SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-312
District Docket No. IIIB-05-016E

IN THE MATTER OF	
MARTIN MORRISON	
AN ATTORNEY AT LAW	

Decision

Argued: March 20, 2008

Decided: May 7, 2008

Frances Ann Hartman appeared on behalf of the District IIIB Ethics Committee.

Respondent appeared pro se.

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

This matter came before us on a recommendation for discipline filed by the District IIIB Ethics Committee ("DEC").

(gross neglect), RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter), RPC 1.5(b) (failure to set forth in writing the basis or rate of the fee), RPC 3.3(a)(1) (false statement of material fact to a tribunal), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The gist of the complaint is respondent's failure to file a criminal appeal or a motion for bail pending appeal, and his misrepresentation that he had. For the reasons expressed below, we determine to dismiss the complaint.

Respondent was admitted to the New Jersey bar in 1973. He has no disciplinary history.

This case has a long and laborious history. The events that are the subject of the ethics complaint took place between 1989 and 1993. The ethics grievance was filed in 1995. For various reasons, hearings were not held until November 2005. They continued until June 2006. Thus, at the time of the ethics hearings, between twelve and sixteen years had lapsed since respondent's representation of the grievant. As a result of this delay, the witnesses often had difficulty remembering the relevant events.

In September 1989, Alesio Politi, the grievant, retained respondent to represent him in municipal court in Little Silver, on a charge of operating a motor vehicle when his driver's

license was suspended. During the same time, on September 19, 1989, Politi was indicted, in Monmouth County, on charges related to a November 25, 1988 (Thanksgiving Day) burglary and theft of a supermarket. After Politi's lawyer suffered a heart attack and could not continue with the representation, Politi retained respondent to defend him in the burglary case. Although respondent charged Politi flat fees of $1,000 for the municipal court case and $3,000 for the burglary case, he did not convey the basis of his fee in a writing to Politi.

On November 1, 1989, Politi gave respondent a $2,000 check, representing partial payment of the $3,000 fee for the burglary case. Because the check was not imprinted with a name, address, or check number, respondent contacted the bank. Based on information that he received, respondent determined not to deposit the check.[1]

On December 14, 1989, Politi's father, Alex Politi, gave respondent a $20,000 check, representing part of Politi's interest in property owned by his family. Respondent deposited the check in his trust account. In accordance with Politi's instruction, respondent then issued an $8,000 check to Politi

---

[1] In his brief, respondent asserted that he had learned from the bank that the check was not good.

and a $2,000 check to himself to replace the prior check. He retained the $10,000 balance in his trust account. Politi signed a document authorizing the above disbursements and the retention of the $10,000 balance in respondent's trust account "for settlement of mortgage default".

At that time, Politi's home was subject to a sheriff's sale because he was in default of a home equity loan. Politi asked respondent to handle the loan matter for him. Respondent retained the $10,000 in his trust account to be used to settle the loan default.

On January 11, 1990, pursuant to Politi's request, respondent disbursed $2,000 to Politi to buy furniture for a woman named Robin Carroll.[2] After this disbursement, $8,000 remained in respondent's trust account on behalf of Politi. As seen below, Politi was later incarcerated for various criminal convictions. During that time, respondent made payments from Politi's trust funds to forestall a sheriff's sale.

On January 16, 1990, Politi retained respondent, after he was arrested and charged, in Morris County, with kidnapping his former father-in-law, Anthony DePasque. Respondent's motion for

---

[2] Carroll testified that she had a "big brother-little sister" relationship with Politi.

bail in the kidnapping case resulted in Politi's release, on April 6, 1990. Upon Politi's release from incarceration, respondent informed him that his fee for the kidnapping case was $3,000, the same as his fee for the burglary case. On May 9, 1990, Politi gave respondent $1,000, which, along with the previous $2,000, paid in full respondent's fee for the burglary case. At this point, respondent had not received a fee for the kidnapping case.

In July 1990, Politi again retained respondent, this time for an arson case. On July 16, 1990, there had been a fire at Politi's home in Little Silver. Although Politi had not been charged at that time, he was being investigated. He was indicted for arson, on March 18, 1991, in Monmouth County.

Politi, thus, was charged with indictable offenses in three matters: the Monmouth County supermarket burglary; the Morris County kidnapping of Anthony DePasque, his former father-in-law; and the Monmouth County arson of his home. The kidnapping case was tried first. On October 22, 1990, Politi was convicted, along with co-defendants Emilio Rodriguez and Adam Mayo. According to respondent, Politi had admitted to him that, because he believed that DePasque owed him $150,000 in connection with a business dispute, he had forcibly taken DePasque and tried to obtain $150,000 from DePasque's family.

During the trial, DePasque testified on direct examination. However, after he suffered a heart attack, he was cross-examined while in a hospital. His videotaped testimony was shown to the jury. According to respondent, Politi may have sent some individuals to DePasque's house, after he had testified at the kidnapping trial. As a result, Politi was incarcerated overnight.[3] Between the October 22, 1990 conviction and the sentencing, on January 4, 1991, respondent informed Politi that, because the jury had seen DePasque testify on direct examination

---

[3] The Appellate Division decision in State v. Rodriquez and Mayo, 264 N.J.Super. 261, 270-71 (1993), recited the following facts:

> On October 2 the prosecutor applied to revoke defendant Politi's bail on the ground that after court the day before, about 4:30 p.m., the prosecutor's office received a call from DePasque's daughter to the effect that two unidentified individuals had stopped by DePasque's house and threatened him with bodily harm if he did not change his story and say he only fell down some steps and in fact was not kidnapped.
>
> The prosecutor related that DePasque was frightened by the experience and around 9:00 p.m. that night had suffered a mild heart attack. He was admitted to the hospital. The prosecutor argued that it was likely that the two individuals were connected to Politi, who was then out on bail, and Politi's continued freedom jeopardized the trial.

at the trial, but had viewed his cross-examination by videotape, Politi may have grounds for an appeal. Politi was sentenced to a fifteen-year term, to be served in state prison, with a five-year parole ineligibility.[4]

On January 14, 1991, respondent received two $3,000 checks delivered by Anthony Allonardo, a Politi family representative. Both checks were signed by Politi's mother and were issued to Politi from a joint bank account held by his parents. After respondent obtained Politi's endorsements on the checks, he deposited one check in his business account and the second check in his trust account.

The purpose of these checks was fiercely contested at the ethics hearing. Politi claimed that one $3,000 check was in payment of respondent's legal fee for filing a motion for bail pending appeal, and that the second $3,000 check was to pay for the trial transcripts for the kidnapping appeal. According to Politi, respondent represented to him that he had filed an appeal from the kidnapping conviction and had ordered the transcripts. In addition, Politi alleged that, during the arson

---

[4] According to State v. Rodriquez, supra, 264 N.J. Super. 261, Politi was convicted of first degree kidnapping, assault, aggravated assault with a weapon, terroristic threats, possession of a weapon for an unlawful purpose, and conspiracy to commit kidnapping. Id. at 264.

trial, in the summer of 1992, respondent had told him that the kidnapping appeal was still pending.

In turn, respondent asserted that the check deposited in his business account represented payment of his $3,000 legal fee for the kidnapping trial, which had concluded ten days earlier, with Politi's sentencing. He claimed that the check deposited in his trust account initially was for the transcripts from that trial, in the event that Politi chose to appeal that conviction. According to respondent, because Politi elected not to appeal the kidnapping conviction, he authorized respondent, on May 6, 1991, to issue a $3,000 check for his legal fee for subsequently representing Politi in the arson case.

Respondent gave the following explanation for advising Politi not to appeal his kidnapping conviction. At some point, Politi told respondent that, in a pending federal case, DePasque was going to recant his testimony and deny that he had been kidnapped. In respondent's view, if DePasque so testified, Politi would have grounds to file an application for post-conviction relief, which could not be filed while an appeal was pending.

In addition, Politi's co-defendants, Rodriguez and Mayo, had appealed their convictions through the Public Defender's Office. According to respondent, he advised Politi that, if their appeal were successful, he could later "jump on board,"

because there was an issue of constitutional magnitude. In his brief filed with the DEC, respondent contended that Politi's right to file an appeal or to join in a favorable appellate decision of his co-defendants was protected under State v. Altman, 181 N.J. Super. 539 (App.Div.1981). That case holds that, if an indigent criminal defendant asked his counsel to file an appeal, and if the attorney fails to file a timely appeal, the defendant's motion to file the appeal as within time must be granted. Id. at 541-42.

At the ethics hearing, Politi testified that he had asked respondent to file an appeal, that respondent had agreed, and that he believed that the kidnapping conviction had been appealed and would be successful. In contrast, respondent claimed that Politi had participated in the decision not to appeal the kidnapping conviction and, therefore, was aware that no appeal had been filed.

On April 29, 1993, in a reported decision, the Appellate Division affirmed the co-defendants' kidnapping convictions. State v. Rodriguez, supra, 264 N.J. Super. 261. Respondent provided Politi with a copy of this decision. In addition, respondent obtained from the public defender copies of the kidnapping trial transcripts to review for a possible post-conviction relief application. He also reviewed the transcripts

of DePasque's testimony in the federal case. Because DePasque had not recanted his testimony, as Politi had expected, respondent advised Politi that he did not have grounds to file a petition for post-conviction relief. According to respondent, therefore, no avenues were available for Politi to seek relief from the kidnapping conviction.

As previously mentioned, on March 18, 1991, Politi was indicted for arson, after his home was damaged by fire. Respondent asserted that, on May 6, 1991, he had removed $3,000 from his trust account, with Politi's authorization, as payment of his legal fee for the arson case. In contrast, Politi claimed that, although respondent did not require any payment for the arson case and had not asked for any fees at that time, Politi paid him legal fees because he "felt [respondent] needed money."

On June 24, 1992, Politi was convicted of aggravated arson. On October 23, 1992, Judge John Ricciardi sentenced him to a twenty-year term of incarceration, with a ten-year period of parole ineligibility, to run consecutively to the kidnapping sentence.

At the sentencing proceeding, Assistant Prosecutor Peter Warshaw referred to two certified judgments of conviction

attached to a previous motion that he had filed, seeking an extended term sentence.[5] Warshaw contended that those two convictions rendered Politi eligible for an extended term. He added that Politi's pre-sentence report referred to a third indictable conviction and that "there is also a fourth indictable conviction out of Morris County, which I ask the Court not to consider because it is under appeal right now, that's the kidnapping conviction." Warshaw noted that, in any event, Politi and respondent stipulated that Politi was eligible for an extended term.

While sentencing Politi, Judge Ricciardi declared that he would consider the kidnapping conviction as part of Politi's criminal history, even if it were on appeal, and determined that, nonetheless, without that conviction, Politi's prior criminal record constituted an aggravating factor for sentencing purposes.

The ethics complaint alleged that respondent had misrepresented to Warshaw that the kidnapping conviction was under appeal, that Warshaw had relayed this information to Judge Ricciardi, and that, by failing to correct either Warshaw or

---

[5] Respondent had not represented Politi in those cases.

Judge Ricciardi, when they stated that an appeal was pending, respondent had misrepresented the status of the appeal to Warshaw, Judge Ricciardi, and Politi. Respondent denied having represented to Warshaw that the kidnapping conviction had been appealed. Warshaw testified, at the ethics hearing, that he could not recall where he had obtained that information. He acknowledged that, during the course of the arson trial, he had communicated occasionally with the Morris County assistant prosecutor who had handled the kidnapping trial. Respondent, thus, asserted that Warshaw may have obtained this information from the Morris County assistant prosecutor.

At the sentencing proceeding, Politi complained to Judge Ricciardi that respondent's services were ineffective, criticizing various aspects of the representation. Both Judge Ricciardi and Assistant Prosecutor Warshaw replied that respondent's representation of Politi had been outstanding. According to respondent, he informed Politi that, because Politi had alleged ineffective assistance of counsel, respondent would not represent him on any appeal of the arson conviction. He suggested that Politi contact the Public Defender's Office.

Notwithstanding Politi's complaints about respondent's representation in the arson case, Politi testified that he

believed that respondent had also filed an appeal of that conviction.

On June 25, 1995, with the assistance of a prison paralegal, Politi submitted two separate pro se motions to file appeals from the kidnapping and arson convictions as within time. Politi asserted, in a certification in support of the motion, that he had given respondent a $20,000 check, dated December 14, 1989, "to initially cover the costs of the [kidnapping] trial." As previously mentioned, this is the check that respondent had received and, pursuant to Politi's direction, from which he had issued only $2,000 to himself as part of his legal fee for the burglary case, disbursing the balance either to Politi or on his behalf.

Politi claimed that, after he learned that respondent had not filed any appeals, he contacted respondent, who admitted that he had failed to file the appeals and offered to help Politi in any way.

Although the complaint did not charge respondent with any other misrepresentation, the presenter introduced evidence of a colloquy that took place in court, immediately following Politi's arson conviction. After the jury returned its verdict, on June 24, 1992, Warshaw asked Judge Ricciardi to increase Politi's bail. Warshaw expressed a concern that, although Politi was

incarcerated at the time of the arson conviction, because the kidnapping sentence was under appeal, Politi might be released before sentencing on the arson conviction could be imposed. The following exchange then took place:

> Mr. Warshaw: I know they have had argument on the case, at least I believe they have.
>
> Mr. Morrison: No, we haven't had argument yet.
>
> The Court: You have not had oral argument?
>
> Mr. Morrison: No, sir.
>
> The Court: I'm going to keep the bail the way it is. The application is going to be denied.
>
> [Ex.P-27 at 48-23 to 49-4.]

Again, respondent denied that he had affirmatively misrepresented to Warshaw or to Judge Ricciardi that the kidnapping conviction had been appealed. As for his failure to volunteer information that the kidnapping conviction was not on appeal, respondent testified that, in his view, his duty was to his client, and that it was not in Politi's interest to correct the court's misperception of the facts. In addition, he claimed that the bail issue was not material because Politi was incarcerated at the time.

By order dated January 17, 1996, the Appellate Division granted Politi's motion to appeal the kidnapping conviction out

of time and referred the matter to the OAE, based on "the allegations of attorney misconduct set forth in the papers supporting appellant's motion." Although the record does not reveal the outcome of that appeal, on December 9, 1997, the Court denied Politi's petition for certification of the judgment of conviction. State v. Politi, 152 N.J. 192 (1997). Presumably, Politi's kidnapping conviction was affirmed by the Appellate Division in an unreported decision.

On March 26, 1997, the Appellate Division dismissed Politi's appeal of the arson conviction, because Politi admitted that the only meritorious issue was ineffective assistance of counsel, which, the Appellate Division ordered, should be heard by the trial court. Thus, on May 27, 1997, Politi, through other counsel, filed an application for post-conviction relief in connection with the arson conviction.

About one month before the post-conviction relief hearing, respondent received a letter, dated August 5, 1998, mailed from New Jersey State Prison, where Politi was incarcerated. Both the letter and the envelope contain Politi's name and prisoner number. That letter, bearing a caption referring to the upcoming hearing on Politi's post-conviction relief motion, contained vile profanity and insults directed at respondent and his wife, Kathleen, who was also an attorney. Although Politi was

incarcerated at that prison at that time and, although Politi's name appeared as the sender on the letter, Politi denied having sent it, asserting that a prison inmate/paralegal had done so without his authorization.

On September 2, 1998, respondent appeared, pursuant to a subpoena issued by Assistant Prosecutor Warshaw, at the post-conviction relief hearing before Judge Ricciardi. At this hearing, respondent testified that he had provided Politi with effective assistance.

On February 8, 1999, Judge Ricciardi denied Politi's application for post-conviction relief. The judge concluded that respondent's "conduct was not deficient, did not fall below an objective standard of reasonableness and, in fact, counsel developed a reasonable trial strategy based upon the evidence revealed in discovery."

On July 7, 2005, more than six years after the denial of his application for post-conviction relief, and only several months before the ethics hearing, Politi sent a letter to respondent, suggesting that, if he did not contact the Monmouth County Prosecutor and indicate that he had lied when he testified at the post-conviction relief hearing, Politi would file additional ethics grievances against him and his wife. In that letter, Politi stated:

> If you come clean and tell the truth that the prosecutor tampered with you, the witness, and they told you to lie on the stand, then I'll dismiss all actions now pending and won't file more ethics on [sic] you and Kathleen.
>
> [Ex.R-1.]

According to respondent, Politi planned to file a lawsuit alleging prosecutorial misconduct. Politi, thus, wanted respondent to disavow his previous testimony, in order to support Politi's lawsuit against the prosecutor.

Although respondent's relationship with Politi was strained, he continued to represent him in connection with the supermarket burglary indictment. On October 4, 1994, Politi pleaded guilty to that charge, after the prosecutor agreed to recommend that the sentence run concurrently with the sentence that Politi was already serving and that Politi receive substantial "gap time" credits. At the plea proceeding, Politi gave a factual basis for the guilty plea, describing how he had entered the supermarket through a wall and had broken into the safe with a saw and a crowbar. Politi further indicated that he was satisfied with the plea and with respondent's services. During the plea proceeding, no one, including Politi, raised the issue of any appeals. Politi received a credit of 1,436 days — almost four years — representing the time from January 4, 1991

(the date of the kidnapping sentence) to the date of the burglary sentencing, December 9, 1994.

Despite the very specific details that Politi gave in court to support the guilty plea to the supermarket burglary charge, and despite overwhelming evidence of his guilt, Politi testified, at the ethics hearing, that he pled guilty to that charge only because respondent had advised him to do so.

In addition to the above criminal cases, respondent represented Politi in a personal injury matter in connection with an automobile accident. After that case settled for $15,000 in April 1992, respondent took his $5,000 fee, representing one-third of the recovery, and retained $10,000 in his trust account, pursuant to Politi's instructions. In that matter, respondent had prepared a written contingent fee agreement.

Apart from the ethics grievance, in 1996, Politi filed a malpractice lawsuit against respondent and his wife. That lawsuit was dismissed in 1999, following respondent's bankruptcy petition. Almost ten years later, in 2005, Politi filed another malpractice lawsuit against respondent, his wife, and their law firm. As of the time of the ethics hearing, that case was still pending.

On October 12, 1999, Politi filed a fee arbitration petition, which was heard by the District VA Fee Arbitration Committee ("the committee"). More than three years later, on

January 31, 2003, the committee found that respondent had received $41,000 on Politi's behalf: $20,000 representing Politi's interest in his family's property, $6,000 (two $3,000 checks) also representing Politi's interest in his family's property, and $15,000 from the personal injury settlement. The committee further determined that respondent had disbursed a total of $37,106.50 in both legal fees and payments either to Politi or on his behalf. The committee ordered respondent to return $3,893.50 (the difference between $41,000 and $37,106.50) to Politi.

Respondent testified, at the ethics hearing, that he had received a total of $15,000 in fees from Politi: $1,000 for the municipal court matter, $3,000 for each of the three indictable cases, and $5,000 for the personal injury case. According to Politi, however, he had given respondent as much as $20,000, some of which had been paid in cash, for which he had not always received a receipt.

At the ethics hearing, certain discrepancies in the evidence that Politi had submitted to the fee arbitration committee were uncovered. Politi presented to the committee copies of the two $3,000 checks that his mother had issued to him and that he had endorsed to respondent. These copies, however, contained notations on the reverse side, above Politi's

endorsement. One check indicated "appeal bail" and the other indicated "transcripts." Those notations do not appear on the copies of those checks that had previously been admitted into evidence at the ethics hearing. Politi claimed that he had explained, at the fee arbitration hearing, that he had added those notations for his own records and had not intended to mislead the committee into believing that those notations had been made, when he had endorsed those checks.

In addition, Politi had submitted to the fee committee an affidavit ostensibly signed by Anthony Allonardo (the family friend who had delivered the two $3,000 checks to respondent in 1991). Allonardo testified, at the ethics hearing, that the signature on the affidavit was not his and that he had not previously seen that document.

As to the charged violation of RPC 1.5(b), respondent admitted that he failed to prepare written fee agreements for any of the Politi matters. He explained that, in 1987, he sat for the California bar examination and, in 1988, was required to take the professional responsibility examination. According to respondent, that exam was based on the ABA rules of conduct, which do not require fee agreements to be in writing. Respondent believed that the New Jersey rule was similar. In addition, respondent contended that, after he agreed to represent Politi in the municipal court

matter, he regularly represented Politi, and was not required to state, in writing, the basis of his fee for the other matters.

Respondent offered, as mitigating factors, his thirty-three year legal career and his service to the community.

The DEC declined to find that Politi had retained respondent to represent him in the appeal of the kidnapping conviction. The DEC concluded that, at the fee arbitration hearing, Politi had submitted a forged certification of Anthony Allonardo and had tampered with the two $3,000 checks to mislead the committee about the purpose of those checks. The DEC, thus, considered Politi's criminal history and these incidences of tampering, in assessing Politi's credibility. The DEC determined that it could not find, by clear and convincing evidence, that Politi had retained or paid respondent to pursue either an appeal or bail pending appeal. The DEC found that the fee arbitration committee erred by not taking into account respondent's $3,000 fee for the kidnapping case and the $800 in costs associated with the personal injury case. The DEC concluded that, had the fee committee considered those two items, it would have found that respondent did not owe a refund to Politi.

Because the DEC found that respondent had not been retained to file an appeal, it dismissed the charges that respondent violated RPC 1.1(a) by failing to file a notice of appeal, RPC

1.4(a) by failing to keep his client informed about the status of the appeal, and RPC 8.4(c) for misrepresenting the status of the appeal.

The DEC determined that respondent misrepresented to Judge Ricciardi, at the arson sentencing, that an appeal of the kidnapping conviction was pending. The DEC found that this misrepresentation was not material, because the judge had indicated that, regardless of the filing of an appeal, he would consider the kidnapping conviction as part of Politi's criminal record and because respondent had stipulated that, even without that conviction, Politi was eligible for an extended term. The DEC, thus, dismissed the charge that respondent violated RPC 3.3(a)(1), which requires that a misrepresentation be material, limiting its finding to a violation of RPC 8.4(c).

In addition, the DEC found that respondent violated RPC 1.5(b) by failing to prepare written fee agreements for his representation of Politi.

The DEC considered, in mitigation, the passage of time; respondent's subsequent use of fee agreements in his criminal practice, demonstrating that he had learned from this incident; and his return of funds to Politi, in accordance with the fee arbitration committee determination, which the DEC found was erroneous. The DEC recommended a reprimand.

Following a de novo review of the record, we are unable to agree with the DEC's finding that the evidence clearly and convincingly established that respondent's conduct was unethical. Accordingly, we dismiss the complaint.

This case turns on whether respondent agreed to file an appeal and a motion for bail pending appeal in connection with Politi's kidnapping conviction. According to Politi, not only did respondent agree to file those pleadings, he accepted fees for those services and misrepresented to Politi and others that the appeal was pending. In contrast, respondent asserted that he had advised Politi to proceed by way of petition for post-conviction relief and that Politi had agreed not to appeal the kidnapping conviction.

The credibility of the parties in this matter is critical to our resolution of contradictory evidence. The DEC properly found that Politi's criminal record and his submission of tampered evidence (the Allonardo affidavit and the checks containing after-the-fact notations) negatively affected his credibility. Allonardo's denial that he had ever seen, let alone signed, the affidavit submitted in support of Politi's fee arbitration petition raises an inference that Politi forged Allonardo's signature. In addition, by submitting to the fee arbitration committee copies of checks in which he had inscribed

the words "appeal bail" and "transcripts," Politi presumably misrepresented that those checks had been issued as payment for those services. Although Politi claimed that he had explained to the fee arbitration committee that he had inserted those notations after he had received the canceled checks, and, thus, had not misled that committee, the DEC hearing panel, whose members had the opportunity to observe Politi's demeanor, rejected this explanation.

Apart from those concerns, Politi's testimony often appeared untruthful on its face. For example, although he pleaded guilty to the supermarket burglary and, as reflected in the plea transcript, provided many details about that crime, he insisted that he was not guilty of that offense. Moreover, he apparently tried to take advantage of the fact that his father had issued a $20,000 check to respondent, representing Politi's interest in family property. Respondent had received only $2,000 from that sum, disbursing $18,000 either to Politi or to others, at his direction. Yet, in a certification in support of a motion to file an appeal from the kidnapping conviction out of time, Politi asserted that he had given respondent a $20,000 check for the kidnapping trial alone. That assertion, contained in a certification filed with the Appellate Division, blatantly misrepresented the facts, as documented by the settlement

statement that Politi had signed, authorizing the disbursements from that check.

We, thus, credit respondent's version of events.

Respondent explained that he had advised Politi to proceed by way of petition for post-conviction relief, rather than by appeal. Politi had anticipated that DePasque, the kidnapping victim, was about to recant that testimony at an impending federal trial. According to respondent, Politi agreed with the decision not to file an appeal. Because DePasque failed to recant his testimony, however, respondent advised Politi that he had no basis for filing a petition for post-conviction relief.

Respondent's strategy of monitoring the appeal filed by Politi's co-defendants and trying to "jump on board," if the appeal was successful, was risky. Respondent claimed that, under State v. Altman, supra, 181 N.J. Super. 539, he would have been able to join in the co-defendants' appeal. That case holds that, if an indigent criminal defendant asks his counsel to file an appeal, and if the attorney fails to file a timely appeal, the defendant's motion to file the appeal as within time must be granted.

Respondent's interpretation of Altman is questionable. That case does not address the circumstances presented here, in which a party relies on the appeal filed by a co-defendant. As it

turned out, because the convictions of Politi's co-defendants were affirmed, the issue of joining in the result of their appeal became moot. At any rate, because Politi agreed with respondent's advice to forego the filing of an appeal, respondent's failure to file the appeal was not unethical.

Much of the ethics hearing was devoted to the issue of whether Politi had paid respondent a legal fee to file an appeal from the kidnapping conviction. On January 14, 1991, respondent received two $3,000 checks. He deposited one check in his business account. According to respondent, that check represented his fee for the kidnapping trial, which had concluded with Politi's sentencing, on January 4, 1991, just ten days earlier. Respondent deposited the second check in his trust account. He testified that the check was initially to be used to order the trial transcripts, if Politi opted to appeal the conviction. After Politi made the decision not to appeal, he directed respondent to disburse the $3,000 as his legal fee for the subsequent arson case.

Politi's claim that one of the $3,000 checks represented respondent's legal fee for filing a motion for bail pending appeal is not credible. Respondent's fee for representing Politi at trial was $3,000. This fee was consistent for the trial of all three indictable offenses: burglary, kidnapping, and arson. It is not reasonable that respondent would charge the same $3,000 fee

for filing a motion for bail pending appeal as he would for all of the services associated with a criminal trial. Moreover, Politi's previously noted lack of credibility militates in favor of accepting respondent's account of the events.

In short, we find no clear and convincing evidence that respondent agreed, or received a legal fee, to file an appeal from Politi's kidnapping conviction. We, thus, dismiss the charges that respondent displayed gross neglect by failing to file the appeal, that respondent failed to keep his client informed about the status of the appeal, and that respondent misrepresented to his client the status of the appeal.

The complaint also charged that respondent misrepresented to Judge Ricciardi and to Assistant Prosecutor Warshaw that he had filed an appeal from the kidnapping conviction. Warshaw, however, testified that, although he was under the belief that an appeal had been filed, he could not recall the source of that information. Respondent denied representing to Warshaw that he had filed an appeal.

Respondent failed to correct Warshaw when he represented to Judge Ricciardi that the kidnapping conviction was on appeal and led both of them to believe that an appeal was pending, when he replied to a question by stating that they had not yet had oral argument. At the ethics hearing, and in his brief submitted to

the DEC, respondent relied on In re Seelig, 180 N.J. 234 (2004), to support his position that he was not required to volunteer information to correct Judge Ricciardi's misapprehension of the facts. According to respondent, in 1992, when Politi was sentenced, criminal defense attorneys were not required to volunteer information that was contrary to their client's interests. Respondent contended that, although attorneys have always been required to answer judges' questions honestly, in 1992, attorneys were not obligated to correct a misapprehension.

In Seelig, an attorney failed to disclose to a municipal court judge that the person involved in his client's automobile accident had died. Had Seelig revealed that information, which was not privileged because it was public knowledge, the client would have been charged with indictable offenses. Seelig did not reveal the death of the individual, hoping that the municipal court would accept his client's plea to motor vehicle offenses and, thus, preclude, on double jeopardy grounds, the more serious indictable charges. Consequently, when the judge asked Seelig if the accident resulted in injuries or property damage, he replied that there were injuries, but did not reveal that one of the people involved in the accident had died.

Seelig argued that he believed that his duty to his client as well as his client's right to counsel under the Sixth

Amendment of the Constitution required him to withhold information from the municipal court. In addition, he produced an expert who rendered an opinion that defense lawyers, as zealous advocates, are not obligated to provide inculpatory information to the prosecution.

The district ethics committee in Seelig dismissed the charges. Although we, by a vote of four to three, found that Seelig's conduct was unethical, the number of votes was insufficient (five are needed) to impose discipline. In reviewing the matter, the Court found that Seelig should have revealed the information to the municipal court. The Court, however, declined to impose discipline:

> This is not a case about an attorney who was unaware of the Rules of Professional Conduct; it is a case in which the attorney believed that he had a superseding obligation to his client. Our prior case law in respect of *RPC* 3.3(a)(5) has not dealt with that issue. Perhaps because of a lack of guidance from our Court, a majority of the District IIIB Ethics Committee believed that respondent had not acted improperly and dismissed the charges against him. Even the DRB was unable to garner the concurrence of five members of the Board for the imposition of discipline. When the totality of circumstances reveals that the attorney acted in good faith and the issue raised is novel, we should apply our ruling prospectively in the interests of fairness. . . . We therefore decline to discipline respondent in these circumstances.
>
> [Id. at 257-58; citations omitted.]

Thus, although the Court ruled, in 2004, that Seelig should have revealed inculpatory information, it determined to apply its ruling prospectively, because there was insufficient guidance on this issue. Respondent, who, in 1992, failed to correct Judge Ricciardi's misapprehension that he had filed an appeal of Politi's kidnapping conviction, is entitled to the benefit of the Seelig ruling. Moreover, Seelig failed to inform the municipal court judge of a critical fact that would have resulted in much more severe consequences for his client. Had Seelig succeeded, his client would have received only fines and other minor penalties. Instead, once the facts came to light, his client was indicted for aggravated manslaughter and death by auto, crimes of much greater magnitude. Here, the judge announced that, regardless of any appeal, he would consider the kidnapping conviction as part of Politi's criminal history. Furthermore, respondent had stipulated that Politi was eligible for an extended term, based on his previous convictions, excluding the kidnapping. Therefore, respondent's failure to disclose that no appeal had been filed did not affect the sentence that the judge imposed.

Based on the foregoing, we determine to dismiss the RPC 3.3(a)(1) and RPC 8.4(c) charges.

As to the failure to set forth, in writing, the basis of his fee, because respondent had represented Politi in the municipal court matter, subsequent fee agreements were not required to be in writing. The complaint did not charge that respondent failed to set forth, in writing, the basis of his fee in the municipal court case. In any event, even if respondent had failed to comply with RPC 1.5(b), the passage of time (sixteen years) would serve as a significant mitigating factor justifying dismissal of that charge.

We, thus, voted to dismiss the complaint against respondent. Member Frost recused herself. Member Neuwirth did not participate.

Disciplinary Review Board
William J. O'Shaughnessy, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Martin Morrison
Docket No. DRB 07-312

Argued: March 20, 2008

Decided: May 7, 2008

Disposition: Dismiss

Members	Dismiss	Suspension	Censure	Reprimand	Recused	Did not participate
O'Shaughnessy	X					
Pashman	X					
Baugh	X					
Boylan	X					
Frost					X	
Lolla	X					
Neuwirth						X
Stanton	X					
Wissinger	X					
Total:	7				1	1

Julianne K. DeCore
Chief Counsel