Disciplinary Grievances against Practitioners at the U.S. Court of Appeals for Veterans Claims (2010-2015)

Introduction

This Compendium illustrates the types of circumstances that have led to grievances and disciplinary proceedings at the Court. Practitioners should refer to the Court's Rules of Practice and Procedure ("P&P Rules"), E-filing Rules, Rules of Admission and Practice ("A&P Rules"), and the ABA's Model Rules of Professional Conduct ("Model Rules") for the rules and professional standards to which they must adhere. *See* Rule 4(a) of the A&P Rules.

Between January of 2010 and June of 2015, thirty-nine grievances were filed. These grievances involved thirty-two members of the Court's bar, including the private bar and VA attorneys. Of those grievances, nine led to discipline or the practitioner's resignation from the Court's bar. Where the Court administered discipline, the consequences included private admonitions, public reprimands, suspensions of various lengths, and disbarment. Some of these grievances resulting in discipline were reciprocal discipline cases. Although thirty of those proceedings did not result in discipline or are still under investigation, in each case referenced herein the practitioner involved was required, at a minimum, to respond to orders of the Court as to the nature of the grievance. Approximately 7.6% percent of the practitioners conducting regular or active practice before the Court (i.e., appearing in ten or more cases at the Court since 2010) were the subject of an attorney grievance between 2010 and 2015. The previous version of this Compendium ended in August 2013.

GRIEVANCES BY CATEGORY SINCE 2010

GRIEVANCE TYPE	FREQUENCY	DISCIPLINE
Candor to the Court	4	0
Communication	6	2
Competence	15	3
Fees	4	1
Privileged Communications	1	0
Professionalism	9	3
Supervisor Responsibility	0	0

Subject Matter Index

I. Candor Toward the Court

II. Communication
See also Privileged Communications

III. Competence

IV. Fees
See also Communication

V. Privileged Communications
See also Communication

VI. Professionalism

VII. Supervisor Responsibility

Compendium Summaries

I. Candor Toward the Court

Practitioners 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." Model Rule 3.3(a)(1). In one case, the Court considered a matter where an attorney insisted in Court filings that a claim had been pending with the Secretary for years when it had in fact been adjudicated.

II. Communication (*See also* Privileged Communications)

A. Communicating with Prospective Clients.

1. *A practitioner should comply with the advertising rules in the Model Rules, which may not be the same as the rules regarding advertising and solicitation in other jurisdictions where the practitioner is admitted.* For example, envelopes containing solicitation letters should be labeled as "advertising materials." *See* Model Rule 7.3(c). The Court has privately admonished attorneys for failing to mark envelopes as "advertising materials," regardless of whether the attorney's home jurisdiction also required such.

2. *Lawyers who fail to communicate with prospective clients after soliciting them and then receiving from them an expression of interest, may be violating their ethical duties.* If the practitioner determines that he or she does not wish to represent the prospective client, the lawyer should inform the prospective client of his or her decision not to take the case. In one case, attorneys sent mailings soliciting clients and then failed to respond to persons who signed and returned a representation consent agreement and an information release agreement. In a non-disciplinary warning letter, the Court advised the attorneys that failure to notify prospective clients that an attorney had declined to take a case may fall short of ethics requirements. In another case, the Court sent a non-disciplinary warning letter to an attorney who notified a prospective client of her decision to decline representation until just days before the filing deadline.

B. Communicating with Current Clients.

1. *Failing to consistently communicate with a client about the status of his or her case may violate Model Rule 1.4.* In one case, an attorney failed to file a statement of the issues for the Rule 33 conference, and subsequently failed to respond to multiple show cause orders to do so. The client dismissed the attorney after independently learning that the Court had

issued a show cause order as to why the appeal should not be dismissed. The attorney then failed to file a compliant withdrawal motion. The Court publicly reprimanded the attorney for, among other misconduct, failing to communicate the status of the case to the client. The attorney was also disciplined by the state bar. In another case, the Court considered a matter where an attorney failed to notify his client of a final decision by the Court before the time period for a motion for reconsideration had passed.

2. *Misleading a client about the status of his or her case may violate Model Rules 1.4(a)(3) and 8.4(c) because it is not "keep[ing] the client reasonably informed about the status of the matter."* Practitioners should not mislead or misrepresent a case's status to a client. In one case, the Court suspended an attorney for two years because the attorney had told the client that their case was dismissed for lack of merit, when in fact the Court had dismissed the case for failure to prosecute.

3. *Failing to include all issues on appeal may violate Model Rule 1.2(a) because a practitioner must "abide by a client's decisions concerning the objectives of representation."* The Court has reviewed an allegation that an attorney disregarded the client's instructions to appeal all medical condition issues. If a practitioner strategically chooses not to include an issue on appeal, he or she must "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Model Rule 1.4(a)(2).

4. *A practitioner who withdraws from representing a client must take steps to protect the client's interest, including giving reasonable notice of withdrawal and allowing time for employment of other counsel.* Model Rule 1.16(d). The Court has reviewed allegations that practitioners did not provide sufficient guidance to clients on how to file a timely motion for reconsideration or panel review, or ask for an extension, in conjunction with a motion for withdrawal.

C. Staying Apprised of a Client's Life/Death Status and Notification when a Client Dies.

1. *The Court expects practitioners to keep reasonably apprised of their client's life/death status.* If practitioners learn that a client has died, practitioners are required to promptly alert the Court and opposing counsel. *See* P&P Rule 43(a)(2) (requiring notification to the Court); ABA Formal Opinion 95-397 (requiring notification to opposing counsel). *See also* Model Rules 1.1, 3.3(a)(1), 4.1. In one case, an attorney allegedly knew that the client had died, but continued representation and filed

motions at the Court without informing the Court or opposing counsel of the client's death.

III. Competence

A. Filing Timely and Rule-Compliant Documents.

1. *Practitioners are expected, without prompting from the Court, to file required documents, including notices of appearance and briefs, that are both timely and otherwise compliant with the Court's rules.* Multiple failures to file timely may result in discipline, even in the absence of any disciplinary history or other misconduct. *See* Model Rules 1.1, 1.3, 3.2, 8.4(d). Computer errors, including crashes and viruses deleting stored case documents and information, are not a valid excuse for missed, late, or otherwise non-compliant filings. Failing to respond to Court orders may violate A&P Rule 4(b)(2). *See also* Model Rules 1.1, 1.3, 8.4.

   Examples of these types of failings include:

   a. An attorney who failed to respond to multiple show cause orders to file a statement of the issues for a Rule 33 conference, and failed to respond to a show cause order as to why the attorney should not be removed from the case and why disciplinary proceedings should not be initiated.

   b. An attorney who had been issued multiple show cause orders for failing to file timely or rule-compliant briefs; had multiple briefs returned because they were either untimely, lacked a rule-compliant motion for extension of time, failed to respond to a show cause order, were otherwise not rule-compliant, or suffered from some combination of the above; and had been the subject of a successful motion to strike portions of the brief.

   c. An attorney who failed to file a response to an EAJA application and to the Court's order to file a response in multiple cases. In one of those cases, the attorney failed to file a record on appeal (ROA) and then failed to respond to the Court's three-day order to file the overdue ROA.

   d. An attorney who failed to file required documents and respond to corresponding Court orders that led to dismissal of the client's case.

e. An attorney who submitted several non-compliant filings, including a brief, and failed to comply with numerous deadlines, including failing to timely respond to multiple show cause orders.

f. An attorney who failed to file a timely brief after assuming a motion for an extension had been granted, and then filed multiple untimely motions for a second extension. The appeal was dismissed for failure to file the brief, and was only reinstated by a panel after a motion for reconsideration. The Court issued a warning letter to the attorney.

B. Filing Professional Quality Briefs and Non-Frivolous Motions.

1. *Poor quality briefs may violate Model Rules 1.1 and 1.3.* Poor quality briefs include those that do not comply with Court rules, rely on frivolous arguments, or are incoherent. For example, cutting and pasting into a brief long block quotes from other cases, as a substitute for analysis, may be incompetent because it does not constitute "inquiry into and analysis of the factual and legal elements of [a] problem." Comment 5 to Model Rule 1.1.

2. *Filing frivolous motions with the Court may violate Model Rule 3.1.* Frivolous motions potentially include any motion that is not supported by either the law or the facts and may include motions that contradict, without justification, well-established precedent or the record.

   Examples of these types of failings include:

   a. An attorney who filed a brief that contained lengthy block quotes without any legal analysis.

   b. An attorney who repeatedly filed out-of-time motions, either stating a frivolous basis for doing so or no basis at all.

   c. An attorney who filed a motion asking the Court to order VA to take action on a client's remand, when the client already had been awarded benefits a year earlier.

IV. <u>Fees</u> (*See also* Communication)

A. Not Claiming EAJA Fees for Post-Mortem "Conversations" with Clients.

1. *In multiple cases, attorneys have claimed EAJA fees for contact with the client after the client's death. The Court has imposed discipline in this*

situation, and in each case, the Court imposed a financial penalty on the attorney, in addition to requiring the return of any EAJA fees paid for any purported post-death conversations. Model Rules 1.1, 3.3, 5.3(b).

B. Charge of Unreasonable Fees

1. *Under Model Rule 1.5(a), "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."* Unreasonable fees include billing several clients for the same work performed or for time not actually expended. In one case, the Court reviewed an allegation that a practitioner billed more than 24 hours in a one-day period and charged clients for work product that was reused. This may also constitute making false statements to a tribunal in violation of Model Rule 3.3(a)(1).

V. <u>Privileged Communications</u> (*See also* Communication)

A. Maintaining Client Confidences.

1. *Pursuant to Model Rule 1.6, confidential information should not be disclosed outside of certain enumerated exceptions.* This prohibition includes posting confidential information about a client's case on the internet, including blogs, social media, etc., without the client's permission. A practitioner violated Model Rule 1.6 when posting on a blog information about a former client's case, even though the client had previously given a newspaper interview about the case.

VI. <u>Professionalism</u>

A. Maintaining Good Standing with your State Bar and Notifying the Court of any Loss of Good Standing.

1. *Failing to remain in good standing with a state bar where an attorney is admitted to practice may result in discipline by the Court.* Attorneys must notify the Court of the loss of good standing in their state bar. The Court has imposed reciprocal discipline after an attorney self-reported, in compliance with A&P Rule 4(c)(1), that a state supreme court had imposed a suspension. Failure to notify the Court may constitute an additional, independent ethical violation. The Court publicly reprimanded an attorney for failure to self-report.

Continuing to practice before the Court without notifying the Court of a suspension or disbarment may also violate Model Rule 5.5 as unauthorized practice of law.

VII. Supervisor Responsibility

A. Ensuring Employees Comply with Rules.

1. *Supervising attorneys are required to take reasonable steps to help ensure that their subordinates, including attorneys, comply with the Court's Rules and the ABA Model Rules.* A supervising attorney may be held responsible for a subordinate's failure to comply with the rules, for example, by failing to timely file a required document, such as a notice of appearance, statement of issues, or a brief. *See* Model Rules 5.1(c)(2) and 5.3. The Court has analyzed the duties of supervising attorneys as a part of the Court's disciplinary process.