



OFFICE OF DISCIPLINARY COUNSEL

July 17, 2017

**BY FIRST-CLASS AND CERTIFIED
MAIL NO. 9414726699042060245761**

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1101 Pennsylvania Ave NW
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Re: *In re Gardner*
(D.C. Bar Registration No. 422962)
Bar Docket No. 2015-D153

Dear Mr. Gardner:

This office has completed its investigation of the above-referenced matter. We find that your conduct reflected a disregard of certain ethical standards under the District of Columbia Rules of Professional Conduct (the "Rules"). We are, therefore, issuing you this Informal Admonition pursuant to D.C. Bar Rule XI, §§ 3, 6, and 8.

This matter was docketed for investigation following receipt of a May 22, 2015 Memorandum and Judgment Order in *In re Estate of Ella Mae Austin*, Appeal Nos. 12-PR1815, 13-PR-48, and 13-PR-142, consolidated appeals before the District of Columbia Court of Appeals.

Our investigation confirmed that you represented your client, Ms. Yvonne Austin (decedent's daughter), in her capacity as a Personal Representative in *In re Estate of Ella Mae Austin*, 2004 ADM 1636, a probate matter in the District of Columbia Superior Court.

The issues in this case center on changes to the probate rules under the 1994 Probate Reform Act. Under the Act, different laws and rules apply to probate proceedings depending on when the decedent died. If a decedent died before July 1, 1995, the applicable rules and regulations require accountings to be filed with the court unless waived and require attorneys to seek court approval before accepting compensation from the estate. If a decedent died on or after July 1, 1995, however, amended rules apply. The amended rules do not necessarily require estates to be supervised or require court approval before accepting compensation.

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Based on our investigation, our office concludes that, because you were then unfamiliar with the probate rules applicable to probate proceedings where the decedent died before July 1, 1995, you treated a supervised probate matter as unsupervised, accepted an unauthorized attorney fee, and failed to timely submit required probate filings, delaying the administration of the Estate. This conduct violated the Rules as set forth below. Disciplinary Counsel finds, however, that there are various mitigating factors. Based on the alleged rule violations, considered with the mitigating factors, Disciplinary Counsel is issuing you this informal admonition, which is the lowest form of discipline in this jurisdiction.

Factual Background

Ella Mae Austin died intestate in 1992. Her sole asset was her home. No probate matter was initially opened upon her death. Instead, Ella Mae Austin's daughter, referred to herein as "Ms. Austin," began paying taxes on the property and took up residence there. Ms. Austin thereafter became unable to pay the property taxes and stopped paying them.

On July 14, 2004, twelve years after Ella Mae Austin's death, the property was auctioned pursuant to an administrative tax proceeding by the D.C. Office of Tax and Revenue, which issued a Certificate of Sale to a tax-sale purchaser.¹ Ms. Austin remained unable to pay the taxes owed at the time.

Ms. Austin sought your assistance in securing her interest in her mother's property and in administering her mother's Estate. You entered into retainer agreements with Ms. Austin in her personal capacity and in her capacity as the Personal Representative of her mother's Estate. The retainer agreement(s) provided that you would represent your client's interests "in all matters relating to real estate tax sale and probating the Estate of Ella Mae Austin." In exchange, the retainer agreement(s) provided that you would be entitled to receive the greater of \$10,000 or 15% of the gross sales price of the Estate's real property, which amount was to be paid at the closing.

On December 15, 2004, you filed a Petition for Probate. Based on the Petition, the court approved Ms. Austin as the Personal Representative of the Estate. The Estate property was sold, and, pursuant to the terms of the retainer agreement, Ms. Austin, as Personal Representative, paid you the agreed-upon fee from the estate checking account.

Even though you filed the Petition for Probate in 2004, because Ella Mae Austin died in 1992, the "old" probate rules applied. Under these rules, you were required to seek court approval before accepting your fee. D.C. Code § 20-751 (1981); *see also In re Wilson*, 935 A.2d 323, 325, n.4 (D.C. 2007) (explaining that the 1981 version of the Probate Code applies to estates of

¹ A Certificate of Sale does not grant a purchaser an ownership interest. Rather, it entitles the purchaser to foreclose the right of redemption if the taxes remain unpaid.

decedents dying before July 1, 1995). However, neither you nor Ms. Austin sought court approval to pay the \$37,500 from the estate checking account.

Under the applicable probate rules, the Estate was required to be supervised by the court, and certain accounts and inventories were required to be filed. However, you did not know that the Estate was required to be supervised. You state that you relied on a publication in the Daily Washington Law Reporter, which published a notice of appointment, notice to creditors, and notice to unknown heirs that the Estate would be unsupervised. While your reliance on the publication may be an additional mitigating factor, the applicable rules and regulations nonetheless required the Estate to be supervised. Based on your misunderstanding of the applicable rules, you did not file required accountings or inventories with the court until the Register of Wills contacted you more than three years after the probate petition was filed.

On January 25, 2008, the Register of Wills, wrote to you and Ms. Austin to inquire why the Estate remained open. You responded and subsequently filed accounts for the Estate on June 12, 2008. On August 20, 2008, the Superior Court held a hearing about the accounts filed in June and about your and Ms. Austin's handling of the Estate. You attended the hearing, but Ms. Austin failed to appear. The court removed Ms. Austin as the Personal Representative and appointed Jerry Hunter, Esq. as successor Personal Representative. The court also ordered you to repay your attorney fee because you accepted the fee without court authorization as required by D.C. Code § 20-751 (1981). You repaid the attorney fee, and you later requested compensation from the court.

Legal Analysis

Based upon our investigation of this matter, we find that your conduct violated Rules 1.3(a) and (c) and 1.5(a) of the District of Columbia Rules of Professional Conduct.

Rules 1.3(a) and 1.3(c)

Rule 1.3(a) provides that "[a] lawyer shall represent a client zealously and diligently within the bounds of the law." Rule 1.3(c) states that "[a] lawyer shall act with reasonable promptness in representing a client."

The Superior Court of the District of Columbia Probate Attorney Practice Standards, Practice Standard 10 provides that an attorney who represents a Personal Representative "must be knowledgeable about . . . [t]he applicable District of Columbia Statutes on Descent and Distribution." See Standard 10.1.² An attorney representing a Personal Representative must also

² Available at <http://www.dccourts.gov/internet/documents/06-19.pdf>. The Office of Disciplinary Counsel notes that you are currently a member of the probate fiduciary panel that is governed by these standards and that you were a member of the panel before you began working on this probate matter.

prepare all “documents needed for closing the estate,” “must know his or her responsibilities with regard to distribution and the payment of claims,” and “[i]n a supervised or pre-1995 Estate . . . must ensure that the final account is timely filed and that all requirements are satisfied in a timely manner.” See Standards 10.8, 10.9. For pre-1995 estates, an attorney who represents a Personal Representative “must file [unless waived] the first account within one (1) year and one (1) day of the first publication of the Notice of Appointment, and subsequent accounts are due every nine (9) months or upon the termination of the Personal Representative’s appointment.” See Standards 10.6, 10.9. Standard 10.6 specifically references Rule 1.3 of the D.C. Rules of Professional Conduct.

Here, you failed to file accounts for more than three years from the date you filed the petition based on your unfamiliarity with the Rules that applied to decedents who died before July 1, 1995. Disciplinary Counsel notes that even had the Estate been unsupervised, you failed to timely complete the Estate’s accountings and failed to file a Certificate of Completion—which is required to close unsupervised estates—for more than three years after opening the probate matter. This conduct violated Rules 1.3(a) and (c).

Rule 1.5(a)

Rule 1.5(a) provides that “[a] lawyer’s fee shall be reasonable.” Rule 1.5(f) provides that “[a]ny fee prohibited . . . by law is *per se* unreasonable.” The applicable rules, specifically D.C. Code § 20-751 (1981), clearly stated that compensation for an attorney’s services could not be paid from estate assets without prior court approval.

Here, you accepted a fee for probating the Estate without obtaining prior court approval. By accepting a fee that was prohibited by law, you violated Rule 1.5(a).

Based on the foregoing conduct, Disciplinary Counsel is issuing you this informal admonition, which is the lowest form of discipline in this jurisdiction. In issuing you an informal admonition rather than bringing formal disciplinary proceedings against you, we have considered that (1) you have no record of prior discipline; (2) you repaid the attorney fee as ordered by the court, which ultimately found your fee to be reasonable and your services to be necessary; (3) the law had changed—if the decedent had died after July 1, 1995, the estate would have been unsupervised, and court approval would not have been required before you accepted your fee; and (4) you took responsibility for your conduct by accepting this informal admonition.

This letter constitutes an Informal Admonition pursuant to D.C. Bar Rule XI, §§ 3, 6, and 8, and is public when issued. Please refer to the attachment to this letter of Informal Admonition for a statement of its effect and your right to have it vacated and have a formal hearing before a hearing committee.

If you change your mind and would like to have a formal hearing, you must submit a written request for a hearing within 14 days of the date of this letter to the Office of Disciplinary Counsel,

Bruce Gardner, Esq.

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with a copy to the Board on Professional Responsibility, unless Disciplinary Counsel grants an extension of time. If a hearing is timely requested, this Informal Admonition will be vacated, and Disciplinary Counsel will institute formal charges pursuant to D.C. Bar Rule XI, §§ 8(b) and (c). The case will then be assigned to a Hearing Committee, and a hearing will be scheduled by the Executive Attorney for the Board on Professional Responsibility pursuant to D.C. Bar Rule XI, § 8(c). Such a hearing could result in a recommendation to dismiss the charges against you or a recommendation for a finding of culpability, in which case the sanction recommended by the Hearing Committee is not limited to an Informal Admonition.

Sincerely,

Hamilton P. Fox, III
Disciplinary Counsel

Enclosure: Attachment Letter to Informal Admonition

HPF:SPO:itm