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OFFICE OF APPELLATE COURTS

FILE NO. A09-1862
STATE OF MINNESOTA
IN SUPREME COURT

FEB 16 2010

FILED

In Re Petition for Disciplinary Action Against
Donald W. Fett
A Minnesota Attorney, Registration No. 29014

FINDINGS OF FACT
AND RECOMMENDATIONS
FOR DISPOSITION

The above-captioned matter came duly on for hearing on December 17, 2009, before the undersigned Retired Judge of the District Court of the State of Minnesota acting as Referee pursuant to the Order filed herein on October 23, 2009, directing that the undersigned hear and make and report his findings of fact and recommendations for the disposition of this matter.

Timothy M. Burke, Senior Assistant Director, appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director).

Donald W. Fett (Respondent) appeared pro se.

Respondent was personally present throughout the hearing.

The Director called Stuart C. Bear to testify at the hearing. Respondent testified at the hearing as well. Exhibits 1 through 10 were offered by the Director and received without objection by Respondent. Exhibits 11 and 12 were offered by Respondent and received without objection the Director.

At the conclusion of the hearing the parties were directed to submit their arguments in writing, accompanied by proposed findings of fact and recommendations. The submission date was set for January 25, 2010. Written arguments and proposed

findings and recommendations were submitted by both parties.

Based upon the file herein, including the Petition for Disciplinary Action filed by the Director, Respondent's answer thereto, the testimony and exhibits received at the hearing, the written arguments of counsel, and proposed findings, the undersigned Referee makes the following:

FINDINGS OF FACT

1. Respondent was admitted to practice law in the State of Minnesota on April 15, 1977.
2. Respondent currently maintains his law office in his home at 6200 Camden Avenue North, Brooklyn Center, Minnesota 55430.
3. Since 2002 Respondent has limited his law practice to estate planning and elder law, including medical assistance planning.
4. In July 2008 Martin Gumbusky was 88 years of age and had been placed in a nursing home because of dementia, depression, and blindness.
5. Martin Gumbusky was not competent to handle his own legal affairs.
6. Martin Gumbusky had no children and his wife, Inez, had died.
7. On September 18, 2000, Martin Gumbusky had executed a Minnesota Statutory Short Form Power of Attorney (SSFPA) appointing his wife, Inez, his Attorney-in-Fact and his brother, Robert Gumbusky, his successor Attorney-in-Fact.
8. In part FIRST of the SSFPA Martin Gumbusky had checked option (N) thereby granting to his Attorney-in-Fact and successor Attorney-in-Fact "all of the powers listed in (A) through (M) above and all other powers."
9. In part THIRD of the SSFPA Martin Gumbusky had checked the provision

indicating that the Attorney-in-Fact and successor Attorney-in-Fact were not authorized to transfer property to herself/himself.

10. On July 9, 2008, Respondent met with Robert Gumbusky, Robert Gumbusky's wife, and Rochester, Minnesota Attorney Jeffrey Thompson at Thompson's law office to explore the possibilities of medical assistance planning for Martin Gumbusky.

11. At that meeting Respondent was shown the SSFPA and was informed of the following:

- a. That Martin Gumbusky had five living siblings;
- b. That Martin Gumbusky's monthly expenses were approximately \$6,600.00;
- c. That Martin Gumbusky's sole source of income was social security in the amount of \$900.00 per month;
- d. That Martin Gumbusky's assets totaled approximately \$607,000.00 and consisted of an investment portfolio with Edward Jones, a small amount of Prudential stock, life insurance or some other form of investment with Met Life and Western Fraternal, and a checking account at U.S. Bank;
- e. That Martin Gumbusky's brothers, Robert Gumbusky and James Gumbusky were authorized to draw checks on the U.S. Bank checking account;
- f. That all of Martin Gumbusky's assets, with the possible

exception of the checking account, were held in a manner which would provide for their transfer on Martin Gumbusky's death. Some assets would transfer to Robert Gumbusky alone, some would transfer to Robert Gumbusky and James Gumbusky, some would transfer to all five of Martin Gumbusky's siblings, and some would transfer to four designated charities.

12. At the meeting Respondent was advised by Robert Gumbusky that his goal was to protect and preserve Martin Gumbusky's assets for distribution upon his death in accordance with Martin Gumbusky's distribution plan while, at the same time, not compromising Martin Gumbusky's care.

13. Robert Gumbusky further indicated to Respondent a desire to retain control of the assets and an aversion to transferring the assets to another of his siblings or to an entity.

14. At the conclusion of the meeting on July 9, 2008, Robert Gumbusky did not retain Respondent and Thompson to proceed with the medical assistance planning but Robert Gumbusky was given a retainer agreement to read and consider.

15. Several days later Robert Gumbusky delivered a signed retainer agreement and a check for one-half of the retainer fee to the Thompson Law Office.

16. Having been advised of the fact that the retainer agreement had been signed, Respondent prepared and sent a letter to Robert Gumbusky dated July 17, 2008. The letter contained the following statements:

- a. The purpose of this letter is to summarize our conference

and to outline and review my recommendations.

b. Your brother executed a power of attorney that gives you the power to act as his attorney-in-fact. You have been acting as his attorney-in-fact since Inez passed away and you have not encountered any objections. The power of attorney is the Minnesota Short Form version. The self dealing provision choice is checked to provide that it does not allow you to transfer assets to yourself.

c. Here are my evaluation and recommendations.

d. Subject to the allowance of up to \$3,000 and the prepaid funeral costs, all of the remainder of your brother's assets should be completely transferred to [sic] out of your brother's ownership as soon as possible.

e. After all transfers are complete (you must be certain they are complete) you must apply for medical assistance to trigger the penalty period that cannot be avoided. The sooner the penalty is triggered, the sooner it will run its course. Please consult with me before you have any interaction with any public employee regarding this process.

f. If this is accomplished before the end of July then the penalty period can begin as of July 1.

g. During the penalty period you will deposit funds given to you as needed back into your brother's account and then

- pay for his care from his checking account.
- h. The remainder of the gift to you will be yours to keep.
 - i. Even if he does not survive that long, you will have gained in that your brother's estate will already be owned by your brother's successor(s) so there would be no need for probate or other after death asset transfers.
 - j. You will initially deposit all funds given to you into an account in which your brother does not have any ownership interest.
 - k. As we have discussed, the ownership and control of the gifted portion is problematic. From the standpoint of simplicity, it is easiest if you own it, invest it and continue to transfer funds into your brother's account to pay his expenses. Upon the death of Martin you could then distribute the funds according to Martin's distribution plan.
 - l. For now, you plan to deposit all funds given to you into a checking/savings account owned by you.
 - m. The gifts from your brother are not considered to be income to the recipient(s). You will not report receipt of the gift on your income tax returns. The income gifted funds earn after you receive them will be income to you that will be included in your individual income tax returns.
 - n. Please keep me up to date as matters progress.

o. The planning recommended herein represents my best efforts to achieve your objectives based upon current law and the facts as I understand them.

p. If you have any questions or would like to discuss any of these matters further, please do not hesitate to call.

17. On July 22, 2008, Respondent sent a second letter to Robert Gumbusky, this time enclosing a document which he titled "Medical Assistance Action Plan for Martin P. Gumbusky."

18. In Step 1 of the "Medical Assistance Action Plan for Martin P. Gumbusky." Respondent again calls to Robert Gumbusky's attention that the SSFPA does not allow him to make a transfer to himself.

19. On July 23, 2008, Respondent, in a telephone conversation with Robert Gumbusky, encouraged Robert Gumbusky to liquidate Martin Gumbusky's assets and to deposit the proceeds in Martin Gumbusky's checking account to facilitate the anticipated transfers.

20. Respondent was scheduled to meet with Robert Gumbusky on July 25, 2008, however, Robert Gumbusky cancelled the appointment after consulting with another attorney regarding the medical assistance plan proposed by Respondent.

21. In his testimony Respondent took the position that his letter of July 17, 2008, was preliminary in nature and not intended for implementation until there had been further consultation and finalization of the plan.

22. Despite Respondent's testimony that the July 17, 2008, letter was preliminary in nature, the overall implication of the letter was that it was, in fact,

Respondent's recommendation and that it was intended by Respondent that Robert Gumbusky act on it.

23. In his testimony Respondent took the position that it was not his intention that distributions to Robert Gumbusky be based on the SSFPA but rather that the powers granted in the SSFPA be the basis for the liquidation of assets and their transfer into Martin Gumbusky's checking account and that the transfers from Martin Gumbusky's checking account to others, including Robert Gumbusky, be based on the power of attorney authority that Robert Gumbusky had as an authorized signatory on that checking account pursuant to the laws of the State or Minnesota relating to multi-party accounts.

24. At no point in his correspondence with Robert Gumbusky did Respondent indicate that the foregoing was his strategy nor did he provide Robert Gumbusky with adequate information on which to make an informed decision as to whether to proceed with Respondent's medical assistance plan in light of the self-dealing restriction in the SSFPA.

25. In his testimony Respondent seemed to take an alternative position as well. The alternative position was that by checking option (N) in part FIRST of the SSFPA, Martin Gumbusky released Robert Gumbusky from the gifting restrictions set out in Minn. Stat. § 523.24, Subd. 8.

26. At no point in his correspondence with Robert Gumbusky did Respondent indicate that the foregoing was his legal position nor did he provide Robert Gumbusky with adequate information on which to make an informed decision as to whether to proceed with Respondent's medical assistance plan in light of the gifting restrictions set

out in Minn. Stat. § 523.24, Subd. 8.

27. It should further be noted that Respondent has provided this Court with no legal authority for the positions set forth in Findings of Fact 23 or 25.

28. On December 9, 1986, Respondent was issued an admonition for neglect of a client matter and non-communication with a client.

29. On March 7, 1996, Respondent was issued an admonition for failing to promptly respond to requests for information in connection with a disciplinary investigation.

30. On October 22, 1996, Respondent was issued an admonition for neglect of a client matter, non-communication with a client, and non-cooperation with the disciplinary investigation.

31. On July 25, 2000, Respondent signed a stipulation for private probation for failing to timely file employer withholding tax returns and pay withholding taxes.

32. On March 18, 2003, Respondent was issued an admonition for failing to deposit the original copy of a client's will with the probate court as agreed and failing to inform the client that the will was not deposited with the probate court.

33. On July 27, 2005, Respondent was issued an admonition for failing to deposit an advance fee payment into his client trust account.

34. Respondent's conduct in this matter resulted in no harm and does not appear to have arisen as a result of improper motive or harmful intent.

CONCLUSIONS OF LAW

1. Respondent's conduct violated Rule 1.1, Minnesota Rules of Professional Conduct.

2. Respondent's conduct violated Rule 1.4(b), Minnesota Rules of Professional Conduct.

3. Respondent's disciplinary history aggravates the sanction for Respondent's current conduct.

4. Respondent's experience in the practice of law with his emphasis on elder law is a further aggravating factor given Respondent's conduct herein.

5. The fact that Respondent's conduct in this matter resulted in no harm and does not appear to have arisen as a result of improper motive or harmful intent is a mitigating factor that should be considered in disposition.

RECOMMENDATION FOR DISCIPLINE

1. That Respondent be publicly reprimanded pursuant to Rule 15, Rules on Lawyers Professional Responsibility.

2. That Respondent pay \$900.00 in costs, plus disbursements, pursuant to Rule 24, Rules on Lawyers Professional Responsibility.

3. That Respondent be placed on unsupervised probation for a period of one year from the date of this order subject to the following conditions:

a. That Respondent cooperate fully with the Director's Office in its efforts to monitor compliance with this probation.

b. That Respondent promptly respond to the Director's correspondence by the due date.

c. That Respondent provide the Director a current mailing address and immediately notify the Director of any change of address.

d. That Respondent cooperate with the Director's investigation of any

allegations of unprofessional conduct which may come to the Director's attention.

e. That, upon request of the Director, Respondent provide authorization for release of information and documents to verify compliance with the terms of this probation.

f. That Respondent abide by the Minnesota Rules of Professional Conduct.

g. That during his year of probation Respondent take at least 15 continuing legal education credits in the area of elder law and at least 30 days before the expiration of this probation provide to the Director documentation sufficient to establish compliance herewith.

Dated: February 12, 2010.



Frederick J. Casey
Referee