Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-389

IN THE MATTER OF	:
RICHARD BANAS	:
AN ATTORNEY AT LAW	:

Decision of the
Disciplinary Review Board

Argued: February 1, 1995

Decided: July 7, 1995

Mary Adele Hornish appeared on behalf of the District VC Ethics Committee.

Vincent Scoca appeared on behalf of respondent.

This matter was before the Board based on a recommendation for public discipline filed by the District VC Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 1.15 (safekeeping property); RPC 4.1 (truthful statements to others); and RPC 4.4 (respecting legal rights of third persons).

Respondent was admitted to the New Jersey bar in 1978. He maintains a sole practice in Bloomfield, almost exclusively in criminal defense work. He has no prior ethics history.

* * *

Carl Grant retained respondent in August 1992 to represent him in the retrial of a homicide case in which his previous conviction had been reversed on appeal. Carl and respondent agreed on a flat fee of $25,000. Respondent received a partial payment of $10,000

from Carl's co-defendant, Tyrone Rush, and agreed to "wait for" the remainder. T108, 120.[1]

Respondent obtained and reviewed the transcripts of the prior trial. He also prepared a bail application. T108-110. Carl's mother, Merita S. Grant, the grievant, and her daughter, Carol Barclay-Peart, were unwilling to use their houses as collateral for the bail. T45, 58. However, Carl's friend, "Paul," was willing to put up the house that he and his girlfriend owned as collateral for the bail, on the condition that he receive a "fee" of $10,000. T24. Carl suggested that the "fee" be obtained from his mother and another source (Mrs. Grant believed it to be Tyrone Rush), at $5,000 each.

Mrs. Grant testified that respondent called her in September 1992 to request the $5,000, and that her son called her shortly thereafter to explain the details of the bail. T8-9. Mrs. Grant borrowed the money from two banks. T10,48. On September 30, 1992, she delivered to respondent two bank drafts totalling $5,000, for which she received a receipt. She indicated to respondent that she wanted a full refund if her son's bail was not arranged. T12, 23-24. Mrs. Grant pointed out that, in another matter in which she had posted a $1,000 bail, she had obtained a receipt and eventually had her money returned. T31, 37-38.

Mrs. Grant described respondent's call to her and their meeting as follows:

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[1] T refers to the transcript of DEC hearing on July 26, 1994.

THE WITNESS: He only said to me, 'Mrs. Grant, your son told me that you are to give me $5,000.00.' I said, 'For what'?

MR. WILKINSON: He said?

THE WITNESS: He said, 'You did not retain me, Mrs. Grant, so I cannot explain anything to you.' And when I went to his office he apologized to me.

MR. WILKINSON: I want to stick on [sic] the telephone conversation before we get to the office. So on the phone Mr. Banas didn't tell you anything about what it was for?

THE WITNESS: No.

MR. WILKINSON: He didn't even say it was for bail at all, right?

THE WITNESS: No. He only said if Paul comes in with the paper and sign it, he and his girlfriend, whoever she is, then Carl will get out. And he will return back the $5,000.00 to me.

MS. HORNISH: Did he tell you that on the telephone?

THE WITNESS: When I went to his office.

[T41-42]

When Mrs. Grant obtained her receipt from respondent, she insisted on a "refund clause":

Q. Can you tell us what happened when you were at Mr. Banas' office? What was the nature of the conversation?

A. I told him that in case that my son don't [sic] get bail, if the money is returnable. He said, sure. I said, okay. And could you write on the receipt that if the bail fell through, then you will return back the money to me. He said, no problem and he wrote it on the receipt.

Q. Can you read for us what it says on the receipt.

A. It said $5,000.00 on behalf of Carl Grant to be held for bail something.

Q. Application?

A. Application move.

Q. Money. Is that money?

A. Money is refundable to M. Grant if bail not obtained, $5,000.00.

[T12]

Later on, when Carl did not get out on bail because of Paul's girlfriend's refusal to cooperate, as seen below, Mrs. Grant expected a refund of her monies:

Q. Is it your testimony that when your son did not get out of jail, he told you to go ahead and get the money back from Mr. Banas?

A. He called me and told me to get the money back because Paul said the girlfriend did not sign the paper.

[T37]

The receipt described the funds received "on behalf of Carl Grant to be held for bail application. Money is returnable to M. Grant if bail not obtained." (Emphasis added). Exhibit G-1. The receipt also bore the notation that the balance due was zero.

Carol Barclay-Peart, daughter of Mrs. Grant and sister of Carl, testified that she had accompanied her mother to respondent's office and that her mother had specifically asked whether the monies would be returned to her if Carl did not get out on bail. According to Carol, respondent replied "most certainly," and wrote a memo on the receipt, as Mrs. Grant had requested. T48-49, 64-65. Carol explained: "We're not legal people. We look at this receipt. It says what it says. We assume that when we asked him to do that [write on the receipt that the money was returnable] he would return the money if the bail wasn't secured. . . ." T70-71.

Respondent deposited the funds in his business account. His alleged understanding was that the $5,000 was his fee for filing the bail application. T110, 126.

Ultimately, bail was set at $100,000, but it could not be posted because Paul's girlfriend refused to allow their house to be used as security. The bondsman contacted by respondent explained that an assignment of interest in real property would become a lien in favor of the company that "issues [his] powers as a bondsman." T79. For the $100,000 bond in this matter, there would be a premium of $11,500 in cash as well as collateral (real estate or financial instruments) posted. T77-78.

In his answer, respondent described the subsequent events:

> I was notified by co-counsel shortly before the trial was scheduled to commence that the funds with which he and I were paid were the subject of an F.B.I. investigation. It appeared that Mr. Pope was presented with negotiable securities (Bearer Bonds) valued at approximately $200,000.00 by this client, Mr. Rush, who instructed him to redeem them and to retain approximately $100,000.00 as payment of legal fees and to hold the remainder in trust. Mr. Pope did so. He also complied with his client's instructions to pay me $10,000.00 from the trust funds. Mr. Pope was notified months later that the bonds were stolen from a New York bank some years earlier and that the rightful owner was Merrill Lynch Brokerage.
>
> Due to that development, Mr. Pope and I met with Judge Codey to discuss the situation. He advised us to make a motion to be relieved as Counsel due to the fact that we both were, in effect, potential witnesses against Mr. Rush and therefore neither of us could participate in a trial involving him. We both made the motion and Judge Codey relieved us. I subsequently met with Mr. Grant and discussed his case with him and indicated I would help his new counsel and himself with his case in any way that I could. And I did have meetings with both new counsel assigned to the defendants.

Respondent filed a motion to be relieved as counsel for Carl, which motion was granted by order dated October 30, 1992. Exhibit R-3. (The record does not indicate the effect of such an order on respondent's flat fee). Thereafter, Carl was represented by the public defender's office. Later, however, respondent re-entered the case to negotiate a plea agreement on the eve of Carl's retrial, in June 1993.

On December 2, 1992, after unsuccessful attempts to reach respondent by telephone, Mrs. Grant wrote to him requesting the refund of "my $5,000 which was to be used toward bail for my son Carl Grant." Exhibit G-3. Mrs. Grant never received a return call or letter from respondent. She, therefore, filed a grievance against him on January 14, 1993. She stated that she did not speak with respondent between the delivery of the funds, on September 30, 1992, and the DEC hearing, on July 26, 1994. T14.

Furthermore, Mrs. Grant claimed that she did not know about her son's affidavit, discussed below, until just before the DEC hearing. She did not know what promises her son had made to respondent about the purpose of the $5,000.

Respondent claimed that he did not know that Mrs. Grant and her two daughters had called his office. He denied knowledge that Mrs. Grant wanted the money returned until he received her December 1992 letter. He acknowledged that he did not reply to her letter. T115, 116. His stated reason was that he had been relieved from the case almost six weeks prior to the receipt of Mrs. Grant's letter. T37.

Respondent contended that the $5,000 was not returnable and was to be applied to his $25,000 fee. In support of his position, he offered an affidavit prepared by himself and signed by Carl, dated June 8, 1993. (Carl did not testify). The affidavit recites that Carl had retained respondent for a fee of $25,000 and that Tyrone Rush had paid the initial amount of $10,000. The second and sixth paragraphs state: "I instructed my mother to pay an additional $5,000.00 to my attorney. . . . I informed [respondent] to keep the $5,000 and credit it to his retainer. I decided not to proceed with the bail." Exhibit R-1. (The affidavit is silent as to when Carl allegedly so informed respondent). According to respondent, the affidavit was signed by Carl on the second day of intensive plea bargaining between respondent and the prosecutor's office. Respondent explained his re-involvement in the case as follows:

A. I went to the jail to see Mr. Grant regarding the complaint made by his mother. We discussed it. He indicated that --

MR. WILKINSON: You are talking about the grievance?

A. Yes. That it would be withdrawn. That it was a misunderstanding. That he felt abandoned when he was left having to be back to a public defender. But that it would all be straightened out.

I told him at that time, I said well, I will prepare then an affidavit for you based on what you've said to me and I will bring it back to you, and if it comports with what you are representing to me today, I will ask you to sign that.

* * *

Following that, we continued plea negotiations for Mr. Grant. Judge Codey allowed me to reinvolve myself as sort of co-counsel with [the attorney] who was representing Mr. Grant, and these negotiations took carried [sic] over a week. . . . [T99,103]

In support of his position that he properly kept the $5,000, respondent pointed to the language of the receipt given to Mrs. Grant: funds "to be held for bail application . . . . returnable to M. Grant if bail not obtained." Respondent contended that the conditions set forth on the receipt had been fulfilled: he had prepared the bail application, had succeeded in having bail set and the only reason why bail had not been posted was that Paul's girlfriend had refused to sign the necessary documents to place their house as collateral for the bail. Having accomplished what he had been hired to do, respondent concluded, he was entitled to keep the monies.

Respondent drew a technical distinction between "obtaining bail" and "posting bail." Respondent offered expert testimony from Charles Truzzolino, a Newark bail bondsman, who explained the terminology to the DEC panel: "obtaining bail" is accomplished through an attorney's application to the court; "posting bail" is handled by a bail bondsman. T77.

* * *

The DEC found that respondent had violated RPC 1.15(b) and (c) because he did not promptly deliver to Mrs. Grant the monies she was entitled to receive and did not keep the disputed funds separately after she requested their return in December 1992. The DEC determined that there was no clear and convincing evidence that respondent had violated RPC 1.15(a) when the $5,000 was first received (holding property of third party separately from the lawyer's property), RPC 4.1 (knowingly making a false statement of

material fact to a third person) or RPC 4.4 (respecting legal rights of third persons).

In a comprehensive report, the DEC determined, after considering the testimony, exhibits, credibility and demeanor of the witnesses, that the true agreement of the parties was that the $5,000 payment would be refunded if Carl did not "get released from prison" and that respondent "seized on a technical interpretation of the term 'obtain' after the fact." Hearing panel report at 7. The DEC gave no credibility to Carl's affidavit because it had been prepared while respondent was negotiating a plea bargain for Carl. The DEC reasoned that, in order to assist the criminal case in any way he could, Carl would have agreed to sign any paper offered by respondent.

* * *

Following a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent acted unethically is fully supported by clear and convincing evidence.

The Board agrees with the DEC's dismissal of RPC 1.15(a) and with the finding of a violation of RPC 1.15(b). The Board cannot agree, however, with the DEC's conclusion that respondent violated RPC 1.15(c) when, following Mrs. Grant's letter of December 1992, he did not segregate the $5,000 until the dispute with Mrs. Grant was resolved. There is no obligation under the rules to keep disputed fees in trust.

However, the finding that respondent improperly and knowingly retained the $5,000 as fees is unavoidable. Like the DEC, the

Board finds that, on the basis of the evidence presented — including the testimony of the witnesses — the logical conclusion is that the $5,000 was entrusted to respondent for the purpose of obtaining Carl's release from prison; otherwise, the $5,000 was to be returned to Mrs. Grant. The Board's finding is grounded on the same reasons expressed by the DEC in its report.

Specifically, respondent's argument that he fulfilled his part of the bargain by obtaining a favorable result to the bail application is specious. The record leaves no doubt that Mrs. Grant understood that the funds were to be returned to her if her son was not released. Mrs. Grant so testified — as did her daughter, Carol Barclay-Peart, who also attended the meeting between Mrs. Grant and respondent. Mrs. Grant's understanding was based on her agreement with respondent, which was briefly memorialized in the receipt prepared at that time: "Received of Marita Grant (2) Bank drafts totalling $5,000 on behalf of Carl Grant to be held for bail application; money is returnable to M. Grant if bail not obtained." The language on the receipt is clear: get Carl out of jail or refund the $5,000. Mrs. Grant had every expectation to recover the advanced funds in case her son was not released. If respondent's understanding of the agreement was different, he had an obligation to word the receipt carefully and clearly so as to eliminate any possible misunderstanding on Mrs. Grant's part. Curiously, his claim that the monies were to "obtain bail" and that he did so surfaced only after Paul's

girlfriend withdrew her consent to placing their house as security for the bail.

The circumstances surrounding Carl's signing of the affidavit persuade the Board that its preparation was belatedly contrived, six months after Mrs. Grant wrote to respondent seeking the return of the $5,000. As properly found by the DEC, Carl would have signed any document drafted by respondent if respondent successfully obtained the plea bargain Carl was seeking in his murder trial. Particularly telling is the omission in the affidavit of any reference that the $5,000 was Carl's money, specially taking into account that respondent himself prepared it. Also significant is the fact that respondent made no reply to Mrs. Grant's December 1992 letter or otherwise communicated with her or with her daughter concerning her request for the return of the $5,000. As with the DEC, the Board's suspicion is that respondent's claimed interpretation of the term "obtain bail" was the product of afterthought, following his realization that his $25,000 fee was jeopardized by the discovery that the previously received $10,000 was illegal money.

For the foregoing reasons, the Board is convinced that respondent knew from the beginning that the purpose of the $5,000 payment was to obtain Carl's release from prison and that, by refusing to return it to Mrs. Grant, he improperly retained monies that rightfully belonged to a third party, in violation of RPC 1.15(b). For this and for respondent's contrived attempt to change the character of the funds after his receipt of Mrs. Grant's

December 1992 letter, respondent is to be suspended for a period of six months. To impose lesser discipline would operate to undermine the public's confidence in the legal profession and the courts, and also frustrate the goals of the disciplinary system. A seven-member majority of the Board determined to impose a six-month suspension. In addition, respondent is to make restitution of the $5,000 advanced by Mrs. Grant.

Two members would have dismissed this matter for lack of competent proof that respondent knew that the funds were to be returned if Carl was not released from prison. One of those members, however, would also have required respondent to make restitution.

Respondent shall reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 7/7/95

By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board