

Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 95-066

IN THE MATTER OF :
 :
PHILIP M. SAGINARIO, :
 :
AN ATTORNEY AT LAW :

Decision of the
Disciplinary Review Board

Argued: April 19, 1995

Decided: July 7, 1995

Bernard B. Montalbano appeared on behalf of the District X Ethics Committee.

Respondent appeared pro se.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before the Board based upon a recommendation for discipline filed by the District X Ethics Committee (DEC). Although this matter arose in the jurisdiction of District XI, it was heard by the District X Committee because of a conflict of interest with the membership of the District XI committee.

The complaint charged respondent with a violation of RPC 1.1(a) (gross neglect) and RPC 1.3 (lack of diligence). During the DEC hearing, respondent stipulated the facts alleged in the complaint almost in their entirety.

Respondent was admitted to the New Jersey bar in 1968. He currently maintains an office in Haledon, Passaic County.

Respondent was privately reprimanded on January 22, 1992 for misconduct arising from a malicious prosecution and defamation of

character suit. Respondent was found guilty of failure to provide a written retainer agreement, failure to keep his clients reasonably informed about the status of their matter and failure to answer the formal ethics complaint.

Respondent had received an earlier private reprimand, on June 23, 1988, for issuing a \$500 expense check as well as post-dated checks against his trust account and for authorizing his secretary to draw checks against the trust account.

* * *

On July 14, 1987, Fabrizio Bertino was convicted of two counts of murder. On or about September 17, 1987, Mr. Bertino retained respondent to appeal that conviction. Giovanna Bertino, Mr. Bertino's mother, paid respondent \$22,500 in three installments to cover the fee and costs, including transcripts.

Respondent filed a notice of appeal on November 4, 1987. By letter dated January 27, 1988, a member of respondent's law firm requested a thirty-day extension of time to file the appellate brief. Thereafter, on February 26, April 27, June 22 and July 22, 1988, respondent filed motions to further extend the time to file the brief. The Appellate Division granted each motion, finally on August 10, 1988, directing that, if the brief were not filed by August 29, 1988, the appeal would be dismissed. When respondent did not file the brief, the appeal was dismissed on September 9, 1988. According to respondent, although he filed no further

documents with the appellate court after that time, he continued to research the issues "on appeal" and to discuss them with Mr. Bertino.

In or about the Fall of 1992, Mr. Bertino retained another attorney, who was successful in reinstating the appeal and in having Mr. Bertino's conviction reversed. As of the date of the DEC hearing, Mr. Bertino was awaiting a new trial.

Giovanna Bertino testified at the DEC hearing that she met with respondent on four occasions, on three of which she gave him checks toward his total fee. She further stated that, although she made several appointments to see respondent, he was never in his office. She testified that respondent never informed her that the appeal had been dismissed. She learned of the dismissal from Mr. Bertino. The record is unclear as to how Mr. Bertino, who did not testify before the DEC, learned that the appeal had been dismissed.

Contrarily, respondent contended that, although he had no recollection about telling the Bertinos of the dismissal of the appeal, both were aware of the dismissal because he had discussed reinstating the appeal with them.

Respondent offered the following explanation for his failure to file the appellate brief. He contended that, approximately one month after he filed the notice of appeal, Mr. Bertino instructed him to "keep [the appeal] going for a little while" (T8/3/94 41). Respondent was unable to understand Mr. Bertino's reasoning. After the appeal was dismissed, Mr. Bertino instructed him to have it reinstated. According to respondent, he intended to do so at the

same time that he would file the appellate brief and appendix. Respondent believed that he could reinstate the appeal at any time, apparently on the basis of his own neglect.

Respondent testified about the death of his brothers, one in December 1988 and the other in 1991, and about his heart attack in 1990. Respondent contended that these events prevented him from completing the brief and appendix, as a result of which he was unable to seek the reinstatement of the appeal. Respondent could not explain why he did not pursue the appeal between the 1988, 1990 and 1991 events or why he did not pursue the matter after he had recuperated.

* * *

By letters dated July 28, 1993 and August 12, 1993, the DEC investigator/presenter requested that respondent reply to the grievance filed against him. By letter dated August 21, 1993, respondent requested a five-day extension to reply. Despite several subsequent telephone calls from the investigator to respondent, no reply was forthcoming. Respondent had no explanation for his dereliction. The formal complaint was filed on December 20, 1993. Respondent replied by letter dated June 24, 1994, which he intended to be an answer to the complaint.

Parenthetically, reference was made during the DEC hearing to a fee arbitration proceeding on the day before the DEC hearing, of which, respondent contended, he had been unaware. The DEC

presenter indicated that he had spoken with the chair of the fee arbitration committee. The chair indicated that several letters had been sent to respondent, the last of which informed him of the hearing date. None of the letters had been returned. In one letter, respondent was informed that he would not be allowed to participate in the fee proceeding because he had not paid the required \$50 fee. As a result of the fee arbitration proceeding, respondent was ordered to refund the entire \$22,500 paid by Mrs. Bertino. During his testimony at the DEC hearing, respondent admitted that he had not earned the entire fee.

The DEC determined that respondent was guilty of a violation of RPC 1.1(a) and RPC 1.3. In its report, the DEC stated that "[w]hile Mr. Saginario obtained transcripts of the trial, the Panel concludes that the evidence is clear and convincing that he made no effort to complete the appeal." The DEC determined that respondent had not informed either Mr. Bertino or Mrs. Bertino that the appeal had been dismissed and "that as of September 1988 Mr. Saginario effectively abandoned the matter." The DEC also found that respondent had violated RPC 8.1(b), an allegation not charged in the complaint.

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing

evidence. The Board disagrees, however, with the DEC's finding that respondent was guilty of a violation of RPC 8.1(b). Although respondent did not reply to the DEC investigator's requests for information, he did ultimately file a letter, intending it to serve as his answer to the formal complaint. Respondent was cooperative at the DEC hearing and stipulated the basic facts alleged in the complaint. Accordingly, the Board reverses the DEC's finding in this regard.

It is undeniable, however, that respondent violated RPC 1.1(a) and RPC 1.3. A key question is whether respondent took \$22,500 from Mrs. Bertino, never intending to pursue Mr. Bertino's appeal. In that case, respondent would have essentially defrauded his client and more serious discipline would be warranted. See In re Spagnoli, 115 N.J. 504 (1989). Here, however, respondent obtained the transcripts, which cost over \$7,000. Had his intention at the outset been to take the fee with no plan of pursuing the matter, it is unlikely that he would have obtained the transcripts, considering their cost. Respondent testified that he had been working on the brief and appendix and had conducted extensive research on the appellate issues. It would have been helpful to see respondent's work product to help resolve the issue of his intent at the outset of the representation. Based on the existing record, however, the Board is unable to find by clear and convincing evidence that respondent undertook the representation never intending to pursue the appeal.

The DEC stated in its report that respondent "effectively abandoned" Mr. Bertino's matter. The Board agrees with the DEC's conclusion. The record lacks proof of exactly what respondent did or did not do in this matter and further lacks the testimony of Mr. Bertino. That notwithstanding, the evidence is sufficient to conclude that respondent's egregious neglect of his client's matter was tantamount to abandonment.

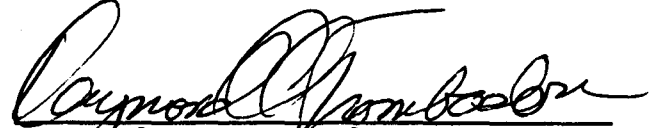
There remains the questions of the appropriate form of discipline for respondent's misconduct. In In re Russell, 110 N.J. 329 (1988), the attorney received a public reprimand for failing to file an appellate brief in a civil matter, causing dismissal of the matter. The attorney also improperly withdrew from representation. The attorney had previously received a "severe" public reprimand in 1971 and, five years later, a private reprimand.

Respondent's misconduct, however, was more serious than that seen in Russell. Respondent's client remained in prison for approximately five years, until retaining another attorney in 1992, apparently all the while believing that respondent had undertaken an appeal. Respondent's argument that he could reinstate the appeal at any time and planned to do so when he filed the appellate brief is specious. If respondent was truly unable to prepare the brief because of problems in his personal life, his obligation was to withdraw from the representation, instead of allowing his client to remain in jail for almost five years, until respondent could find the time to prepare the brief.

Given respondent's disturbing neglect of Mr. Bertino's appeal, the Board unanimously voted to suspend him for a period of three months. One member did not participate.

The Board further determined that respondent reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 7/7/95

By: 
Raymond R. Trombadore
Chair
Disciplinary Review Board