A-2, including the effective-1994 addition of subparagraph d). Thus, under canons of statutory construction, the express mention of New Jersey Court Rule 1:28-2(a) in Local Rule 101.1(b) weighs in favor of excluding similarly worded counterparts in other sections of the New Jersey Court Rules. If the drafters of revised Local Rule 101.1(b) wished to make eligibility to practice in this District contingent on IOLTA good standing, they could have easily included language about such preconditions to practice in an updated Local Rule 101.1(b), but they did not. See also Shamshoum v. Bombay Cafe, 257 F. Supp. 2d 777, 779 81 (D.N.J. 2003) (Rosen, Mag. J.) (discussing Local Rule 101.1(b) using canons of statutory construction in the context of the bona-fide office requirement

The significant differences between IOLTA and Fund attorney obligations support this outcome. IOLTA requirements apply only to those engaged in the private practice of law in New Jersey. Those



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attorneys are obliged to place client funds in New Jersey banking institutions at interest to a client or IOLTA. After that, t IOLTA compliance is passive; the collection of interest earned on IOLTA accounts is a matter between the bank and the Trustees of the IOLTA fund. The attorney is not making a contribution to a fund that exists to protect clients (the Fund); or supporting a program that addresses lawyers in crisis, inuring to the benefit of clients and fellow attorneys (LAP); or supporting the disciplinary system all obligations of practice which this District has decided are deserving of reciprocal enforcement. Furthermore, the sanctions for noncompliance differ markedly. As discussed above, the IOLTA ineligibility list is separate from the Fund list, and IOLTA delinquency does not expose an

13 attorney to a financial penalty or loss of license. In short, IOLTA obligations arise in the context of how state practitioners set up their law practices, which is none of the this Court .

Along with common sense, there is another point worth making: a goal of the New Jersey IOLTA program is to See What is NJ IOLTA?, http://www.ioltanj.org/grnt_home.html (last visited Dec. 13, 2013). How contrary to bend the technicalities of IOLTA into an assault on the ability of attorneys to vindicate rights under an important federal statute that as is made clear by its very name shares the same important mission!

The Court holds that Local Rule 101.1(b) does not mandate either on its face or in its spirit that this Court deny Langton & Alter attorneys were engaged in the unauthorized practice of law before the federal courts. Put simply:

the Langton & Alter law firm was not violating this by overlooking the New Jersey IOLTA reporting obligation and falling into state administrative noncompliance, and the Commis would make a fee award under the EAJA unjust.

III. Conclusion The Commissioner put at issue eligibility for fees, not the amount, and the Court has ruled. An appropriate order will be entered gran full amount sought.

December 18, 2013 /s/ Katharine S. Hayden Katharine S. Hayden, U.S.D.J.

