SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-358

IN THE MATTER OF

ROBERT M. READ

AN ATTORNEY AT LAW

Revised Decision

Argued: February 8, 2001

Decided:

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

Joseph L. Garrubbo appeared for respondent, who was also present.

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

This matter was before us based upon a disciplinary stipulation between respondent and the Office of Attorney Ethics (OAE).

Respondent is an eighty-five-year old attorney who was admitted to the New Jersey bar in 1952. He has no ethics history. This matter was originally before us on October 29, 1999, based on the OAE's motion for discipline by consent (reprimand). We granted the motion, stating as follows in our October 29, 1999 letter to the Supreme Court:

> As pointed out by the OAE, however, the present case is unique, in that it involves two related instances of misconduct by an eighty-four-year old

> attorney with no prior disciplinary history. Respondent has made restitution by returning $85,000 of the $100,000 [fee] collected and $47,000 of the $87,000 [fee] collected. In addition, with the conclusion of these two estates, respondent has retired from the practice of law. Under these unique circumstances, the OAE maintained, a reprimand is adequate discipline for this respondent. The Board agreed.

One of the mitigating factors that we considered at the time was the stipulation's statement that respondent was permanently retired from the practice of law.

In June 2000 the Supreme Court reviewed the matter and questioned two things: (1) whether respondent had made a misrepresentation to the New Jersey Lawyers' Fund for Client Protection that he had been admitted to the New Jersey bar in 1944 — an issue that has now been resolved in respondent's favor — and (2) whether respondent was, in fact, permanently retired from the practice of law. The Court then requested the OAE to obtain a certification from respondent, stating that he was completely retired from the practice of law. On June 28, 2000 OAE counsel informed the Court that, in connection with the Court's instructions, he had spoken to respondent and had found out that respondent had not completely withdrawn from the practice of law. Counsel added that, although respondent was no longer affiliated with any firm, he occasionally did some legal work for relatives and others.

On July 13, 2000 the Court remanded the matter to us "for reconsideration and appropriate action in light of the corrected record." We then vacated our earlier decision granting the motion for discipline by consent and remanded the matter to the OAE for the

filing of a formal ethics complaint. We were concerned that respondent might have misrepresented in the stipulation that he was "permanently retired from the practice of law."

In the interim, however, OAE counsel informed the Board's office that he had obtained a certification from respondent, dated July 26, 2000, stating that "I have as of this date completely retired from the practice of law, . . . I have given up my law office and I do not intend to engage in any further legal representation nor perform any legal services whatsoever in the future." In possession of this certification, the OAE suggested to the Board's office that the certification be first sent to us and then to the Supreme Court. Because, however, the Court was relying on our close review of this matter to ensure that respondent had not made a misrepresentation in the July 1999 stipulation of discipline by consent, we required the OAE to explain in detail the circumstances that led the OAE to believe that respondent was retired at the time of the July 1999 stipulation. The OAE then conducted an investigation (apparently for the first time), which led to its supplemental report of October 10, 2000 and then to the present matter. That report states as follows, in part:

> In the Stipulation of Discipline by Consent, respondent represented '...with the conclusion of these two estates, respondent has retired from the practice of law.' That statement appeared in the Stipulation of Discipline by Consent as a result of respondent's representations to the OAE during investigation that he had retired from the practice of law and as a result of certain facts disclosed during investigation. In particular, it appeared that respondent was eighty-four years old (d.o.b. 03/11/15), that he had retired 'Of Counsel' to the firm of Lindabury, McCormick and Estabrook in July 1998, and that he had no office and no secretary. Based on these facts, the OAE undertook no further inquiry to confirm that he was retired, but accepted his statement as true.

In that supplemental report, OAE counsel disclosed to us for the first time that, at the time that the 1999 motion for discipline by consent was being negotiated, respondent's counsel, Joseph L. Garrubbo, had forwarded to him the original signed stipulation with a July 15, 1999 cover letter stating, in part, as follows:

> [Respondent] has withdrawn from his former practice and presently maintains no office for the practice of law.
>
> Despite the foregoing, [respondent] has indicated that he handles miscellaneous matters, on occasion, for friends out of his home.
>
> To the extent that this information in any way requires a revision of the enclosed documents, please be guided accordingly. To me the information seems relatively unimportant and it would hardly seem worth revising the Stipulation. Please advise. [Emphasis added].

OAE counsel did not suggest that the stipulation be revised. Moreover, Garrubbo asked OAE counsel to advise him if his interpretation of the stipulation was incorrect. Garrubbo's letter was not included with the motion for discipline by consent originally before us. Therefore, we never saw that letter when we ruled on the motion.

Upon receipt of Garrubbo's letter, OAE counsel called respondent and told him that he had made an affirmative representation in the stipulation, that is, that he had retired. OAE counsel added that the OAE "would not speculate as to what minor acts may or may not constitute the practice of law" and told respondent that he "would be held to his statement and ... should be guided accordingly." Exhibit 4 at 2-3. Nothing in the record indicates that OAE counsel either informed respondent at the time that, in light of his

statement in the stipulation, he was forbidden to practice law thereafter or that the stipulation would have to be amended if he did not cease to practice law permanently. Moreover, there is no indication that OAE counsel confirmed this pivotal conversation, in writing, with either respondent or his attorney.

Essentially, there are three aspects to this case: 1) respondent's misconduct in two estate matters, which was the subject of the original July 1999 stipulation stating that he was permanently retired from the practice of law; 2) the alleged misrepresentation that he was permanently retired as of July 1999; and 3) his representation of family and friends after July 1999.

I. *The Original Estate Matters*

There is no dispute that respondent charged excessive fees in two estate matters. Respondent stipulated to these violations. In connection with the Klug estate, respondent collected almost $100,000 as fees, when $15,000 would have been reasonable. Therefore, respondent overcharged the estate by some $85,000, a violation of RPC 1.5(a). Respondent also failed to utilize a retainer agreement, in violation of RPC 1.5(b). Finally, respondent presented inflated time records to the estate, in an effort to legitimize his exorbitant fee, in violation of RPC 8.4(c).

In the Brady estate matter, respondent violated RPC 1.5(a) by charging combined fiduciary commissions and attorney fees of $87,000 under circumstances in which total fees

and commissions should have been limited to approximately $40,000. Again, respondent did not prepare a retainer agreement and submitted inflated time records to justify his fee. His conduct in the Brady matter violated RPC 1.5 (a), RPC 1.5 (b) and RPC 8.4(c).

II. The Alleged Misrepresentation of Retirement

In his October 16, 2000 disciplinary stipulation, respondent admitted that he had misrepresented, in his July 1999 stipulation, that he was permanently retired from the practice of law. As will be seen below, it is not so clear that respondent made a misrepresentation in this regard, notwithstanding his admission that he did.

III. The Subsequent Representations

In the new stipulation, respondent admitted that he handled six legal matters between July 1999 and July 2000. The OAE's supplemental report detailed the representations as follows:

> 2. Madeline Rosa Estate - Madeline Rosa died at age 81 on May 8, 1999. Constance Burke, Rosa's daughter and an old friend of Respondent's, was named Executrix. [Respondent] handled the estate from May 8, 1999 until April 2000, when litigation arose. On August 30, 1999, [respondent] received a fee of $1000 for handling the Rosa Estate. Respondent stated that much of his work in administering the estate preceded the July 15, 1999 Stipulation although he continued to provide legal services after July 15.
>
> 3. Florence B. Kitchell Estate - Florence B. Kitchell died at age 94 on November 2, 1999. Respondent had prepared Kitchell's Will on November 25, 1995 and was named Executor. On December 16, 1999,

the Estate paid respondent an attorney's fee of $1,065 for representation in the sale of Kitchell's Plainfield, New Jersey home. Respondent received an executor's commission of $11,104 and a counsel fee of $3,052[.] Respondent billed $165/hr. for 18.5 hours of work and $203.11 for legal expenses.

4. Shirley Whiteneck Will - In November 1999, respondent prepared a will for his former secretary, Shirley Whiteneck, and mailed it to her at her current residence in West Virginia. He did not attend to its execution, he had no file in the matter and did not charge for his services. Respondent did not know whether Whiteneck was represented by West Virginia counsel when she executed the Will.

5. William O'Rourke deed - O'Rourke was [respondent]'s friend, neighbor and long-time client. In January 2000, [respondent] prepared an Executor's Deed conveying real estate from O'Rourke as executor of his deceased wife's estate to O'Rourke individually and his children. [Respondent] charged O'Rourke a fee of $165 to prepare the Deed.

6. Saleem Boghdan deed - In January 2000, respondent prepared a deed conveying real estate from Boghdan as executor of his deceased parents' estate to Boghdan and his siblings. Respondent had no file in the matter and did not charge for his services. According to respondent, Boghdan was an old friend.

7. Pamela Read Sale & Purchase of Real Estate - Pamela Read is respondent's daughter. Pamela purchased a new home eight (8) days before she sold her former home. Respondent represented Pam in both the purchase of her new home and the sale of her former home. Respondent handled both real estate transactions through his personal checking account with Summit Bank .... Of note, the buyer, Thomas Palumbo, paid a $6,000 deposit on the purchase of Pamela's former residence. The Contract of Sale called for the deposit to be 'held in escrow by seller's attorney until the closing of title, at which time all such monies shall be paid over to the seller.' [Respondent] received Palumbo's $6,000 and deposited it into his Summit Bank account on April 10, 2000. On the same date, he transferred $6,000 from that account to a Vanguard investment account .... When respondent transferred those funds, his Summit Bank account balance fell below

> $6,000. Respondent re-deposited $6,000 to his Summit Bank account on June 12, 2000 and expended it in the closing on Pamela's purchase.

The OAE now urges the imposition of a three-to six-month suspension for the totality of respondent's misconduct.

* * *

Upon a de novo review of the record, we were satisfied that the record contains clear and convincing evidence of unethical conduct.

Respondent stipulated that, in the Klug and Brady matters, he charged excessive fees and failed to utilize retainer agreements, in violation of RPC 1.5(a) and (b). He also stipulated that he misrepresented the nature of his fees and/or commissions in both matters, thereby violating RPC 8.4(c). In October 1999, we agreed with the OAE's assessment that several factors mitigated respondent's misconduct and justified a reprimand, instead of more severe discipline. As seen above, our letter stated as follows:

> As pointed out by the OAE, however, the present case is unique, in that it involves two related instances of misconduct by an eighty-four-year old attorney with no prior disciplinary history. Respondent has made restitution by returning $85,000 out of the $100,000 collected and $47,000 out of the $87,000 collected. In addition, with the conclusion of these two estates, respondent has retired from the practice of law.

We have not changed our position on the fee overreaching issue, because we find that respondent did not misrepresent that he was permanently retired.

It is undeniable that respondent signed a stipulation in July 1999 that listed, under the heading "Mitigating Factors," respondent's permanent retirement from the practice of law.

It is also evident that the OAE knew of respondent's intentions to the contrary. In Garrubbo's July 15, 1999 cover letter to OAE counsel, he made it clear that respondent continued to handle occasional matters for friends. He invited OAE counsel to revise the stipulation to conform to respondent's view of retirement, if advisable. OAE counsel did not think it necessary to do so. Under these circumstances, respondent cannot be faulted for continuing to practice law in a limited capacity, since he notified OAE counsel of this restricted activity. Moreover, OAE counsel declined to give respondent or Garrubbo any guidance about what might or might not constitute the practice of law. Only after the Court's remand to us and our remand to the OAE for an investigation of the circumstances of the "retirement," did OAE counsel disclose his awareness, in 1999, via Garrubbo's letter, that respondent intended to continue to practice in a limited capacity after the July 1999 stipulation. On these newly disclosed facts, we cannot find that respondent made a misrepresentation in July 1999. To the contrary, we find that respondent and his counsel were forthright in their dealings with the OAE on the issue of respondent's retirement.

In addition, there is significant evidence, beyond Garrubbo's letter to the OAE, that respondent did not understand what it meant to be permanently retired. In fact, the OAE admitted that respondent might not have understood what permanent retirement was. In its supplemental report, the OAE noted that, with regard to inconsistencies in respondent's answers to OAE questions concerning the date of his New Jersey bar admission, "[t]o some degree, this inconsistency draws into question [respondent]'s memory of the facts and/or his

understanding of the issues." Indeed, according to the OAE, respondent stated that it was not until June or July 2000, in discussions with the OAE about an affidavit attesting to his complete retirement from the practice of law, that he understood that by providing occasional legal services he would not be considered as permanently retired. It is also possible that respondent equated permanent retirement with the fact that he no longer maintained a law office, a secretary, files, a client base and so on, that is, all the accoutrements incidental to a full-blown practice of law. It is not unusual, for instance, for a lawyer who occasionally still drafts a will for a friend or handles a real estate closing for a relative to consider himself or herself retired from the practice of law, in the sense that he or she is no longer affiliated with or being monetarily compensated by a law firm. In some situations, that same retired lawyer continues to go to his or her former law office, even if only to make a few telephone calls to friends or to check his or her mail. Under these circumstances, it is also possible that respondent viewed himself as permanently retired, despite his sporadic involvement in simple matters involving friends and family.

Indeed, respondent continued to practice law in a limited capacity after July 1999. It is apparent from the record that he handled a total of six matters between July 1999 and July 2000. In each of the first five matters, respondent was engaged in minor legal work, conducted in behalf of several close personal friends and his former legal secretary. In the final two matters, respondent conducted real estate closings for his daughter in the purchase and sale of a house, substituting his personal bank account for his trust account, which had

been closed two years earlier for inactivity. Those transactions apparently proceeded smoothly and no funds were misappropriated. Respondent admitted that his actions violated RPC 1.15 (a) (commingling of funds). There are no other specific allegations of misconduct to be considered in any of the matters.

With regard to the imposition of discipline, we disagree with the OAE that respondent should be suspended for three to six months for his misconduct. The OAE was particularly disturbed by respondent's use of his personal account for his daughter's two real estate matters. However, the OAE cited no cases in support of its position. Rather, the OAE's analysis relied on a misrepresentation by respondent that he had retired from the practice of law. Without the misrepresentation component, we have the excessive fee violations and the lack of a trust account for the daughter's two transactions. We concluded that, when we take into account respondent's age, his return of the excessive fees and his unblemished career of forty-five years before these 1997 incidents, a reprimand is still sufficient discipline for the fee overreaching and the use of his personal account for his daughter's two transactions.

On a procedural note, the fact that respondent stipulated misconduct that did not occur does not mandate a finding of guilt. Respondent might have had practical considerations in mind at the time of the stipulation, such as, the avoidance of a hearing, the saving of attorney's fees, the swift resolution of this matter and the absence of a deleterious effect on his practicing of law (other than from a moral standpoint). Nothing prevents us

from vacating or rejecting a stipulation that contains statements not supported by facts. Here, the facts simply do not support a finding that respondent misrepresented to the OAE that he was completely retired from the practice of law. Therefore, we specifically rejected that portion of the stipulation that contains an admission of misrepresentation of respondent's status as an attorney.

Finally, had we been made aware the first time we reviewed this matter of respondent's qualified statement about his retirement, respondent and the entire disciplinary system would have been better served.

In sum, we unanimously agreed that a reprimand continues to be the appropriate form of discipline for respondent, particularly in light of the compelling mitigating circumstances still present in this case: (1) respondent had a forty-five year career without a whisper of impropriety; (2) he is an eighty-five year old attorney who, according to the OAE, may not have completely understood all of the issues in the matter before us; (3) he made prompt restitution in the underlying estate matters; and (4) he is now completely retired from the practice of law. Two members did not participate.

We also required respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

ROCKY L. PETERSON
Chair
Disciplinary Review Board