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SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
DOCKET NO. DRB 98-383

IN THE MATTER OF :
JOHN R. LOLIO, JR., :
AN ATTORNEY AT LAW :

Decision

Argued: November 19, 1998

Decided: April 5, 1999

Joseph A. McCormick, Jr. appeared on behalf of the District IV Ethics Committee.

Arthur Montano appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for discipline filed by the District IV Ethics Committee ("DEC"). The complaint charged respondent with a violation of RPC 1.1(a) and (b) (gross neglect and pattern of neglect) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey and New York bars in 1986 and to the Pennsylvania bar in 1980. He is a shareholder in the law firm of Sherman, Silverstein, Kohl, Rose and Podolsky in Haddonfield, Camden County. He has no history of discipline.

The essential facts in this matter were stipulated during the DEC hearing. Those facts,

as set out in respondent's brief to the DEC, are as follows:

> Mr. Lolio's principal area of law is in estate planning, estate and trust administration and general taxation.
>
> During the period of 1992 through 1995, Mr. Lolio prepared approximately 1,200 wills, all of which were signed, sealed, published and declared by the testator in the presence of Mr. Lolio. The wills were self-proving.
>
> Of the foregoing wills, approximately 219[1] wills were signed by the testator in the presence of Mr. Lolio but either one or both witnesses who subscribed their names thereto were not present when the wills were signed by the testator/testatrix. Witnesses who signed outside the presence of the testator/testatrix were told and assured by Mr. Lolio, acting on behalf of the testator/testatrix, that he had seen the testator/testatrix sign the wills. He did in fact see them do so. It is conceded that the wills in question were not executed in strict conformity with the Statute of Wills. However, there was no deliberate attempt to circumvent the law.
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> [Exhibit R-3 at 1-2]

After respondent saw each testator sign the will, he executed the jurat.[2] He then brought the documents to his office, usually the following day, and asked his staff members to execute the witnesses' statement in the self-proving affidavit.

Respondent testified that in these cases he had been called upon to prepare the wills quickly by clients who were, for example, leaving on vacation or having medical procedures performed. Respondent typically took the wills to the client's home or office after normal business hours. Respondent stated that his requests to the clients to have witnesses available for the execution of the documents went unheeded. Respondent further explained that his

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[1]Respondent testified that a number of the 219 wills were properly executed, but that the firm erred on the side of caution and identified as questionable wills that, for example, named respondent's wife - a secretary at the firm - as a witness.

[2]For the purposes of this decision, the word "testator" is used in lieu of "testator/testatrix."

office was understaffed and that none of his employees were willing to accompany him after business hours to act as witnesses.

Respondent testified that, in at least ninety-eight to ninety-nine percent of these cases, he advised his clients that, if the wills were contested, the absence of witnesses at the time of execution could be problematic. According to respondent, his clients gave him oral authorization to advise the witnesses that the will had been signed in his presence and to have the witnesses sign the document thereafter. Respondent testified that he informed the witnesses that he had seen the testator execute the will, that the signature of the testator was legitimate and that the document was the client's will. Respondent added that he watched the witnesses sign the wills. The following was respondent's testimony:

> [RESPONDENT'S COUNSEL] What was your understanding of the general principles of agency?
>
> [RESPONDENT] You know, I felt that, and I believed that, and I got the authorization from the client, I was acting as their agent to be able to have the witnesses sign as a witness to the person's will as long as I had the authorization from the client to do so.
>
> [RESPONDENT'S COUNSEL] And under your -- and under the understanding that you had about basic principles of agency, were you under the belief that a person could act on behalf of another in doing anything that the other principal, as we would call it, desired to be done?
>
> [RESPONDENT] Yes. If someone else could sign the will on behalf of the testator, I felt that, you know, the testator allowed me to provide witnesses after the fact, as long as they were aware of it, that sort of followed the statute.
>
> [RESPONDENT'S COUNSEL] And the statute you're referring to is 3B:3-2?

[RESPONDENT] Right.

[RESPONDENT'S COUNSEL] Which allows someone to sign on behalf of a testator?

[RESPONDENT] Correct.

[T8/6/98 143-144]

Respondent testified that the witnesses were employees in his law firm and that, in "a good majority" of the cases, they had communicated with the testators throughout the will process. Respondent further explained that the witnesses knew when and where the wills were being signed because they knew his schedule. With regard to the communication between the witnesses and the testators, respondent stated the following:

[PRESENTER] Okay. And did you instruct the witnesses to contact the clients to confirm that the various testators had signed the will?

[RESPONDENT] They didn't make a written, you know, request, but a lot of times they'd -- I don't know what they did, but a lot of times they did call the client and ask if they signed the will. I'm sure they did. That was one of the things that I always recommended, if they didn't really think I had the authorization from the client to do that. If they didn't believe me, they could call the testator and get written confirmation.

[PRESENTER] So it was a matter of whether or not they believed you as to whether or not they would call?

[RESPONDENT] Correct, but they had the opportunity and the privilege to do so.

[T8/6/98 112-113][3]

Respondent's practices in connection with the execution of the wills came to the

[3]None of the witnesses to the wills were called to testify before the DEC about these procedures.

attention of his law firm in November 1995.[4] Each of the wills in question was then re-executed by the firm in accordance with statutory requirements. Fortuitously, no harm to any client resulted from respondent's actions. His firm adopted new procedures to avoid any future irregularities in connection with the execution of wills.

* * *

The DEC did not find a violation of RPC 1.1(a), determining that gross negligence had not been proven. The DEC did find, however, that respondent was guilty of a pattern of neglect, in violation of RPC 1.1(b). In addition, the DEC found that respondent was guilty of misrepresentation, in violation of RPC 8.4(c). Specifically, the DEC concluded that respondent failed "to include accurate dates in the jurats that he executed, and more importantly, that he placed witnesses in a position whereby they were executing inaccurate self-proving affidavits."

By way of mitigation, the DEC considered the unlikelihood that respondent would repeat his misconduct; the forty character letters submitted in respondent's behalf; respondent's exemplary reputation and lack of prior discipline; his involvement in charitable activities; respondent's cooperation with the disciplinary system and his apology during the hearing and to his law firm for the problems that his misconduct caused. Most important to the panel was respondent's lack of intent to deceive or defraud anyone in connection with

[4]The firm learned of the improper executions while investigating the allegations of a former employee who had sued the firm for wrongful termination of employment.

the misrepresentation. The DEC found that respondent had been motivated by his desire to accommodate his clients and his law firm.

The DEC recommended the imposition of a reprimand, relying on In re Doig, 134 N.J. 118 (1993) (reprimand imposed where the attorney undertook the dual representation of two persons in a business/real estate matter without obtaining their consent after full disclosure, altered a deed after closing, failed to inform co-owner and bank of action and misrepresented the reason for inclusion of additional name on deed).

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

There is no question that respondent was guilty of misconduct in connection with the execution of the wills. Indeed, several improprieties are immediately apparent:

1. Respondent signed the jurat, as a notary, after the testator had executed the will, but prior to the witnesses' signing the self-proving affidavit. Respondent stated that he had seen the testator and the witnesses sign the documents.[5]

2. The jurat contains only one date, although the testator and witnesses in most cases --

[5]In seventeen of the 219 wills in question, another individual notarized the will. Respondent testified that, in those cases, another attorney may have handled the execution of the documents. In addition, the head of respondent's firm testified that, although their investigation did not focus on the notarizations, he did not recall any evidence of improper notarizations on the wills in question.

signed the documents on different dates.

3. At respondent's direction, and as required in self-proving wills, the witnesses stated in the self-proving affidavits that they had seen the testators sign the wills. In fact, they had not done so.

Although respondent admitted that the wills were not executed in strict compliance with the statutory requirements, he argued that his actions would not have affected the validity of the wills. In his opening statement to the DEC, respondent's counsel contended as follows:

> You're going to hear about the statute that I referred to N.J.S.A. 3B:3-2 and that statute, which is the basis of the complaint against Mr. Lolio, requires that the testator sign the wills in the presence of witnesses or acknowledges his signature or acknowledges the will in the presence of witnesses, but that statute, and I'm going to read it to the panel, also provides that a person may sign a will for the testator. And I'll read this to you. 3B:3-2, Formal Execution of the Will. Except as provided in N.J.S.A. 3B:3-3, every will shall be in writing, signed by the testator or in his name by some other person, and I believe that that's a very important part of the statute and this case. And my position is this, and one reason I cannot concede that what Mr. Lolio did was, although not in strict conformity, was [sic] inappropriate and that wills, that the wills that were done would have been invalidated is because of the, that particular statute, that if a person can sign his name as a -- in the name-- can sign in the name of the testator, then certainly the testator ought to have the authority to appoint, impliedly or expressedly, [sic] an ability to do that for which he could have done himself.
>
> So under the statute of wills, under the agency principles which I think are applicable and which I will further elaborate on, it is my position that, and in view of the fact that there has been no opinion, no opinion on this subject whatsoever in the State of New Jersey, that I do not feel that I can concede that

what was done, even though the literal words of the statute were not complied with, was improper or inappropriate or that these wills would have been invalidated.

[T8/6/98 14-16]

In its entirety, N.J.S.A. 3B:3-2 reads as follows:

> Except as provided in N.J.S. 3B:3-3 [holographic will] every will shall be in writing, signed by the testator or in his name by some other person in his presence and at his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

As stated above, respondent testified that he believed that he could act as agent for the testator in obtaining the witnesses' acknowledgments and that the wills could have held up to a challenge at the time of probate. This argument misses the mark, however. Harm to the client is not essential to a finding of unethical conduct. Although one might posit that the wills may ultimately have been upheld as valid in a will contest, it is not reasonable for respondent to argue that he could act as an agent to arrange for witnesses' signatures in a self-proving will. Respondent's actions totally vitiated the protections for self-proving wills imposed by statute. Respondent, as attorney for the testator, was obligated to avoid any action that could potentially subject the wills to a contest. Respondent's conduct here, in fact, invited litigation in 219 cases. For obvious reasons, strict compliance with statutory requirements is required in estate matters.

By way of explanation for his actions, respondent testified that he was accommodating clients that had to have their wills executed on short notice and/or could not

come to his office. Although it is unlikely that on 219 occasions from 1992 through 1995 the testators needed their wills done posthaste, it is possible that respondent's actions were the result of good motives. However, an attorney's responsibility is to abide by the law and the Rules of Professional Conduct. When it became obvious that the witnesses were not present, respondent should have refused to allow the testators to execute the wills. At a minimum, if the reason for these improper executions was time constraints, respondent could have had the wills re-executed when the need for immediacy was over, for example, when the clients returned from vacation.

The DEC determined that respondent was not guilty of gross neglect. The Board agrees. In fact, respondent acted with intent. He knew that he was violating the statutory provisions, knew that a challenge of the wills could be a likely result and knew that, in admitting the wills to probate, the court would have relied on the witnesses' self-proving affidavits. In that sense, respondent violated RPC 8.4(c) as well as RPC 8.4(d) (conduct prejudicial to the administration of justice). Here, not only did respondent, on many occasions, affix his signature to a jurat that contained inaccurate information about the dates on which the testators and witnesses signed, but he did so before the witnesses signed and also encouraged the witnesses to affix their signatures to affidavits that contained inaccurate information. Specifically, the witnesses attested that they had seen the testators sign the wills, a statement that was false. Indeed, the purpose of a self-proving will is to eliminate the need for the witnesses' appearance in the future when the will is offered for probate.

In his briefs to the hearing panel and to the Board, the presenter concisely stated the improprieties in respondent's actions:

> It is submitted that the non compliance at issue with the 219 wills should not simply be characterized as 'not being strictly in compliance.' Rather, because of the consequences involved, it should be seriously considered.
>
> It is to be noted that the wills in question were 'self proving.' This means that the witnesses are asked to sign an Affidavit pursuant to N.J.S.A. 3B:3-4 which states that the witness has witnessed the signing of the will and that he or she is of sound mind and under no constraint or undue influence. How can a witness be asked to sign such an Affidavit when they have not observed the Testator. Such a situation is fraught with the possibility of possible fraud. Indeed, the basic purpose of the Wills Act is to provide safeguards. . . in order to forestall frauds by the living upon the dead. *In re Posey's Estate*, 89 N.J. Super. 293 (C. 1965), *aff'd* 92 N.J. Super [sic] 259 (App. Div. 1966). It is fortunate that none occurred in the instant cases.
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> There is no question that the above referenced statute requires that the signature of the Testator's signature be either witnessed by two witnesses or the Testator must acknowledge the genuineness of the signature personally to the witnesses. The Supreme Court has noted that the 'observatory function' of a witness to a will consists of actual witnessing, the direct and purposeful observation, of the signature of a testator to or acknowledgment of the will and entails more than physical presence or general awareness of the will's execution by the Testator. *In the Matter of the Estate of Peters*, 107 N.J. 263 (1987). If this is not complied with, the will shall be determined to be invalid. See *In re Wheary's Estate*, 18 N.J. Misc. 436 (1940). There can be no worse result for a Testator. See also, *In re Estate of Cunningham*, 198 N.J. Super. 484 (Law 1984).
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> [Exhibit 6 at 3]

Respondent claimed that the risk of an objection to the probate of these wills was "probably zero" because of "the way the wills were structured." Again, although the Board does not share respondent's conviction, even if the wills were to stand up to a challenge of validity respondent's conduct was still unethical. He knowingly circumvented the critical

safeguards of the statute, in the process exposing his clients to possibly protracted and costly litigation – with potential disastrous results to the will of the testator – and, very significantly, inducing the court to rely on defective procedural requirements, in admitting the will to probate. Moreover, the number of cases in which the improprieties occurred was staggering: 219 improperly executed wills. Unquestionably, respondent's conduct in connection with these wills was extremely serious, rather than merely a technical violation or harmless error, as urged by respondent's counsel.

The level of discipline in cases dealing with the improper execution of jurats, without more, is ordinarily an admonition or a reprimand. When an attorney witnesses and notarizes a document that has not been signed in his or her presence, but is signed by the legitimate party, the discipline imposed has ordinarily been a private reprimand (since 1994, an admonition).[6] If there are aggravating factors, such as the attorney's personal stake in the transaction, or the direction that a secretary sign the party's name on a document that the attorney then notarizes, or a pattern of practice, then the appropriate discipline is a reprimand. See, e.g., In re Giusti, 147 N.J. 265 (1997) (reprimand where the attorney forged the signature of his client on a medical record release form. The attorney then forged the signature of a notary public to the jurat and used the notary's seal); In re Rinaldo, 86 N.J. 640 (1981) (public reprimand where an attorney permitted his secretaries to sign two affidavits and a certification in lieu of oath, in violation of R.1:4-5 and R.1:4-8); and In re Conti, 75

[6]Because private reprimands were confidential, they cannot be cited.

N.J. 114 (1977) (public reprimand where the attorney's clients told his secretary that it was impossible for them to come to the attorney's office to sign a deed and instructed her to do "whatever had to be done" to record the deed. The attorney had the secretary sign the clients' names on the deed. He then witnessed the signatures and took the acknowledgment).

Where the improper acknowledgment is accompanied by other unethical conduct, the discipline generally should be more severe, as in In re Just, 140 N.J. 319 (1995). In Just, a three-month suspension was imposed where the attorney facilitated a conveyance that was questionable because of the grantor's apparent lack of competence and affixed a jurat to a signature he did not witness. More severe discipline resulted in In re Surgent, 79 N.J. 529 (1979). In that case, a six-month suspension was imposed where the attorney took an improper jurat for various clients who had signed a verified complaint and affidavits filed with the court. In addition, he entangled his personal business relationship with clients and acted against a corporation in a matter substantially related to his former representation of the corporation. In another serious case, In re Friedman, 106 N.J. 1 (1987) the attorney entered a guilty plea to three counts of falsifying records for improperly affixing his jurat to three affidavits subsequently submitted to an insurance company. The Supreme Court found that the attorney's conduct had not been an aberrational act done with the purpose of benefiting a client, but a pattern of practice that would undoubtedly have continued if not for the criminal prosecution. In that case, the Court's resolution was "time served" (the attorney had been temporarily suspended for more than one year).

Here, respondent's misconduct also clearly demonstrates a pattern of practice that would have continued but for the civil proceeding against the law firm that sparked the discovery of his activities. Indeed, it is that pattern involving so many clients that calls for the imposition of a term of suspension. No compelling mitigating factors militate against less severe discipline. Indeed, although respondent advanced as mitigation his desire to accommodate his clients, that argument loses its appeal in the face of the virtually non-existent likelihood that all 219 clients needed special accommodation as well as the fact that respondent's shortcuts generated quick profits to his law firm. In addition, the lack of harm to a client, while sometimes a mitigating factor, is irrelevant to a finding of unethical conduct. Lastly, although respondent has shown some contrition, which the DEC and the Board accepted as sincere, it is clear from the record that he still fails to recognize the seriousness of his actions.

Accordingly, the Board unanimously determined that a six-month suspension is appropriate discipline for respondent's misconduct. Three members did not participate. One member recused herself.

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

Dated: 4/5/99

By: _____
LEE M. HYMERLING
CHAIR
DISCIPLINARY REVIEW BOARD