

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

IN RE:

KENNETH A. FREE, JR., ATTORNEY

)
)
)
)
)
)
1:14-MC-40

ORDER OF REPRIMAND

By an Order to Show Cause issued on June 26, 2014, the Court initiated disciplinary proceedings against respondent Kenneth A. Free, a member of the North Carolina bar and the bar of this Court, arising from his failure to file a notice of appeal on behalf of his criminal client.¹ The Court held a hearing on August 5, 2014, at which Mr. Free appeared and admitted that he violated professional conduct rules by neglecting to file a notice of appeal on his client's behalf. The Court finds that Mr. Free's conduct violated the applicable rules of professional conduct and imposes a public reprimand.

Lawyers practicing in North Carolina and in the Middle District of North Carolina owe their clients duties of competence, diligence, and communication. *See* North Carolina Rules of Professional Conduct 1.1, 1.3, 1.4; *see also* L.R. 83.10e(b) (adopting the Code of Professional Responsibility adopted by the Supreme Court of North Carolina). In the Fourth Circuit, "[e]very attorney, including retained counsel, who represented a [criminal] defendant in the district court shall continue to represent the client after termination of those proceedings, unless relieved of further responsibility" by the Fourth Circuit. Plan of the United States Court of Appeals for the

¹ The Court acts pursuant to Local Rule 83.10e and Local Criminal Rules 57.1 and 57.3 and in its inherent authority. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (noting federal courts have the inherent authority to control admission to their bars and to discipline attorneys who appear before them).

Fourth Circuit in Implementation of the Criminal Justice Act at 6; *see also* L.R. 83.1(e)(1). This includes the duty to file a timely notice of appeal on the defendant's request. Fourth Circuit Plan at 6; *see, e.g., Richardson v. United States*, 612 F. Supp. 2d 709, 716 (N.D.W. Va. 2009) (holding retained attorney owed petitioner duty to file appeal); *see also Hernandez v. United States*, Civil No. 1:12-cv-00044-MR, 2013 WL 388984, at *1-2 (W.D.N.C. Jan. 30, 2013) (holding retained counsel's failure to file notice of appeal on defendant's request is per se ineffective assistance).

Based on Mr. Free's admissions and the matters of record in case number 12-cr-00068, including the Court's previous finding that Mr. Free provided ineffective assistance of counsel to his client, (No. 12-cr-00068, Docs. 32-1, 37, 39), the Court finds by clear and convincing evidence that Mr. Free violated his duties of competence, diligence, and communication by failing to file a notice of appeal for his client knowing that his client wanted to exercise his right to appeal. *See* North Carolina Rules of Professional Conduct 1.1, 1.3, 1.4; *see also* Rules 8.4(a), (d).

Sanctions, including disbarment, suspension, fine, public reprimand, and private reprimand (admonition), are appropriate when attorney misconduct has been proven by clear and convincing evidence. *See In re Liotti*, 667 F.3d 419, 426 (4th Cir. 2011) (citing with approval the American Bar Association Standards for Imposing Lawyer Sanctions). In determining whether and what sanctions are appropriate, the court should consider the ethical duty violated, the lawyer's mental state, the extent of actual or potential injury caused by the misconduct, and any aggravating or mitigating factors. ABA Standards § 3.0; *see also Liotti*, 667 F.3d at 426.

At the show cause hearing, Mr. Free testified that he did not file the notice of appeal because he was unaware of the Fourth Circuit's continuous duty rule. He also testified that he

has not attended any of the continuing education programs offered by the Federal Defender in this district even though he was aware of those programs. The Court accepts this testimony and finds that the violation of the Rules was negligent rather than intentional. Nonetheless, Mr. Free did not overlook filing the notice of appeal or miss the deadline; rather he acted knowingly and deliberately in failing to file the notice of appeal. The violation actually injured Mr. Free's client, necessitating retention of new counsel to file a petition under 28 U.S.C. § 2255. (*See* No. 12-cr-00068, Docs. 30, 31, 33.) Though the Court resolved the petition relatively swiftly, Mr. Free's negligence caused delays and expense to his client and required time and resources from the government, who had to respond to the §2255 motion, and from the Court.

Mr. Free's violation is mitigated by his zealous representation up until the point he failed to file the notice of appeal, by his remorse, and by the absence of a prior disciplinary record. *See* ABA Standards § 9.32(a). It is also mitigated somewhat by his relative inexperience in federal court. *See id.* at § 9.32(f). However, his inexperience in federal court does not excuse him from knowing his duties under the rules of this Circuit and the United States Constitution. *See id.* § 9.22(i). Indeed, his substantial experience in state court criminal practice and his failure to undertake sufficient professional education or study to familiarize himself with the differences between state and federal court practice before appearing in the Middle District are aggravating.

The Court has considered a range of options, including a private admonition. Private sanctions are generally only appropriate when the conduct "causes little or no actual or potential injury to a client." *Id.* §§ 4.44, 4.54, 4.64. As stated above, this is not such a case. Moreover, the ABA guidelines endorsed by the Fourth Circuit seem to contemplate private admonitions only by state disciplinary authorities such as the State Bar. *See* ABA Model Rule for Lawyer Disciplinary Enforcement 10.1(5). Finally, courts operate in the public arena and not in secret,

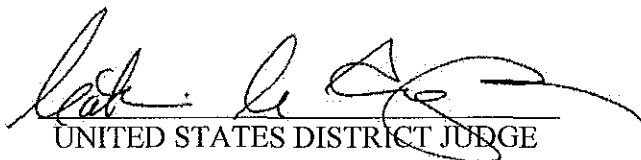
and the legal profession and the public are best served by public opinions explaining the imposition of sanctions. *See* ABA Standards at Part I.A. While there might be a case where a private admonition from a court would be appropriate, this is not one of them.

The Court finds that the appropriate sanction is a public reprimand, subject to the completion within one year of eight hours of continuing legal education in the specific area of federal criminal practice, offered in a program or programs presented by the Federal Defender of the Middle District or otherwise approved by the North Carolina State Bar. *See id.* § 2.8(f) (listing continuing education courses as permissible sanction). This sanction is an appropriate response to misconduct which caused actual harm to a client, is sufficient to deter future violations by Mr. Free and others, and offers protection to the public.

It is therefore **ORDERED** that:

- (1) Attorney Kenneth Free is **REPRIMANDED** for violating his professional duties as a lawyer by failing to file a notice of appeal for his client who asked him to do so.
- (2) By August 12, 2015, Mr. Free must proffer to the Court evidence that he has completed eight (8) hours of continuing legal education in the specific area of federal criminal practice, offered in a program or programs presented by the Federal Defender of the Middle District or otherwise approved by the North Carolina State Bar. Failure to do so will subject Mr. Free to reconsideration of the matter.
- (3) The Clerk shall provide a copy of this Order to all District Judges and Magistrate Judges in the Middle District and to the North Carolina State Bar.

This the 12th day of August, 2014.


UNITED STATES DISTRICT JUDGE