

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-8002A

IN RE MICHAEL J. KELLEY, MEMBER OF THE BAR

Before TOTH, FALVEY, and LAURER, *Judges*.

ORDER

On June 7, 2021, the Court received a grievance against Michael J. Kelley, a member of this Court's bar. Michael R. Mason, Mr. Kelley's client in case no. 19-4427, filed the grievance and alleged that Mr. Kelley committed professional misconduct by failing to diligently and competently handle Mr. Mason's case. Mr. Mason further alleges that Mr. Kelley filed an additional appeal on his behalf without his knowledge or consent, noting that Mr. Kelley also filed such appeal past the deadline.

The Chief Judge found *prima facie* validity pursuant to Rule 6(a) of this Court's Rules of Admission and Practice (Rules) and referred the grievance to the Court's Standing Panel on Admission and Discipline (Panel) on August 18, 2021. On August 24, 2021, the Panel ordered Mr. Kelley to show cause why the Court should not refer the grievance to the Court's Committee on Admission and Practice (Committee) for action under Rule 2(b). Mr. Kelley did not respond. Accordingly, on December 6, 2021, the Panel referred the matter to the Committee. *See* Rules 2(b)(4); 7(d)(3)(C).

The Committee investigated the matter to the extent that it could, given that Mr. Kelley failed to respond to any of the Committee's inquiries. The Committee filed with the Court a report of its findings and recommendations on April 7, 2022 (Report). The Committee recommended that the Court (1) impose a minimum 120-day suspension from practice; (2) order Mr. Kelley to complete 12 hours of continuing legal education ("CLE") required by a previous order; (3) order Mr. Kelley to complete another minimum three hours of CLE relating to diligence and timeliness; and (4) impose a probationary period of at least 2 years. The Court notified Mr. Kelley of his right to submit a rebuttal to the Committee's report. Again, Mr. Kelley did not respond.

On June 3, 2022, the Court mailed Mr. Kelley a preliminary version of this order, advising him of the Court's intent to suspend him. At that time, the Court also advised Mr. Kelley of his right to file a motion for reconsideration within 21 days after the date of the June 3 order, pursuant to Rule 5(d). Mr. Kelley has not filed a motion for reconsideration.

I. BACKGROUND

On July 1, 2019, Appellant Michael R. Mason filed an appeal through Mr. Kelley, case no. 19-4427. On March 4, 2020, the Court ordered the Appellant to file a brief within 30 days. Mr. Kelley failed to file a brief, and on April 6, 2020, the Court issued another order to file the brief. On April 13, 2020, Mr. Kelley filed a non-compliant motion to extend time to file the brief. On April 16, 2020, Mr. Kelley filed a motion for leave to accompany his motion to extend time to file the brief, which the Court granted on April 20, 2020.

On May 11, 2020, Mr. Kelley filed the brief. On November 30, 2020, the Chief Judge issued a memorandum decision in which she noted briefing deficiencies. Specifically, she wrote that "Mr. Mason's initial brief fails to address the merits of his claim in any form, and he filed no [reply] brief." Mem. Decision at 3. Through her single-judge decision, the Court affirmed the Board decision. Judgment issued December 28, 2020. In his grievance, Mr. Mason alleges that the brief failed to provide "evidence or arguments" related to Mr. Mason's appeal and cites the Chief Judge's order.

Further, on February 27, 2021, Mr. Kelley filed an appeal with the U.S. Court of Appeals for the Federal Circuit. On May 19, 2021, the Federal Circuit dismissed the appeal because Mr. Kelley failed to file it within the required 60 days after this Court's judgment. Mr. Mason alleges that Mr. Kelley failed to consult with him before filing this late appeal.

The Court has previously disciplined Mr. Kelley for professional misconduct. In December 2020, the Court privately admonished Mr. Kelley for failure to act with reasonable diligence and promptness in several appeals, noting a pattern of misconduct amid the Court's repeated warnings. In that disciplinary order, the Court ordered Mr. Kelley to complete at least 12 hours of CLE within one year and placed him on probation for 2 years. Mr. Kelley had until January 4, 2022, to submit proof of completing the CLE requirement. Mr. Kelley has submitted no evidence of completion.

II. PROFESSIONAL MISCONDUCT STANDARDS

Pursuant to Rule 4(a) of the Court's Rules of Admission and Practice, the Court applies the *Model Rules of Professional Conduct* (Model Rules) adopted by the American Bar Association (ABA). A practitioner is subject to the Court's disciplinary authority for professional misconduct, defined in part as "an act or omission that violates the Court's disciplinary standard or any other disciplinary rules applicable to the practitioner" and may include "a failure to comply with any rule of the Court." U.S. VET. APP. R. ADM. & PRAC. 4(b)(1)(A), (2).

As detailed below, the Court concludes that Mr. Kelley violated Model Rules 1.2 (Scope of Representation), 1.3 (Diligence), and 1.4 (Communications), and therefore committed professional misconduct as defined by Rule 4(b).

Model Rule 1.3 states that a lawyer "shall act with reasonable diligence and promptness in representing a client." Model Rule 1.2(a) states that a lawyer shall "abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." Model Rule 1.4 requires that a lawyer "promptly inform the client of any decision or circumstance with respect to which the client's informed consent. . . is required" and "keep the client reasonably informed about the status of the matter."

Mr. Kelley has not disputed the factual allegations. Indeed, he has failed to engage with any process afforded to him. Based on the Model Rule requirements as applied to the allegations, as well as the Chief Judge's parallel assessment of the deficiencies in Mr. Mason's brief, we conclude that Mr. Kelley violated Model Rules 1.2, 1.3, and 1.4. Specifically, Mr. Kelley failed to

show the diligence expected of a member of this Court's bar and repeatedly failed to comply with the Court's Rules. His conduct caused undue delay and may have unfavorably affected the decision in his client's case. His lack of diligence also caused Mr. Mason's untimely appeal to the Federal Circuit, which was apparently filed without Mr. Mason's input or consent. We conclude that Mr. Kelley's conduct demonstrates a lack of "commitment and dedication to the interests of [his] client" in violation of Model Rule 1.3, Comment 1, and therefore constitutes professional misconduct.

III. DISCIPLINE

Consistent with Rule 4(a), the Court looks to the ABA's *Standards for Imposing Lawyer Sanctions* (ABA Standards) for guidance. Those standards state that "[t]he purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession." ABA Standard 1.1.

ABA Standard 3.0 provides that, "[i]n imposing a sanction after a finding of lawyer misconduct, a court should consider" four factors: (1) the duty violated; (2) the lawyer's mental state; (3) the potential, or actual, injury caused by the misconduct; and (4) any aggravating or mitigating factors. ABA Standard 3.0.

Regarding the first factor, the record demonstrates that Mr. Kelley violated his duties to his client by failing to act with reasonable diligence and promptness. *See* ABA Standards, Theoretical Framework (providing that "the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients"). In case no. 19-4427, Mr. Kelley filed a brief so deficient that the deficiencies were mentioned in the Court's dispositive order, failed to comply with the Court's Rules, potentially jeopardized his client's interests by failing to file a reply brief, and filed deficient, untimely, and non-compliant documents.

Second, the Court has no evidence that Mr. Kelley acted intentionally or with improper motive. The Court agrees with the Committee that the "misconduct appears to stem from garden-variety procrastination, a lack of diligence in complying with order and rules, and a lack of reasonable communication with his clients." Report at 7. However, given Mr. Kelley's pattern and prior disciplinary record, it is likely that Mr. Kelley acted with knowledge of his misconduct. *See* ABA Standards, Theoretical Framework (defining "knowledge" as "when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct [but] without the conscious objective or purpose to accomplish a particular result").

Regarding potential or actual injury, whether the client's benefits claims were ultimately affected by this misconduct is a matter of speculation. But the pattern in this case and others the Court has previously reviewed is concerning. The Court concludes that potential harm could have occurred. Mr. Mason's appeal to the Federal Circuit was filed without his knowledge or consent and was dismissed due to Mr. Kelley's failure to timely appeal. Additionally, Mr. Kelley's inadequate brief in case no. 19-4427 potentially prejudiced his client's interests. While the Court cannot conclude that Mr. Mason would have been successful with more diligent counsel, Mr. Kelley's conduct did a disservice to his client in the unprofessional way he presented the case to the Court. Additional injuries include unnecessary hurdles to the administration of justice,

unjustified burdens on the Court's resources, and the potential anxiety to his client from the uncertainty and delays caused by Mr. Kelley's conduct.

Finally, the Court addresses any aggravating or mitigating factors. ABA Standard 9.22 lists several potential aggravating factors. We find four applicable here: (1) prior disciplinary offenses; (2) a pattern of misconduct; (3) substantial experience in the practice of law; and (4) indifference to making restitution.

Mr. Kelley's prior disciplinary offenses and pattern of misconduct weigh heavily toward a severe sanction. Mr. Kelley's misconduct in representing Mr. Mason occurred, in part, during a two-year probationary period that was imposed for similar misconduct in various appeals at this Court. Indeed, the probationary period was imposed just 6 months before the present grievance was filed against Mr. Kelley. Further, Mr. Kelley is an experienced attorney who was admitted to the Massachusetts bar in 1994 and has been a member of this Court's bar since 2000.

Mr. Kelley has displayed indifference to this Court's rules and its disciplinary procedures and actions. Although this Court's deadline for submitting evidence of CLE completion expired on January 4, 2022, Mr. Kelley has yet to submit any evidence that he completed the 12 hours of CLE required of him by this Court's December 10, 2020, order. And, in the context of this grievance, Mr. Kelley has repeatedly failed to respond to inquiries by the Panel and the Committee. His disregard for the process in place to protect his own interests raises serious concerns about his ability to protect the interests of others.

ABA Standard 3.0 also requires that we consider mitigating factors. While ABA Standard 9.3 lists several such factors, we strain to find any applicable here other than noting no evidence of dishonest or selfish motive for Mr. Kelley's misconduct. Of course, the Court lacks information about Mr. Kelley's motivations at all. He has provided no justifications, no indication of any remorse, and—in fact—no input at all.

Having considered all factors, the final step in our analysis is to impose an appropriate sanction. Mr. Kelley's lack of diligence has repeatedly exposed his clients to potential harm and burdened the Court. Moreover, Mr. Kelley has previously been subject to discipline and has failed to comply with the requirements of the Court's recent disciplinary order. While his conduct does not appear to be motivated by any dishonesty or malice, Mr. Kelley has provided the Court with no explanation for his behavior or any other mitigating circumstances. Accordingly, the Court adopts the Committee's recommendations in full.

Finally, the Court notes the Mr. Kelley was scheduled to appear for oral argument on July 20, 2022, in case no. 21-1289 (Hunt). Mr. Kelley's suspension will preclude him from participating in that oral argument. The suspension will not, however, preclude him from filing a motion to withdraw from his active cases or to assist clients in finding substitute counsel for any of those cases. Indeed, it is his duty to mitigate the disruption this suspension may cause for his clients. *See* Commentary to Model Rule 27.

IV. CONCLUSION

Upon consideration of the foregoing, it is

ORDERED that, as of the date of this order, Michael J. Kelley shall be publicly suspended from practice before the U.S. Court of Appeals for Veterans Claims for a period of 120 days. It is further

ORDERED that Michael J. Kelley shall be required to complete the 12 hours of continuing legal education focused on professional responsibility previously required by the Court. It is further

ORDERED that Michael J. Kelley shall be required to complete an additional 3 hours of continuing legal education focused on the ethics rules governing diligence and timeliness. It is further

ORDERED that Michael J. Kelley shall be required to submit evidence of satisfactory completion of all continuing legal education requirements before reinstatement as a member of this Court's bar. And it is further

ORDERED that Michael J. Kelley shall be on probation for 2 years beginning on the date of any potential reinstatement as a member of the Court's bar, during which the Court will closely monitor his compliance with the Court's Rules.

DATED: July 8, 2022

PER CURIAM.

Copy to:

Michael J. Kelley

CERTIFIED MAIL – RETURN RECEIPT REQUESTED