



## BAR COUNSEL v. RICHARD ROE

### B.B.O. File No. C3-11-0086

In March 2013, bar counsel filed a petition for discipline charging that the respondent was retained to vacate or seal the client's record of felony convictions; the respondent concluded initially that the client had no basis for relief, but he failed to so inform the client; instead he gave false assurances that he would be filing a motion; the respondent then discovered that prior counsel had filed a motion to revise and revoke the client's sentence, called in the clients, falsely took credit for filing the motion, promised he would seek a hearing, and charged a fee of \$3,500 knowing that the motion to revise or revoke would not accomplish the client's goals; the respondent then neglected the matter and failed to refund unearned fees when he was ultimately discharged.

The matter was assigned to a hearing committee of the board. The committee found, in summary, as follows.

The client, at age eighteen, had pled guilty to charges of unarmed robbery and conspiracy to commit robbery, both felonies. His defense counsel filed a motion to revise or revoke his sentence, which consisted of thirty months in the house of corrections, sixty days to be served, on the conspiracy charge, straight probation on the robbery charge, and an order of restitution. The motion to revise and revoke was never heard.

In the years following the conviction, the client reformed himself. He paid the court-ordered restitution, and he served the last six months of probation unsupervised, while he attended college in Rhode Island. He earned a bachelor's degree in mechanical engineering technology. Still, his conviction posed an obstacle to better employment. The client's father undertook to help the client obtain relief; both understood that expungement was unlikely, and they focused on sealing or vacating the conviction.

The client was referred to the respondent in 2009. The respondent knew that, under the law then in effect, the client would not be eligible for sealing the records of his felony conviction until 2018; and even if his conviction were to be reduced from a felony to a misdemeanor, the client would not be eligible for sealing the record until 2013.

The respondent and the client's father spoke in early 2010, and the client's father contacted the respondent repeatedly thereafter. The committee did not credit that the respondent committed to seeking some relief other than sealing the records, such as overturning the conviction. Meanwhile, the respondent continued his investigations, which included review of materials sent to him by the client's father. The respondent contacted the prosecuting attorney in the hope of arranging some relief that could be sought without opposition.

The respondent also spoke with the court clerk, who recommended a motion for a new trial. The respondent, however, moved for a hearing on the motion to revise or revoke the client's sentence.

Around this time, the respondent met with both the client and the client's father, when the respondent was paid a flat fee of \$3,500. The respondent interviewed the client and discussed various forms of relief. There was some discussion of a motion for new trial and sealing the criminal record, and there was some question whether the client had fully understood the consequences of his guilty plea. The committee specifically found that the respondent did not promise to file a motion for a new trial; instead, the upshot of the meeting was permission to the respondent to pursue his strategy for relief. This strategy revolved around obtaining a hearing on the motion to revise or revoke filed by prior counsel. The respondent deliberately chose not to overtly challenge the trial judge's performance during the client's plea colloquy, rather, his plan was to use the motion to revise or revoke as a vehicle for appealing to the court's discretion in fashioning some form of relief for a truly reformed client. The committee credited that the respondent explained this strategy to the client and the client's father.

After that meeting, the client's father followed up weekly; the respondent assured him that he was taking care of the matter. Meanwhile, the respondent was seeking to place the matter before the judge who had taken the client's guilty plea. His efforts were complicated by the fact that the judge had retired and was now on recall, hearing matters in different courts.

During this time, the respondent told the client's father that the motion to revise and revoke would not obtain the relief sought; they also discussed a recent Supreme Court case concerning the warnings a judge must give during a plea colloquy. Further, the respondent learned that the original prosecuting attorney had left the district attorney's office, which also complicated his efforts to appeal, objection-free, to the court's sense of justice and compassion. The committee rejected testimony that the respondent admitted he was doing nothing at the time.

As time went on with no apparent progress, the client and his father decided to terminate the respondent's engagement. The committee noted, however, that the respondent had first been contacted only eight months before the termination, and only five months had passed between his being paid and his termination. The client's father demanded a refund, which the respondent did not provide. A complaint to bar counsel followed.

The client obtained employment commensurate with his education and petitioned pro se to have his records sealed, relief to which he became entitled under the then-current law in August 2013.

The committee concluded that the respondent reasonably believed he was pursuing a viable strategy for obtaining relief for his client, and that he had properly communicated with the client and the client's father. It also concluded that he had provided valuable services that were not wildly out of line with the flat fee charged. For these reasons, it rejected bar counsel's charges that the respondent had acted dishonestly or misrepresented facts to the client (Mass. R. Prof. C. 8.4(c)), that he had failed to communicate with or explain matters to the client (Mass. R. Prof. C. 1.4(a), 1.4(b), as then in effect), that he handled the matter without competence of diligence (Mass. R. Prof. C. 1.1, 1.3) and failed to pursue his client's lawful objectives (Mass. R. Prof. C. 1.2(a)), and charged a clearly excessive fee (Mass. R. Prof. C. 1.5(a)) and failed to make a prompt refund on termination (Mass. R. Prof. C. 1.16(d)).

Bar counsel did not object to the hearing committee's findings, conclusions, and recommendations, and the board accepted the report and ordered the matter dismissed at its meeting on January 27, 2014.