SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-157

IN THE MATTER OF	:
DONALD D. PHILLIPS,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 17, 1991

Decided: October 3, 1991

Rocco J. Tedesco appeared on behalf of the District I Ethics Committee.

David R. Fitzsimons, Jr. appeared on behalf of the respondent.

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

This matter is before the Board based upon a presentment filed by the District I Ethics Committee ("DEC"). The single issue before the DEC concerned respondent's failure to take prompt action in an estate matter.

Respondent was admitted to the New Jersey bar in 1960. His office is located at One South New York Avenue, Atlantic City, New Jersey. Respondent was charged with failing to conclude the probate of an estate for a six-year period and for failing to reply to telephone calls and letters made by the beneficiaries' attorney.

On or about December 27, 1982, respondent prepared the Last Will and Testament of the decedent, George W. Leek. Respondent was also named therein as the executor of the estate. Helen, George Leek's great-niece, and her husband, Norman Carson, were named beneficiaries under the will. George Leek devised his home and garage located in Oceanville, New Jersey, to the Carsons. According to the will, they were also to have received one-sixth of the remainder of the estate.

George Leek entered the Linwood Convalescent Center approximately two and one-half years before his death. In or about September 1981, he executed power-of-attorney to his great-nephew, Harold Leek. Prior to George Leek's death, on or about January 25, 1983, Harold Leek entered into a contract for the sale of George Leek's property, apparently with his great-uncle's knowledge. George Leek died on February 19, 1983. Settlement on the property occurred thereafter on April 14, 1983. On that same date, the will was admitted to probate, letters testamentary were issued to respondent, as executor, and respondent opened an estate account as well.

Apparently, respondent had provided the beneficiaries with a copy of the will at the funeral. Subsequently, the Carsons attempted to contact respondent on a number of occasions to determine the status of their bequest. Their efforts were to no avail. In July 1983, five months after George Leek's death, the Carsons contacted Robert A. Cooper, an attorney practicing in Northfield, New Jersey. The Carsons sought Cooper's assistance to

ascertain why they had not yet received a distribution from the estate.

Cooper wrote four letters to respondent on behalf of the Carsons. The letters, dated August 9, 1983, September 13, 1983, October 13, 1983 and December 22, 1983 (Exhibits C-5 to C-8) went unanswered. Cooper's first letter indicated that, on several occasions, the Carsons had attempted to contact respondent regarding their interest in the Leek estate. In that letter, Cooper also indicated to respondent that the Carsons were entitled to an accounting. He advised respondent that the residuary estate had to be exhausted prior to invading the Carsons' specific bequest. Finally, Cooper informed respondent that the Carsons were particularly concerned by the fact that respondent had made no attempt to contact them regarding the status of the estate. (Exhibit C-5).

When he received no reply, by letter dated October 13, 1983 (Exhibit C-1), Cooper threatened respondent with court action. There was some indication in Cooper's December 22, 1983 letter that he had finally had some contact with respondent. The letter stated: "I am still awaiting a response in the Leek matter. It was my understanding that same would be forthcoming. Please provide me with the necessary information immediately." (Exhibit C-8). Despite Cooper's entreaties and his earlier threat of court action, respondent failed to contact either Cooper or the Carsons.

The Carsons moved to Virginia sometime in 1984. In February 1984, they forwarded to Cooper a copy of the settlement sheet from

the sale of the George Leek's property. Cooper opined that grievants probably received the settlement sheet directly from the title company involved in the closing of the property.[1] Sometime in 1984, Cooper and the Carsons explored the possibility of initiating a formal action against respondent. The Carsons, however, were not capable of financing litigation against respondent. The Carsons met with Cooper again in 1987 and thereafter wrote Cooper a letter in 1989. Respondent had still failed to contact either Cooper or the Carsons.

On November 21, 1988, the Office of Attorney Ethics received Helen and Norman Carson's grievance against respondent. Approximately five months later, on April 13, 1989, respondent, with the assistance of Frank J. Ferry, Esq., prepared the transfer inheritance tax return for the estate of George Leek. The filing took place more than six years after the decedent's death. Finally, under cover letter dated January 26, 1990, grievants received a distribution from the estate, in the amount of $1,650.28. Receipt of same was acknowledged on January 31, 1990.

At the time of George Leek's death, the only assets in his estate were his home and three Series E savings bonds. As executor, respondent's responsibilities included marshaling the estate's meager assets, paying the debts of the estate and making the appropriate distributions pursuant to the will.

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[1] The information contained in the settlement document reflected that there was very little money left following the sale of the property. A substantial portion of the proceeds was used to satisfy a lien that had been placed on the property by the nursing home.

At the DEC hearing, respondent admitted that he had had no contact with either the grievants or Cooper from 1984 through 1990. He failed to proffer an explanation for same. In his defense, respondent testified that, during the period of time between George Leek's death (February 19, 1983) and April 1989 (when the inheritance tax return was filed), a period of more than six years, he attempted to resolve a difficult legal problem with respect to the estate. Respondent claimed that he believed that, because the decedent's realty was "under an agreement of sale during his lifetime, [ ] there was an equitable conversion of the property . . . . that [the] equitable conversion led to an abatement of [the] bequest and that the asset in [his] hands was cash and not the property." T13[2] Respondent claimed that it was not until the filing of the transfer inheritance tax return, in 1989, and the subsequent audit by the Transfer Inheritance Tax Bureau, that he became aware of the applicable statute. According to respondent, the relevant provision of the New Jersey Uniform Probate Code contradicted his original belief that grievants "did not have a claim and the [the proceeds of the estate] would have to be apportioned among the bequests." T14 Respondent claimed that his misperception of the law was the reason for his failure to distribute the proceeds of the estate.

Respondent testified that a transfer inheritance tax return should be completed within eight months. Interest was due as the

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[2] T denotes the transcript of the district ethics hearing on April 23, 1991.

result of respondent's six-year delay. Respondent recognized his responsibility for same and personally paid the interest. The estate was, therefore, not harmed as a result of respondent's failure to act.

By way of explanation for his inaction, respondent testified that, between 1983 and 1987, he had had an enormous turnover of secretaries and he had also been involved in two complex and lengthy murder trials. He admitted, however, that what little work he did accomplish on the estate did not require six years to complete. Respondent conceded that there was no excuse for what had happened and stated that he was sorry and ashamed for his conduct. He explained, however, that, when faced with a legal question for which he did not have the answer, he put the file aside and just let it sit. In an attempt to correct problems in his practice, respondent advised the DEC that, to prevent future delays or mix-ups similar to those in this case, he had established a calendar control to project his deadlines. As the result of the foregoing evidence, the DEC found that respondent had violated RPC 1.1(a), 1.3 and 1.4(a).

CONCLUSION AND RECOMMENDATION

Upon a de novo review, of the full record, the Board is satisfied that the conclusions of the DEC in finding respondent guilty of unethical conduct are fully supported by clear and convincing evidence. Respondent admitted that he had not been in

contact with the Carsons, other than to provide them with a copy of the will. He further neglected to respond to their inquiries and readily admitted that he had not been in contact with the Carsons or their attorney from 1984 through 1990. T34.

Respondent was, at all times relevant to this proceeding, acting as both executor and attorney for the estate, notwithstanding that, at some undetermined time, he obtained the services of Frank J. Ferry, Esq. to assist him. Respondent's responsibility as attorney for the estate also extended to the beneficiaries. An attorney must act in his business transactions with high standards and his professional obligation reaches all persons who have reason to rely on him even though not strictly clients. In re Katz, 90 N.J. 272, 284 (1982), citing In re Lambert, 79 N.J. 74, 77 (1979); In re Genser, 15 N.J. 600, 606 (1956). Respondent was, therefore, required to respond to the beneficiaries' inquiries with the same degree of diligence he owed to any of his clients.

The evidence presented at the DEC hearing established that the Leek estate was relatively uncomplicated because there were few assets and debts. Apparently, the only legal issue that arose during the administration of the estate was whether the agreement of sale during the decedent's lifetime created an equitable conversion and an abatement of the Carsons' bequest. Regardless of the complexity of this issue, it could not possibly have taken six years to resolve. In fact, respondent admitted he had put the matter aside and forgotten about it. Respondent did not take any

further action to complete the probate of the estate until after the instant grievance was filed.

A review of the record in its entirety demonstrates clear and convincing evidence of respondent's violation of RPC 1.3 for failing to act with reasonable diligence and RPC 1.4(a) for failing to keep the beneficiaries reasonably informed about the status of the matter. The Board, however, does not agree with the DEC's conclusion that respondent's conduct rose to the level of gross neglect.

While prior cases are helpful in suggesting the scope of appropriate discipline, the individual facts of each disciplinary matter must be considered. In re Lunn, 118 N.J. 163, 167 (1990). Mitigating factors, In re Goldstein, 116 N.J. 1, 6 (1989), as well as aggravating factors, such as prior disciplinary history, In re Vincenti, 114 N.J. 275, 285 (1989), are also to be considered in determining the severity of discipline to impose.

Similar cases involving lack of due diligence, gross neglect and failure to communicate with a client have generally resulted in the imposition of a public reprimand. For example, a public reprimand was ordered in a case where an attorney ignored the administration of an estate. See In re Yetman, 113 N.J. 556 (1989). In Yetman, the attorney was not experienced with estate matters, but nevertheless undertook the administration of what seemed to be a simple estate. Complications soon developed and the attorney ignored the matter, instead of turning it over to someone more experienced. The attorney also ignored calls from the

grievant regarding the status of the estate and, thereafter, ignored similar requests from two attorneys whom the grievant had contacted for assistance. In addition to the foregoing, the attorney failed to cooperate with the DEC. Finally, at the DEC hearing, the attorney assured the committee that he would immediately hand the estate file over to new counsel, but failed to do so for a period of three months. Mitigating circumstances existed and the Court only imposed a public reprimand.

A public reprimand was similarly imposed in In re Stewart, 118 N.J. 423 (1990), also an estate matter. In Stewart, the attorney failed to pay the funeral bill in a timely fashion, failed to file the New Jersey inheritance tax form for fourteen months after he was retained, failed to provide an accounting to the grievant and failed to keep his client reasonably informed.

In this matter, respondent did not act with due diligence and failed to communicate with the beneficiaries of the estate. Respondent, however, candidly admitted his wrongdoing, fully cooperated with the ethics authorities and displayed deep remorse for his conduct, by which he was greatly embarrassed. Furthermore, he bore sole responsibility for the payment of the accrued interest that resulted from his excessive delay in filing the inheritance tax return. Lastly, he has incorporated calendar controls in his office to avoid similar problems.

The Board is aware that respondent received a private reprimand in 1988 for failing to disburse escrow funds and failing to communicate with his clients for two years. The Board noted,

however, that respondent's prior unethical acts occurred within the same time-frame of the instant infractions. Accordingly, they are not part of a pattern of misconduct.

In light of the compelling mitigating circumstances present in this matter, the Board is convinced that a private reprimand is sufficient discipline for respondent's misdeeds. The Board unanimously so recommends.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 10/3/97 By: _____
Raymond R. Trombadore
Chair
Disciplinary Review Board