SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-145

IN THE MATTER OF	:
WILLIAM E. SCHMELING	:
AN ATTORNEY AT LAW	:

Decision

Argued: June 20, 2002

Decided: August 23, 2002

John McGill, III appeared on behalf of the Office of Attorney Ethics.

Edward A. Genz, Jr. appeared on behalf of respondent.

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

This matter was before us based on a recommendation for discipline filed by Special Master Michael R. DuPont.

Respondent was admitted to the New Jersey bar in 1981. He maintains an office for the practice of law in Manasquan, New Jersey. He has no disciplinary record. He was, however, temporarily suspended on October 6, 1998, after he failed to cooperate

with the Office of Attorney Ethics' ("OAE") investigation of this matter. In re Schmeling, 156 N.J. 369 (1998).

The ethics complaint alleged violations of RPC 1.1(a) (gross neglect); RPC 1.15(b) (failure to promptly notify a client or third person of the receipt of funds in which the client or third person has an interest and failure to promptly deliver funds that the client or third person is entitled to receive); RPC 1.15(d) (recordkeeping violations); RPC 8.1(b) (failure to cooperate with disciplinary authorities); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), by improperly taking excessive executor's commissions and, therefore, knowingly misappropriating estate funds; and RPC 8.4(d) (conduct prejudicial to the administration of justice). The complaint also charged that respondent did not submit to the OAE the post-suspension affidavit required to be filed by R. 1:20-20 and that such conduct constituted contempt of court.

* * *

The material facts are not in dispute. Respondent admitted the factual allegations in the complaint. However, he disputed that he knowingly misappropriated estate funds by taking excessive executor's commissions. Our independent review of the record led us to conclude that respondent's conduct did not constitute knowing misappropriation of estate funds.

In November 1990, respondent drafted a will for William E. Jube. Respondent had met Jube several years before, when, as an associate of another attorney, he had

drafted wills for Jube and his wife. When Jube's wife died, Jube consulted respondent about the administration of his wife's estate. Thereafter, respondent and Jube became friends, meeting occasionally for lunch. Respondent also prepared Jube's tax returns for a few years.

Jube's will named respondent as executor of his estate and trustee of a testamentary trust. Jube died on April 21, 1992. On the New Jersey inheritance tax return that respondent filed in 1992, respondent valued Jube's estate at $1,196,574. The return showed $72,000 in executor's commissions.

Under the will, Jube's house was to be sold and the proceeds added to his residuary estate. Catherine Ahearn, Jube's sister-in-law, was entitled to any of Jube's personal property that she elected to take. The will contained four specific bequests: $10,000 to Dennis Gilgan; $10,000 to Brendan Gilgan; $5,000 to William Thistle; and $5,000 to Alan Powell. The remainder of the estate was to be placed in trust for Ahearn. As the executor and trustee, respondent was to establish the trust from the estate assets, invest the trust funds and distribute the net income from the trust to Ahearn "at least quarterly...during her life." Upon Ahearn's death, the entire balance of the trust was to be distributed to Laura Weber, Jube's niece.

On May 19, 1992, Ahearn was declared mentally incompetent. Initially, Thomas Beach was appointed her guardian. However, on July 11, 1994 Reverend Brian Swedberg replaced Beach.

Although respondent made some income distributions to Ahearn, he did not make

The OAE Demand Audit

In April 1998, McWeeney filed a grievance against respondent. On June 10, 1998, the OAE conducted a demand audit of respondent's attorney records, including his files for the Jube estate. Respondent failed to bring all of his records and to provide the accounting requested by the OAE

According to respondent, he established the following accounts for the Jube estate: (1) a non-interest bearing estate checking account at Provident bank in May 1992, (2) a brokerage account at Shearson Lehman Brothers in August 1992 and (3) an estate sub-account in his Summit trust account in October 1995.

During the audit, respondent was advised of numerous recordkeeping deficiencies. The OAE requested that respondent reconstruct his trust and business receipts and disbursement books for the one-year period ending March 31, 1998 and prepare quarterly trust account reconciliations for July 1, 1997 through May 30, 1998. Respondent was directed to provide the documents by August 3, 1998. He provided some, but not all, of the records. Therefore, the OAE filed a motion for his temporary suspension, which was granted. The order also directed respondent to comply with R. 1:20-20 within thirty days of his suspension. However, respondent never submitted to the OAE the affidavit required by R.1:20-20(b)(14), despite an August 10, 1999 letter from the OAE reminding him of his obligation and warning him that failure to comply with the order constituted contempt of court. According to a memorandum from the OAE investigator, respondent turned over the remaining records for the Jube estate on February 22, 1999.

Respondent's Neglect in the Administration of the Jube Estate

Respondent admitted that he never completed the administration of the Jube estate and never established the testamentary trust for the benefit of Ahearn. Furthermore, respondent admitted the following facts:

1. He never notified Thistle and Powell that they were beneficiaries of Jube's will and never forwarded their bequests to them;

2. The state inheritance tax return that he filed was incorrect in that it did not include approximately $200,000 in stock owned by Jube, even though respondent knew about the stock;

3. He never filed a federal estate tax return;

4. He never filed federal and state fiduciary income tax returns for 1993, 1994, 1995 and 1996;

5. Some of the stock was never placed in the Shearson account and never reissued to the estate. Shearson returned to respondent the stock certificates that were held jointly by Jube and his wife and requested that respondent supply them with Jube's wife's death certificate and an affidavit of domicile. Respondent never sent the documents to Shearson and never had the certificates reissued to the estate or the trust. Instead, he kept the stock certificates in a box in his home;

6. Stock that was held in Jube's name alone was not deposited in the Shearson account;[1]

7. He failed to deposit all stock dividend checks into an estate account, thereby allowing them to become "stale." Although he contended that he subsequently returned the checks to the relevant companies to be reissued, he admitted that he did not keep track of them to verify whether they had been actually reissued;

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[1] Respondent did not explain why he did not send those stock certificates to Shearson.

8. In June 1993, he failed to deposit a Van Kampen dividend check. The Van Kampen account was worth $170,690 at the time of Jube's death and respondent received monthly dividend checks of approximately $1,200. Because respondent failed to deposit the check, it was reversed by Van Kampen and reinvested into the account. After respondent failed to return Van Kampen's telephone calls, Van Kampen changed the status of the account to "income reinvestment," whereby the dividends were reinvested in the account, instead of being sent to respondent. Van Kampen also retained Keane Tracers, Inc. to locate the owner of the securities. Keane Tracers' fee was twenty-five percent of the account value. Although respondent realized that he was no longer receiving dividend checks from Van Kampen, he never ascertained why Van Kampen stopped issuing the checks and did not reply to Keane Tracers' letters to him;

9. He failed to deposit several General Electric ("GE") dividend checks. GE also retained Keane Tracers, whose fee was paid by the estate;

10. The Exxon Corporation account statement showed that stock dividend checks were sent to respondent on a quarterly basis. However, five dividend checks, totaling $2,377.44, were not deposited in any estate account and could not be located;

11. He allegedly gave Jube's jewelry, worth $19,755, to Ahearn. Respondent did not obtain a receipt or a refunding bond and release for the jewelry. There was no evidence that Ahearn had received the jewelry. According to Swedberg, Ahearn did not have the jewelry;[2]

12. He did not prepare an inventory of the contents of Jube's safe deposit box;

13. He took one of Jube's cars as corpus commissions. Although he contended that his friend, a car dealer, had told him that it was worth $1,000, he never obtained a written estimate;

14. He did not keep records of the income earned by the estate. Therefore, his payments to Ahearn were based on his estimates of the income;

15. He loaned $100,000 in estate funds to Laura Weber, who signed a note with interest at 5.25 percent annually. Although she made a few payments on the loan, she ceased making payments because respondent did not provide some paperwork that she had requested. Respondent took no action to provide the paperwork or to collect the loan

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[2] The complaint did not contain specific charges related to respondent's disposition of the jewelry.

payments. He also gave another of Jube's cars, a Lincoln town car valued at $20,000, to Weber.

The Commissions Taken by Respondent

Respondent took $52,997.93 in executor's commissions from the estate, as well as the automobile valued at $1,000. Of the $52,997.93, $35,000 pertained to corpus commissions, while $17,997.93 was allocated to income commissions. According to respondent, he took the automobile as a corpus commission as well.

Respondent took the $35,000 in corpus commissions in the following annual amounts: 1992, $10,000; 1993, $0; 1994, $10,000; 1995, $5,000; 1996, $5,000; and 1997, $5,000. The complaint alleged that, except for 1993, respondent took an amount in excess of the maximum statutory annual corpus commission allowed without court approval.[3] The alleged excess annual corpus commissions ranged from $2,606.85 to $7,606.85. Although respondent conceded that in some years he had taken more than he was allowed without court approval, he contended that the total commissions taken were less than the allowable amount. The statutory maximum on a $1,196,574 estate amounts to $41,931.48; on a $1,376,265 estate it totals $45,525.30.

With respect to income commissions, the estate earned $254,584.99 in income,

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[3] N.J.S.A. 3B:18-14 states that an executor can take the following commissions based on the gross value of the estate: 5% on the first $200,000; 3.5% on the excess over $200,000, up to $1,000,000; and 2% on the excess over $1,000,000. N.J.S.A. 3B:18-17 states that an executor "may annually, without court allowance...take...one-fifth of 1% of the value of the corpus."

while respondent was executor. The complaint alleged that respondent took more than six percent of the income earned in 1993, 1995, 1996 and 1997, as well as more than six percent of the total income.[4] The excess annual income commissions ranged from $30.43 to $4,354.51. Furthermore, respondent took a total of $17,997.93 in income commissions, when he was only entitled to take $15,275.09.

Respondent, however, contended that he was entitled to take an aggregate of $57,206.57 in both corpus and income commissions and that he took only $53,997.93.

The Testimony of Louise Reich

Laura Weber retained Louise Reich as attorney for the estate. Reich testified that, as of the August 2, 2001 ethics hearing, a trust had been established, Jube's estate had essentially been closed and all assets had been transferred to the trust, except for approximately $1,000 in the estate checking account. According to Reich, she was still attempting to resolve several problems caused by respondent, including: (1) stock certificates of AT&T and Bell Atlantic (now Verizon) had been sent to the state as unclaimed property and she had not yet succeeded in obtaining them; (2) Johnson Controls' dividend checks, totaling approximately one thousand dollars, had not been cashed and could not be located; and (3) respondent had deposited First Union dividend

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[4] N.J.S.A. 3B:18-13 states that an executor may take income commissions of six percent "without court allowance on all income received by the fiduciary." Although the statute states that commissions may be taken on all income "received," the complaint did not distinguish

checks in his trust account and she had not been able to get an accounting of those checks. Reich stated that, although she did not have any reason to believe that there were additional estate assets, she could not be certain of that because she was unable to obtain all of the records for the accounts respondent had used. According to Reich, respondent never offered to assist her in locating assets.

Reich testified that respondent's neglect of the estate and his failure to establish the trust resulted in the following damages to the estate/trust, estimated to be between $250,000 and $300,000:

1. The failure to include the Van Kampen account on the state inheritance tax return resulted in the payment of $13,455.02 in interest and penalties;

2. The failure to file a federal estate tax return resulted in an IRS assessment of $298,534.33 in interest and penalties against the estate. However, as a result of Reich's negotiations with the IRS, the assessment was reduced to $164,609.84;

3. The failure to file federal fiduciary income tax returns for 1993, 1994, 1995 and 1996 resulted in interest and penalties. According to Reich, the estate had to pay $17,524.58 to the IRS in interest and penalties for the late filing of the 1993 fiduciary tax return. She did not testify as to the interest and penalties for the remaining years;

4. The failure to file state fiduciary income tax returns for 1993, 1994, 1995 and 1996 resulted in the payment of $7,496.96 in interest and penalties to New Jersey;

5. The estate had to pay $61,665.75 to Keane Tracers to "recapture assets which we subsequently learned [respondent] had been aware of, but for some reason we didn't know. Had never included them on the transfer inheritance tax return";

6. The estate had to pay $800 in accounting fees for the filing of tax returns, $926 in investigation fees for the "collection of assets," $390 in bank fees to obtain archived records and $2,000 to transfer agents to obtain 1099 forms needed for the tax

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between income earned by the estate and income actually received by respondent.

returns;

7. As of August 2, 2001, Reich's fees totaled $16,153.36;

8. $2,900 of estate funds remained in respondent's trust account when the funds were frozen and turned over to the court trust fund. Reich was not sure that she would be filing a petition to obtain the funds because the costs of filing the petition might be equal to or greater than $2,900;

9. If the trust had been established and the income paid to Ahearn, neither the estate nor the trust would have incurred any tax liability because Ahearn would have had to pay the tax due on the income. Reich testified that trusts and estates are taxed at a much higher rate than are individuals.

10. The estate had to pay a forensic accountant to determine if Ahearn was entitled to additional income from the trust for the years when respondent was estimating the income. In order to make that determination, the accountant had to calculate the "opportunity cost" resulting from the "loss of control of the assets" and the "loss of the assets availability to be invested possibly in other assets in a more balanced portfolio." The accountant was also "looking at all of the assets that were part of the estate and trying to project what income these assets would have generated had they been put into the trust account in a timely fashion." Reich determined that $5,000 would have to be paid to the accountant.

The Testimony of Jeffrey McWeeney

Both parties agreed that McWeeney could testify as an expert witness, as well as a fact witness. From 1990 to 1997, McWeeney was first a staff attorney and then a special deputy surrogate for the Ocean County surrogate's office. Since 1997, his private practice has been "exclusively estate related."

McWeeney testified that, while respondent was the executor, there "wasn't a tremendous amount done." He described the Jube estate as a "relatively clean, easy estate to administer" and estimated that it should have been closed within six months to a

year.

According to McWeeney, respondent had not provided any assistance in untangling the problems caused by his negligence and the only information received from respondent was the court-ordered accounting. He described the accounting as "sketchy," not a "full blown accounting that one would get on the closure of an estate or one filed in court to finalize an estate." McWeeney complained that respondent never provided the "independent paperwork" that was used to prepare the accounting. Therefore, according to McWeeney, it was necessary to "recreate the estate and go back and try to figure out what happened."

McWeeney did not know if respondent appreciated the consequences of his negligence: "it's fairly traumatic and had an affect [sic] on Catherine Ahearn's ability to live her life and will have an effect on Laura Weber for what should be her rightful inheritance."

According to McWeeney, he had an "open application" with the court to obtain a judgment against respondent as soon as the total amount of the damages may be ascertained. McWeeney stated that he was awaiting the forensic accountant's report.

With respect to executor's commissions, McWeeney testified that it is the practice in Monmouth and Ocean counties for executors to take commissions without court approval, even if the commissions exceed the statutory maximum.[5] On the other hand, he

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[5] N.J.S.A. 3B:18-14 was amended June 16, 2000 to make it clear that court approval

stated,

> [i]f you're going to take the commissions, you have an obligation and duty and responsibility to account for it at some point in time. And in this particular case it just – you know, we accepted the fact it was taken but what was it taken for, you know. Even though it's a statutory right and theoretically I can be an executor and do nothing and have my attorney do 99 percent of the work and still get my commission, you still have accountability. Somebody had to have done it whether it was the attorney or executor that did it. In this case the attorney is the executor and the work did not get done period. I'm not saying no work was done. I'm saying what should have been done was not done, so there's a quantifier there to say am I entitled to take commissions. Obviously Judge Fischer felt not that's why he required them to be returned.

McWeeney testified that many attorneys who serve as executors wait to take their commissions and/or fees until they are ready to close the estate, submit an informal accounting to the beneficiary showing the commissions and/or fees and obtain a waiver of a formal accounting. McWeeney also noted that, when an estate is worth more than $200,000, an attorney who is also an executor must keep a record of the services provided as attorney separately from those provided as executor to make sure that there is no duplication of services.

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of executors' corpus commissions is not necessary, absent objection by a beneficiary. The senate judiciary committee statement explained that it had been the general practice that court approval of executors' commissions was "rare," but that the IRS had sometimes taken the position that it would not allow the amount claimed as executor's commissions on the estate tax return because the amount had not been approved by the court. Therefore, the statute was amended to state that the court could reduce the commissions "upon application by a beneficiary adversely affected upon an affirmative showing that the services rendered were materially deficient or that the actual pains, trouble and risk of the fiduciary...were substantially less than generally required for estates of comparable size."

McWeeney further testified that, when an attorney drafts a will in which he or she is named an executor or trustee, case law holds him or her to a "much higher standard."

Respondent's Testimony

Respondent did not recall why Jube had selected him to be executor and trustee. He stated that he and Jube had discussed that a financial institution or a relative could serve as the fiduciary. He did not remember, however, why Jube had rejected those alternatives.

Respondent contended that his initial handling of the Jube estate was appropriate, but that he became overwhelmed by the amount of paperwork that he received for the estate and by his other obligations. In addition to his full-time job with Lions Head and his own small solo practice, respondent was involved in many community activities. He stated as follows:

> I think what happened to me was I realized I made a big mistake and basically I just ignored it thinking maybe it would go away. Somehow it would correct itself. Somewhere down the road I would be able to correct it that's why I did – either before I heard from Mr. McWeeney. Before that I heard from a different attorney, you know, asking for an accounting. And it was my intent all along to provide one. But really what happened was, as I said, Mr. Jube had a lot of holdings which he held them individually. Did not have them in a brokerage firm, so the amount of checks that came in with all the other stuff just overwhelmed me.

According to respondent, before giving Laura Weber the $20,000 car, he discussed it with Ahearn. Apparently, he also communicated with Beach, Ahearn's guardian at the

time, before loaning $100,000 to Weber.[6]

With respect to the alleged excessive commissions, respondent testified that it was his understanding that an executor is entitled to take a corpus commission of five percent of the estate's value and an income commission of six percent of the annual income generated by the estate. According to respondent, his understanding was based on information obtained while working for another attorney in 1985. He conceded that he did not research the issue when he became executor of Jube's estate. Respondent testified that he put $72,000 in executor's commissions on the 1992 inheritance tax return because he believed that he was entitled to that amount, based on the size of the estate.

Respondent denied knowledge that the statute permitted an executor to take only five percent of the first $200,000 of all corpus and that thereafter the percentage decreased for larger estates. He also asserted that he was unaware of the statutory limit (one-fifth of one percent annually) on the amount of corpus commission, in the absence of a court order. He claimed that he believed that he was entitled to more than the $53,997.93 that he took as total commissions, based upon the gross value of the estate and its total income. He also pointed out that he never charged the estate legal fees for the sale of Jube's house, including the preparation of the deed and affidavit of title and the review of the contract and title binder.

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[6] Conceivably, there could have been ethics improprieties in respondent's giving the automobile to Weber and lending her estate monies. However, the complaint did not contain any charges related to those transactions.

According to respondent, by the end of 1993, he realized that he was neglecting the estate. However, he claimed, he continued to take commissions because he believed that he was entitled to them and had every intention to conclude the administration of the estate. He stated that he took commissions sporadically, rather than wait until the estate was concluded, because he wanted to decrease his income tax liability.

As to his failure to comply with the court orders directing him to reimburse the estate, respondent testified that he did not have the necessary funds. He stated that he left his employment at Lion's Head in 1999 for a position that paid $12,000 less, but gave him stock options; that company, however, went out of business. According to respondent he had not worked in four months. Respondent also stated that, at the time of the ethics hearing, he had a son in high school and a daughter in college and that her college costs were $23,000 annually.

As to his plans to repay the estate, respondent testified as follows:

> Well, one of the things I would hope to do if I were to get my license back, I would still plan on having a regular job. I would not go into private practice. But I'm sure that – my wife is a realtor and I have had several friends ask me, you know, am I going to go back practicing and that money basically I would give 100 percent – I would give whatever I netted out I would return that. That would be a start.

Asked about his plans to compensate the estate, if he is not reinstated, respondent replied "I have to see what I can do. Honestly, I don't know."

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In mitigation, respondent contended that, from April 1992 until January 1993, he had correctly administered the estate. He stated that part of his problem in administering the estate was due to his attempts to minimize estate expenses by not retaining an attorney and/or an accountant to assist him.

Respondent also testified about his several community activities: Manasquan borough councilman, member of the planning board, member of the board of trustees of the food bank of Ocean and Monmouth counties, administrator for the mid-Monmouth basketball league and director of an elementary school basketball program.

Lastly, respondent presented letters from three attorneys, the executive director of the food bank, the mayor of Manasquan and a member of the Manasquan borough council, attesting to respondent's reputation for honesty and dedication to community service.

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The special master dismissed the charge that respondent knowingly misappropriated funds by taking excessive commissions from the Jube estate. Although the special master did not state the basis for the dismissal, in another part of his report he alluded to McWeeney's testimony that "the vast majority of the estates are concluded informally rather that [sic] court directed resolution" and that "[McWeeney] has seen it done regularly and, as administrator, has himself taken commissions without compliance with the statute that requires court approval."

Although the special master did not address each of the remaining charges, presumably because respondent admitted the allegations in those counts of the complaint, he found that respondent grossly neglected the handling of the Jube estate. The special master recommended that respondent be suspended for five years and that he be required to complete ten hours of continuing legal education courses, including courses in estate administration.

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Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

Respondent admitted – and the record contains clear and convincing evidence – that he violated RPC 1.1(a) by grossly neglecting the administration of the Jube estate and failing to establish the trust; RPC 1.15(b) by failing to safekeep the estate's funds and property, in that he did not provide Ahearn with the income that she was entitled to receive from the trust and did not notify Thistel and Powell that they were beneficiaries of the estate or forward their bequests to them; RPC 1.15(d) by failing to comply with the recordkeeping provisions of R.1:21-6; RPC 8.1(b) by failing to cooperate with the OAE's investigation and RPC 8.4(d) by failing to comply with the probate court's orders of August 1, 1997 and November 14, 1997 and with the Supreme Court's order of October 6, 1998. Respondent also admitted that his failure to provide to the OAE the affidavit

required of suspended attorneys violated R.1:20-20 and constituted contempt of court. For the above violations, respondent argued that the "time served" since his October 6, 1998 temporary suspension was a sufficient sanction.

On the other hand, respondent denied that he knowingly misappropriated estate funds by taking excessive executor's commissions. With respect to corpus commissions, respondent pointed out that he took $36,000 (including the automobile), while the total amount permitted by N.J.S.A 3B:18-14 was $41,931.48 on a $1,196,574 estate.

Respondent admitted that he took more in corpus commissions annually than permitted by N.J.S.A. 3B:18-17, but contended that he was unaware of that statute. He also pointed to McWeeney's testimony that it was the practice in Monmouth and Ocean counties not to seek court approval of executors' commissions, even when the commissions exceeded the statutory maximum. In addition, respondent contended that the practice of not seeking court approval was clarified by the 2000 amendment to N.J.S.A. 3B:18-14, which states that court approval of an executor's commission was not necessary, absent objection by a beneficiary. Respondent conceded, however, that the amendment was not made applicable to N.J.S.A. 3B:18-17.

With respect to income commissions, respondent admitted that, in addition to excessive interim commissions, he took more than six percent of the total income earned by the estate. Respondent paid himself $17,997.93, while the six percent statutory maximum amounted to $15,275.09. However, he pointed out that he was entitled to take a total of $57,206.57 in both corpus and income commissions and that he took only

$53,997.93.

The OAE, on the other hand, argued that, despite McWeeney's testimony as to the accepted practice, there was no legal authority to support respondent's excessive commissions without the need to obtain court approval. In support of its position that respondent's excessive commissions constituted a knowing misappropriation of estate funds and warrants disbarment, the OAE cited In re Simeone, 108 N.J. 515 (1987) and In re Gleason, 96 N.J. 1 (1984).

In Simeone, the attorney was suspended for six years, retroactively to the date of his 1980 temporary suspension. He was not disbarred because "the proofs [in two separate cases] fall short of establishing a knowing misappropriation of funds." In the first case, Simeone, while executor of an estate worth approximately $315,000, consisting primarily of savings bonds, took $36,000 in commissions. The probate court found that he was entitled to $10,000. In addition to taking excessive commissions, Simeone failed to render an accounting, despite a court order; failed to notify all of the beneficiaries about the will; immediately cashed in the savings bonds and paid a tax on the accumulated interest, resulting in a tax loss to the estate; and failed to produce the estate records to ethics authorities. With respect to the excessive commissions, Simeone testified that he had incorrectly believed that he was entitled to ten percent of the corpus and income.[7] The Court found negligent, not intentional, misuse of client's funds and of

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[7] In the second case, Simeone received $17,462 in proceeds from a December 1979

the estate's funds, as well as multiple instances of gross neglect and misrepresentations to clients regarding the status of their cases.

The OAE argued that, unlike Simeone, respondent "cannot credibly claim a good faith belief of entitlement to post-1993 income and corpus commissions" because he did little, if any, work on the estate after 1993. Specifically, the OAE pointed out that respondent failed to establish the trust, neglected the administration of the estate and "made no attempt to either formally or informally settle his fiduciary account."

In Gleason, the attorney was appointed administrator of a client's estate and guardian for the client's son in August 1975. At that time, Gleason's trust account contained funds from his client's refinancing. Between August 1975 and "early 1979," he used $4,500 of the funds for his personal use. Gleason admitted that "he knew he was wrong at the time he took the money" and intended to return the funds to his trust account. Gleason contended, however, that the "monies ultimately were due to him" for executor's commissions and for his legal services in connection with the sale of the client's house. The Court found that his misuse of the funds was not "excused" by his claim that the monies were ultimately due him and that, accepting Gleason's claim to commissions and fees, he was still out of trust by more than $700.

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real estate closing, which sum was to be paid to the seller. Despite repeated requests for the funds, Simeone did not pay the seller until April 1980, at which time he had to use $10,000 of his own funds. He blamed his trust account shortage on his poor accounting practices.

The Court suspended Gleason for eighteen months, retroactively to his March 1982 temporary suspension. Although the Court did not expressly state why Gleason was not disbarred, it alluded to In re Smock, 86 N.J. 426 (1981). In Smock, the attorney was suspended for two years for knowing misappropriation of client's funds. The Court did not disbar him because his misconduct predated In re Wilson, 81 N.J. 451 (1981). Gleason's actions also predated Wilson.

Like Simeone and unlike Gleason, respondent testified that he believed that he was entitled to the executor's commissions. His testimony is supported by the fact that he showed executor's commission of $72,000 on the inheritance tax return he filed in 1992, as well as by McWeeney's testimony that (1) executors generally do not seek court approval of their commissions, even when the commissions exceed the statutory maximum and (2) an executor can retain an attorney, "do nothing," have the attorney do the work and still collect executor's commissions. See, also, N.J.S.A. 3B:18-6 ("If the fiduciary is a duly licensed attorney of this State and shall have performed professional services in addition to his fiduciary duties, the court shall, in addition to the commissions provided by this chapter, allow him a just counsel fee.") Furthermore, with respect to the income commissions, respondent did not keep accurate records of the estate income, making it more likely that the excessive income commissions were the result of mistake, rather than intentional misuse of estate funds. Finally, the special master obviously found credible respondent's testimony that he honestly believed that he was entitled to the commissions at the time.

In its brief, the OAE argued that respondent was entitled to income commissions only as a trustee, pursuant to N.J.S.A. 3B:18-24, rather than as an executor, pursuant to N.J.S.A. 3B:18-13, and that, because respondent did not establish the trust, his "receipt of income commissions as an executor for the lengthy period from 1993 to 1997 was knowingly without authority." However, the complaint charged that "respondent was entitled to a maximum annual amount equal to 6% on all income received as executor pursuant to N.J.S.A. 3B:18-13" and that his taking of amounts in excess of that statute's maximum in 1993, 1995, 1996 and 1997 constituted knowing misappropriation. Neither the complaint nor the ethics hearing focused on the issue of whether respondent misappropriated estate funds by reason of his failure to establish the trust. Therefore, we did not deem the complaint amended to add such a charge. We further noted that a trustee under a will is also entitled to a commission of six percent on all income received by the trustee, without court approval. N.J.S.A. 3B:18-24.

In light of the foregoing, we found no clear and convincing evidence that respondent knowingly misappropriated estate funds. However, notwithstanding McWeeney's testimony regarding the practice in Monmouth and Ocean counties of taking executors' commissions in excess of the statutory maximum without court approval, respondent's actions were in derogation of the statutes.

There remains the issue of discipline. Respondent's administration of Jube's estate was appalling. That he became overwhelmed with the volume of work involved in no way excuses or mitigates his conduct. He had several alternatives available to him,

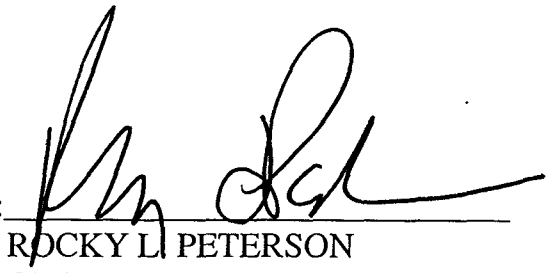
such as hiring competent professionals to assist him in the administration of the estate, reducing his political and other activities or withdrawing as executor and trustee. Instead, he did nothing.

Respondent's reckless disregard of his fiduciary responsibilities has cost the estate hundreds of thousands of dollars. His conduct was rendered more egregious by his refusal to take any steps to correct the chaos his negligence created.

Of particular concern to us was respondent's contemptuous disregard of two probate court orders for the production of the Jube estate records and an accounting and the return of all fees and commissions to the estate. It was not until he was arrested that he agreed to produce the accounting. Although he was ordered to provide the accounting by January 1, 1999, he did not do so until February 22, 1999. According to a memorandum from the OAE investigator, at that time, respondent also turned over the remaining records for the Jube estate. As of the ethics hearing, respondent had no concrete plan to comply with the court orders to repay to the estate the $53,997.93 in executor's commissions.

In light of the foregoing, we unanimously determined to suspend respondent for three years, retroactively to February 22, 1999. Prior to reinstatement, respondent is to comply with the reimbursement provisions of the probate court orders of August 1 and November 14, 1997. Two members did not participate.

We further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

By: 

ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of William E. Schmeling
Docket No. DRB 02-145

Argued: June 20, 2002

Decided: August 23, 2002

Disposition: Three-year suspension

Members	*Disbar*	*Three-year Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson		X					
Maudsley		X					
Boylan		X					
Brody		X					
Lolla		X					
O'Shaughnessy		X					
Pashman							X
Schwartz							X
Wissinger		X					
Total:		7					2

by Isabel Frank 8/21/02
Robyn M. Hill
Chief Counsel