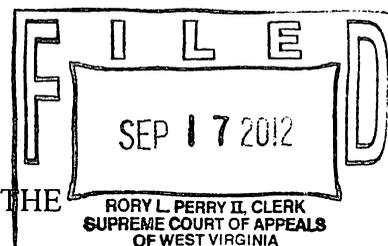


BRIEF FILED
WITH MOTION

BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 11-0813

D. MICHAEL BURKE,

Respondent.

SURREPLY TO REPLY BRIEF OF LAWYER DISCIPLINARY BOARD

D. Michael Burke limits this surreply to a discussion of two cases which the Complainant relied upon in its Reply Brief and which were not mentioned in its initial brief.

At page 4 of the Reply Brief, the Lawyer Disciplinary Board (“Board”), relies on *In re: Ponds*, 888 A.2d 234 (D.C. 2005). *Ponds*, however, is not persuasive authority for the Board’s position in this case. The case involved a disciplinary matter against an attorney who continued to represent a defendant in a criminal case after the client sought to withdraw his guilty plea based on an accusation that the attorney had coerced him into accepting the plea. The Court reasoned that the attorney had an actual conflict of interest in violation of Rule 1.7(b) Maryland Rules of Professional Conduct¹ because once the defendant “alleged coercion and ineffective assistance of counsel as grounds for his motion to withdraw his guilty plea, respondent could not argue the motion to withdraw without possibly admitting serious ethical violations and subjecting himself to possible liability for malpractice. As a result, due to the conflict, Thompson was unrepresented by counsel on the issue relating to the request to withdraw the guilty plea.”² 888 A. 2d at 239.

The Court concluded that once the defendant accused the attorney of coercing his guilty plea,

¹ According to the opinion, the Maryland Rule 1.7(b) stated, at the time, “that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third party, or by the lawyer’s own interests.” 888 A.2d at 239, fn. 2.

² The defendant eventually did succeed in renegotiating his plea. 888 A. 2d at 238, fn. 10.

the attorney had a duty to withdraw pursuant to Rule 1.16(a)(1) which states: “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation if the representation will result in a violation of the rules of professional conduct.” 888 A.2d at 239, fn. 3. As a result, the attorney was required to withdraw because his continued representation violated Rule 1.7(b).

Thus, the language from *Ponds* quoted at page 4 of the Reply arises out of a totally different set of facts. Mr. Ponds continued to represent a client in a case where he could not represent the client’s interest because that interest conflicted with his own. Nothing remotely similar occurred in the present case. Mr. Burke’s conflict was with a defendant doctor, not with his own client. Mr. Burke did not ignore a clear conflict of interest, remain in a case where, in order to advocate for his client, he would have to advocate against himself, and fail to pursue his client’s claim that he, the client, was coerced into a plea he did not want to make. The case is simply not analogous to the present case.

At pages 4-5 of the Reply, the Board also relies on *Aulenbach v. Ky. Bar Ass’n*, 151 S.W.3d 330. 331 (Ky. 2004), another case that has little resemblance to the present case. In *Aulenbach*, the attorney sought to withdraw from a client’s case, sent a letter of withdrawal to a wrong address and “made no attempt to ensure that she [his client] received notification of his withdrawal.” 151 S.W. 3d at 331. The attorney’s conduct amounted to abandonment of his client’s case. As a result, the client, who was not informed that her trial date had been changed or that her attorney had withdrawn, had a judgment entered against her. The attorney had also committed four separate crimes of driving under the influence in a seven-year period. Charges were brought against the attorney under Rules 1.4(a)-(b) (failure to keep a client informed about the case); 1.16(d) (failure to “take steps to the extent reasonably practicable to protect a client’s interests” for matters related to these rules). He was also charged with and admitted to a violation of Rule 8.3(b) for misconduct involving “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer

in other respects.”³ 151 S.W.3d at 332. Based on *all* of these violations, the attorney was given a public reprimand, a suspension for thirty days, an additional suspension that was deferred on the condition that he participate in the Kentucky Lawyer Assistance Program and an order to repay his client’s fees and to pay the costs of the disciplinary case. *Id.* Unlike Mr. Aulenbach, Mr. Burke did not walk away from the Trustee and Mrs. Miller, leaving them without representation. Mr. Burke knew that his clients would be represented by one of the leading malpractice lawyers in the region and, when contacted by the Trustee’s office, he informed the Trustee’s assistant as to what had occurred. This was not abandonment as occurred in *Aulenbach*. Further, unlike Mr. Burke, Mr. Aulenbach admitted to misconduct arising out of 4 D.U.I. charges. The *Aulenbach* case simply is not precedent for disciplining Mr. Burke.

RESPONDENT,
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³ This violation was for the drunk driving charges.

CERTIFICATE OF SERVICE

I, ALLAN N. KARLIN, attorney for the respondent, do hereby certify that service of the within and foregoing Motion to File Surreply to Reply of the Lawyer Disciplinary Board and Surreply to Reply Brief of the Lawyer Disciplinary Board was made upon the parties hereinbelow listed by depositing a true copy of the same in the United States Mail, postage prepaid, addressed as follows:

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all of which was done on the 14th day of September 2012.



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