

**STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM**

**In Re: PRB File No. 021-2022
Theodore Kennedy, Esq., Respondent**

Petition of Misconduct

Now Comes special disciplinary counsel, Ian P. Carleton, and formally charges Attorney Theodore Kennedy with violating Rules 1.1, 3.1, and 3.4 of the Vermont Rules of Professional Conduct (the “Rules”).

To The Respondent: This is a formal petition of misconduct. Pursuant to Rule 13(D)(3) of Administrative Order 9, you are required to respond to the allegations contained herein by filing an original answer with the Professional Responsibility Program – c/o 109 State Street, Montpelier, Vermont 05601 – with a copy to me. If you do not file your answer within twenty (20) days of service of this petition, the facts and charges alleged herein may be deemed admitted.

I. Background

1. Attorney Theodore Kennedy is an attorney who is admitted to practice law in Vermont. He was admitted to the Vermont Bar in September 2000.
2. On August 9, 2017, Ms. Delna Khambatta (formerly Boyce) filed for divorce from her then-husband, Rustum Boyce.
3. Ms. Khambatta was represented in that action by Christopher Davis and Eliza van Lennep of Langrock Sperry & Wool.
4. Attorney Kennedy represented Mr. Boyce in the divorce proceeding.

II. The Divorce Hearing

5. On May 6, 2021, the Court scheduled a final contested divorce hearing for June 3, 2021.

The hearing notice provided that the parties should file any proposed exhibits “with the Court at least 7 days prior to the hearing and shall send copies to the other parties in sufficient time for that side to have copies of those proposed exhibits by that same time.”

6. On June 1, 2021, two days before the hearing, Attorney Kennedy filed a letter addressed to Cheri Goldstein at the Vermont Superior Court stating:

Please note that following this Honorable Court’s recent decisions: refusing to hear from the minor children; denying a necessary and promised discovery hearing that was properly detailed and pled on the record; ordering sale of the real property to a third party, thereby permanently severing the Defendant’s and his children’s ties to the property that they had wished to retain, while stranding in situ valuable personal property belonging to the Defendant; the Defendant wrote to me, on the day exhibits were Ordered to have been exchanged in advance of the presently scheduled Dissolution Hearing on 6/3/21: “Please find attached my affidavit. On advice of Indian counsel, I will not participate in the Dissolution Hearing for the reasons outlined in the affidavit. Please file this affidavit in court.” As such, please find attached for filing Defendant’s 5/28/21 Affidavit, along with a Certificate of Service in the above-referenced matter. Thank you and please contact me should you have any questions or concerns.

7. The letter attached an affidavit signed by Mr. Boyce, in which he averred that he would not participate in the final divorce hearing in Vermont Superior Court because he did not believe the Court had jurisdiction over the matter.

8. The following day, on June 2, 2021, Attorney Kennedy sent an email to Shannon Maloney, Donna Water, and Cheri Goldstein at the Washington Superior Court reiterating his intentions not to appear for the final hearing. The email stated:

Good morning. I hope this e-mail finds you each well. Pursuant to my Odyssey filing yesterday on behalf of my client, Rustum Boyce, in the above-referenced matter, as noted in my cover letter and by my client in his Affidavit, I want to please make doubly sure that his Honor and this Honorable Court know that I have been recently instructed (on 5/28) by my client, who relied on the advice of his Indian

counsel, not to participate in the Dissolution Hearing scheduled for tomorrow starting at 9 am for six hours. I very much regret the short notice and deeply respect that this Honorable Court is very busy and could likely have used these blocked-off hours tomorrow on other matters. I will nonetheless remain the attorney of record for Mr. Boyce for purposes of Court communications/Orders, Ex Parte or otherwise, going forward. Thank you. Sincerely, Theo Kennedy.

9. Later that same day, the Court entered an order stating the following:

The court understands defendant does not intend to attend the hearing. As to his attorney, attention should be given to Rule 15(f) [of the] V.R.F.P. Leave to withdraw has not been given, nor sought.

10. Attorney Kennedy did not attend the final divorce hearing on June 6, 2021.

11. Attorney Kennedy did not move to withdraw from his representation of Mr. Boyce at any point before the hearing or thereafter.

III. Post-Hearing Submissions

12. On June 17, 2021, following the final hearing, Ms. Khambatta filed her Proposed Findings of Fact and Conclusions of Law and Requests for Relief (“Plaintiff’s Proposed Findings”).

13. On June 21, 2021, Attorney Kennedy filed a response to the Plaintiff’s Proposed Findings, titled “Defendant’s Reply to the Plaintiff’s Proposed Findings of Fact and Conclusions of Law and Requests for Relief.”

14. Attorney Kennedy asserted that the pleading was filed “[w]ithout submitting to this jurisdiction of this Court and without participating in the above proceedings” The pleading further stated that “Defendant is constrained to file this response” because Plaintiff’s filing “is replete with false statements at [the Defendant’s] assets and the value thereof [and] Plaintiff has also made totally untrue statements about her own financial status and assets.” (Id. ¶ 6.)

15. The brief disputed many of the facts set forth by Ms. Khambatta in her Proposed Findings. For example, the brief asserted:

- “The Steinway piano was not purchased in 2019. The Plaintiff broke into the Defendant’s house in Vermont which contained valuable personal affects and laboratory equipment and samples, and the Defendant is unaware of their present location. In all probability they have been siphoned away by the Plaintiff.”
- “There is no rental property worth 10M in Mumbai. The Defendant puts Plaintiff to the strict proof thereof.”
- “The Jersey Account has not appreciated much since the Defendant inherited the same. However, since the pandemic the funds in the investments have depreciated significantly in value.”
- “This court’s order is completely perverse, bad in law and Defendant has obtained protection from enforcement thereof from the Hon’ble Bombay High Court since it is against the children’s interest.”

16. There were no citations in the opposition pleading to any documents, testimony, or any other exhibits.

17. The pleading was comprised exclusively of objections and conclusory factual assertions offered without any evidentiary support.

18. Neither Attorney Kennedy nor his client had attended the final divorce hearing or offered any evidence prior to that hearing.

19. Attorney Kennedy knew or should have known that there was no admissible evidence to support the facts set forth in his post-hearing pleadings, because his client did not submit any evidence at, or even attend, the final hearing.

IV. Filings Regarding Jurisdiction

20. Attorney Kennedy’s primary defense on behalf of Mr. Boyce in the divorce proceeding was that the Vermont courts did not have jurisdiction to handle the divorce and division of property.

21. Attorney Kennedy filed his first motion to dismiss for lack of jurisdiction on September 13, 2017. That motion was denied on March 22, 2018.

22. On April 20, 2018 – 29 days later – Mr. Kennedy filed a notice with the Vermont Supreme Court appealing the denial of the motion to dismiss.

23. This appeal was made on an interlocutory basis because the denial of the motion to dismiss was not a final order.

24. The notice was untimely because it was filed outside the 14-day appeal window set forth in V.R.A.P. 5.

25. The notice was also submitted to the wrong court because leave to file for interlocutory appeal is filed in the first instance in superior court. V.R.A.P. 5.

26. The Supreme Court denied the motion to appeal on May 4, 2018.

27. On May 7, 2018—three days later—Attorney Kennedy filed a motion with the Superior Court titled “Motion for Permission to Appeal, Alternative Motion for Reconsideration, and Motion for Permission to Leave with the Minor Children.”

28. The pleading was two pages long. The entire discussion regarding the untimeliness of the request to appeal was as follows:

[T]he Defendant’s counsel, thinking the Decision entered on May 22, 2018 was final, inadvertently failed to first file a Motion for Permission to Appeal interlocutorily [sic], pursuant to V.R.A.P. 5(b)(1), within 14 days after entry of the Order with this honorable Court, resulting in the dismissal by the Vermont Supreme Court of the Defendant’s appeal

29. The pleading did not cite any case law or include any legal argument for why the missed deadline should be waived.

30. The pleading did not discuss the standard that must be met in a motion for permission to bring an interlocutory appeal set forth in Vermont Rule of Appellate Procedure 5(b) or include legal argument of the same.

31. Despite being stylized as a motion to reconsider, in part, the motion did not discuss the standard for reconsideration or otherwise make any legal argument that the standard was met.

32. On June 13, 2018, the Superior Court denied the motion as untimely, noting the “timely filing of an appeal is jurisdictional,” and adding that “the issue subject to appeal has recently been considered by the Supreme Court under very similar circumstances.”

V. Filings Regarding The Marital Home And Representation Of The Children

33. On June 23, 2020, Ms. Khambatta filed a motion requesting sole authority to sell the marital home.

34. Attorney Kennedy filed an opposition to that motion on July 6, 2020. In that opposition, he asserted that Mr. Boyce wished to retain the marital home and requested that the Court deny the motion and order that the reasonable appraised value of the property be deposited in escrow, pending a final property division hearing.

35. On July 15, 2020, the Court granted Ms. Khambatta’s motion, noting that the “real estate taxes on the property are delinquent and there is no money remaining in the two bank accounts in the United States.”

36. The Entry Order gave Ms. Khambatta sole authority to sell the marital home.

37. On July 28, 2020, Attorney Kennedy filed a “Request to Reconsider the Court’s 7/15/20 Entry Order and Motion to Appoint an Attorney for the Children.”

38. The motion was two pages. It largely re-stated the factual assertions set forth in Mr. Boyce's opposition to Ms. Khambatta's original motion.

39. The motion requested that the Court reconsider its decision granting Ms. Khambatta the right to sell the marital home.

40. The brief cited no case law and contained no legal argument. The motion did not discuss the legal standard for reconsideration. It did not cite any rule, statute, or case law supporting the request for reconsideration.

41. The request to appoint an attorney for the children was a single sentence in the section entitled "Prayers for Relief." There were no factual allegations or arguments supporting this request.

42. Attorney Kennedy opposed the motion on August 18, 2020. On September 2, 2020, the Court denied the motion.

43. On May 6, 2021, Ms. Khambatta filed a motion to "clarify" the Court's July 15, 2020, entry order that granted her the right to sell the marital home. The motion requested that the Court modify the entry order to give Ms. Khambatta "the effect of a Power of Attorney to sign all documents necessary for the sale on behalf of the Defendant."

44. On May 11, 2021, in response to that motion, Attorney Kennedy filed a "Motion in Opposition to Plaintiff's Motion to Modify Entry Order (to Allow Plaintiff to Have a POA to Sell the Marital Residence)."

45. The "motion in opposition" was two pages. The motion restated the facts set forth in Defendant's motion to reconsider filed in July 2020.

46. The motion requested for a second time that the Court reconsider and reverse its prior decision giving Ms. Khambatta authorization to sell the marital home.

47. The motion included no legal citations or argument.

48. The motion did not address in any way the subject of Ms. Khambatta's motion to clarify, which was a request regarding power of attorney.

49. The last paragraph of the document requested that the Court appoint an attorney for the children. There were no factual allegations or arguments supporting this request.

50. Ms. Khambatta opposed this "motion in opposition" on May 12, 2021.

51. The Court denied the motion to appoint an attorney for the children on May 13, 2021, noting that "[t]his issue has been addressed by the court previously and no new reason has been advanced sufficient for the court to reconsider the question of testimony from the children." The Court issued a revised Entry Order regarding the marital home on May 18, 2021, giving Ms. Khambatta power of attorney to execute the necessary closing documents.

VI. Filing Of Affidavits From The Boyce Children

52. On October 29, 2019, the Court denied a motion, filed by the children's attorney, to allow the minor children to testify on their own behalf at a hearing regarding the parental rights and responsibilities and parent-child contact.

53. The Court concluded that the probative value of the children's testimony did not outweigh the potential detriment to them from being called as witnesses and further noted "concerns" about "whether the children's testimony would be reliable."

54. One week later, on November 5, 2019, Attorney Kennedy filed affidavits from both children, attached to a renewed motion to stay. In the affidavits, the children expressed their apparent desire to stay in India with their father and to limit contact with their mother.

55. The motion did not offer any justification or legal basis for filing the affidavits, which directly contravened the Court's prior order denying the motion for the children to testify. The motion also did not offer any explanation for why the filing of the affidavits was not a violation of 15 V.S.A. § 594 and V.R.F.P. 7(d), which provide that minor children may not testify unless permitted by the Court.

VII. Violation Of Vermont Rule Of Professional Conduct 1.1

56. The facts alleged in paragraphs 1 to 55 are restated and incorporated herein.

57. Rule 1.1 of the Vermont Rules of Professional Conduct requires a lawyer to “provide competent representation to a client” which requires “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

58. As explained *infra* ¶¶ 20-32, by filing a Notice of Appeal in the Vermont Supreme Court that was both untimely and failed to follow the procedural rules regarding interlocutory appeals, Attorney Kennedy violated Rule 1.1 because he did not provide competent representation.

VIII. Violation Of Vermont Rule Of Professional Conduct 3.1

59. The facts alleged in paragraphs 1 to 58 are restated and incorporated herein.

60. Rule 3.1 of the Vermont Rules of Professional Conduct provides “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”

61. As set forth *infra* ¶¶ 12-19, by filing post-hearing submissions asserting facts without any supporting evidence, Attorney Kennedy violated Rule 3.1 because he filed a pleading without any basis in law or fact.

62. As set forth *infra* ¶¶ 20-32, by filing an untimely and procedural improper Notice of Appeal, and a subsequent motion for permission to appeal without any good faith argument for the Court to waive the missed deadline and without any legal analysis of the interlocutory appeal rule, Attorney Kennedy violated Rule 3.1 because he filed a pleading without any basis in law or fact.

63. As set forth *infra* ¶¶ 33-51, by filing multiple motions regarding the sale of the marital home and requesting that the Court appoint an attorney for the children, including motions requesting that the Court reverse its prior decision without any good faith argument for reversal, Attorney Kennedy violated Rule 3.1 because he filed pleadings without any basis in law or fact.

64. As set forth *infra* ¶¶ 52-55, by filing affidavits from the children without offering any reason why the filing of the affidavits was not a violation of 15 V.S.A. § 594 and V.R.F.P. 7(d), Attorney Kennedy violated Rule 3.1 because filed pleadings without any basis in law or fact.

IX. Violation Of Vermont Rule Of Professional Conduct 3.4

65. The facts alleged in paragraphs 1 to 63 are restated and incorporated herein.

66. Rule 3.4 of the Vermont Rules of Professional Conduct provides “[a] lawyer shall not: . . . (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.”

67. As set forth *infra* ¶¶ 5-11, by failing to attend the final divorce hearing, or withdrawing from his representation prior to hearing, despite clear direction from the Court, Attorney

Kennedy violated Rule 3.4(c) because he knowingly disobeyed an obligation under the rules of the tribunal.

68. As set forth infra ¶¶ 52-55, by filing affidavits from the children despite a Court order denying a prior motion for the children to testify, Attorney Kennedy violated Rule 3.4(c) because he knowingly disobeyed an obligation under the rules of the tribunal.

WHEREFORE, a hearing panel of the Professional Responsibility Board having found that there is probable cause to do so, Special Disciplinary Counsel charges Attorney Kennedy with violating Rules 1.1, 3.1, and 3.4 of the Vermont Rules of Professional Conduct.

Dated at Burlington, Vermont this 15th day of June, 2022.

SPECIAL DISCIPLINARY COUNSEL

By: /s/ Ian P. Carleton

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