IN THE MATTER OF MOWITT S. DREW,
A Member of the State Bar of Michigan,
Respondent.
No. DP-32/80

Decided: March 17, 1981

OPINION OF THE BOARD

Respondent has practiced law since 1948, without previous disciplinary incident. He is a former city attorney and mayor of Niles, Michigan, and assistant attorney general and public administrator for the state. Respondent first met decedent Clara Thurston [Elmore] in 1963, when she came to him as a client. They became friends, and she opened a joint bank account with Respondent, with the understanding that if she died, Respondent should use this money to care for her elderly father. Tr. at 11. The first joint account was closed when decedent was married in that period, but another joint account was opened several years later. This second account, in time, came to contain about $20,000. Decedent asked Respondent if he wished to borrow the money in the account. He agreed, since he needed money to pay various expenses, and gave her a promissory note. It was an unsecured loan, with `7-1/2~ interest. Decedent asked for monthly interest payments to supplement her Social Security benefits Respondent faithfully paid the $125.00 interest each month, and spent the principal.

Respondent drafted a will for Mrs. Thurston in the 1960's. She approached him in 1976 concerning a new will. He recommended that she go to another attorney when he discovered she wished to name him in the will, but she refused. Respondent eventually drafted the will, in which he was named executor, residual legatee, and in which he was forgiven the $20,000 loan at her death. Respondent testified that he never suggested to Mrs. Thurston what the content of the will should be. Tr. at 17. Respondent believed, at the time he drafted the will, that the estate was so arranged that there would be no residue let for him to inherit.

Mrs. Thurston died October 1, 1977. Some time before her death, she told Respondent that the promissory note "had been taken care of." Respondent apparently took this comment to mean that she had physically destroyed the note. Respondent, however, continued to make the monthly interest payments on the note after the time of decedent's oral indication of discharge, and even for a time after her death.

On October 17, 1977, Respondent went to the bank and entered a safe deposit box in which he had been joint tenant with decedent. He had not petitioned the probate court for permission to enter the box and did not wait until the county treasurer made an inventory of the contents. Respondent realized such an entry was improper, but he had been told that decedent's husband believed there was another joint account with Respondent, out of which Respondent was expected to pay Mrs. Thurston's funeral expenses. Tr. at 35, 55. Respondent testified that he opened the box, despite his scruples, due to the emotional stress felt after Mrs. Thurston's death, and because he was searching for a passbook or other evidence of the rumored joint account. He found none, but did find the promissory note from the $20,000 loan. He was shaken to discover the note, and took it with him to his office where he tore it into several pieces. Respondent destroyed the note because he felt it was to be destroyed anyway, and because he thought decedent would have wanted it destroyed. Tr. at 24. Respondent quickly realized that he should not have torn up the note, and kept the pieces in his office safe.

When Respondent eventually filed an inventory of Mrs. Thurston's estate with the probate court, he did not list the note as an asset, because he had already told several people that the note had been destroyed. He later intentionally made misrepresentations to the court about the note. Tr. at 40. When he filed the accounting, he did not believe he was still obligated to the estate for the note.

In time, Respondent stipulated the true facts to the probate court, and voluntarily resigned as administrator of the estate. The probate judge filed the Request for investigation with the Grievance Commission. Respondent has settled the debt with the estate for $14,000.

Respondent has apparently suffered great anguish over his actions, and attributed various delays in working on the estate to a "mental block." He admitted the facts in the Formal Complaint, but attempted to explain his actions to the hearing panel. Counsel for the Grievance Commission recommended disbarment, Tr. at 93, but the Kalamazoo Circuit Rearing Panel "C" suspended Respondent for eighteen months. We reduce discipline to a suspension of one hundred eighty days.

Without doubt, Respondent engaged in substantial unethical activities. He entered the safe deposit box after the death of his joint tenant, but before it had been inventoried by the county treasurer. He knew this was an unlawful entry. That he was a joint tenant did not make it any less unlawful. MCLA 205.209b; MSA 7.570(2) provides that

> An executor, administrator or legal representative of [a] deceased lessee, [or] a surviving joint lessee,... if entitled to access to such safe deposit box or compartment, may procure the attendance of [the] county treasurer, or his deputy, at the opening . . .

for the purpose of making an inventory of the contents. Such a box may only be opened, once a tenant has died, if these provisions are followed. See Att'y Gen. Op. No. 3388, August 27, 1959. In addition, the safe deposit box of a joint lessee, for whom a fiduciary was appointed, may be opened by the fiduciary as provided by this above section. MSA 27.5609; MCLA 700.609. Respondent approached the box in the double role of joint tenant and fiduciary. In either case, the entry was improper.

Even had Respondent found evidence of the joint' account for which he was searching, it could not have been removed at the time. Indeed, under an order from a probate court, only a purported will or a deed to a burial plot may be taken from the safe deposit box under such circumstances, and only if other requirements are complied with. MSA 7.570(7); MCLA 205.209g.

Similarly, even had Respondent's entry been lawful, he could not properly have removed the promissory note. We do not decide whether the obligation was actually forgiven, but observe that the note itself had never been surrendered to Respondent. Decedent's retention of the note tends to indicate an intention to retain possession of it. A discharge of a promisor's obligation, in the absence of the surrender of the note, does not pass title to the note itself from the holder to the promisor. MSA 19.3605(2); MCLA 44.3605(2). Finally, the items placed into a jointly held box do not become joint property themselves, and the surviving tenants have no right of access to the box until the provisions of the statutes discussed above are complied with. MSA 23.1123; MCLA 487.721.

We also note that Respondent made intentional misrepresenta-tions to the probate court concerning the note. This, in itself, is a serious breach of ethics.

Nevertheless, we think a suspension of eighteen months is too harsh under the circumstances of the present case. In light of Respondent's past record and public service, and noting that he has settled the debt with the estate, we reduce discipline to a suspension of one hundred eighty days. Before he can practice again, Respondent will be required to attend a reinstatement hearing, and provide clear and convincing proof of his fitness to re-enter the Bar. GCR 1963, 972.2.

As significant factors in mitigation, we consider Respondent's long unblemished record of law practice. In re O'Brien, No. 33975-A (Mich. Att'y Discip. Bd. 1978) (per curiam); In re Swainson, No. 34144-A (Mich. St. B. Grievance Bd. 1978) (per curiam); In re Charlip, No. 26340-A (Mich. St. B. Grievance Bd. 1976) (per curiam); and his public service, and endorsements from other

members of the profession. See Schwartz v Grimes, No. 35939-A (Mich. Att'y Discip. Bd. 1981). His settlement of the debt with the estate is also properly considered in mitigation. Cf. In re Dunn, No. 35169-A (Mich Att'y Discip. Bd. 1978) (per curiam).

The findings of fact of the hearing panel are affirmed, and discipline is reduced to a suspension of one hundred eighty days.

AFFIRMED AS MODIFIED.