

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

07 - 1595

In Re:	:	
Complaint against	:	Case No. 06-079
John Richard Tomlan	:	Findings of Fact,
Attorney Reg. No. 0007449	:	Conclusions of Law and
	:	Recommendation of the
Respondent	:	Board of Commissioners on
	:	Grievances and Discipline of
Disciplinary Counsel	:	the Supreme Court of Ohio
	:	
Relator	:	
	:	

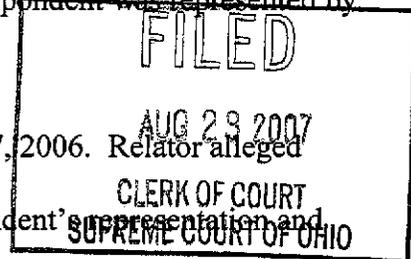
Procedural History

1. This matter was heard on April 24, 25, 26 and 27, 2007 in Columbus, Ohio, upon the Complaint of the Disciplinary Counsel, Relator, against John Richard Tomlan, Attorney Registration No. 0007449, Respondent.

2. The members of the hearing panel were Charles E. Coulson, Martha L. Butler and John H. Siegenthaler, Chair. None of the panel members is from the district from which the complaint arose and none was a member of the probable cause panel that certified the matter to the Board of Commissioners on Grievances and Discipline.

3. Relator was represented by Robert R. Berger. Respondent was represented by Stuart G. Parcell and Terry K. Sherman.

4. Relator's complaint was certified on September 27, 2006. Relator alleged numerous violations of the disciplinary rules arising from Respondent's representation and activities regarding one Katherine Rice and her estate. Respondent answered the complaint on



October 30, 2006. In his Answer, Respondent admitted no wrongdoing, denied that his conduct violated any disciplinary rules and raised other defenses.

5. In addition to generally denying any violations, Respondent also asserted the defenses of waiver, estoppel, consent and ratification of his activities by Katherine Rice; laches and unreasonable prejudicial delay in the investigation of the matter; res judicata; and, release and/or accord and satisfaction.

6. The parties filed separate witness and exhibit lists. There were no stipulations of any matters of fact or law.

7. Respondent's motion for dismissal, filed prior to the hearing and based on unreasonable delay in the investigation, was overruled.

8. Relator's motion to preclude the expert testimony of Alvin E. Mathews, formerly an attorney in the Disciplinary Counsel's Office, filed prior to the hearing was overruled but sustained on reconsideration. Relator's motion to preclude the testimony of various nurses involved in the care and treatment of Catherine Rice was overruled.

Summary of the Case

9. Respondent John Richard Tomlan is accused by Relator, Disciplinary Counsel, of violating various disciplinary rules and his responsibilities to his client, Katherine Rice, then a nursing home patient, approximately 96 years old. Rice and Respondent were not related. The main claim against Respondent is that he improperly participated in several transfers by Rice to him of joint and survivor ownership of her substantial assets then valued at over \$1,400,000.

10. Additionally, Relator maintains that Rice was incompetent when some of the transfers were made, that Respondent failed to adequately act on Rice's behalf by not paying

certain taxes and other obligations and by not securing her former residence although he held Rice's power of attorney authorizing him to do so.

11. Finally, Relator alleges that Respondent's conduct or lack of action after Rice's death violated the disciplinary rules in that he did not attempt to probate her estate for some sixteen months after her death, concealed assets, failed to pay her creditors, failed to safeguard estate property and deposit monies, although he was named as executor by Rice's Will and that he had improper contact with the Probate Judge handling the estate.

12. Respondent maintains that he was like family to Rice and was the normal and expected beneficiary of nearly all of her estate and that the transfers of assets into joint ownership with him were solely Rice's idea.

13. Respondent claims that he provided no legal services to Rice in connection with the property transfers and that therefore he could not have violated any disciplinary rules. Nonetheless, Respondent says that the transfers were made after he made adequate disclosures to Rice.

14. Further, Respondent denies that he neglected any duties to Rice during her lifetime and that he did nothing improper respecting her estate after her death.

15. Relator's complaint states that Respondent's misconduct violates the following provisions of the Code of Professional Responsibility: DR 1-102(A)(2) [circumventing a disciplinary rule through the actions of another]; DR 1-102(A)(4) [conduct involving fraud, deceit, dishonesty or misrepresentation]; DR 1-102(A)(5) [conduct that is prejudicial to the administration of justice]; DR 1-102(A)(6) [conduct that adversely reflects upon the lawyer's fitness to practice law]; DR 5-101(A)(1) [except with consent of a client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the

client will be or reasonably may be affected by the lawyer's financial and personal interests]; DR 6-101(A)(3) [neglect of an entrusted legal matter]; DR 7-101(A)(3) [intentionally prejudice or damage a client during the course of a professional representation], DR 7-109(A) [suppressing evidence that a lawyer has a legal obligation to reveal or produce]; DR 7-110(B) [engaging in ex parte communication on the merits of a cause with a judge before whom the proceeding is pending]; and DR 9-102(B)(2) [failure to safeguard properties of a client promptly upon receipt].

Findings of Fact

In the absence of any stipulations, the panel makes the following findings from the evidence by clear and convincing proof:

16. Respondent, John Richard Tomlan, a graduate of the Ohio State University College of Law was admitted to the Ohio Bar on November 1, 1983. Respondent is subject to the Code of Professional Responsibility and the Rules for the Government of the Bar of Ohio.

17. On or about August 6, 1993, Katherine Rice was admitted to ManorCare, Heartland of Lansing Nursing Home by her brother Robert L. Hill. Rice was 90 years old at the time of her admission and suffered from Parkinson's disease. She was unmarried and had no children.

18. Rice had substantial personal assets when she entered the nursing home and as such she paid for her own care.

19. Some time later in 1993 or 1994, Respondent began visiting Rice at the nursing home, at the request of Rice's nephew, Robert Wesley Hill.

20. In 1997 Respondent handled a real estate closing for Rice and drafted the deed for the sale of a cabin owned by Rice. In 1997 or 1998, Respondent began assisting Rice with the

payment of her bills and speaking with nursing home personnel on behalf of Rice. He then began to receive and review her mail either at his office or at the nursing home. Some of her mail was directed by him to his home address.

21. In 1998, Respondent prepared a Will for Rice. Rice executed the Will on May 5, 1998 and named respondent as executor and Respondent's wife, Shawn D. Tomlan, as the alternate executor. In the Will, Rice made the following bequests:

- \$20,000 to the nephew, Robert W. (Wesley) Hill;
- \$3,500 divided among three individuals;
- \$25,000 divided among three churches;
- \$2,000 divided between two fraternal organizations;
- \$1,000 for the perpetual care of her cemetery lot;
- \$1,000 to the Bridgeport Alumni Association; and
- the remainder of her estate divided among named hospitals and fraternal organizations.

22. In the Spring of 1999 Rice told the Respondent that she wished to revise her Will to leave him a financial bequest. At this time, Respondent advised Rice that he was not permitted to prepare a Will naming him as a beneficiary and that she would have to get another attorney to prepare the Will. Rice declined to hire another attorney and the Will was not revised.

23. In June 1999, Respondent obtained paperwork to create a \$100,000 certificate of deposit for Rice at the Belmont Savings Bank. The paperwork created a joint account with rights of survivorship in the name of Rice and Respondent. As such, Respondent would obtain sole ownership rights over the account upon Rice's death. Rice endorsed a check to withdraw \$100,000 from Belmont National Bank and signed the paperwork creating the certificate of deposit on June 11, 1999.

24. In 1999, Respondent drafted a healthcare power of attorney and a durable power of attorney for Rice's signature. Rice signed both documents on July 14, 1999. The healthcare power of attorney named Rice's nephew, Robert Wesley Hill, as Rice's attorney-in-fact for healthcare decisions. Rice named Respondent as first alternate attorney-in-fact for healthcare decisions.

25. The durable power of attorney designated Respondent as attorney-in-fact for Rice. Through this document, Rice granted Respondent broad authority, including the right to buy and sell real estate and personal property, to enter into transactions with financial institutions, to buy and sell stocks and bonds, to transact business related to social security, pensions, IRA's, government benefits, insurance, credit cards, tax returns, and civil claims.

26. During Rice's lifetime, Respondent did use the power of attorney authority granted to him several times to correspond concerning Rice's affairs and to open bank accounts, manage funds and renew certificates of deposit.

27. In June 2000, Respondent prepared paperwork for Rice's signature to facilitate the transfer of 28,800 shares in American Home Products Corporation [nka Wyeth Pharmaceuticals] stock. The paperwork transferred the stock from Rice's sole name into joint ownership in the name of Rice and Respondent. As such, Respondent would obtain sole ownership rights over the account upon Rice's death. At the time of the transfer the value of the stock was over \$1,000,000. Rice signed the paperwork to make this transfer and create the joint stock ownership on June 15, 2000.

28. In July 2000, Respondent obtained paperwork to renew a \$100,000 certificate of deposit at Wheeling Savings Bank [nka Wesbanco]. The paperwork created a joint account with rights of survivorship in the name of Rice and Respondent. As such, Respondent would obtain

sole ownership rights over the account upon Rice's death. Rice signed the paperwork creating the joint certificate of deposit on July 12, 2000.

29. In January 2002, Rice's treating physician, Dr. Sharon Lazo determined that it was necessary to place Rice into hospice care due to her deteriorating health. At the time, Rice was in the end stage of Parkinson's disease and also suffered from a hiatal hernia, anemia, gastritis, depression, dementia and chronic dermatitis.

30. On January 16, 2002, Respondent signed two documents on behalf of Rice under the authority of Rice's medical power of attorney. By signing these documents, respondent provided consent for Valley Hospice to provide care for Rice.

31. In February 2002, Respondent obtained paperwork to create a \$250,000 certificate of deposit at Citizens Bank. The paperwork created a joint account with rights of survivorship in the name of Rice and Respondent. As such, Respondent would obtain sole ownership rights over the account upon Rice's death. Respondent had Rice sign the paperwork creating the new joint certificate of deposit on or about February 6, 2002.

32. At no time did Respondent urge Rice to obtain disinterested advice from any independent, competent and knowledgeable person with respect to the creation of the joint bank or joint stock accounts benefiting him.

33. At no time did Respondent insist that Rice obtain the services of another attorney with respect to the creation of the joint bank or joint stock accounts benefiting him.

34. Rice was not mentally incompetent at the time of any of the transfers to Respondent.

35. Rice died on December 25, 2002 at age 99. After Rice's death, Respondent arranged for her funeral and notified Rice's out of town niece, Jean Miller.

36. Despite the fact that Respondent was the executor of Rice's Will and controlled all of Rice's primary assets by operation of the joint survivorship accounts, Respondent took no action on behalf of her estate for over sixteen months. During this time Respondent failed to:

- file Rice's Will with the Probate Court;
- file estate tax returns;
- pay Rice's creditors such as the nursing home and funeral home;
- cancel payment of Rice's AARP health insurance premium which continued to be deducted from her checking account;
- deposit numerous bank account interest and stock dividend checks that were mailed to Respondent's residence, many of which originated from the joint accounts with Rice;
- secure Rice's former residence.

37. In late 2003, the nursing home hired Attorney Thomas Semple to collect Rice's outstanding bill of approximately \$11,500. On December 30, 2003, Semple filed an Application for Authority to Administer Rice's estate in the Belmont County Probate Court.

38. On or about February 2, 2004, Semple spoke to Respondent regarding the pending Rice probate matter. During this conversation, Respondent advised Semple that Respondent had Rice's Will and that he intended to file an application to administer the estate.

39. On March 1, 2004, the Probate Court appointed Semple as administrator of Rice's estate. On March 2, 2004, Semple sent Respondent a letter requesting Respondent provide Semple with documentation of Rice's assets, Rice's Will and keys to Rice's house. Respondent failed to respond to Semple's letter and Semple's subsequent requests for these materials. As a result, on April 14, 2004, Semple made two filings with the probate court. Semple filed a motion

requesting the probate court order Respondent to produce the Will. He also filed a concealment action against Respondent alleging that Respondent had assets belonging to Rice's estate in his possession.

40. On May 5, 2004, Respondent filed a Motion for Appointment of himself as Executor and Discharge of Semple as Administrator and an Application to probate the Will of Katherine Rice. In his application to administer the estate, Respondent estimated the value of Rice's estate at \$190,000. Respondent's estimate of the value of Rice's probate estate was about \$200,000 less than the actual value of the probate assets.

41. On May 14, 2004, Belmont County Probate Judge Mark Costine held an evidentiary hearing on the motions and pleading filed by respondent and Semple.

42. On or about May 27 or 28, 2004, Respondent approached Judge Costine as the Judge was leaving the courthouse and walking to his vehicle. Respondent made comments to Judge Costine regarding the opposing motions which the Court had heard from Respondent and Semple. Respondent further stated that he knew the court had discretion and that Respondent hoped the Court's discretion would come down in his favor. Respondent also advised Judge Costine that Respondent had been Rice's attorney and knew her personal affairs.

43. On June 17, 2004, the Probate Court denied Respondent's motion to discharge Semple as administrator. The Court also found that Respondent was "not a suitable person to serve as executor" because of Respondent's "undue delaying the administration of [the] estate . . . to the detriment of the beneficiaries," Respondent's failure to properly manage assets and settle estate bills and Respondent's failure to respond to Semple's numerous communications requesting information and documents. On July 17, 2004, Respondent appealed the Court's

order and on September 28, 2005, the Court of Appeals affirmed the Probate Court's order denying Respondent's motion.

44. On August 27, 2004, Respondent's wife, Shawn Tomlan, filed an application to administer Rice's estate based upon the fact that Rice's Will named her as alternate executor. The Probate Court denied this application on September 27, 2004.

45. On November 8, 2004, Semple sent Respondent a set of interrogatories inquiring about Rice's assets and requested a response within 28 days. Semple specifically requested Respondent to identify all assets that were previously owned by Rice, but now owned by Respondent. Respondent provided an unsworn response dated December 6, 2004. In his response, Respondent failed to identify the \$100,000 Belmont Savings Bank joint certificate of deposit or proceeds created by Rice in June, 1999.

46. On December 22, 2004, Semple filed an action in the Belmont County Common Pleas Court against Respondent alleging undue influence, breach of fiduciary duty, conversion, unjust enrichment and negligence in Respondent's handling of Rice's affairs.

47. On January 7, 2005, Respondent appeared at a Probate Court hearing on a request for a temporary injunction by Semple. During this hearing, Respondent testified regarding Rice's non probate assets. Respondent testified that Rice only had three non probate assets and again failed to disclose the \$100,000 Belmont Savings Bank joint certificate of deposit or proceeds. As a result of this hearing, the probate court issued a preliminary injunction on February 1, 2005. The court's order restrained Respondent from exercising any control over the three non probate assets identified by Respondent and issued jointly to Rice and Respondent -- the Wyeth stock, the \$100,000 Wesbanco certificate of deposit and the \$250,000 Citizens Bank certificate of deposit.

48. In May 2005, Respondent retained Attorney Stuart G. Parsell to represent him in the lawsuit pending in the Common Pleas Court. At a May 20, 2005 pretrial, Parsell advised the Court for the first time of the existence of the proceeds from the \$100,000 Belmont Savings Bank joint certificate of deposit which had previously been redeemed with the proceeds included in a CD then issued to Respondent and his wife.

49. On May 26, 2005, the Court signed an agreed entry that restrained Respondent from exercising any control over the proceeds of the previously undisclosed \$100,000 Belmont Savings Bank joint certificate of deposit.

50. During this period of sixteen months after Rice's death, Respondent took no action to exercise any survivorship rights in the bank deposits and Wyeth stock held in joint names with Rice except for the \$100,000 Certificate of deposit at Belmont Savings Bank created in June, 1999 which Respondent later redeemed.

51. On August 22, 2006, Semple dismissed the lawsuit pending against Respondent pursuant to a settlement agreement. Under the settlement agreement, Respondent agreed to return the jointly held Wyeth stock then valued at \$1.4 million and the \$250,000 Citizens Bank certificate of deposit to the Rice estate. Respondent was permitted to retain ownership of two other \$100,000 certificates of deposit, jointly held with Rice, including the Belmont Bank CD and all accrued interest on those certificates. The terms of the settlement agreement authorized its use in disciplinary proceedings against Respondent.

52. The amended inventory in the Rice estate which included the \$1,600,000 worth of subsequently returned assets was filed August 20, 2006 and totaled \$2,158,931.93 in value.

Conclusions of Law
A. The Competency Issue

53. Much of the hearing involved the issues of Rice's mental competency. Relator presented the testimony of Sharon Lazo, M.D., a general practitioner, who was the attending physician for the patients at the Heartland Nursing Home. Dr. Lazo reviewed Rice's chart at the nursing home at least once per month and saw the patient at about the same frequency.

54. While Dr. Lazo said that Rice suffered from dementia and organic brain syndrome during much of her residency at the nursing home from 1993 to 2002, the physician was unable to say that Rice was mentally incompetent at any specific time. Therefore, Dr. Lazo was not able to form an opinion as to Rice's competency on the dates of the property transfers. Dr. Lazo did submit that it was not uncommon for elderly persons, with those diagnosed mental conditions to be competent one day and incompetent the next day.

55. Respondent's medical expert Renato Cruz, M.D., also with a nursing home patient base, testified as an expert without having ever seen Rice. He gave his opinion from his review of the nursing home records, depositions and related material, that Rice was competent during her nursing home stay and through February 2002, when the final bank deposit joint account transfer to Respondent was made.

56. Several of Respondent's witnesses were either registered nurses, licensed practical nurses or others who had known Rice from her stay at the nursing home. These persons were uniform in their opinions from observing Rice that she was generally alert, oriented, aware and responded appropriately regarding various conversations and questions. They thought she was strong willed and not easily influenced.

57. The panel is unable to find from the evidence with the required reasonable medical probability that Rice was mentally incompetent at the time of any of the property transfers to Respondent.

B. The Attorney-Client Relationship Issue

58. Respondent maintains that although he was Rice's attorney, from early 1997 until her death in later 2002, that the transfers to him were made in recognition of their deep friendship and his many personal kindnesses to her. Respondent says that he provided no legal services respecting the transfers.

59. The panel, however, feels that the professional relationship trumps the friendship and cannot be disregarded in the context of the disciplinary rules. The existence of the attorney-client relationship may be by implication and as understood by the person claimed to be the client. In *Cuyahoga County Bar Assn v. Hardiman*, 100 Ohio St.3d 260, 262-263, 2003-Ohio-5596, the court reasoned that:

Contrary to respondent's view, neither a formal contract nor the payment of a retainer is necessary to trigger the creation of the attorney-client relationship. While it is true that an attorney-client relationship may be formed by the express terms of a contract, it "can also be formed by implication based on conduct of the lawyer and expectations of the client." The determination of whether an attorney-client relationship was created turns largely on the reasonable belief of the prospective client. See, e.g. *Disciplinary Counsel v. Furth* (2001), 93 Ohio St.3d 173, 184, 754 N.E.2d 219, where we found, inter alia, a violation of DR 6-101(A)(3) based upon the reasonable belief of the "client" that the respondent was representing him and his son in a legal matter. (some citations omitted)

60. Respondent became Rice's lawyer prior to the initial transfers to him. He was still her lawyer at the time the transfers were made and continued as her lawyer until her death. There was no evidence that Rice had another lawyer for any purpose during that time period. Respondent never resigned as Rice's lawyer or made any representation to anyone, including Rice, that he was not her lawyer from 1987 until her death. There was no evidence that Rice felt that Respondent was not her lawyer at any time after his initial legal services for her in 1997. In

addition, Rice had named Respondent as her attorney-in-fact in a power of attorney prepared by him in July, 1999.

61. While, as Respondent contends, much of the transfer of property work could have been done by a lay person, those services when performed by an attorney constitute the practice of law. Respondent did provide those services for Rice in order to expedite the transactions.

62. Respondent contacted the banks, obtained contractual signature papers, directed the completion of the papers, presented items to Rice for her signature and signed certain items himself, including some as Rice's attorney-in-fact. Respecting the Wyeth shares, he contacted the transfer agent, obtained and completed the stock power form, enlisted a bank employee to guarantee Rice's signature and took the steps required to transfer registered ownership of the shares. During this time he wrote various letters on his letterhead on behalf of Rice regarding her financial matters.

63. The panel also rejects Respondent's apparent argument that because he did not charge Rice for his services at the time rendered that he should somehow have some lesser responsibility to her than had charges been made. Pro bono legal work constitutes the provision of services by an attorney and requires the same degree of responsibility as where fees are paid. Respondent's explanation as to when and why he decided to charge some clients for his work and not others is not relevant.

64. Respondent cites the unreported case of *Schwinn v. Baggot* (1992), No. 12930 – 2nd Ohio Appellate District, in support of the propriety of his acts. That case involved a \$100,000 gift made by a client to her attorney several months after the attorney had advised the client in writing of his retirement and that he would no longer be providing legal services to her. The client's heirs attempted to reclaim the gift. The Court found no violation of EC 5-5 which

requires the exercise of independent professional judgment on behalf of the client. The gift did not occur during the attorney-client relationship and was made after the lawyer advised the client in writing that she should seek other counsel.

65. Unlike the present case, in *Schwinn*, supra, there was no question that the attorney client relationship had ended well before the gift was made and that the attorney had adequately memorialized the significant facts.

C. The Undue Influence Issue

66. It is clear that an attorney acts in a fiduciary capacity in any dealings with his client. The attorney client relationship creates a presumption of undue influence where the attorney benefits from any financial transaction with the client.

67. The presumption of undue influence is noted and discussed in *Krischbaum v Dillon* (1991), 58 Ohio St.3d 58. This concerned the contest of a Will prepared by an attorney not a relative of the testator, who named himself as the beneficiary of a fifty percent residual share of the estate. The court examined the law of various other jurisdictions and adopted for Ohio the presumption of undue influence, stating in different parts of the opinion:

In adopting the presumption of undue influence, courts have focused upon the attorney-client relationship as demanding the highest level of trust and confidence between the parties. *Krischbaum* at 62.

A client's dependence upon, and trust in, his attorney's skill, disinterested advice, and ethical conduct exceeds the trust and confidence found in most fiduciary relationships. Seldom is the client's dependence upon, and trust in, his attorney greater than when, contemplating his own mortality, he seeks the attorneys advice, guidance, and drafting skill in the preparation of a will to dispose of his estate after death. These consultations are often among the most private to take place between an attorney and his client. . . It is for precisely these reasons that EC 5-5 of the Code of Professional Responsibility requires that, other than in exceptional

circumstances, a lawyer must insist that an instrument in which he is beneficially named be prepared by another lawyer. *Id* at 63.

68. The panel feels that the rationale of *Krischbaum, supra*, although stated in the context of a will contest, also holds true with respect to any other transaction which may have the same effect as a testamentary transfer.

69. Although Respondent provided various legal services for Rice over a period commencing in early 1997 and until her death in late 2002, he argues that the substantial joint and survivor transfers made by her for his benefit should not carry the presumption of undue influence. He claims the transfers were made to him as a close friend and helper notwithstanding his other roles as Rice's lawyer and the holder of her power of attorney. The panel disagrees with Respondent and feels that the presumption of undue influence exists and is not overcome by the evidence presented.

D. The Expert Witness Issue

70. Respondent moved to introduce the expert testimony of attorney Alvin E. Matthews, formerly of the Disciplinary Counsel's Office, to assist in the defense. After the motion was overruled, counsel for Respondent proffered Matthew's testimony which in substance was, in his opinion, that Respondent violated no disciplinary rules.

71. The panel determined that Matthew's testimony was not necessary and would be of no assistance and that the panel was able and qualified to act. In *Office of Disciplinary Counsel v. Karto*, 94 Ohio St3d 109, 2002-Ohio-61, involving proceedings brought against a judge, the Court upheld the panel decision to exclude expert testimony, stating at page 113:

“ . . . respondent argues that he acted within his contempt power and that the board erred in excluding expert testimony to support this conclusion. Contrary to respondent's position, we find that the panel was justified in excluding expert testimony regarding respondent's contempt power. The panel

members consisted of an attorney, a judge, and a layperson who had served on the board for several years. These individuals were qualified to decide the issues of whether respondent had abused his contempt power and whether his actions constituted judicial misconduct. Therefore, since no expert testimony was necessary to decide these issues, the panel chair properly excluded the expert testimony sought.”

E. Respondent’s Affirmative Defenses

72. Respondent claims that unreasonable delay in the investigation prejudiced his rights. He submits that certain nursing home medical records were lost and that a necessary witness died, both during the course of the investigation and that this evidence would have supported Respondent’s claim of Rice’s competency. Respondent raised this defense by his answer and by motion to dismiss filed prior to the hearing. These motions were overruled. The panel found no undue delay or prejudice. Now, inasmuch as the panel does not find Rice to have been incompetent, the unreasonable delay defense is moot.

73. The panel also finds no merit in Respondent’s other defenses of waiver, estoppel, consent and ratification, laches, res judicata and release and/or accord and satisfaction.

F. The Disciplinary Rule Violations

(1) The Duty of Full Disclosure and The Opportunity for Disinterested Advice

74. DR 1-102 provides in part:

- (A) a lawyer shall not:
- (6) Engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law.

DR 5-101 provides in part:

- (A)(1) Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer’s financial, business, property, or personal interests.

EC 5-5 provides:

A lawyer should not suggest to the lawyer's client that a gift be made to the lawyer or for the lawyer's benefit. If a lawyer accepts a gift from the lawyer's client, the lawyer is peculiarly susceptible to the charge that the lawyer unduly influenced or overreached the client. If a client voluntarily offers to make a gift to the client's lawyer, the lawyer may accept the gift, but before doing so, the lawyer should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Unless the client is related by blood or marriage, a lawyer should insist that an instrument in which the lawyer's client desires to name the lawyer beneficially be prepared by another lawyer selected by the client.

75. There was no evidence presented that Respondent disclosed to Rice that these transfers of joint property interests to him could generate substantial gift or estate taxes, could cause the Rice probate estate to be insolvent because of these taxes, and therefore could effectively negate the specific and residual bequests in her Will. Respondent's claims that he told Rice only that the joint and survivor transfers to him would not go under her Will but would go to him instead and that he made similar statements concerning all of the transfers.

76. Even if Tomlan's testimony is accepted as far as it goes, he failed to meet his obligations to his client that he both urge her to obtain disinterested, independent, competent and knowledgeable advice and insist that she obtain other counsel to prepare the instruments of transfer under EC 5-5. He did assist in preparing the instruments respecting the bank deposits and stock transfers in joint and survivor form and never mentioned the use of other counsel or the need for appropriate advice.

77. Respondent accepted employment related to the joint transfers without full disclosure of all relevant facts as mandated by DR 5-101(A)(1). Tomlan did not inform Rice that there could be substantial estate or gift taxes due from her estate on account of the transfers or that these taxes would come first from the probate residue. (In this, the panel takes judicial notice that the federal estate tax deduction equivalent in 2002, the year of Rice's death, was \$1,000,000 and the marginal tax rate was 50%).

78. Respondent also gave no testimony that he disclosed to Rice that because of the size of the joint transfers, possible estate tax implications, final debts and expenses of administration that the bequests, under Rice's Will could be reduced or result in insolvency. He did not explain to Rice the estate or gift tax consequences of the gifts to him compared to the tax favored status of the charitable bequests in her Will if qualified as such.

79. Respondent claims that Robert Wesley Hill, an elderly nephew of Rice, was informed by him and Rice and agreed to the various property transfers. Respondent says that each time a transfer was contemplated that he discussed the matter with Hill, that Hill discussed the matter with Rice out of Respondent's presence and that those three persons later met for further discussions and consented to the transactions.

80. Hill died in 2002, shortly before Rice's death in December of that year. Hill had earlier physical problems and symptoms consistent with a stroke which had concerned Rice as to how long Hill would survive.

81. There was no evidence that Hill was a disinterested, independent, competent person who was cognizant of all the circumstances as contemplated by EC 5-5.

82. There was no corroboration or documentation of any of the disclosures, discussions or consents with Rice or Hill as claimed by Respondent concerning the transfers.

83. Michael Goclan was the bank officer enlisted by Respondent in June 2000 to guarantee Rice's signature on the stock power for the Wyeth shares transfer benefiting Respondent. These shares were then valued at approximately \$1,000,000.

84. Goclan testified that his only duty was to identify Rice as the person signing the stock power. He had no recollection as to the substance of any discussion between Rice and Respondent at that time nor did he know if Rice knew what she was signing. Goclan did say that

he would not have participated if he thought that Rice was incompetent. Goclan also testified that the stock power may have been incomplete or blank when Rice signed it although he later attempted to recant that statement. Goclan did acknowledge that he had no authority to guarantee a signature on a stock power when the share value exceeded \$100,000 and that he would not have furnished the guarantee had he known that the value of the transaction exceeded \$100,000.

85. The panel does not accept Respondent's claim that it was Rice's idea to place her substantial assets in joint ownership form with Respondent. More likely, the device was used as his substitute for a Will which Respondent admittedly knew he could not prepare if he were to be a beneficiary.

86. The panel does not believe that a 96 year old woman, who was not shown to have had any prior joint bank deposits, would be expected to initiate this type of ownership transfer without the suggestion of some knowledgeable person such as Respondent. This is particularly true when the initial transfers to joint and survivor form took place shortly after Rice proposed naming Respondent a beneficiary under her Will which would have required the use of independent counsel.

87. The panel is also unable to accept Respondent's testimony to the effect that Rice feared a bank collapse and therefore thought it best to separate her funds into \$100,000 increments, but also include Respondent as joint owner, in order to satisfy deposit insurance requirements.

88. It is curious that Respondent, during any of his many claimed discussions with Rice, never asked the obvious question. That is, would Rice still make the transfers to him if outside advice and counsel were obtained. Respondent's testimony that Rice didn't want others

to know her business may have been convincing had some third party been the beneficiary; not so, however, where the donee attorney later speaks for the decedent.

89. Significantly, Respondent says that after he raised the need for another attorney for Rice in the 1999 discussion about her Will, the subject never again came up. The transfers to him, however, then commenced and continued.

90. Respondent testified that he visited Rice at the nursing home at least three times per week over a period of about nine years. He presented several witnesses who said there were frequent visits without specificity as the number of the visits. However, there was no testimony from anyone other than Respondent as to his claimed conversations with Rice (or with Hill, her nephew) concerning her informed understanding of the effect of the transfers on her estate and the beneficiaries under her Will.

91. *Mahoning County Bar Assn. v. Theofilos* (1988), 36 Ohio St.3d 43, involved the preparation of a Will for an elderly client by a non-relative attorney in which the attorney and his son were named as sole beneficiaries. That case has similarities to the present case in that the client had also authorized Attorney Theofilos to establish joint and survivor accounts in both their names approximating a total \$200,000. These accounts would have constituted most of the probate estate, if not for the survivorship form.

92. The Court in *Theofilos*, supra, found that the standards of EC 5-5 were not observed by the attorney notwithstanding his testimony that he suggested that the client “consider” seeing another attorney for the Will preparation and that even then

. . . no documentary or testimonial evidence corroborated Respondent’s version of his professional relationship with (the client) or offset respondent’s particular susceptibility to charges of undue influence.”

Theofilos was found to have violated DR 1-102(A)(6) prohibiting improper conduct adversely reflecting his fitness to practice law. Likewise in the present case, there is no corroborating evidence to support Respondent's position that he made adequate disclosures to Rice at the time of the joint and survivor transfers.

93. The panel finds no rational basis to differentiate between the non-relative attorney who prepares a will naming himself as beneficiary and the same attorney who handles the paper work to establish joint and survivor ownership with the same eventual result.

94. The panel feels that Respondent probably considered the consequences of bringing independent advice and full disclosure to Rice and came down on the side of doing neither. It is apparent that Respondent did not want some third party involved, which could have resulted in a reduction or elimination of the substantial benefits to him.

95. Respondent's sixteen month delay before attempting to commence administration of Rice's estate or asserting sole ownership of \$1,800,000 in jointly held assets, confirms the suspicion that Respondent had not met his obligations in his financial dealings with Rice. While Respondent testified that he was emotionally undone by Rice's death and could not bring himself to open the estate or complete the survivorship transfers to him, the most plausible reason would be that Respondent knew that his conduct would be questioned and simply did not know what to do about it. There is no good reason why Respondent, if he was unable to proceed, did not obtain another attorney to open the estate.

96. Respondent's explanation as to why he voluntarily settled the related civil action against him and returned assets approximately \$1,600,000 in value to the estate also strains belief. He says he settled because of his fear of the unfavorable publicity affecting his small

town life. The panel feels that no reasonable person would capitulate if Respondent was as sure as he says he was about Rice's informed consent to transfer the property interests to him.

97. For the reasons stated and by clear and convincing evidence, the panel concludes that Respondent did not comply with the provisions of EC 5-5 [the lawyer shall urge the client to secure disinterested advice with respect to a gift to the lawyer and insist on another lawyer to prepare the instruments] resulting in a violation of DR 1-102(A)(6) [conduct that adversely reflects on the lawyer's fitness to practice law] and that Respondent violated DR 5-101(A)(1) [except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be effected by the lawyer's financial and personal interests].

(2) The Prohibition on Ex-Parte Communication with a Judge

98. DR 7-110(B) provides:

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law.

Respondent initiated an out of court conversation and made comments to Probate Judge Costine concerning Respondent's application to be appointed executor of Rice's estate. If successful this would also have resulted in the removal of Attorney Semple, previously

appointed as Administrator. The panel finds by clear and convincing evidence that these comments were in violation of DR 7-110(B).

99. The proceeding was adversarial. The comments by Respondent were made ex parte and on the merits. Respondent provided no notice to opposing counsel of his oral communication with the Judge and the conduct is not otherwise authorized by law.

(3.) The Duty Not to Conceal Evidence

100. DR 1-102 provides, in part:

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

DR 7-109(A) provides, in part:

(A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce:

101. Attorney Semple, as the estate administrator in Probate Court Interrogatory No. 6 filed on November 8, 2004, asked Respondent to identify “all personal property, tangible and intangible, previously owned by Rice and now owned by Respondent. Interrogatory No. 7 asked Respondent to identify “any and all assets” previously owned by Rice and now owned by Respondent. Respondent’s unsworn answers which he served upon the administrator identified certain bank CDs and the Wyeth stock but made no mention of a \$100,000 Belmont Bank CD. This had also been set up in joint names by Rice and Respondent but had been redeemed by Respondent after Rice’s death. Respondent had used the proceeds of this CD and interest to partially fund a new CD opened by him and his wife at another bank on April 1, 2004.

102. Respondent's sworn testimony in the probate case was taken January 7, 2005. Respondent verified his answers to the interrogatories as true to the best of his knowledge and referenced again the two other certificates of deposit and the Wyeth stock previously transferred to him in joint and survivor form. When asked if there were "any other non-probate assets in the estate" that he was aware of, Respondent answered, "No, sir." Again, the Belmont Bank CD and interest then totaling \$112,154 was not identified.

103. It was not until Respondent obtained the services of Attorney Parcell that an agreed judgment entry was filed in the probate court on May 26, 2005 which, among other things, identified the proceeds from the Belmont Bank CD (then \$116,444) and made an order securing the proceeds pending the outcome of the proceedings.

104. Respondent was eventually allowed to retain the Belmont Bank CD proceeds in the settlement of the civil action. Although Respondent did retain those proceeds in the settlement, the panel finds by clear and convincing evidence that he violated DR 1-102(A)(4) and DR 7-109(A) by his deceit and misrepresentation in failing to timely disclose that property. As stated in *Cincinnati Bar Assn. v. Marsick*, 81 Ohio St.3d 551, 553, 1998-Ohio-337:

A discovery request raises an obligation to produce the evidence sought when it is relevant and not privileged. Concealing evidence that is clearly requested is tantamount to deceiving both opposing counsel and the court. We have consistently imposed sanctions for lying to clients, to opposing counsel, and to the court.

105. Here the discovery request was clear, relevant and not privileged, Respondent twice failed to make a truthful disclosure. The panel cannot accept Respondent's excuse that he simply forgot about the Belmont Bank CD and that the information was also available to Rice's administrator from other documents in the files.

**(4.) Other Conduct Prejudicial to the Administration
Of Justice and Respecting Fitness to Practice Law**

106. DR 1-102(A) mandates that a lawyer shall not:

(5) engage in conduct that is prejudicial to the administration of justice.

The panel finds that Respondent's inaction in not turning over estate assets and not paying creditors which led to the related civil case also substantially damaged Rice's estate (though not then his client) and thus harmed the residual beneficiaries under her Will.

107. The fees paid to the firm of Attorney Semple in obtaining the \$1,650,000 settlement with Respondent were approximately \$560,000 and satisfied from the estate assets. This would have resulted in the reduction of the residual estate by that amount. Less significant, of course, was the delay and inconvenience caused to the beneficiaries and creditors of the estate.

108. Respondent failed to deposit numerous dividend and interest checks accruing from the stock and certificates of deposit later returned by him to the estate. The estate and beneficiaries were therefore deprived of the use of these funds and lost the interest which otherwise would have been earned.

109. The panel finds improper Respondent's sixteen month delay before commencing probate proceedings in the Rice estate while holding Rice's Will and assets later recovered by the estate. Respondent also failed to cooperate with the court appointed administrator, Attorney Semple, which necessitated Respondent being cited for failure to produce the Will and for concealment of assets.

110. The panel finds by clear and convincing evidence that Respondent's inaction in dealing with estate assets and creditors and later with the administrator caused undue delay in the probate of the Rice estate, was prejudicial to the administration of justice as contemplated by DR 1-102(A)(5) and that this conduct adversely reflects on Respondent's fitness to practice law as found in DR 1-102(A)(6).

111. There is no clear and convincing evidence of any wrongdoing by Respondent relating to the maintenance of Rice's former residence after her death.

(5) Relator's Incidental Claims

112. Relator claims that Respondent should have paid certain of Rice's income taxes, and kept her former residence inhabited and secured during her lifetime. There is no evidence that Rice had instructed Respondent to pay the taxes or deal with the residence property although he was authorized to do so by virtue of the power of attorney given to him by Rice. The panel finds no disciplinary rule violation from this alleged inaction by Respondent.

113. The panel finds no clear and convincing evidence that Respondent violated, as claimed, any of DR 1-102(A)(2) [circumvent a disciplinary rule through the actions of another], DR 6-101(A)(3) [neglect of an entrusted legal matter], DR 7-101(A)(3) [intentionally prejudice or damage his client during the course of a professional relationship] and DR 9-102(B)(2) [failure to safeguard properties of a client properly upon receipt].

G. Aggravation and Mitigation

114. Respondent's failure to urge that Rice have the benefit of disinterested independent, competent and knowledgeable advice and his lack of full disclosure to Rice regarding the transfers show a selfish motive. Respondent refuses to acknowledge the wrongful nature of his conduct. Rice was vulnerable and she and the intended beneficiaries of her estate suffered harm as a result of Respondent's misconduct. Respondent's misconduct, although limited to one client, did involve multiple incidents and offenses.

115. Respondent has no prior disciplinary record. Respondent made a voluntary settlement in the related civil action and restitution to the satisfaction of the plaintiff in that matter. He had a cooperative attitude toward the disciplinary proceedings. Testimony at the

hearing and by letters furnished to panel showed that Respondent has done many good deeds professionally and personally in his community and is of good character and reputation.

H. Recommendation of the Parties

116. Relator recommends that Respondent be indefinitely suspended from the practice of law. Respondent submits that the panel either dismiss the charges or recommend dismissal to the Board of Commissioners. If, however, there were to be a finding that Respondent violated any Disciplinary Rules, Respondent states that the sanction should be either a public reprimand or a six month stayed suspension.

I. Panel Recommendation

117. As stated, the Panel has found, by clear and convincing evidence, violations of DR 1-102(A)(4) [conduct involving fraud, deceit, dishonesty or misrepresentation], DR 1-102(A)(5) [conduct that is prejudicial to the administration of justice], DR 1-102(A)(6) [conduct that reflects on Respondent's fitness to practice law]; DR 5-101(A)(1) [except with the consent of a client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial and personal interests], DR 7-109(A) [suppressing evidence that a lawyer has a legal obligation to reveal or produce] and DR 7-110(B) [engaging in ex parte communication on the merits of a cause with a judge before whom the proceeding is pending].

118. Based upon the multiple incidents of misconduct by Respondent, although involving only one client and her estate, the panel recommends that Respondent be suspended from the practice of law for a period of two years.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on August 10, 2007. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. The Board recommends, however, based on the scope of Respondent's calculated misconduct and the actual harm suffered, that the Respondent, John R. Tomlan, be indefinitely suspended in the State of Ohio. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.



**JONATHAN W. MARSHALL, Secretary
Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio**