SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

DOCKET NO: ACJC 2006-026

IN THE MATTER OF SURROGATE DONALD W. DE LEO	**PRESENTMENT**

The Advisory Committee on Judicial Conduct, pursuant to Rule 2:15-15(a), presents to the Supreme Court its Findings that the charges set forth in a Formal Complaint against Donald W. De Leo, Surrogate of Hudson County, have been proven by clear and convincing evidence and its Recommendation that the Respondent be publicly reprimanded.

On December 11, 2006, the Advisory Committee on Judicial Conduct issued a Formal Complaint against the Respondent, which alleged that his conduct in preparing estate planning documents on behalf of a client, while serving as Surrogate of Hudson County, violated Rule 1:15-1(c) and Rule 2:15-8(a)(1) of the New Jersey Rules of Court and Canons 1 and 2A of the Code of Judicial Conduct. See Complaint, Count I. The Complaint further alleged that in signing letters testamentary and presiding over the probate of a Will that he drafted, Respondent violated Canons 3(C)(1) and 5(A)(1) of the Code of Judicial Conduct and Rule 2:15-8(a)(6) of the New Jersey Rules of Court. See Complaint, Count II. The Respondent filed an Answer on January 16, 2007, in which he admitted certain factual allegations of the Formal Complaint and denied others.

The Committee convened a formal hearing on March 29, 2007. Respondent appeared with Counsel and offered testimony in his defense. Exhibits were offered by both parties and

accepted into evidence. After carefully reviewing the evidence, the Committee made factual determinations, supported by clear and convincing evidence, which form the basis for its Findings and Recommendation.

I. FINDINGS

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1967. At all times relevant to these matters, Respondent served as Surrogate of Hudson County.

A. As to Count I

On or about February 28, 1997, Respondent prepared the Last Will and Testament (the "Will"), Living Will and "Limited Power of Attorney for Health Care Purposes" of Abraham Kohl, a Hudson County resident. The Will was executed by Abraham Kohl (the "Decedent") on May 29, 1997. The Will revoked Decedent's earlier will executed in 1995, which resulted in the disinheritance of the Decedent's daughter, Faye DeRosa, a renaming of the Decedent's son, Seth Kohl, as a successor beneficiary only, and a renaming of the Decedent's sister, Mae K. Savage, as the sole beneficiary. The Will also appointed Ms. Savage as Executrix.

Count I of the Committee's Complaint against Respondent asserts that by preparing the Will, Living Will and Limited Power of Attorney on behalf of the Decedent, while concurrently serving as Surrogate of Hudson County, Respondent engaged in the practice of trust and estate law in violation of Rule 1:15-1(c). Rule 1:15-1(c) prohibits a surrogate from "practic[ing] law in any estate or trust matter in or out of court." In his Answer to the Complaint and during the formal hearing before the Committee, Respondent took the position that as Mr. Kohl was alive at the time the pertinent documents were prepared, he did not engage in the practice of trust and estate law and therefore did not violate the Rule. Respondent argues that "An Estate is only

established and the probating of a Will only occurs once, a testator is deceased." Answer, Second Affirmative Defense.

The New Jersey Supreme Court considered an earlier version of Rule 1:15-1(c) in In re Diamond, 72 N.J. 139 (1976). In Diamond, the Court discussed its concern that statements in the underlying record appeared to "countenance the practice of probate law by a deputy surrogate as long as no court appearance is made." Id. at 141. The Court held as follows: "The Rule, which we confess is somewhat ambiguous, should be interpreted as having the comprehensive meaning accorded to it by the Advisory Committee [on Professional Ethics]; a deputy surrogate who is an attorney should not, during his term of office, practice probate law." Id. at 141-42. The Advisory Committee had interpreted the Rule to prohibit a deputy surrogate from acting as a consultant in the field of probate law. Id. at 141. See also In re Blackman, 124 N.J. 547, 554 (1991) ("In general, rules governing judicial conduct are broadly construed, in keeping with their purpose of maintaining public confidence in the judicial system.").

The Committee finds that Respondent violated Rule 1:15-1(c) when he drafted estate planning documents in his private capacity as an attorney while he held the public position of Surrogate of Hudson County. The Committee relies not only upon the instructions in Diamond that Rule 1:15-1(c) be construed broadly, as are all rules of judicial conduct, but upon the broad language of the Rule itself. Rule 1:15-1(c) prohibits a surrogate from "**the practice of law in any estate or trust matter in or out of court**" (emphasis added). The Committee can find no basis on which to conclude that this stricture only forecloses the practice of estate law when an estate comes into technical existence upon an individual's death. Moreover, common interpretation of the field of trust and estate law plainly considers the preparation of wills and

living wills as a part of the larger overall subject matter. See e.g., William M. McGovern, Wills, Trusts and Estates (3rd ed. 2004).

By violating Rule 1:15-1(c), the Committee concludes that Respondent has also violated Canons 1 and 2A of the Code of Judicial Conduct and has engaged in misconduct in office in violation of Rule 2:15-8(a)(1). Canon 1 of the Code of Judicial Conduct requires judges to maintain high standards of conduct, while Canon 2A requires judges to conduct themselves in a manner that promotes public confidence in the integrity and impartiality of the Judiciary. Rule 2:15-8(a)(1) prohibits a judge's misconduct in office.

Despite the foregoing, the Committee acknowledges, as did the Court in Diamond, that Rule 1:15-1(c) is somewhat ambiguous and has been subject to varying interpretations. Such ambiguity lends credence to Respondent's assertion that he has consistently construed the term "estate," as it is used in Rule 1:15-1(c), to prevent legal actions that relate only to a "probate practice," or the practice of law that occurs after a testator's death. Will preparation would not be included under this understanding. Because Rule 1:15-1(c) was not clearly or consistently understood or applied to encompass the drafting of a will and related documents, the Committee believes that public discipline, with respect to Count I, may not be appropriate. See In re Blackman, 124 N.J. at 556 ("Although we now determine that [respondent's conduct] violates the *Rule*, we do not believe respondent's conduct warrants discipline, because the *Rule* may have been open to varying constructions prior to our decision today.").

B. As to Count II

On November 26, 2003, Respondent, acting in his capacity as Surrogate of Hudson County, signed the letters testamentary to permit Ms. Savage to serve as executrix of Decedent's Will and admitted the Will to probate.

Count II of the Committee's Complaint against Respondent asserts that by presiding over the probate of Decedent's Will -- a Will he drafted -- and by signing the pertinent letters testamentary, Respondent engaged in a conflict of interest in violation of Canons 3(C)(1) and 5(A)(1) of the Code of Judicial Conduct. Canon 3(C)(1) mandates a judge's disqualification from a legal proceeding in which his or her impartiality might reasonably be questioned. Canon 5(A)(1) requires judges to conduct all of their extra-judicial activities in a manner that will avoid creating a reasonable doubt as to the judge's capacity to act impartially as a judge. While Respondent does not dispute that he admitted Decedent's Will to probate and signed the letters testamentary, he claims both acts to be "ministerial" and therefore not a violation of the alleged Canons.

The law regarding the role of a county surrogate is clear. "The county surrogate is elected by the people of his county [citations omitted], and is both judge and clerk of the surrogate's court of the county. [Citations omitted]. The surrogate is thus a judicial officer...." In the Matter of Conda, 104 N.J. 164, 173 (1986). One aspect of a surrogate's judicial function is to pass on the validity of wills and to admit them to probate, if appropriate. See N.J.S.A. 3C:3-18. The language of the Judgment for Probate signed by Respondent in this case confirms this function: "On reading and filing the application of Mae K. Savage ... for the probate of the Last Will and Testament of Abraham Kohl, deceased, and for Letters Testamentary therein, and the Surrogate having inquired into the circumstances and taken proof, and being satisfied of the genuineness of the Will produced, the validity of its execution and the competency of the testator ..., [i]t is, thereupon ... ADJUDGED that the instrument offered for probate in this matter be and the same hereby is established as the Last Will and Testament of the said ... deceased...." See P-11.

It is indisputable that Respondent violated Canons 3(C)(1) and 5(A)(1) by passing on the validity of a Will that he drafted and by signing the resulting letters testamentary. As the attorney who drafted Decedent's Will, Respondent undoubtedly had personal knowledge of and familiarity with both the Will and the circumstances surrounding its preparation. Yet, the role of a Surrogate is to provide a neutral and unbiased third-party review of estate documents. The Committee believes it unlikely, if not impossible, that an impartial review of Mr. Kohl's Will occurred given Respondent's role as both author of the Will and decision-maker regarding its validity. Respondent's actions were not only ethically offensive, but they created an inherent and obvious conflict of interest.

The Committee is not swayed by Respondent's claim that his functions in admitting the Will to Probate and signing the letters testamentary were ministerial in nature. As the Committee previously concluded in In re Newman, ACJC 2004-196, 189 N.J. 477 (2006), "the fact that a proceeding may involve ministerial, rather than discretionary, action is irrelevant to the issue of conflict. The reasonable observer sees only the conflict, the exercise of the judicial office by one who lacks, or appears to lack, impartiality." In this case, the Committee finds that Respondent's actions, which were, in fact, reasonably questioned by the grievant, created a conflict of interest that is not negated by classifying the actions as "ministerial." Respondent should have disqualified himself from admitting Mr. Kohl's Will to probate in accordance with the demands of Canons 3(C)(1) and 5(A)(1) and his statutory obligations as County Surrogate.

By violating Canons 3(C)(1) and 5(A)(1) of the Code of Judicial Conduct, the Committee finds he has further violated Canons 1 and 2A, as well as Rule 2:15-8(a)(6) of the New Jersey Court Rules, which prohibits conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

II. RECOMMENDATION

In light of the above findings and determinations, the Committee recommends that Respondent be publicly reprimanded. Although the Committee does not believe that Respondent's conduct as alleged in Count I merits the imposition of discipline due to the ambiguity of Rule 1:15-1(c), it does find that Respondent's actions, as alleged in Count II of the Complaint, constitutes improper and unethical conduct and violated the pertinent Canons of Judicial Conduct and Rules of Court. It is on this basis that the Committee submits its recommendation for public reprimand.

Respectfully submitted,

Advisory Committee on Judicial Conduct

By: Alan B. Handler
Alan B. Handler, Chair

Dated: July 31, 2007