TOLEDO BAR ASSOCIATION *v.* CANDIELLO.

[Cite as *Toledo Bar Assn. v. Candiello* (1999), ___ Ohio St.3d ___.]

Attorneys at law — Misconduct — Two-year suspension with twelve months of suspension stayed — Improper conduct arising out of the representation of the guardianship and later the estate of a client.

(No. 98-1230 — Submitted December 2, 1998 — Decided March 10, 1999.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Supreme Court, No. 97-17.

On February 18, 1997, relator, Toledo Bar Association, filed a complaint charging respondent, V. Robert Candiello of Toledo, Ohio, Attorney Registration No. 0003355, with several disciplinary violations arising primarily out of his representation of the guardianship and later the estate of Mary Bonner. The respondent's answer admitted nearly all the facts alleged in the complaint and admitted to violations of some of the Disciplinary Rules charged by the relator. The parties entered into stipulations, and the matter was heard by a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court ("board').

The panel found that respondent, who had represented Mary Bonner for twenty-three years, drafted a will for her in 1987, designating himself as beneficiary. In 1988, respondent directed Bonner to another attorney, who prepared a second will for her, which also named respondent as beneficiary. In 1991, respondent prepared a third will for Bonner, in which she named respondent's long-time secretary, Beverly LaHote, as beneficiary. And in May 1992, he prepared a fourth will for Bonner, also naming LaHote as beneficiary. When Bonner died, LaHote received $37,000 from Bonner's estate. The panel

concluded that respondent's conduct violated DR 1-102(A)(6) (a lawyer shall not engage in conduct adversely reflecting upon his fitness to practice law).

The panel found that in September 1984, respondent prepared a will for Bonner's sister, Anne A. Simon. Upon Simon's death, respondent did not take the $20,000 that he was to receive as a beneficiary of a testamentary trust established in Simon's will; however, he did receive a legal fee for probating the Simon estate. The panel concluded that respondent's conduct again violated DR 1-102(A)(6).

The panel found that respondent maintained an ownership interest in Bomar Corporation, a real estate development company. In 1988, at respondent's suggestion, Bonner invested $73,634 in the company for a guaranteed fourteen percent return for two years and received a corporate note that respondent personally guaranteed. When the note came due, the company failed to pay, and Bonner settled with both the company and respondent. Respondent paid Bonner the $73,634 in four installments from his trust account and his law firm's general account. Respondent and Bonner also agreed that he should pay her $16,000 in lieu of the minimum return she was guaranteed on her investment. The panel concluded that respondent thereby violated DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), 1-102(A)(5) (a lawyer shall not engage in conduct prejudicial to the administration of justice), 1-102(A)(6), 5-104(A) (a lawyer shall not enter into business transactions with a client when they have differing interests unless the client consents after full disclosure), and 9-102(B)(3) (a lawyer shall keep complete account of all client funds coming into his possession).

In August 1993, the probate court appointed respondent guardian of the person and estate of Bonner. In November 1993, Bonner died, and in December 1993, respondent filed an application to open her probate estate. He then closed

the guardianship, and, it appears, transferred over $350,000 from the guardianship to the probate estate. Although the probate court did not appoint respondent as executor of the Bonner estate until late February 1994, respondent continued to use guardianship checks to pay bills incurred by and for the Bonner estate after her death and until his appointment. As executor, respondent redeemed certificates of deposit in Bonner's name and closed bank accounts, accumulating at least $190,000 in cash, which he deposited in his office safe. Respondent said that he put the cash in his safe because he knew that Bonner disliked the persons who were likely to contest her will. Therefore, he attempted to make it difficult and expensive for them to trace and obtain the funds. Respondent kept no office ledger to journalize receipts and disbursements. Instead, he kept mental notes of money received and put written notes in each file. When he liquidated assets in the Bonner estate, respondent attached written notes to the cash in his safe so that he would know the source of the funds.

The probate court removed respondent as executor in January 1995. In order to avoid reporting to the Internal Revenue Service, respondent transferred most of the cash in the estate to the administrator with will annexed by obtaining cashiers checks in denominations of under $ 10,000 from banks and persons who "liked to buy large sums of cash."

With respect to the guardianship and estate administration, the panel concluded that respondent violated DR 1-102(A)(4), (5), and (6), 9-102(B)(2) (a lawyer shall identify all property of a client upon receipt and deposit it in a place of safekeeping), and 9-102(B)(3).

In mitigation, the panel heard testimony regarding respondent's competence and good character and the fact that respondent has since adopted more traditional accounting procedures. The panel recommended that respondent be suspended

from the practice of law for two years, that a monitor be appointed to oversee respondent's practice, with a requirement that respondent take at least ten hours of continuing legal education relating to law firm accounting, the requirements of maintaining an IOLTA, and the proper policies and procedures associated therewith. The board adopted the findings and conclusions of the panel, and, essentially its recommendation.

Christopher F. Parker, *Julia Wiley* and *George Gernot III*, for relator.

N. Stevens Newcomer, for respondent.

Per Curiam. We adopt the findings of the board. As the board noted, respondent drafted wills for Bonner and Simon, in which he or his secretary was named as a beneficiary before DR 5-101 was amended in May 1996 to prohibit an attorney from drafting such a will or trust. Nevertheless, for reasons which we expressed in *Disciplinary Counsel v. Galinas* (1996), 76 Ohio St.3d 87, 90, 666 N.E.2d 1083, 1086, we conclude, as did the board, that in each case respondent violated DR 1-102(A)(6).

Respondent also suggested that Bonner invest in a company that he owned. When Bonner failed to realize the profit she was promised, respondent repaid her the principal amount. However, by agreement with Bonner, he paid only $16,000, instead of the full interest due on Bonner's Bomar investment. We believe that respondent should have refrained from seeking Bonner as an investor in his company. Also at the time he agreed with Bonner to compromise the interest due, his status as her long-time attorney put him in a position to unduly influence her decisions and profit by the situation. "A lawyer should avoid even the appearance of impropriety and the implication that his professional judgment on behalf of a

client could be affected by the lawyer's own interests." *Miami Cty. Bar Assn. v. Thompson* (1997), 78 Ohio St.3d 103, 104-105, 676 N.E.2d 879, 881. Moreover, respondent paid Bonner this agreed amount in lieu of interest partly from his trust fund and partly from his general office fund. In so doing, he violated DR 9-102(A)(2), which states that a client trust fund may contain no funds of the lawyer except those that belong partly to the client and partly to the lawyer. Because respondent paid his personal guarantee of interest partly from the trust fund, respondent necessarily used funds of another client or used the trust fund improperly.

Respondent's administration of the Bonner guardianship and estate was inadequate. He not only poorly identified funds in his possession, but also held those funds in the form of cash, not because he was so directed by Bonner's will, but because he "knew" that Bonner disliked the persons who would claim against her estate and so attempted to make it difficult and expensive for them to trace the estate's assets.

As a fiduciary, respondent is expected to act as a prudent person and pursuant to written instructions of the deceased. It was imprudent to maintain funds in an office safe where they were uninsured and at risk and would not accrue interest. Also, respondent acted beyond the scope of his authority in attempting to frustrate litigants because of his perception of the deceased's wishes. We adopt the board's conclusions with respect to respondent's administration of Bonner's guardianship and estate.

We note, however, that respondent has had an otherwise unblemished reputation during more than twenty years of practice and that he did finally account for the funds in his possession.

Respondent is hereby suspended from the practice of law for two years, with twelve months of that suspension stayed. Cost are taxed to respondent.

Judgment accordingly.

DOUGLAS, FAIN, F.E. SWEENEY, PFEIFER and LUNDBERG STRATTON, JJ., concur.

MOYER, C.J., and COOK, J., dissent.

MIKE FAIN, J., of the Second Appellate District, sitting for RESNICK, J.

COOK, J., dissenting. Respondent's conduct warrants at least a two-year suspension. I would, therefore, impose the sanctions and conditions recommended by the board.

MOYER, C.J., concurs in the foregoing dissenting opinion.