SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-291
District Docket No. XIV-00-110E

IN THE MATTER OF	:
	:
IRVING TOBIN	:
	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 17, 2005

Decided: December 20, 2005

Thomas Carver appeared on behalf of the Office of Attorney Ethics.

Stephen Ritz 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 on a recommendation for discipline filed by the District XII Ethics Committee ("DEC"). The complaint charged respondent with violating RPC 1.8(c) (a lawyer shall not prepare an instrument giving the lawyer any substantial gift from a client, including a testamentary gift, except where the client is related to the lawyer) and RPC 1.7

(conflict of interest). At the close of the hearing below, the parties made a joint motion to amend the complaint to conform to the proofs. The charge of a violation of RPC 1.7 was amended to a charge of a violation of RPC 1.9(a) (a lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation with the former client).[1]

Respondent was admitted to the New Jersey bar in 1957. In November 2001, he was reprimanded for conflict of interest, business transaction with a client, misrepresentation, negligent misappropriation, commingling of funds belonging to clients and investors (including respondent), and recordkeeping violations. In re Tobin 170 N.J. 74 (2001).

Prior to the DEC hearing, respondent and the Office of Attorney Ethics ("OAE") entered into a stipulation of facts.

In April 2000, Iris A. Belkin filed a grievance alleging that respondent had mishandled the estate of her aunt, Ida R. Ortenberg, of which Belkin was a beneficiary.

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[1] At the time of respondent's misconduct, the 1993 version of the rules was in effect.

In 1984, respondent was retained to draft a will for Ortenberg. Thereafter, respondent revised Ortenberg's will in March 1986, March 1988, and February 1993. The specific provisions of each will are set forth below:

EXECUTOR/ EXECUTRIX	SUBSTITUTE EXECUTOR	SPECIFIC BEQUESTS	RESIDUARY BEQUESTS	SUBSTITUTE RESIDUARY
		FEBRUARY 1984		
Alex & Beatrice Rothman	None	Wedding Ring- S. Rothman $1,000- J. Sklar	(1/3)- A. Rothman (2/3)Shared- I. Belkin, A. Fleishman, L. Rothman, S. Rothman, B. Xenitelis	None
		MARCH 1986		
Julia Sklar	Respondent	$2,000- J. Sklar, I. Belkin, A. Fleishman, B. Rothman, L. Rothman, S. Rothman, B. Xenitelis	A. Fleishman	D. Fleishman
		MARCH 1988		
Julia Sklar	Respondent	$2,000- I. Belkin, A. Fleishman, L. Rothman, S. Rothman, B. Xenitelis, Hadassah Org., Deborah Heart Ctr.	J. Sklar	None
		FEBRUARY 1993		
Respondent	None	$2,000- I. Belkin, A. Fleishman, L. Rothman, S. Rothman, B. Xenitelis, Hadassah Org., Deborah Heart Ctr.	Respondent	None

[S¶2.][2]

[2] S refers to the stipulation of facts, in evidence as Exhibit J-3.

As seen from the chart, the final will that respondent drafted for Ortenberg left her entire residuary estate to him. The individuals receiving specific bequests were Ortenberg's nieces.

According to respondent, during the time in question, Ortenberg had virtually no relationship with her nieces, and her contact with Sklar, her sister-in-law, had diminished when the latter had moved from the area. Respondent stated that, in 1993, when Ortenberg advised him of her wish to revise her will, he told her to think about it for a week. Upon her return to his office with her objective unchanged, he suggested that she see another attorney to verify her intentions and to write the will. When Ortenberg refused, respondent had two attorneys with offices in his building come in and speak to Ortenberg to confirm her wishes.

These attorneys, Martin M. Glazer and Alan Kamel, testified before the DEC. According to Glazer, respondent asked him and Kamel to speak to Ortenberg to confirm that she was competent and acting of her own free will. Glazer testified that, "in the conversation [respondent] mentioned that he was going to be a beneficiary so I looked at him and he said, you know, I thought about it and I think it's all right." Respondent, in turn, had no recollection of that conversation.

Glazer testified that, during his meeting with Ortenberg, she asserted that she was acting voluntarily, and that she wanted respondent to be a beneficiary of her estate. Kamel confirmed that Ortenberg was "adamant" that she wanted respondent to be an heir.[3]

At the DEC hearing, respondent admitted that he did not review the Rules of Professional Conduct prior to drafting the will, and that he had been unaware that he was violating the rules when he drafted it. He acknowledged that he violated "the way the rule is written." He stated that, had he known that he was violating the rule, he would have had another attorney draft Ortenberg's will. Respondent claimed that he had complied with the spirit, although not the letter of the rule. At the hearing, the following exchange took place between respondent and a panel member:

> **MS. MATTINGLY:** You're saying that you did not violate the spirit of the law. You did violate the letter of the law. How is that differentiated? What do you feel you violated the letter as to not—
>
> **THE WITNESS:** The rule specifically, if you read the rule specifically it says, "No attorney shall

[3] Exhibit R-2 is a memo to the file, prepared by OAE investigative auditor Barbara M. Galati to the file. Galati documented her conversation with Harvey Teicher, whose wife was Sklar's sister. Teicher stated that respondent had taken care of Ortenberg, and that Ortenberg understood what she was doing in connection with the changes to her will.

write a will naming himself as beneficiary." I violated that language. I violated that language.

I did not intend to violate the language. The purpose that rule exists is to make sure that nobody takes advantage of a client. That's the reason the rule exists.

I did not take advantage of this client. I did not deprive her of what she wanted. I did not connive or scheme or get her to do something she didn't want to do. She came in to me and hit me with a complete surprise that she wanted me to do it.

So the spirit of the — the spirit of the rule is that no lawyer should take advantage of a client, and it would appear he is taking advantage of a client if he writes the will.

Had I known about that rule at the time, as I've said now many, many times I would merely have said go next door, they'll write the will for you. Because she had already told Glazer & Kamel, she had already told Glazer & Kamel what it was that she wanted, and that's why I say that I did not violate the spirit of the law. Because I did not in any way take advantage of her. I did not in any way go against her wishes. I did not in any way try to influence her to do something, except I tried to influence her to give more to her nieces then [sic] that 2,000, but I did not try to influence her in any ways towards me, that's why I say that.

[1T265-10 to 1T266-22.][4]

Ortenberg died in December 1994. In May 1995, Belkin and Ortenberg's other four nieces, who had been named as residuary beneficiaries in the February 1984 will, filed a verified complaint to set aside judgment for probate.[5] The complaint

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[4] IT refers to the transcript of the hearing before the DEC on July 11, 2005.

[5] One niece withdrew from the litigation.

alleged that respondent had exercised undue influence over Ortenberg, and that, as drafter of the will, executor, and residuary beneficiary, he had violated the Rules of Professional Conduct.

Robert J. Lenahan, Jr., who represented Ortenberg's nieces, testified that he mentioned RPC 1.8 to respondent during various telephone conversations. According to Lenahan, during one such conversation, he advised respondent that the nieces would raise a presumption of undue influence, that the will was clearly contrary to the ethics rules, and that, apart from the undue influence argument, the will might be set aside because of the ethics issue. Respondent replied that the rule was not "absolute," and that it was clear that Ortenberg wanted him to be the only beneficiary. Lenahan, who served for eleven years as the Union County deputy surrogate, opined to the DEC that a violation of RPC 1.8(c) could result in an ethics charge against the attorney who drafted the will, but was not an absolute bar to the validity of the will. As Lenahan noted, the rule was directed toward attorneys and not toward the substantive law of probate.

Respondent did not recall discussing the potential violation of the ethics rules with Lenahan.

The dispute over Ortenberg's will was settled and confirmed in a May 1996 agreement. The agreement provided that the residuary assets would be divided thirty-five percent to respondent and sixty-five percent to the four nieces, who waived their specific bequests.[6] According to respondent, he was to receive three percent of the estate as executor fees.

In addition to drafting the will, representing the estate, and being named its executor and beneficiary, respondent was the accountant for the estate. In that capacity, he prepared three accountings, as follows:

	First Accounting: 12/20/94-6/30/96	**Second Accounting: 7/1/96-9/30/96**	**Third Accounting: 9/30/96-9/30/00**
Assets Remaining	$43,290.46	$42,354.91	$2,073.55
Liability Remaining — Respondent's Fee Other Liabilities	$ 650.00 $ 6,078.80	$ 650.00 $ 0	$ 850.00 $ 0
Balance Remaining	**$36,561.66**	**$41,704.91**	**$1,223.55**

[Ex.P-15;Ex.P-16;Ex.P-17.]

[6] Lenahan testified that, if the 1993 will had been declared invalid, the prior will would have been reinstated, and the nieces would have received only their $2,000 bequests.

Respondent sent the first accounting to Lenahan in August 1996. The following month, Belkin and the remaining nieces filed a verified complaint to compel executor to account, alleging that respondent had failed to make the distributions and to settle the estate. Respondent filed an answer in October 1996. In April 1997, Lenahan filed an exception to respondent's accounting on a number of specific items. The court dismissed the complaint and exceptions in December 1997, after both parties failed to file trial briefs and to appear on the scheduled trial date.

The following chart sets out the distributions to beneficiaries of Ortenberg's will from December 1994 through December 1999:

BENEFICIARY	**TOTAL DISTRIBUTION**
Hadassah	$ 2,000.00
Deborah Heart & Lung Association	$ 2,000.00
Irving Tobin	$130,341.96
Iris Belkin	$ 53,698.13
Barbara Gocek	$ 53,698.13
Amy Fleischman	$ 53,698.13
Linda Rothman	$ 53,698.13
Sharon Rothman	$ 2,000.00
TOTAL	**$351,134.46**

[S¶10.]

The charged violation of RPC 1.9(a) refers to a October 1992 will that respondent prepared for Julia Sklar. The will named her brother-in-law and her "advisor" (respondent) as co-executors. As noted above, Sklar was Ortenberg's sister-in-law and the two had been close until Sklar moved to a location further from Ortenberg. As noted in the chart on page 3, Sklar was the residuary beneficiary of Ortenberg's estate, prior to respondent's drafting of Ortenberg's 1993 will, naming himself as the residuary beneficiary.

On the day of the DEC hearing, respondent's counsel filed an amended answer to the complaint, setting forth the affirmative defense of laches, which the DEC considered as a motion to dismiss. Counsel presented argument about the delay in the proceedings, noting that the will in question had been drafted twelve and a half years before the hearing. The DEC denied his motion to dismiss for several reasons, including the absence of a statute of limitations in ethics matters. The DEC also concluded that the evidence of laches raised during oral argument was all hearsay, and that respondent did not do all he could have done to bring the matter to a speedy resolution or to preserve testimony.

As to the allegation that respondent violated RPC 1.9, the DEC found no infraction, reasoning that the Sklar and Ortenberg

wills were distinct matters. The DEC found that Sklar's position as a beneficiary of the Ortenberg will was unrelated to the matter in which respondent represented her – the drafting of her own will.

As to the RPC 1.8(c) charge, as noted above, respondent admitted his misconduct. The sole issue before the DEC then was whether his actions warranted discipline and, if so, to what extent.

In a scathing report, the DEC found no mitigating factors and a host of aggravating factors. Primarily, the DEC focused on respondent's prior discipline for an improper business relationship with a client, which revealed "a continuing course of dishonesty and misrepresentation," and his lack of remorse. In the DEC's view, respondent did not understand the public policy and the breach of trust involved in his actions. He displayed no remorse, having only admitted that he erred and should have had another attorney draft the will. Respondent either did not understand or refused to understand that the conflict of interest was not waivable, and that Ortenberg's consent was not a mitigating factor. Furthermore, the DEC believed that respondent should have returned the money that he ultimately received from the estate. It concluded that his failure to do so evidenced a lack of remorse and failure to

remediate. Had respondent returned the money, the DEC would have considered it as a mitigating factor.

Finally, the DEC pointed to respondent's lack of candor with disciplinary authorities, finding his testimony not truthful in several respects. Among other instances, the DEC noted Glazer's testimony about his interaction with respondent, and Lenahan's testimony that he discussed the potential ethics violation with respondent. In both instances, the DEC found the witness more credible than respondent.

The DEC recommended a three-month suspension.

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.

Respondent admitted his underlying conduct and contended that, at the time of his actions, he was unaware of the prohibitions of RPC 1.8(c). That respondent may have been ignorant of his duties in this regard is irrelevant. "Lawyers are expected to be fully versed in the ethics rules that regulate their conduct. Ignorance or gross misunderstanding of these rules does not excuse misconduct." In re Berkowitz, 136 N.J. 134, 147 (1994). The DEC's finding of a violation of RPC 1.8(c) was, thus, correct.

With regard to the charge that respondent violated RPC 1.9(a), we agree with the DEC that the Sklar will was a distinct matter from the Ortenberg will, and that respondent's actions in removing Sklar as the residuary beneficiary had nothing to do with his having drafted a will for her. The dismissal of the charge was, therefore, appropriate.

An admonition or a reprimand has been imposed for conduct similar to respondent's. See In the Matter of Kenneth H. Ginsberg, Docket No. DRB 02-449 (February 14, 2003)(admonition for attorney who drafted a will for a client and named himself as the recipient of a specific bequest of $10,000; the attorney was unaware that RPC 1.8(c) specifically prohibited that action, took steps to dissuade the long-time client from leaving the bequest, recommended that she obtain another attorney to draft the will and 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); 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, a 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 long-standing client, which included a $25,000 bequest to the attorney, a violation of RPC 1.8(c); the attorney did not advise the client to seek independent legal advice 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; the attorney then 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; we found that the attorney "showed monumental bad judgment, rather than venality"); and 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; there were serious questions about the competence of the testator).

In re Hock, supra, 172 N.J. 349, is quite similar to the within matter. Like respondent, Hock had been a member of the bar for some fifty years at the time of his discipline; Hock, however, had a previously unblemished record. There was no evidence that the client's wishes were any different from those contained in the wills. Indeed, there was no inkling of foul play. Hock expressed remorse for his actions, stating that he had been unaware of the prohibition under RPC 1.8(c). He believed that he was permitted to draft the wills, but that he would have to rebut the presumption of undue influence under caselaw. Hock was convinced that he could rebut the presumption because so many people knew of his client's wishes.

The OAE argued that respondent's conduct was worse than that of the attorneys in Polis, Hock, Mangold, and Ginsberg. The OAE noted that respondent not only made himself the residuary beneficiary of Ortenberg's estate, but also litigated the matter on his own behalf, to the detriment of his client Julia Sklar, who was the residuary beneficiary under the previous will. In the OAE's view, respondent's conduct warrants a three-month suspension.

In support of that position, the OAE pointed to not only the language in the above-discussed cases, but also to In re Grevemberg, 838 So. 2d 1283 (La. 2003). There, the attorney

held a power of attorney for his client, a widow in declining health, and drafted a new will naming himself as executor and residuary legatee. The will contained a clause naming the attorney's wife as the residuary legatee, in the event that (1) the bequest to the attorney was prohibited, (2) there was a conflict of interest, or (3) he should predecease her. When the will was contested, the court determined that the client was competent, and that the attorney had not exercised undue influence. The court, nevertheless, invalidated the gifts to the attorney and his wife, as well as their appointments as executor and executrix. The attorney was aware of RPC 1.8, but did not acknowledge its applicability.

The Supreme Court of Louisiana suspended the attorney for one year, finding that his refusal to acknowledge the wrongful nature of his conduct was an aggravating factor. The Court pointed to the "conscious decision by respondent to disregard his ethical obligations by continuing the litigation when he was aware that he was in violation of the rule." In the Court's view, the attorney placed his hopes of potential recovery ahead of any disciplinary sanctions he might receive.

In this matter, Lenahan testified that respondent's ethics violation would not prevent the estate from being probated. The OAE and the DEC placed much blame on respondent for not simply

walking away when the nieces challenged the will. In their view, the only sufficient sign of remorse would have been respondent's "return in full" of his inheritance under the will. That, however, is not required by the rules. The failure to abandon the lawsuit does not evidence a lack of remorse on respondent's part.

As to respondent's prior reprimand, it was based on four matters. Of those four, three bear 1999 district docket numbers, and the remainder bears a 1997 docket number. Respondent drafted the will in question in 1993. Indeed, the underlying litigation was settled before the matters that led to his previous reprimand were docketed. Those matters were not brought to his attention as questionable until six years after he drafted the Ortenberg will. Generally, when discipline is increased because of a prior matter, it is because the attorney has failed to learn from a previous mistake. That is not the case here. Although respondent may have a history of entering into questionable relationships with clients, the fact remains that the within misconduct was over and done years before he was disciplined for the other matters. Indeed, respondent drafted the will in question more than twelve years ago.

The OAE and the DEC believe that respondent should be suspended. In support of that position, the OAE cited a

Louisiana case where the attorney engaged in similar conduct. When our precedent is strong and clear, however, we need not look to other jurisdictions for guidance. Respondent's misconduct is no worse than matters that led our Court to impose reprimands. For instance, in In re Polis, supra, 136 N.J. 421, there were serious questions about the testatrix' competence. Indeed, she was determined to be incompetent by two physicians two months after she signed the will. That was not the case here. To use our words in In re Mangold, supra, 148 N.J. 76, this attorney "showed monumental bad judgment, rather than venality." In the Matter of Edward J. Mangold, Docket No. 92-618 (DRB November 20, 1996)(slip. op. at 7).

One more point warrants mention. The panel report is critical of respondent for an alleged misrepresentation to the panel:

> Mr. Tobin misrepresented to me that he had never engaged in a business transaction with a client other than a tax certificate that he had invested in with a client on some level in which he had had some sort of waiver relating to his obtaining attorneys's [sic] fees from the investment. In fact this was a misrepresentation to the Panel insofar as when I reviewed the DRB decision in the earlier In re: Tobin matter from 2001 clearly that decision referenced business transactions with clients. That has been marked for identification and entered into evidence as P-25.
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> [2T29-19 to 2T30-6.][7]

[7] 2T refers to the transcript of the hearing panel report, dated July 11, 2005.

We cannot conclude by clear and convincing evidence that respondent intentionally attempted to mislead the DEC about his prior discipline. He would have known that the record of his prior discipline was known to the DEC, as it is to us.

We conclude, thus, that a reprimand is appropriate discipline for respondent's infractions. We do not believe that he has failed to show remorse. His testimony evidenced his acknowledgment of his violation of the rule and his recognition that, if the situation arose again, it would be handled differently.

Member Lolla would impose a censure. Member Stanton would impose a three-month suspension, due to the great risk of undue influence in these situations. Chair Maudsley and Vice-Chair O'Shaughnessy did not participate.

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

Disciplinary Review Board
Louis Pashman, Esq.

By: Isabel Frank
Julianne K. DeCore
Chief Counsel