

# UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-8003A

IN RE KENNETH S. BESKIN, MEMBER OF THE BAR

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

## ORDER

Respondent, Kenneth S. Beskin, a member of the Court's bar, is the subject of a grievance by the Clerk of the Court (Clerk). The grievance alleged that Mr. Beskin repeatedly failed to respond to Court orders and failed to comply with the Court's Rules of Practice and Procedure. After the Chief Judge made a finding of prima facie validity pursuant to Rule 6(a) of this Court's Rules of Admission and Practice, the Court ordered the matter to be referred to the Court's Standing Panel on Admission and Discipline.

On June 2, 2020, the Court ordered respondent to show cause why the grievance should not be referred to the Court's Committee on Admission and Practice (Committee) for action pursuant to Rule 2 of the Court's Rules of Admission and Practice. Mr. Beskin submitted a response to our order on July 2, 2020, and also, on July 6, 2020, submitted an affidavit in support of his position from the managing partner of the law firm at which he is employed. We will discuss these submissions below. On July 7, 2020, we referred this matter to the Committee.

The Committee submitted its report on November 5, 2020. That same day, pursuant to Rule 6(b)(2)(B) of the Court's Rules of Admission and Practice, the Court ordered respondent to show cause why the Court should not impose a suspension of 6 months with conditions concerning continuing legal education and supervised practice. On December 8, 2020, respondent submitted a timely response to our order, which we will also discuss below.

### I. PROFESSIONAL MISCONDUCT

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, which is 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). Here, the Court concludes that respondent violated Model Rules 1.1 (Competence) and 1.3 (Diligence) and committed professional misconduct as defined by Rule 4(b) of the Court's Rules of Admission and Practice.

#### A. Appeals Subject to the Grievance

Seven cases in which respondent appeared were the subject of the Clerk's grievance. We briefly described respondent's conduct in these cases here, adding information concerning the cases

that occurred after our referral of this matter to the Committee. We then turn to our finding that respondent's conduct violated the Court's rules. Thereafter, we address the appropriate sanction.

### **1. *Brown*, 18-4834**

In this case, Mr. Beskin struggled to file documents on time, in correct form and, ultimately, without sufficiently developed arguments. Specifically, Mr. Beskin first failed to file a brief on behalf of appellant. The Court ordered him to "comply with the rules of the Court," and file a brief. Five days later, he attempted to file a brief and motion for leave, but both documents were nonconforming because they were missing signatures and the brief had incorrect page numbering and did not contain a table of authorities. Mr. Beskin's stated reason for failing to file the brief was he was under the mistaken impression that VA might settle the appeal, but he had missed the email from VA counsel saying they would not file a joint motion for remand. Of course, that rationale does not address the failure to comply with the Court's rules.

Mr. Beskin submitted a "corrected" brief on March 27, 2019, but the brief still had incorrect page numbering and did not contain a table of authorities. He also failed to submit a motion for leave that stated the reason for delay. On April 3, Mr. Beskin attempted a third time to submit a corrected brief, but the brief still did not conform to the Court's Rules. After receiving three notices of nonconforming documents for the same brief, Mr. Beskin finally filed a conforming brief on April 11, 2019. Mr. Beskin did not cite to a single case in this otherwise "compliant" brief.

The Court affirmed the Board decision and noted that Mr. Beskin's brief did not "contain any citations to relevant law, regulation, or other legal authority" or "challenge any specific finding of fact or conclusions of law in the... Board decision." The Court concluded "that his arguments are not sufficiently developed to warrant consideration."

### **2. *Ebert*, 18-5367**

Mr. Beskin also struggled to conduct himself professionally in this case in ways similar to *Brown*. He submitted a nonconforming brief on March 14, 2019. After receiving a notice of the errors, Mr. Beskin filed a new brief on March 20, 2019, that was still nonconforming. The Court issued another notice of the errors.

When respondent did not submit a new brief within the seven days the Court provided, on April 3, 2019, the Court issued an order noting that failure to file a compliant brief could result in dismissal or sanctions. Mr. Beskin later stated that he did not realize that his second attempt to file was nonconforming. The Court issued another notice of nonconforming documents to Mr. Beskin on April 12, 2019, after his third, non-compliant attempt. It took four attempts for Mr. Beskin to file a Rule-compliant brief, more than a month after it was originally due.

The Court issued a memorandum decision on September 24, 2019 affirming the Board's decision. The Court said the following regarding Mr. Beskin's brief: "It is difficult to follow appellant's arguments. Moreover, those arguments are often unsupported by citations to the record or the law. In fact, in his opening and reply brief combined, appellant cites a grand total of one

case." Furthermore, the Court stated that the appeal could have been resolved "entirely on the underdeveloped nature of appellant's argument."

### **3. *Prescott*, 18-6166**

This case also follows a similar, concerning pattern. Mr. Beskin failed to file a brief on time, and the Court accordingly issued an order on June 12, 2019, noting the possibility of dismissal or sanctions. The Court received both a brief and motion for leave on June 18, 2019, but neither submission conformed to the Court's Rules. After the Court issued a notice of the nonconforming documents, Mr. Beskin attempted and again failed to file Rule-compliant versions of both documents on June 19, 2019.

Mr. Beskin filed a compliant brief on his third attempt, but it did not contain any citations to legal authorities. In a memorandum decision denying reconsideration and affirming the Board's decision, the Court pointed to the lack of "factual or legal support" for his arguments.

### **4. *Wine*, 19-3118**

Mr. Beskin failed to file a brief on time, and the Court issued an order on November 18, 2019, noting the possibility of dismissal or sanctions if he did not submit a brief. Mr. Beskin responded to the Court's order the next day with a non-compliant motion for extension of time. On December 4, 2019, the Court received a motion for leave and a motion for a 45-day extension of time to file his brief, both of which were also not Rule-compliant. Finally, Mr. Beskin attempted to submit a brief on December 30, 2019, but the brief was marked as received, not filed, because the brief was not timely filed and his motion for leave was not in accordance with the Court's Rules.

On March 11, 2020, the Court ordered that appellant, within 14 days, file an opening brief that complied with the Court's Rules. On March 23, 2020, Mr. Beskin again submitted a brief that did not comply with the Court's Rules, and the Court ordered the proceedings stayed in the interest of judicial efficiency pending further order of the Court. The Court also issued a notice of nonconforming documents to Mr. Beskin on April 6, 2020. After Mr. Beskin submitted another noncompliant brief on April 13, 2020, the Court ordered that he show cause why the appeal should not be dismissed, or sanctions imposed.

In his response to the Court's order, on April 29, 2020, Mr. Beskin stated that he was not able to file his opening brief on time because "he was confined for three weeks to a hospital and then to a rehabilitation nursing home receiving intravenous therapy." He further stated that any nonconforming documents are "completely inadvertent and do not reflect any lack of sincere effort on [his] part."

In May 2020, the Court ordered respondent to submit a conforming brief within 14 days. On the day his conforming brief would have been due, he filed a motion for an extension. That motion did not conform to the Court's rules. In June 2020, the Court ordered respondent to show cause why the appeal should not be dismissed. In his response, respondent stated that the "errors

that have been made in the past have not been due to a lack of effort or respect for Court Rules, but have been inadvertent."

On June 18, 2020, the Court dismissed the appeal. The Court stated that "[h]ere, the appellant had four opportunities to file a brief that conforms to the Court's rules. He did not do so. Instead, after the Court afforded him one last chance, he missed the deadline and submitted two additional nonconforming documents." The Court denied a motion for reconsideration. Mandate entered in September 2020.

#### **5. *Rivera, 19-3086***

In May 2019, appellant filed this appeal with the pro bono consortium as counsel. He eventually became self-represented. Acting pro se, appellant filed an informal brief in November 2019. In January 2020, respondent filed a notice of appearance. He did not seek leave to file a replacement brief. The Secretary filed his brief in February 2020. Respondent did not file a reply brief.

In May 2020, the Court entered order finding that respondent had not filed a retainer agreement and noting that he had not submitted briefing in the appeal. The Court directed respondent to "file a valid retainer agreement or seek leave of Court to withdraw his appearance." The Court allowed respondent 10 days to respond.

Respondent did not comply the Court's order. All he did was misfile a document in this appeal that should have been filed in a separate matter. In June 2020, the Court entered an order directing respondent to show cause why he should not be removed as counsel in this appeal. Respondent submitted a response in which he noted that he had filed a fee agreement in May but had done so by email instead of using the Court's electronic filing system.

Later in June 2020, the Court issued yet another order to show cause, this time allowing respondent five days to explain his noncompliance with the Court's rules and to demonstrate why he should not be removed as counsel. Respondent did not submit anything in response to the order. On June 30, 2020, the Court removed respondent as counsel, stating that respondent's "failure to file anything on behalf of his client has deprived Mr. Rivera of the benefit of any representation, diligent or otherwise."

#### **6. *O'Brien, 19-3777***

In June 2019, respondent filed a notice of appeal in this matter. Later that month, the Court entered order directing respondent to show cause why the appeal should not be dismissed based on the failure to comply with the Court's rules. Specifically, the Court informed respondent that he had not submitted either a filing fee or a declaration of financial hardship. The Court allowed respondent 20 days in which to respond. Respondent did not respond to the Court's order within 20 days and did not seek an extension of time to respond. He eventually responded 49 days after the Court's order, providing no explanation for his untimely response. Nonetheless, the Court accepted the untimely submission. The appeal eventually resolved through a joint motion for

remand.

### **7. *Lee*, 19-3123**

The Clerk included citation to *Lee* in his grievance because the brief respondent filed was only three pages long. It also misspelled the veteran's name. However, as the Committee noted, the Court set aside the Board decision on appeal, an action that implicitly indicated that appellant had carried his burden to establish error on appeal. So, we will follow the Committee's lead and not consider this appeal as grounds for discipline.

#### **B. Respondent has violated the applicable ethical rules.**

Model Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The commentary to this rule indicates that competent handling of a case includes "adequate preparation" and "inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." Model Rule 1.1, Comment 5.

Model Rule 1.3 further provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." The commentary to this rule explains that "[a] lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Model Rule 1.3, Comment 1. The commentary also reflects that "[a] client's interests often can be adversely affected by the passage of time." Model Rule 1.3, Comment 3. But, "[e]ven when the client's interests are not affected in substance," unreasonable delay from a lawyer's lack of diligence "can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." *Id.*

We note that respondent is admitted to practice law in New York State. The New York State Rules of Professional Conduct (N.Y. Rules) mirror those of the Model Rules. For example, an attorney admitted to the New York State bar must display the "legal knowledge, skill, thoroughness and preparation reasonably necessary for representation." N.Y. RULES OF PROFESSIONAL CONDUCT 1.1(a). In addition, the rules further provide that an attorney must "act with reasonable diligence and promptness in representing a client," *id.* R. 1.3(a), and cannot "habitually violate any established rule of procedure." *Id.* R. at 3.3(f)(3).

Based on respondent's conduct in the six appeals discussed above, the Court concludes that respondent violated Model Rules 1.1 and 1.3, as well as the corresponding provisions of the N.Y. Rules. First, respondent consistently submitted documents that did not conform to the Court's Rules of Practice and Procedure. This noncompliance required the Court to repeatedly issue orders informing respondent that his filings did not comply. In many cases, even after being told that a filing was noncompliant, respondent filed a replacement document that also failed to comply with the Court's rules. This conduct delayed the processing of the appeals and needlessly burdened the Court. Second, respondent consistently failed to timely comply with Court orders. In some cases, he would ignore the orders entirely. In others, he would eventually comply without providing any

explanation for missing the Court imposed deadline or seeking an extension. Third, in many of the appeals we have considered, respondent's arguments were underdeveloped both factually and legally. By missing multiple filing deadlines, repeatedly ignoring Court orders submitting nonconforming documents, and filing substandard legal arguments, respondent has demonstrated an inability or unwillingness to adequately prepare his cases and to follow this Court's procedures in violation of Model Rule 1.1 and N.Y. Rules 1.1(a), 1.3(a), and 3.3(f)(3); see *In re Gluck*, 114 F. Supp. 3d 57, 59 (E.D.N.Y. 2015) (finding that, by repeatedly failing to comply with deadlines and appear at pretrial conferences, the respondent displayed incompetence and a disrespect for the court and judicial process).

Further, respondent's neglectful conduct has caused undue delay in his cases and demonstrates a lack of "commitment and dedication to the interests of [his] client[s]," in violation of Model Rule 1.3, Comment 1. In addition to the anxiety that he likely caused his clients, respondent's behavior also placed unnecessary burdens on this Court. In regard to harm to clients, the Court notes specifically that in *Wine* (19-3118) the Court dismissed an appeal based on a failure to submit a compliant brief. Moreover, in other appeals (*Brown* (18-4834), *Ebert* (18-5367), and *Prescott* (18-6166)), various Judges of the Court noted the serious problems with respondent's arguments. A client relies on his or her lawyer to make arguments supported by an adequate discussion of the law and facts. Respondent repeatedly did not do so.

As a member of this Court's bar since November 2013 (although he appeared before the Court pursuant to Rule 46 earlier), respondent should be aware of this Court's Rules of Practice and Procedure. His behavior shows an apparent lack of respect and blatant disregard for this Court's rules and constitutes professional misconduct.

## II. DISCIPLINE

Pursuant to Rule 4(a) of the Court's Rules of Admission and Practice, the Court relies on the ABA's *Standards for Imposing Lawyer Sanctions* (ABA Standards). These standards provide 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.

When imposing discipline, the Court should assess whether public or private discipline is appropriate. In this regard, ABA Standard 1.2 provides that "[o]nly in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed." ABA Standard 1.2. "[L]awyer discipline should be public . . . in cases of disbarment, suspension, and reprimand." *Id.* Additionally, 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. For the reasons discussed below, the Court concludes that private discipline is not appropriate. However, as we explain, respondent's conduct since being informed of the Committee's recommendation leads us to impose a sanction that is less severe than the Committee recommended.

With regard to the first factor considered under ABA Standard 3.0, the record overwhelmingly demonstrates that the respondent violated duties to his clients by failing to provide competent representation and 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").

As to the second factor, the Court has no evidence that respondent acted intentionally. However, given his pattern of misconduct and the Court's repeated warnings, the record strongly suggests that he acted with knowledge of wrongdoing. *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").

Turning to the third factor, the Court concludes that respondent's conduct caused, or had the potential to cause, injury or serious injury to his clients. The most serious example of this harm is to the appellant in *Wine* (19-3118) because the appeal was dismissed on procedural grounds. There was at least potential harm to clients in other appeals because of respondent's substandard legal arguments, although we recognize that we cannot definitively determine whether the clients were harmed because we have not reconsidered the underlying merits of the appeals. Nevertheless, the third factor points in favor of a significant sanction.

Under the fourth factor, the Court is required to consider the existence of any aggravating or mitigating factors. ABA Standard 9.22 delineates several potential aggravating factors. We find three applicable here: A pattern of misconduct, multiple offenses, and substantial experience in the practice of law. As set forth above, respondent's history establishes a clear pattern of misconduct in which he has engaged in multiple offenses that constitute violations of Model Rules 1.1 and 1.3. *See Lawyer Disciplinary Bd. v. Scott*, 579 S.E.2d 550, 558 (W. Va. 2003) (considering a pattern of misconduct and multiple offenses aggravating factors). Further, he has been a member of this Court's bar since 2013, appearing in 19 appeals, and has been a lawyer admitted to practice in New York State for nearly half a century. Therefore, respondent has had substantial experience before this Court as well as before other courts. He should be familiar with the Court's rules and the duty he owes to his clients and the Court.

There are, however, mitigating factors. To begin with, under ABA Standard 9.32, the absence of a prior disciplinary record and a presumed absence of selfish or dishonest motive are mitigating factors for a court to consider. Respondent has not been subject to discipline in the Court before today. Nor are we aware of any other court or administrative body that has sanctioned respondent. In addition, there is no evidence that respondent acted in way that was designed to benefit himself financially at the expense of clients.

We note one other factor we consider as mitigating. While in his initial response to the Clerk's grievance, respondent continued to defend many of his actions in the appeals we have discussed, he changed his tone considerably by the time he filed a response to the Committee's report. To begin with, he expressed sincere regret and a desire to improve the quality of his

representation. Moreover, he no longer defended his conduct. We also find it important that respondent proactively took steps to comply with the conditions that the Committee recommended by attached to a proposed suspension from practice. Namely, he reported that he attended a continuing legal education program concerning appellant practice. He also attended the Fall 2020 conference of the National Organization for Veterans' Advocates. In addition, he informed the Court that he has arranged to be mentored by a practitioner experienced in veterans law.

Having considered all the factors, the final step is for the Court to decide the appropriate sanction. After carefully considering respondent's conduct and the relevant aggravating and mitigating circumstances, the Court will publicly sanction Mr. Beskin. We will also impose a six-month period of probationary practice. In addition, we will require Mr. Beskin to continue in a mentorship relationship as well as participate in further continuing legal education activities during the period of his probation.

We make one additional comment. We seriously considered suspending respondent from practice based on the nature of his conduct. We have explained why we ultimately elected not to do so. We caution respondent that he should not take the fact that we will impose a period of probation as opposed to suspension as suggesting that his conduct is not seriously troubling. We trust he will use the opportunity we have provided to recommit himself to the high ethical standards governing the legal profession.

Finally, the Court notes that, on December 29, 2020, the Court provided Mr. Beskin with a preliminary, non-public version of this order, wherein he was informed of his right to file a motion for reconsideration pursuant to Rule 5(d) of the Court's Rules of Admission and Practice. On January 20, 2021, in response to this order, Mr. Beskin submitted a letter informing the Court that he is "not contesting the decision." Therefore, the Court will impose the public discipline described herein.

### **III. CONCLUSION**

Upon consideration of the foregoing, it is

ORDERED that Kenneth S. Beskin will be publicly reprimanded with respect to the conduct described in this order. It is further

ORDERED that Kenneth S. Beskin will be on probation for a period of six months starting on the date of this order. It is further

ORDERED that Kenneth S. Beskin shall be required to complete at least 12 hours of continuing legal education focused on professional responsibility, veterans law, or appellate practice during the course of his probation. Respondent shall certify completion of this requirement by submitting an affidavit providing the details of his compliance. And it is further



ORDERED that Kenneth S. Beskin shall continue a mentorship relationship with an experienced practitioner in veterans law during the period of his probation.

DATED: March 1, 2021

PER CURIAM.

Copy to:

Kenneth S. Beskin

CERTIFIED MAIL – RETURN RECEIPT REQUESTED