STATEWIDE GRIEVANCE COMMITTEE

Kazimierz Kosiorek Complainant	:	
vs.	:	Grievance Complaint #07-0007
Jacek Smigelski Respondent	:	

DECISION

Pursuant to Practice Book §2-35, the undersigned, duly-appointed reviewing committee of the Statewide Grievance Committee, conducted hearings at the Superior Court, 80 Washington Street, Hartford, Connecticut on July 12, 2007 and December 13, 2007. The hearings addressed the record of the complaint filed on January 4, 2007, and the amended probable cause determination rendered by the New Britain Judicial District, and Judicial District of Hartford for Geographical Area 12 and the towns of Avon, Bloomfield, Canton, Farmington and West Hartford Grievance Panel on May 7, 2007, finding that there existed probable cause that the Respondent violated Rules 1.5(a) and (c) and 1.15(b) of the Rules of Professional Conduct.

Notice of the July 12, 2007 hearing was mailed to the Complainant, to the Respondent and to the Office of the Chief Disciplinary Counsel on June 5, 2007. Notice of the December 13, 2007 hearing was mailed to the Complainant, to the Respondent and to the Office of the Chief Disciplinary Counsel on November 2, 2007. Reviewing committee members Attorney Geoffrey Naab and Dr. Frank Regan were present at the July 12, 2007 hearing. There was a vacancy on the reviewing committee at the time of that hearing. Attorney Evelyn Gryk-Frolich joined the reviewing committee subsequently and attended the hearing on December 13, 2007. She also reviewed the entire transcript and record of these proceedings prior to participating in the decision.

Pursuant to Practice Book §2-35(d), Chief Disciplinary Counsel Mark Dubois pursued the matter before this reviewing committee. The Respondent and the Complainant appeared and testified. Exhibits were admitted into evidence. Both the Respondent and Disciplinary Counsel submitted post-hearing briefs.

This reviewing committee finds the following facts by clear and convincing evidence:

The Complainant is a beneficiary of the estate of Stanislaw Kośiorek, his father. The Complainant's father had entered into a second marriage less than a year before his death with a Polish woman named Bronislawa Pliszka. The Complainant and his siblings ("the heirs") believed that this marriage was a sham and either void or voidable for a number of reasons. On July 16, 2004, the Complainant, along with his seven brothers and

sisters, initiated a lawsuit against Bronislawa Kosiorek requesting, among other things, a declaratory judgment that a quitclaim deed of his home (the estate's only asset) from Stanislaw Kosiorek to Bronislawa Kosiorek was invalid, null and void and of no effect and that Stanley Kosiorek, as executor of the estate, was the rightful owner of the property. The heirs believed that the quitclaim deed in question was either a forgery or obtained under undue influence. Januszewski, McQuillan & DeNigris, LLP initially represented the heirs in their lawsuit.

Attorney John Matulis of Januszewski, McQuillan & DeNigris, LLP was able to obtain a settlement offer from the defendant Bronislawa Kosiorek of $45,000 in exchange for a release of her claims. The heirs were unhappy with this settlement offer and they wished to work with an attorney who spoke Polish. In June of 2006, Attorney Matulis moved to withdraw his firm's appearance on the grounds that the heirs wished to hire a new attorney. Januszewski, McQuillan & DeNigris, LLP charged $7,849.93 for the work performed.

In early June, Stanley Kosiorek, the executor of the estate, met with the Respondent to discuss the possibility of the Respondent representing the plaintiffs in the lawsuit. The Respondent was reluctant to accept the case because it was scheduled for a trial that summer and he would only have two months to prepare, but he agreed to accept the case. The Respondent drafted a fee agreement, which authorized the Respondent either to receive his full hourly rate from Stanley Kosiorek, or to receive a contingency fee of one-third of the gross settlement, whichever was greater. Neither Stanley Kosiorek nor the Respondent consulted with the Probate Court prior to entering into the fee agreement.

On June 10, 2006, the Complainant sent the Respondent a check for $5,000 as a retainer for the Respondent's representation in the case. On June 15, 2006, Stanley Kosiorek, individually and as the executor of the estate, signed a retainer agreement with the Respondent in which the fee was stated as:

> ATTORNEY FEE: It is agreed that the fee for legal services rendered by Smigelski, will be based on an hourly charge of $225.00 per hour or it will be contingent upon recovery of benefits and shall be ONE-THIRD of the gross judgment or settlement, which ever amount is greater.

The Complainant was not given a copy of the fee retainer agreement. The Respondent entered an appearance for all plaintiffs in the case, each of the heirs individually and Stanley Kosiorek as executor. He did not review or use the prior law firm's work on the file. He researched the legal and factual issues claimed in the lawsuit. He attempted to hire an expert witness in regard to the forgery claim and researched the attorney who had prepared the allegedly forged deed. He filed an Amended Complaint and prepared for trial. On August 15, 2006, the first day of jury selection, he negotiated a settlement of the case, which was approved by the heirs. He did further work including the

preparation of releases, the sale of the home, and two appearances in the Probate Court. He did not send monthly bills to Stanley Kosiorek or the Complainant accounting for his time or asking for regular payments, nor did he account for his time at all before submitting his legal bill to the executor, Stanley Kosiorek.

The case was settled for a $35,000 payment to Bronislawa Kosiorek in exchange for a release of her claim to the real estate. Neither Stanley Kosiorek nor the Respondent consulted with the Probate Court prior to settling the case, although Stanley Kosiorek did file an Application to Sell or Mortgage Real Property on May 7, 2006. The Complainant loaned $35,000 to the estate to pay Bronislawa Kosiorek.

The estate sold the home to Adam and Kylie Kosiorek, relatives of the heirs for a net price of $170,000. On August 24, 2005 Attorney Matulis had obtained an appraisal, which valued the home at $257,000. On May 6, 2006, a month before hiring Attorney Smigelski, the executor filed an inventory in the Probate Court, listing the sole asset of the Estate as the home, valued at $215,000. On May 7, 2006, the executor filed an application to sell the home to Adam and Kylie for $170,000. After a hearing on November 8, 2006, the Probate Court approved the sale for that amount, but on December 12, 2006 issued a revised decree, authorizing the sale for $212,500, including a gift of equity of $42,500. Those amounts were reported on the HUD-1, which also reported a closing cost credit of $5,983.68.

At the real estate closing on December 21, 2006, the Respondent withheld all of the money due the estate. On December 26, 2006, the Respondent paid $88,462.50 to the estate, as the total due from the closing after withholding $66,838.32 for his attorney's fee and expenses. The fee was based on one-third of the gross amount of the settlement in the lawsuit, which the Respondent determined to be $257,000, the amount of the 2005 appraisal, despite the gross sales price of $212,500, as approved by the Probate Court. The Respondent determined he was entitled to a fee of $85,665.81 but discounted this amount by $14,832.48 for a total fee of $70,833.33, which is one-third of $212,500, and expenses of $1,004.99. In calculating the value of the settlement and his fee, the Respondent did not consider the $35,000 the estate paid to Bronislawa Kosiorek.

The Complainant, as an heir of the estate, objected to the fee. On January 4, 2007, the estate, through counsel, informed the Respondent that it objected to the fee and told him to place the legal fee in escrow until the fee dispute could be resolved. A Motion for Hearing to Compromise Claim and Determine Reasonableness of Fees Charged to Estate was filed in the Probate Court on January 9, 2007 with service on the Respondent. The heirs opposed the executor paying the Respondent's legal fee from estate funds because it was unreasonable. The Respondent filed an Objection to the Motion on January 11, 2007.

The Respondent did not safeguard the funds or place the funds in escrow. On May 21, 2007, the Probate Court (Famigletti, J.) issued a decision finding that the Respondent had charged the estate an unreasonable legal fee and that a reasonable legal fee would be

$15,000 plus $1,000 for the expense of hiring an expert witness. She ordered the executor, Stanley Kosiorek "to restore to the estate the sum of $54,833.33 and to report such restoration in an Affidavit of Closing." The Respondent refused and continues to refuse to restore that sum to Stanley Kosiorek so that the money could be restored to the estate. Stanley Kosiorek instituted a legal action to recover the legal fee from the Respondent. Stanley Kosiorek, Executor v. Jacek Smigelski, Judicial District of New Britain, Docket No. HHB-CV-07-4014607-S. The Respondent did not escrow the disputed fee or indicate in any way that he was preserving the funds pending judicial resolution of the dispute.

This reviewing committee also considered the following:

The Respondent argued that he and his client, Stanley Kosiorek, had the freedom to contract for the fee and that through his efforts Stanley Kosiorek obtained an excellent result in a case with weak factual support. He further argued that Stanley Kosiorek was perfectly satisfied with the agreement and it was the Complainant who objected to the attorney's fee. He did not believe that he had represented the Complainant as a client. He further disputed that the Probate Court decree was binding on him, because he was not a party in the Probate Court proceedings, and the decree was directed not to him, but to the executor.

Disciplinary Counsel argued that the Respondent had undertaken to represent all of the heirs including the Complainant, the Probate Court decree determining the Respondent was entitled to $16,000 was binding on the Respondent, and therefore the Respondent was not entitled to accept a fee greater than the $16,000.

The Complainant claimed that the Respondent did not let him look at the fee agreement, that the Respondent tricked his brother Stanley Kosiorek, and that the family would never have agreed to a contingency fee in this case.

The Respondent has received four prior reprimands for violating the Rules of Professional Conduct.

This reviewing committee concludes by clear and convincing evidence that the Respondent violated the Rules of Professional Conduct.

Rule 1.5(a):

Rule 1.5(a) of the Rules of Professional Conduct states: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." The Rule then cites eight factors to be considered in determining the reasonableness of a fee. This reviewing committee believes that the relevant factors to be considered in this case are: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly"; "(4)

the amount involved and the results obtained" and "(5) the time limitations imposed by the client or by the circumstances."

In this case, Stanley Kosiorek approached the Respondent on behalf of the family and asked him to represent them in a lawsuit with a trial date approximately two months away. The legal question raised was novel and required inquiry into an unusual fact pattern. The Respondent was constrained by a short time period, in which to prepare for a trial. Therefore, we do not find clear and convincing evidence that the fee agreement on its face violated the Rules of Professional Conduct. Further, because the fee dispute is now subject to civil litigation, we decline to determine what fee would have been reasonable in this case.

However, this reviewing committee does find by clear and convincing evidence that the Respondent's collection of his fee was unreasonable and a violation of Rule 1.5(a) of the Rules of Professional Conduct. In determining that the collection of the fee was unreasonable, we considered the fourth factor: "the amount involved and the results obtained". Because the Respondent chose to collect a contingency fee, we consider whether or not he properly evaluated the results obtained when determining his fee. We conclude, by clear and convincing evidence, he used an inflated result to compute his legal fee and that this violated Rule 1.5(a).

The fee agreement stated:

> ATTORNEY FEE: It is agreed that the fee for legal services rendered by Smigelski, will be based on an hourly charge of $225.00 per hour or it will be contingent upon recovery of benefits and shall be ONE-THIRD of the gross judgment or settlement, which ever amount is greater.

In this case, the Respondent did not submit a bill for an hourly rate to Stanley Kosiorek at the end of his representation. The Respondent chose to compute his fee by using the contingency option in the fee agreement. The Respondent inflated the actual results he obtained for Stanley Kosiorek. The Respondent's bill shows that he based his contingency fee on one-third of $257,000, which he claimed was the estimate of the value of the home. The property had appraised for $257,000, but it did not sell for that price. The evidence shows that the property was worth $212,500, the purchase price listed on the HUD-1 at the time of the sale, as approved by the Probate Court. The Respondent also failed to consider the $35,000 paid to restore the property to the estate. Therefore, we determine the result obtained was $177,500 and not $257,000. Accordingly, we find by clear and convincing evidence that the "gross judgment or settlement" used by the Respondent in determining his fee was inflated and unreasonable. The $35,000 settlement paid should have been considered in determining the gross settlement, in part, because one purpose of a contingency fee agreement is to share the risk between the attorney and the client.

The Respondent's fee was unreasonable because it was not based on the results he obtained and was for more than he bargained[1]. We further find, as discussed in our analysis of Rule 1.15(b), it was unreasonable to collect the attorney's fee from the estate of Stanislaw Kosiorek rather than from the executor Stanley Kosiorek's personal funds. Wherefore, we find by clear and convincing evidence that the Respondent violated Rule 1.5(a) of the Rules of Professional Conduct when he charged and collected a legal fee larger than the one he contracted for and when he collected the legal fee from the estate of Stanislaw Kosiorek rather than the personal funds of Stanley Kosiorek.

Rule 1.5(c):

This reviewing committee does not find that the use of a contingency fee agreement in the circumstances of this case violates Rule 1.5(c) of the Rules of Professional Conduct. The estate had no significant assets other than its claim to the house. If the heirs had been unsuccessful in their lawsuit, there was a risk that the Respondent would not be paid for his work at all. There is merit to the Respondent's argument that if he had pursued the matter to judgment and lost the house, the Complainant would have objected to his fee because he had not obtained positive results for the heirs.

Rule 1.15(b) (2006)

Rule 1.15(b) of the Rules of Professional Conduct states, in part: "...a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property."

In this case, we find by clear and convincing evidence that Stanley Kosiorek, acting both in his personal capacity and as executor of the estate, hired the Respondent to represent the executor and all of the heirs in their lawsuit against Bronislawa Kosiorek to recover property they believed belonged to the estate of Stansilaw Kosiorek. The evidence shows that the Respondent entered an appearance for all of the heirs in the lawsuit and proceeded to represent all of the heirs in both court proceedings and settlement negotiations. At the time, the heirs and the executor had a unity of interest in obtaining clear title to the real property in question for the benefit of the estate.

The executor was liable for the Respondent's fee, but he was not authorized to pay the Respondent from the funds collected for the benefit of the estate without approval by

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[1] We do not determine what fee would be reasonable under these factual circumstances. That question is currently before the court in Stanley Kosiorek, Executor v. Jacek Smigelski, Judicial District of Hartford at New Britain, Docket No. HHB-CV-07-4014607-S. We believe that the Superior Court is a more appropriate forum for the resolution of this fee dispute.

the Probate Court. "Whenever an executor or administrator enters into a contract binding the estate, he or she incurs a personal liability since the estate is not a legal entity and cannot be the obligor." Constas v. Tucci, Judicial District of Stamford-Norwalk at Stamford, Docket Nos. CV-01-0182864-S and CV-01-0182865-S, 2007 Conn. Super. LEXIS 255 at *11-12 (January 23, 2007) quoting Ralph H. Folsom, PROBATE LITIGATION IN CONNECTICUT 2D §4.10. "The administrator or executor is personally liable for breach of express contracts...for all debts incurred in the continuation by the fiduciary of the business of the deceased and for expenses of administration generally." Id.

> In theory, if the legal fees charged by counsel to the fiduciary are disallowed in part or in whole as an administration expense, those fiduciary expenses would be out-of-pocket. In practice, however, it is customary for the question of the reasonableness of attorney's fees to be addressed by the Probate Court in connection with the accounting of the fiduciary, and for the attorney to voluntarily reduce those fees to the extent disallowed by the court. Gayle B. Wilhelm and Daniel L. Daniels, SETTLEMENT OF ESTATES IN CONNECTICUT 2D (2005) §9:124.

In this case, Stanley Kosiorek was personally liable to the Respondent for the legal fee, but the estate of Stanislaw Kosiorek had no obligation to indemnify Stanley Kosiorek, as executor, unless the contract was approved by the Probate Court or the Respondent successfully litigated the issue under General Statutes §52-570a. Thus, the asset obtained by the executor was part of the inventory of the estate, but the expense of obtaining the asset was a personal obligation of the executor.

The evidence shows that the funds held by the Respondent were always part of the inventory of the estate and were never Stanley Kosiorek's personal financial gain. The lawsuit was initially filed to return the real estate to Stanley Kosiorek as the executor, not individually, and even before the settlement of the lawsuit, Stanley Kosiorek, as executor, applied to the Probate Court to sell the real estate.

General Statutes §45a-98 governs the general allowability of administrative expenses incurred in settling an estate, including legal fees. The statute gives the Probate Court jurisdiction to determine whether or not the expenses provided by the executor, or other fiduciary, in the final accounting are reasonable. An executor has the right to settle claims and hire attorneys on behalf of the estate; however his conduct is always under the jurisdiction of the Probate Court and the Probate Court can disallow any expenses it deems unreasonable. General Statutes §45a-151 allows an executor to apply to the Probate Court for pre-approval of his actions in settling a claim for or against the estate.

Neither the executor nor the Respondent applied to the Probate Court for approval of the fee agreement or for approval of the settlement. See General Statutes §45a-151. The Respondent negotiated the fee agreement with Stanley Kosiorek at his own risk.

The Respondent is correct that the Probate Court decree was directed not to him, but to the executor, but the decree is binding on the extent to which the estate is obligated to pay the Respondent for his services. The funds from which the Respondent paid himself did not belong to Stanley Kosiorek; they were an asset of the estate, which Stanley Kosiorek held in his fiduciary capacity as executor. The Respondent should have safeguarded the estate's funds until he knew that his legal fee was reimbursable by the estate. Further, once he was aware that the heirs of the estate disputed the legal fee and that the question would be presented to the Probate Court, the Respondent should have continued to safeguard the funds. After the Probate Court disallowed all but $16,000 of his fee and expenses, the Respondent should, at the very least, have placed the balance of the funds in escrow pending judicial resolution of his claim against Stanley Kosiorek, pursuant to General Statutes § 52-570a.

The evidence shows that the Respondent represented the estate at a closing on December 21, 2006, and provided the executor with an accounting on December 26, 2006. By January 4, 2007 he knew that the heirs intended to object to his fee. A Motion for Hearing to Compromise Claim and Determine Reasonableness of Fees Charged to Estate was filed in the Probate Court on January 9, 2007, to which the Respondent objected on January 11, 2007. On May 21, 2007, the Probate Court issued its decision, finding the Respondent's fee was unreasonable. After receiving the Probate Court decree, the Respondent refused and continues to refuse to repay the disallowed portion of his legal fee to the estate. The Respondent knew or should have known that the money he held belonged to the estate. This reviewing committee finds that the above actions demonstrate by clear and convincing evidence that the Respondent violated Rule 1.15(b) of the Rules of Professional Conduct.

Since we conclude that the Respondent violated Rules 1.5(a) and 1.15(b) of the Rules of Professional Conduct, we direct the Disciplinary Counsel to file a presentment against the Respondent in the Superior Court for the imposition of whatever discipline is deemed appropriate.

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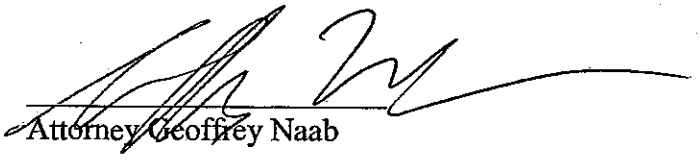
DECISION DATE: 7/18/08



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