Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-435
District Docket Nos. XIV-2017-0264E
and IV-2018-0908E

In the Matter of	
Donald Lee Kingett	Dissent
An Attorney at Law	

Argued: May 21, 2020

Decided: November 10, 2020

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

Like the three members of the District IV Ethics Committee who found a lack of clear and convincing evidence to support any of the ethics charges against respondent, I too would dismiss the entire complaint against him. Thus, I disagree with the four members of this Board who would suspend respondent for three months and also the four members who would reprimand him.

The crux of this case is the fraud that third parties, unrelated to respondent, perpetrated in order to convince him to prepare a will for his client, Janet Bradford (Janet), benefitting themselves. Respondent himself was a victim of

this fraud since he was duped into drafting a will that he otherwise would not have drafted. It is true that the fact that he was successfully duped can be attributed in part to his own negligence, as found in a malpractice action filed by Janet's estate and Janet's three other children, in which 25% of plaintiffs' damages were attributed to respondent's professional negligence. But simple negligence is not an ethics violation and I do not find respondent blameworthy beyond his simple negligence that allowed the fraud perpetrated by others to succeed, unbeknownst to him when he prepared the estate documents. Indeed, in the lawsuit challenging Janet's will, the other defendants were found to have committed common law fraud, consumer fraud, and breach of fiduciary duty, legal wrongs, along with gross negligence, which the malpractice jury did *not* find respondent to have committed, as noted by this Board's majority opinion (at pp. 9 -10).

The undisputed facts are detailed in the Board's majority opinion and are repeated here only insofar as necessary to explain the lack of proof of each RPC violation found by the Board. **First**, it is undisputed that respondent was deceived and exploited by his client's daughter, Melodie White, her granddaughter, Jennifer White, and Jacqueline McGlinchey of Fidelity Estate Planning (FEP), the entity that referred this estate matter to him, and that he knew nothing of fraudulent acts perpetrated by these persons. **Second**, in 2007 when these events occurred, respondent had been dealing for several years with

FEP and the record contains no evidence that he had reason to distrust McGlinchey. **Third**, as far as he knew and as reflected in the workbook prepared by McGlinchey, his client's estate was simple, with her only asset being her home valued at about $200,000; and no vehicles, miscellaneous items, insurance, cash accounts, or investments. **Fourth**, when respondent spoke on the telephone to the person he believed to be his client, namely, Melodie pretending to be Janet, Melodie disguised her voice to sound like an elderly person so that respondent would not suspect that he was not speaking with his client who seemed in that conversation to be cogent and responsive. Nor did respondent know, or have reason to believe, that Janet's signature on the documents he prepared were forged by Jennifer because they were notarized by McGlinchey, who attested that Janet had signed them in front of her. Indeed, the fraud involving *three* persons was so brazen and unlikely, especially because it included one person with whom respondent had worked before, that respondent can hardly be faulted for failing to suspect it.

The four RPCs that the Board found respondent to have violated and the lack of clear and convincing evidence of each violation are as follows:

RPC 1.4(c) requires a lawyer to explain a matter sufficiently to a client so as to allow the client to make informed decisions. The Board finds that respondent violated this rule because, it says (at p. 19), (a) his only involvement with Janet was an eight-minute phone call and his preparation of several estate

planning documents; and (b) respondent could not have determined from this conversation "whether she had the mental capacity to engage in estate planning." But the record contains no evidence of the substance of that phone call. Lacking such evidence, the Board is left to speculate that respondent could not have discussed Janet's assets with the person he believed to be her during that call even though the workbook showed her estate to be a simple one consisting only of her home.

While it may be fair to conclude that respondent was negligent in not conducting a longer interview with Janet or in relying so heavily on the workbook prepared by McGlinchey, I find, as did the District Ethics Committee (DEC), that the record lacks clear and convincing evidence that respondent did not counsel Janet sufficiently to allow her to make an informed decision about what he understood to be this very simple estate, especially when the workbook showed that she already had decided how her assets were to be distributed and when respondent, believing he was speaking with Janet, needed only to have those wishes confirmed during that call in order for him to prepare her estate documents. In short, as the DEC found (Hearing Panel Report, at 32), "there is no proof as to exactly what did or did not take place [during the phone call]" and so the panel "cannot conclude, on this record, by clear and convincing evidence, that Respondent failed to communicate." Moreover, the intervening fraudulent acts of Melodie and Jennifer prevented respondent from speaking

with Janet and thus concealed from him any mental disability which Janet may have had.

The majority says that respondent engaged in a concurrent conflict of interest in violation of RPC 1.7(a)(2) because "there was a significant risk that the representation of Janet would be materially limited by [his] personal and financial interest in the referrals he received from FEP." (Opinion, at 19) while at the same time acknowledging, to the contrary, that this single referral by FEP in this case, even when considered with "hundreds of other referrals" "may not rise to the level of conflict of interest." (Opinion, at 19-20).

The majority tries to compensate for this problematic acknowledgement by making statements lacking documentation in the record. It says that: (1) somehow there was a "pre-ordained path that clients would take in their estate planning" in FEP cases, meaning, they say, that respondent "used no judgment to measure whether [the trust set up here] was the best . . . approach for this particular client;" (2) respondent's representation of Janet "was limited by the inherent nature of the referral and his business relationship with FEP to finalize a trust instrument as a foregone conclusion;" and (3) this was a joint venture [between respondent and FEP] pure and simple" "to generate business for [respondent]." (Opinion, at 20).

All of these statements are pure speculation. Not only is the record barren of evidence to support them but they are *counter to the factual findings made by*

the DEC after a lengthy evidentiary hearing. Although FEP had referred numbers of estate matters to respondent over approximately a three-year period prior to the events of this case in 2007, *there is no evidence in the record that FEP required respondent to handle any matter in any particular manner in order that FEP would refer matters to him*, no evidence that FEP dictated how respondent was to handle Janet's estate and, as the DEC found, no evidence "to indicate in any way that Respondent had any specific loyalty to FEP that clouded his professional judgment" or that "if Respondent had questioned whether a specific product was appropriate for a client that Respondent would have lost referrals from FEP." (Hearing Panel Report, at 33).

Moreover, as the DEC concluded (Hearing Panel Report, at 33), the income received by respondent from FEP referrals was alone unlikely sufficient to generate such loyalty to FEP that compromised his professional judgment. Any such conclusion would be mere speculation, far short of the required clear and convincing evidence. Rather, in this case specifically, the evidence supports the view that respondent believed that the will he drafted for Janet carried out her wishes to bequeath the majority of her estate to Melodie and Melodie's children, replacing a prior will that had provided an equal distribution to her four children because, he was told, Melodie's daughter, Jennifer, had been her primary caregiver in recent years.

Finally, the majority's assertion that respondent and FEP were engaging in a "joint venture" (Opinion, at 20) is puzzling and its relevance unclear; it was never alleged at any prior stage of this ethics case. Although therefore not worth discussing at length, it is worth pointing out that under New Jersey law, a joint venture is essentially identical to a partnership. A partnership requires not only an agreement between the parties but also (a) a contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking; (b) a joint property interest in the subject matter of the venture; (c) a right of mutual control of the enterprise; and (d) an agreement to share in the profits or losses of the venture. E.g., Fliegel v. Sheeran, 272 N.J. Super. 519, 523-24 (App. Div. 1994), certif. denied, 137 N.J. 312 (1994); Hellenic Lines, Ltd. v. Commodities Bagging & Shipping Process Supply Co., Inc., 611 F. Supp. 665, 679 (D.N.J. 1985); Kozlowski v. Kozlowski, 164 N.J. Super. 162, 171 (Ch. Div. 1978), aff'd, 80 N.J. 378 (1979) (elements of a partnership include agreement, sharing profits and losses, ownership and control of the partnership's property and business, among others). Neither the DEC nor the majority made findings of any of these elements, which indeed are absent here.[1]

[1] It is worth noting the unpublished Appellate Division opinion, In re Estate of Wlodarczyk, 2018 WL 3431779 (2018), affirming a lower court decision that upheld the legitimacy of a will prepared by an attorney who, like respondent, got "a large volume of clients" from an estate planning referral service like FEP, used its template in preparing estate documents, and did not personally meet with the testator, speaking with him by phone. While ethics issues were not involved, the court made findings that bear on the issues here. Despite the large volume of referrals made to this attorney, the court found nothing improper either in having the referral service interview the client to gather information, or in the estate attorney's use of the referral service's template, noting that the

RPC 5.3(a) requires a lawyer to make reasonable efforts to ensure that the conduct of non-lawyers retained or employed by the lawyer is compatible with lawyer's professional obligations. Similarly, RPC 5.4(c) states that a lawyer shall not permit a person who recommends, employs or pays a lawyer to direct the lawyer's professional judgment. The Board finds that respondent violated both of these RPCs because he relied on FEP's McGlinchey to collect Janet's personal data, witness her signatures, and "otherwise determine the course of the representation" (Opinion, at 19-20), although the Board does not explain or document any ways in which McGlinchey "otherwise determine[d] the course of the representation."

Contrary to the Board's finding, RPC 5.3(a) is inapplicable to this case because McGlinchey was not "retained or employed by [respondent]." Nor did she work for him in any capacity. She worked for FEP, an independent contractor. Moreover, McGlinchey's misdeeds were carried out behind respondent's back without his knowledge. Indeed, they were deliberately hidden from him and so, over the course of this fairly brief representation, he simply did not know that her actions were not compatible with his professional obligations. Even if it can be said in hindsight that he should have discovered her misdeeds and fraudulent acts, that deficiency, it seems to me, constituted

---

testator's wishes were "simple" and saying "[l]awyers do it all the time, and they trade documents and update them."

simple negligence and not an RPC violation. Likewise, a violation of RPC 5.4(c) also is not supported by clear and convincing evidence as there is no evidence in this record that McGlinchey or anyone else on behalf of FEP directed respondent how to do his work for his client.

I note that respondent has no disciplinary history in his thirty-three years at the bar. He is a well-respected, experienced estate lawyer, as documented by the many letters written on his behalf and the character witnesses who testified for him at the DEC hearing. He did not benefit from the scheme perpetrated by his client's daughter and granddaughter. In fact, he was harmed by their selfish, secret fraudulent actions and those of FEP's McGlinchey when he had to defend the malpractice case filed against him and pay $61,000 in damages to compensate the intended beneficiaries of his client's estate for the 25% harm attributed to him by the malpractice jury. Lastly, although unmentioned by the majority opinion, it is relevant that the facts in this case occurred thirteen years ago in 2007, In re Kotok, 108 N.J. 314, 330 (1987); In re Verdiramo, 96 N.J. 183, 187 (1984), and respondent has continued to maintain a clean disciplinary record to date as a well-respected member of the Bar of this State.

In summary, it is notable how little importance the majority attributes to the fraud perpetrated by third parties when it was their fraudulent acts that not only caused the harm but also blinded respondent to their nefarious scheme. They were the ones who secretly forged decedent's signature on estate

documents, falsely notarized her forged signatures, and pretended to be respondent's client on a telephone call with him. Indeed, their intentional, fraudulent acts were specifically designed to deceive respondent. Respondent too can be faulted for his negligence in failing to take steps that would have revealed the fraud, especially in failing to more thoroughly explore his client's mental state and testamentary intent. For example, he could have met with her in person instead of on the telephone; or he could have conducted a longer telephone conversation with her; and he could have himself insisted on witnessing her signature on the documents he drafted. But no RPC requires him to take any of these specific precautions. Respondent's failing to discover the fraud perpetrated by others, as unfortunate as it was, was simple negligence and not a violation of any RPC. Lacking clear and convincing evidence of any ethics infraction, I would dismiss the ethics complaint in its entirety.

Disciplinary Review Board
Anne C. Singer, Esquire

By: _____
For: Ellen A. Brodsky
Chief Counsel