STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of November, 1992, the following order was made and entered:

Committee on Legal Ethics of The West Virginia State Bar, Complainant

vs.) No. 21485

Robert P. Martin and Arthur T. Ciccarello, members of The West Virginia State Bar, Respondents

On a former day, to-wit, November 4, 1992, came the Committee on Legal Ethics of The West Virginia State Bar, by Maria Marino Potter, its attorney, and presented to the Court its verified complaint praying for the dismissal of disciplinary proceedings against the respondents, Robert P. Martin and Arthur T. Ciccarello, or, in the alternative, public reprimands, together with the original Report of the Committee on Legal Ethics, as provided by Part D, Article VI, of the Bylaws, Rules and Regulations of The West Virginia State Bar, the Findings and Recommendations of said Committee and the various pleadings and exhibits filed with the Committee, and moved the Court to dismiss these proceedings, or, in the alternative, issue public reprimands.

Upon consideration whereof, the Court is of opinion to and doth hereby accept the recommendation of the Committee on Legal Ethics of The West Virginia State Bar to dismiss the disciplinary proceedings against the respondents, Robert P. Martin and Arthur T. Ciccarello. It is therefore considered and ordered that the disciplinary proceedings numbers 91-089 and 91-091, be dismissed and that this order be certified to the respondents, Robert P.

Martin, Esq., and to Arthur T. Ciccarello, Esq., and to the Committee on Legal Ethics of The West Virginia State Bar.

A True Copy

Attest: _____
Clerk, Supreme Court of Appeals

BEFORE THE COMMITTEE ON LEGAL ETHICS OF THE
WEST VIRGINIA STATE BAR

IN RE: ARTHUR T. CICCARELLO,
a member of the West Virginia
State Bar

ID No. 91-091

and

IN RE: ROBERT P. MARTIN,
a member of the West Virginia
State Bar ID No. 91-089

RECOMMENDED DECISION OF HEARING SUBCOMMITTEE

The above cases came on for joint hearing before a hearing subcommittee comprised of Priscilla Haden, Elizabeth Rose, Esq., and John W. Cooper, Esq., on August 26, 1991, in the offices of the West Virginia State Bar, in Charleston, West Virginia.

Respondent, Arthur Ciccarello, was represented by Jeffry A. Pritt, Esq., and John M. Slack, III, Esq., in this hearing. Respondent, Robert P. Martin was represented by Christopher P. Bastien, Esq., and Michael C. Allen, Esq. The West Virginia State Bar was represented by Maria M. Potter, Esq.

The cases involved two separate but identical complaints against the Respondents arising out of their representation of a client in the Fourth Circuit Court of Appeals. The proceedings were in the nature of a hearing for reciprocal discipline pursuant to Art. VI, § 28 of the By-Laws of the West Virginia State Bar. The proceedings were initiated as a consequence of action taken by

the Fourth Circuit. A full and complete hearing was conducted by the Hearing Subcommittee. At the conclusion of the State Bar's case in chief, the Respondents moved to dismiss the request for reciprocal discipline, which motions were taken under advisement. Subsequent to the hearing, the parties submitted lengthy briefs on the matters at issue.

For the reasons set forth below, the Hearing Subcommittee grants the motions to dismiss of each Respondent and recommends that the proceedings be dismissed.

Findings of Fact:

Upon a review of the entire record and the clear and convincing evidence before it, this Panel makes the following recommended findings of fact and conclusions of law:

1. Respondent, Arthur T. Ciccarello, is a licensed member of the West Virginia State Bar. Mr. Ciccarello has practiced law in the Charleston area for many years and he is recognized as a distinguished and competent criminal defense lawyer within this State. He devotes a major portion of his practice to criminal practice and has extensive experience in that specialty in both State and Federal Courts.

2. Respondent, Robert P. Martin, is a licensed member of the West Virginia State Bar. Although younger, and far less experienced than Mr. Ciccarello, he also has practiced law in the Charleston area for several years, and he is recognized as a competent criminal defense lawyer within this State. Until recently, he devoted a large portion of his practice to criminal

defense and he has practiced criminal defense in both State and Federal Courts. Until recently, he was associated with Mr. Ciccarello's law firm.

3. The Respondents are subject to the disciplinary jurisdiction of the Supreme Court of Appeals and its properly constituted Committee on Legal Ethics of the West Virginia State Bar.

4. Matters of jurisdiction, venue and composition of the hearing subcommittee were not contested in this proceeding.

5. On March 7, 1991, a joint order of suspension was issued by the Fourth Circuit Court of Appeals against the Respondents reprimanding them for conduct in that Court and suspending them from practicing before that Court for a period of ninety days.

6. The suspension order of the Fourth Circuit found that the disciplinary action was warranted against the Respondents because of alleged misstatements made in a brief and reply brief filed on behalf of their client, Umberto Petino, which briefs allegedly appeared to be false and which were allegedly made with apparent reckless disregard of whether the same were true. Respondents filed a written response to the order of the court to show cause why disciplinary action should not be imposed, but they did not request a formal hearing on the merits.

7. The thrust of the alleged unprofessional conduct was that the appellant's brief stated that the district judge denied the appellant's motion to withdraw a guilty plea on a drug related offense on the basis of evidence seen by the judge at the trial of

Petino's co-defendants. The district judge did, in fact, refer to evidence he heard in the trial of other co-defendants in his discussion and ruling, but he thereafter modified his previous statements by stating:

> Let me make it abundantly clear for the record that in reaching my decision on the motion to withdraw the plea, I did not rely upon the evidence that I heard in the trial of the two codefendants. I relied upon the evidence I heard here today.

The Fourth Circuit concluded that any contention that the trial judge relief upon evidence heard at the previous trial of the two co-defendants was dispelled by the judge's corrective statement, and the statement contained in the appellant's brief that "[t]he Court cited as its reasons therefor (sic), the knowledge of the Court of the trials of the Appellant's co-defendants and the evidence presented therein which the Court felt implicated the Appellant . . . is clearly incorrect and purposely misleading in light of the judge's subsequent clarification.'" The appellant's brief also contained a statement that at the hearing on the motion to withdraw the guilty plea that "[t]here existed exculpatory evidence from a co-defendant relating to Appellant." The Fourth Circuit then determined that what actually occurred was that Appellant's counsel at that hearing, L. Samuel Dockery, III, stated that he believed that Petino's co-defendants could give testimony which would "fully and completely" exculpate his client.[1] Respondents were also criticized for indicating that Appellants

---

1. Dockery was also disciplined in the Fourth Circuit disciplinary order with the Respondents herein.

original counsel had not even shown him an indictment in Texas prior to his execution of a plea agreement in North Carolina (which apparently contemplated the Texas charges). In fact, the Texas Court had not even indicted Petino at the time of his North Carolina plea and Respondents acknowledge that fact, but Respondents herein argue that "a requirement of entering a plea knowingly is that the accused knows what the indictment charges are. We do not believe that requirement can be met without seeing the indictment." The Fourth Circuit summarily rejected the argument by saying that the argument differed substantially from the allegation made in the brief. The Court also concluded that when the brief indicated that the record is devoid of any factual basis underlying the plea that the statement was another misstatement giving rise to disciplinary action because of the testimony of an FBI agent who gave testimony indicating a basis for a plea. Respondents acknowledged that this statement was an error. The Court concluded in its disciplinary order that the brief and reply contained statements which were false, were made with the intent to mislead the Court, or were made with reckless disregard to whether the same were true. Consequently, it imposed the reprimand and suspension upon Dockery and Respondents.

8. The Respondents did not represent Petino in any court proceedings before his appeal. Other counsel had represented him at the time of his indictment and plea. Dockery represented him at the hearing on the motion to withdraw his guilty plea.

9. Petino is a Sicilian immigrant who neither speaks nor

understands English.[2] Thus, some of the early communication in this case before the Respondent's involvement arose from an interpreter. Much of the information providing a basis for Respondents' appellate brief and reply brief came from information provided by attorney Dockery.

10. The Fourth Circuit proceedings apparently were based in large part upon a contradictory statement of the district judge that he did not consider the evidence he had heard in the trial of co-defendants. However, his representation that he did not consider such evidence is self-serving, at best, and likely was made to attempt to protect the record on appeal. When such a statement had been made by the Court below, defense counsel would have been potentially negligent in their responsibilities on appeal if they had not made mention of the Court's admitted consideration of facts. Although the briefs and reply briefs of Respondents did contain some factual errors or inaccuracies, the clear and convincing evidence in the instant disciplinary proceedings establishes that the statements were not made with intent to mislead the Court nor were they made with reckless disregard for whether the same were true. Any errors or misstatements that appeared in the briefs were unintentional and were reasonably based upon information provided to Respondents by prior counsel, from co-counsel Dockery, and from documents in their files. At worst, it appears that Respondents were guilty of zealous advocacy. But

---

[2] Although Ciccarello speaks Italian, his understanding of Petino's Sicilian dialect was somewhat limited.

nothing in the evidence adduced in the instant hearing indicates any intentional dishonesty or intentional misrepresentation on the part of either Respondent.

11. As indicated above, no actual hearing was held by the Fourth Circuit on the merits of the case. Nor did Respondents request a hearing.

12. The testimony introduced in the instant disciplinary proceeding establishes that the proof upon which the Fourth Circuit based its determination of misconduct is based to some degree upon supposition and speculation, and the level of proof in that forum did not appear to rise to requisite the standard of clear and convincing proof which is mandated by the West Virginia Supreme Court of Appeals in lawyer disciplinary proceedings.

13. Since very little of Respondents' respective practices involve appellate matters, the discipline imposed by the Fourth Circuit Court of Appeals, if warranted, has had little or no effect upon Respondents (other than the embarrassment created by the public reprimand.) As a matter of fact and law, however, in this jurisdiction, a reciprocal suspension from practice before the Supreme Court of Appeals would have the much more serious effect not only of terminating their privileges before that body, but also it would have the effect of preventing them from practicing in any of the State and Federal Courts (since admission to practice before the Supreme Court of Appeals is a precondition to practicing before the State and Federal Courts of this State).

Conclusions of Law:

1. Article VI § 28-A makes reciprocal discipline mandatory if imposed in a sister jurisdiction unless it is determined by the Hearing Panel that (1) The procedure followed in the foreign jurisdiction did not comport with the requirements of due process of law; or (2) The proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the Supreme Court cannot, consistent with its duty accept as final the determination of the foreign jurisdiction; or (3) The imposition by the Supreme Court of the same discipline would result in a grave injustice; or (4) The misconduct proved warrants that a substantially different type of discipline be imposed by the Supreme Court. Committee on Legal Ethics v. Battistelli, 405 S.E. 2d 242 (W. Va. 1991).

2. The proof upon which the Fourth Circuit based its determination of misconduct does not meet the requirements of the West Virginia Supreme Court of Appeals. There certainly were some inaccuracies in the brief. But the inaccuracies were not proven by clear and convincing evidence to have occurred to promote falsity, nor to mislead the Court. Nor were those misstatements proven by clear and convincing evidence to have been made with reckless disregard for the truth.

3. As indicated in Finding of Fact No. 13, the imposition of the same discipline in this State as was imposed in the Fourth Circuit would result in a grave injustice. The Hearing Subcommittee does not feel that the conduct warrants any discipline. However, if any discipline is warranted, because of the effect which a suspension from practice before the Supreme

Court would have upon Respondents, only a reprimand should be imposed.

Discussion:

Under Battistelli and under Article VI § 28-A, three of the four exceptions to automatic imposition of reciprocal discipline have been established by the Respondents. The procedure afforded Respondents in the Fourth Circuit did comport to due process of law requirements. Since the Respondents did not request an evidentiary hearing on the Rule to Show Cause, they waived any complaint as to lack of hearing.

But with respect to the proof of the other three exceptions which would warrant dismissal of the proceedings or different discipline from the West Virginia Supreme Court, Respondents have met their burden by clear and convincing proof. The record in the Fourth Circuit decision does not disclose proof of misconduct by the minimum standard required for disciplinary action within this State. An attorney in this State cannot be disciplined unless his misconduct is established by clear and convincing evidence. That burden does not appear to have been met in the Fourth Circuit. The evidence adduced in this proceeding clearly indicates that the conclusions of the Fourth Circuit could not have risen to that level. The imposition of equal discipline in this State would result in grave injustice, even if discipline were warranted. The net effect of such punishment would be far greater than that which resulted in the Fourth Circuit. No intentional or reckless misconduct was found by the Hearing Subcommittee to have occurred,

so no discipline is recommended.

However, if the Supreme Court should conclude that some discipline would be appropriate, no more than a reprimand is appropriate.

Recommendation:

The Hearing Subcommittee recommends that the Respondents' Motions to Dismiss these reciprocal disciplinary proceedings be granted. No discipline should be imposed.

Dated the 26th day of May, 1992.

John W. Cooper

Elizabeth L Rose

Priscilla M. Hodges