SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-030
District Docket No. XI-03-027E

IN THE MATTER OF	:
	:
DAVID H. VAN DAM	:
	:
AN ATTORNEY AT LAW	:

Decision

Argued: March 16, 2006

Decided: April 28, 2006

Thomas Kazak appeared on behalf of the District XI Ethics Committee.

Respondent waived appearance for oral argument.

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 the District XI Ethics Committee ("DEC"). The complaint charged respondent with violating RPC 1.8(c) (a lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling or spouse

any substantial gift from a client, including a testamentary gift, except where the client is related to the donee).[1]

Respondent was admitted to the New Jersey bar in 1981. In 1995, he received a three-year suspension, retroactive to the date of his temporary suspension in 1993, following his guilty plea to making a false statement to an institution insured by the Federal Savings and Loan Insurance Corporation and obstruction of justice. In re Van Dam, 140 N.J. 78 (1995). He was reinstated to practice in 1997. In re Van Dam, 148 N.J. 582 (1997).

In April 2001, respondent drafted a will for his client Nicholas DeLaura. Respondent had represented DeLaura's father, was representing DeLaura and his brother as executors of their father's estate, and had handled a number of other legal matters for DeLaura. Respondent had suggested to DeLaura that he should have a will because his estate was sizeable – three to four million dollars. DeLaura instructed respondent that the primary beneficiary was to be his wife, and that respondent was to be one of four contingent beneficiaries.[2] Respondent advised DeLaura that he did not want to be named in his will, and that

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[1] The complaint was drafted in 2004. Thus, the 2004 version of the rule is cited.

[2] Respondent's wife was to be the contingent beneficiary, should respondent predecease DeLaura.

he deemed it inappropriate. He suggested that DeLaura name other family members as beneficiaries. DeLaura, however, insisted that respondent name himself as a contingent beneficiary "based upon what [respondent] had done for him." DeLaura stated that respondent would be fired as his attorney if he did not write the will as instructed.[3] Respondent advised DeLaura that, if he were to inherit under the will, he would disclaim his interest in the estate. Respondent was also named as the executor of the estate, should DeLaura's wife predecease him or be unable to serve. Respondent did not charge DeLaura for the preparation of the will.

Respondent knew that naming himself as a beneficiary in the will "was not appropriate and it wasn't the right thing to do." However, he denied knowledge of the prohibition against such action in the Rules of Professional Conduct.

In March 2003, DeLaura came to respondent's office with another individual. DeLaura then left the room and the third party advised respondent that he was fired as DeLaura's attorney. According to respondent:

> He threw a piece of paper across the conference room at me, which was the rule of professional conduct, saying that I was not to be named as a beneficiary in the Will; and he also had a very

[3] According to respondent, DeLaura "is a volatile personality, at best."

> large friend standing in the conference room at the time, and they insisted that all the files be removed immediately, which I did.
>
> [T18-1 to 7.][4]

DeLaura then filed a grievance against respondent.[5]

The DEC found that respondent had violated RPC 1.8(c) and recommended a reprimand.

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

If respondent's version of the facts is accurate, then DeLaura's filing of the grievance against him makes little sense. According to the presenter, DeLaura contended that respondent had surreptitiously inserted himself as a beneficiary in the will. The presenter had a letter from DeLaura, which was not placed in the record. Thus, as little sense as this all makes, there is nothing in the record to refute respondent's version of the facts. The presenter could have subpoenaed DeLaura to testify, or obtained an affidavit from him to support his contentions. He did neither and, as the record stands,

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[4] T refers to the transcript of the DEC hearing on September 30, 2005.

[5] DeLaura did not attend the DEC hearing, although the presenter believed that he was aware of the hearing date.

there is nothing to rebut respondent's testimony that he complied with his client's wishes. It seems that the presenter did not think DeLaura's testimony or the letter was necessary because respondent clearly violated RPC 1.8(c) by naming himself as a beneficiary. The violation would be far more serious, however, if respondent had acted without DeLaura's authorization. With nothing to refute respondent's version of the facts, we accept his testimony and view this as yet another case of an attorney who claimed to be unaware of the prohibition of RPC 1.8(c).

Ordinarily, either an admonition or a reprimand is imposed for conduct similar to respondent's. In In the Matter of Kenneth H. Ginsberg, Docket No. DRB 02-449 (February 14, 2003), we admonished an attorney who drafted a will for a client and named himself the recipient of a specific bequest of $10,000. He was unaware at the time that RPC 1.8(c) specifically prohibited that action. He also took steps to dissuade the long-time client from leaving the bequest. Furthermore, he recommended that she obtain another attorney to draft the will. When she insisted on his representation, the attorney made her sign an acknowledgment that she had requested him to prepare the will, despite his advice. The attorney had previously been reprimanded for assisting a client in backdating estate-planning

documents to permit the client to take advantage of tax provisions that might not otherwise have been available. See also In the Matter of Frederick L. Bernstein, Docket No. DRB 98-128 (April 27, 1998) (admonition for attorney who, as the scrivener of several wills, named himself as beneficiary, in violation of RPC 1.8(c)); In the Matter of Robert C. Gruhin, Docket No DRB 97-403 (February 9, 1998) (admonition for attorney who prepared a codicil to the will of a longstanding client, which included a bequest to the attorney of $25,000, in violation of RPC 1.8(c); the attorney did not advise the client to seek independent counsel regarding the client's desire to bequeath a "substantial" gift to him); In re Hock, 172 N.J. 349 (2002) (reprimand for attorney who drafted several wills for a client who left a large share of her estate, which was worth $1.1 million, to himself and his wife; the attorney had suggested that the client have another attorney draft the wills, which she refused, and had another attorney in his office review the will with her); In re Mangold 148 N.J. 76 (1997) (reprimand for attorney who drafted a will, served as the executor of the estate, and benefited from the estate by removing items, specifically furniture and stamps, allegedly given to him verbally by the testator; the attorney "showed monumental bad judgment, rather than venality"); In re Polis, 136 N.J. 421

(1994) (public reprimand imposed where the attorney prepared a will for an elderly client giving most of her $500,000 estate to the attorney's sister, thereby creating a conflict of interest; there were serious questions about the competence of the testator). But see In re Tobin, N.J. (2006) (censure imposed on attorney who drafted a will making himself a beneficiary of the estate; the attorney advised the client to have another attorney draft the instrument and, when she refused, had other attorneys confirm that she wanted him as her beneficiary; the attorney contended that he was unfamiliar with RPC 1.8(c); when the beneficiaries questioned the attorney's bequest, he pursued his entitlement to it through the courts; the attorney had a prior reprimand).

In fashioning the appropriate level of discipline in this matter, we considered, in mitigation, that there was no harm to the client. On the other hand, in aggravation, we considered respondent's admitted knowledge at the time that it was inappropriate to name himself as a beneficiary in DeLaura's will. In our view, his admission that he knew that it was not the right course of action, coupled with his prior suspension, brings this matter out of the realm of an admonition.

On the other hand, we do not believe that respondent's prior three-year suspension – for unrelated conduct - is a

sufficient aggravating factor to require the imposition of a censure. Furthermore, Tobin (a censure case) is distinguishable from this matter because of Tobin's unwillingness to "back off" when the questionable (at best) nature of his conduct was brought to his attention. Tobin pursued his interest in his former client's estate through the courts. That there was no harm to the testator or other potential heirs or any wasting of judicial resources is a factor that makes the appropriate level of discipline in this matter a reprimand. We so vote.

One more point warrants mention. The complaint asserts that "[t]he respondent's conduct, in this matter, as alleged in this pleading constitutes misconduct as defined by RPC 1:20-3(i)(2)(A)." R. 1:20-3(i)(2)(A) provides:

> (i) Determination of Misconduct.
> (2) Minor Misconduct.
> (A) Defined. Minor misconduct is misconduct which, if proved, would not warrant a sanction greater than a public admonition. Misconduct shall not be considered minor if any of the following considerations apply: (i) the misconduct involves the misappropriation of funds; (ii) the misconduct resulted in or is likely to result in substantial prejudice to a client or other person and restitution has not been made; (iii) the respondent has been publicly disciplined in the previous five years; (iv) the misconduct involved is of the same nature as misconduct for which the respondent has been disciplined in the past five years; (v) the misconduct involves dishonesty, fraud or deceit; (vi) or the misconduct constitutes a crime as defined by the New Jersey Code of Criminal Justice (N.J.S.A. 2C:1-1, et. seq.). Classification of misconduct as minor

misconduct shall be in the sole discretion of the Director.

Although the presenter classified respondent's misconduct as minor and, thus, warranting only an admonition, that was not the view of the hearing panel, which recommended a reprimand. Respondent did not file a brief with us objecting to the apparent discrepancy. Respondent could have argued that, had he known that discipline more severe than an admonition could be imposed, he would have defended against the charges more vigorously. Because he failed to raise that argument before us, we deem any objection to the discrepancy between the language in the complaint and the DEC's recommendation for a reprimand to be waived. Furthermore, respondent should be aware that our review is de novo and that we can categorize the misconduct as we deemed appropriate, given the facts that gave rise to it. We have, thus, disregarded the complaint's reference to R. 1:20-3(i)(2)(A).

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

Disciplinary Review Board
Mary J. Maudsley, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David H. Van Dam
Docket No. DRB 06-030

Argued: March 16, 2006

Decided: April 28, 2006

Disposition: Reprimand

Members	Suspension	Reprimand	Admonition	Disqualified	Did not participate
Maudsley		X			
O'Shaughnessy		X			
Boylan		X			
Holmes		X			
Lolla		X			
Neuwirth		X			
Pashman		X			
Stanton		X			
Wissinger		X			
Total:		9			

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel