

**IN RE: MARK W. KASILOWSKI**

**NO. BD-2015-040**

**S.J.C. Order of Term Suspension entered by Justice Spina on June 24, 2015.<sup>1</sup>**

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<sup>1</sup> The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

COMMONWEALTH OF MASSACHUSETTS  
BOARD OF BAR OVERSEERS  
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL,

Petitioner

vs.

MARK W. KASILOWSKI, ESQ.,

Respondent

BOARD MEMORANDUM

Bar counsel appeals from the hearing committee's recommendation that the respondent receive a three-month suspension stayed on certain conditions. She argues that the suspension should be served and that the respondent be required to make "restitution" to two estates that suffered tax penalties and interest when the respondent delayed filing certain tax returns.

We adopt the findings and conclusions of the hearing committee. For reasons discussed below we recommend a three-month suspension, to begin only after the respondent obtains reinstatement from the administrative suspension the board is currently seeking.<sup>1</sup> Further, the respondent's reinstatement should be conditioned on his compliance with certain conditions which, for the reasons discussed below, do not include restitution.

The Committee's Findings

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<sup>1</sup> The respondent failed to provide a current address when he assumed retired status and moved out of state, in violation of S.J.C. Rule 4:02, § 1. Assuming retired status after the discipline hearing concluded did not relieve him of his obligation to provide a current address to the board. Retired attorneys are obligated to continue to file registration statements during the three years following their retirement. S.J.C. Rule 4:02, § 5(a).

Neither party has appealed from the committee's findings and conclusions. Based on our own review we see no reason to disturb them. We briefly summarize the committee's findings and conclusions to the extent they are pertinent to our analysis of the appropriate sanction.

When an elderly client, Hazel Kiewlicz, died in 2006, the respondent was appointed executor of her estate, and he acted as his own estate counsel. A second estate, of Rosa Mello, was the primary beneficiary of the first. The co-executors of Mello's estate (who, in turn, were the primary beneficiaries of Mello's estate) retained the respondent as their estate counsel.

The respondent did not file timely state estate tax returns for either the Kiewlicz or the Mello estate. As a result of the delay in filing, the Kiewlicz estate incurred interest and penalties in the amount of about \$4,300, and the Mello estate incurred interest and penalties of about \$7,000.

The committee accepted the respondent's explanation that his delay in filing the estate tax returns stemmed from his effort to establish the value of real estate, which constituted about a third of the value of the Kiewlicz estate and most of the value of Mello's. It found no ethical lapse in that regard. Still, it found that the respondent's failure to obtain extensions to file the two returns was an error of judgment. While the extensions would have completely avoided some of the late-filing penalties, they would not have avoided all late-payment penalties or all interest charges. Therefore, taking into consideration the relatively short delay in filing, the relatively small percentage of the estate at risk, and the risk that paying estimated taxes to obtain an extension could require abatement proceedings and additional legal fees, the committee concluded that the respondent's errors of judgment here did not rise to the level of an ethical violation, citing Matter of an Attorney, 18 Mass. Att'y Disc. R. 586, 598, *aff'd*, 437 Mass. 1001, 18 Mass. Att'y Disc. R. 586 (2002); Matter of Doe, 15 Mass. Att'y Disc. R. 833, 837-838 (1999); and Bar Counsel v. Doe, BBO File No. C5-03-022, Board Memorandum at 7-8 (July 7, 2007). Nevertheless, the committee took these errors into account in fashioning its recommendation, as do we.

The only rule violations the committee found in connection with the estate tax returns for either of the two estates concerned notice of an additional assessment of interest and penalties on the Mello estate. While the respondent had paid interest and penalties when he filed that estate tax return, the Department of Revenue later sent him a notice of an additional assessment of about \$2,200. The committee did not credit the respondent's testimony that he had sent DOR a written objection to the assessment based on the release of an estate tax lien DOR had issued. When he received the notice, he was still representing the co-executors of the second estate, and he was still executor of the first estate. He did not pay the additional assessment, and he did not notify his clients about it. About three weeks after the respondent received the notice, the co-executors demanded that the respondent turn over the Mello file to successor counsel. Successor counsel learned of the additional assessment from a copy of the notice in the respondent's file. She caused it to be paid.

The committee found that the respondent's failure either to pay the additional assessment or to notify his clients of it violated Mass. R. Prof. C. 1.3 (diligence), 1.4(a) (communicate with client), and 1.4(b) (explain matters to client for informed decision).

With regard to the Kiewlicz estate, the respondent knew that tax returns for the decedent's income in 2005 were due in 2006, and that returns for her personal income in early 2006 and for the estate's income during 2006 were due in 2007. The respondent also knew that some taxes would be due on the estate's 2006 income. He caused some of the proceeds from annuities that passed through the probate estate to be paid to the taxing authorities as withholding.

After making these preliminary moves, the respondent referred the entire matter of the preparation of tax returns to a tax return preparer. He failed to follow up with the preparer in any meaningful way to ensure that necessary returns were filed. He ignored inquiries during 2007 from a public accounting firm that took over the matter at the request of the tax return preparer. He also ignored or took no action of substance in response to inquiries from the co-executors'

successor counsel during 2008 and 2009. In response to a motion to remove him as executor of the first estate, the respondent resigned in 2012. At successor counsel's request, the public accounting firm completed the returns, and they were filed in February 2013. Because of the delay in filing the income tax returns, the estate could not collect \$850 in refunds due the decedent, and it incurred about \$55,000 in interest and penalties.

The committee found that the respondent's misconduct concerning the income tax returns violated Mass. R. Prof. C. 1.1 (competence); 1.2(a) (pursue the client's lawful objectives); 1.3 (diligence); 1.4(a) (communicate with client); and 1.4(b) (consult with client for informed decisions).

The committee made two findings in aggravation of the respondent's misconduct.

First, the committee noted that the respondent had substantial experience in the practice of law at the time of his misconduct. See Matter of Crossen, 450 Mass. 533, 580, 24 Mass. Att'y Disc. R. 122, 179 (2008); Matter of Luongo, 416 Mass. 308, 312, 9 Mass. Att'y Disc. R. 199, 203 (1993). Indeed, the respondent had substantial experience specifically in the administration of probate of estates, and his testimony at the disciplinary hearing displayed a solid command of that field of law.

Second, the committee also noted that the respondent displayed no understanding of the nature of his misconduct and appeared to lack any remorse. See Matter of Cobb, 445 Mass. 452, 480, 21 Mass. Att'y Disc. R. 93, 125-126 (2005); Matter of Clooney, 403 Mass. 654, 657, 5 Mass. Att'y Disc. R. 59, 67-68 (1988); Matter of Kerlinsky, 428 Mass. 656, 666, 15 Mass. Att'y Disc. R. 304, 315 (1999). Our review of the record confirms that, at least with respect to the income tax returns, the respondent displayed no sense of obligation to the estate. Instead, he pointed an accusatory finger at the return preparer for providing assurances the committee found vague and uninformative, and upon which it was unreasonable for the respondent, as the person with primary responsibility, to have relied. Likewise, the respondent sought to shift blame to the

public accounting firm for not prodding him to answer their inquiries; the respondent claimed (incorrectly) that the accountants had not contacted him at all.

The hearing committee made no findings in mitigation.

The committee recommended a three-month suspension, stayed for two years on the conditions (1) that the respondent: take and pass the Multi-State Professional Responsibility Examination; (2) that he consult with the Law Office Management Assistance Program to determine whether an audit of his office practices is appropriate and, if so, that he implement any recommendations made and permit bar counsel to review his compliance with those recommendations; and (3) that he attend in person at least sixteen hours of continuing legal education in subjects pertinent to his practice and provide bar counsel with evidence of his attendance. The committee expressly designated the M.C.L.E. course called "How To Make Money And Stay Out Of Trouble" as one of the courses he must take. The committee declined bar counsel's request that the respondent be required to make restitution as a condition of probation; in the circumstances the committee believed that this was a matter best left to civil remedies.

#### Discussion

The only questions before us are whether the respondent's suspension should be stayed and whether he should be required to compensate the two estates for interest and penalties.

Both the committee and bar counsel rely on Matter of Kydd, 25 Mass. Att'y Disc. R. 341 (2009), in support of the sanction they recommend. As the single justice noted in Kydd, "[i]n cases where attorneys have repeatedly neglected their duties to multiple estates, suspension has been deemed appropriate. *See Matter of Lansky* . . . . However, public reprimand has been imposed for repeated neglect of a single estate with no harm."<sup>2</sup> 25 Mass. Att'y Disc. R. at 345

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<sup>2</sup> In Matter of Lansky, 22 Mass. Att'y Disc. R. 443 (2006), the attorney received a six-month suspension for neglect of two estates as co-executor and attorney for the estate, with substantial harm consisting of more than \$40,000 in penalties and interest on the Massachusetts estate tax return in one, plus conflict of interest, aggravated by prior discipline for neglect. In Matter of Norton, 19 Mass. Att'y Disc. R. 222 (2003), the attorney received a public reprimand where neglect resulted in delayed distributions, delayed filings of accountings, and penalties and interest on tax returns, but the estate suffered no harm because the attorney paid the penalties and interest.

(citation omitted). Our task, then, is to place this case in the range between public reprimand and suspension.

Kydd received a three-month suspension, stayed for a year on the condition that he resolve tax liabilities arising from his neglect. A sanction greater than public reprimand was warranted by Kydd's many instances of neglect as executor, aggravated by misrepresentations to estate beneficiaries and his failure to cooperate with bar counsel. But Kydd's neglect did not leave the beneficiaries out of pocket: payouts to those beneficiaries in excess of their entitlement left the estate without funds to satisfy tax liabilities. Kydd's agreement to resolve the estate's remaining tax liabilities made it unnecessary for the beneficiaries to disgorge a portion of the excessive distributions.

In deciding not to recommend outright suspension here, the committee pointed out that, while there were aggravating factors here not present in Kydd, the reverse was true, as well. The respondent did not, like Kydd, make misrepresentations to the clients or fail to cooperate with bar counsel. Therefore, the committee reasoned, the presence in this case of aggravating factors absent in Kydd did not compel an actual suspension here. We disagree.

First, the respondent's extended neglect of the income tax returns in the first estate was compounded by his neglect of the additional assessment in the second estate and by his failure to notify the clients of it. Second, the respondent's misconduct, unlike Kydd's, resulted in actual harm to the estate that left the beneficiaries out of pocket – harm to which the respondent has shown considerable indifference. Finally, the respondent, again unlike Kydd, has not demonstrated reform by accepting responsibility and taking steps to minimize the harm he caused. Consequently, this case has all the features placing it firmly in the range of misconduct that, as noted by the single justice in Kydd, warrants an actual suspension.

Where the focus of discipline is the perception of and effect on the public and the bar, e.g., Matter of Balliro, 453 Mass. 75, 85-86, 25 Mass. Att'y Disc. R. 35, 47 (2009), we do not believe that imposing the conditions recommended by the committee is an adequate substitute

for an actual suspension. We agree with the committee that those conditions should be imposed when the respondent seeks to return to practice. His performance on the two estates, including the lapses of judgment that did not rise to the level of ethical violations, indicates that these conditions are needed to avoid the same misconduct and related errors in the future.

While this case has some similarity to Lansky with respect to the respondent's neglect and the resulting harm, it does not also involve the self-interested conflict and prior discipline present there.<sup>3</sup> Because the record evinces misconduct more serious than in Kydd, but less serious than in Lansky, an actual three-month suspension, which falls between the discipline in those two cases, is warranted. For the reasons mentioned above, any order for the respondent's reinstatement should also require that he comply, within one year of his reinstatement, with the committee's recommended conditions.

Finally, we address bar counsel's argument that the respondent should be required to make restitution by paying the estates the amounts of the additional assessment on the estate tax return in the second estate (about \$2,200), and the interest, penalties, and lost refunds under the income tax returns in the first estate (by bar counsel's calculation, about \$55,850). We are, of course, authorized to order a respondent to "make restitution to those persons financially injured by his . . . misconduct." S.J.C. Rule 4:01, § 24. But we have distinguished an order for restitution, which the board may grant, from an award of damages, for which the clients may seek by pursuing their civil remedies. The core concept warranting an equitable order of restitution is unjust enrichment,<sup>4</sup> and we know of no good reason why "restitution" in the disciplinary context should be understood differently.

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<sup>3</sup> Lansky allowed an estate beneficiary to exercise an option for the purchase of a business that was an asset of the estate — a business in which the respondent acted as director, officer, and legal counsel, and which would have been liquidated if the option had not been exercised. In addition, some of Lansky's neglect occurred after bar counsel had commenced an investigation. Finally, Lansky had already received an admonition for neglecting two other estates. Lansky, 22 Mass. Att'y Disc. R. 447-449.

<sup>4</sup> "A person who has been unjustly enriched at the expense of another may be required to make restitution to the aggrieved party." 31 Massachusetts Practice, Equitable Remedies, § 25.4 (3d ed. 2015), citing Restatement (First) Restitution, § 1.

Thus, in both Matter of Murray, 24 Mass. Att’y Disc. R. 483 (2008), and Matter of Lupo, 447 Mass. 345, 22 Mass. Att’y Disc. R. 513 (2006), the attorneys obtained value at the expense of the client and they were required to disgorge it. In Murray, the attorney collected a clearly unlawful and excessive fee to which he had no colorable right. In Lupo, the attorney had converted client assets. Here, however, bar counsel has not demonstrated that the respondent had unlawfully obtained some financial benefit that he must be required to disgorge. Bar counsel seeks damages, not restitution.

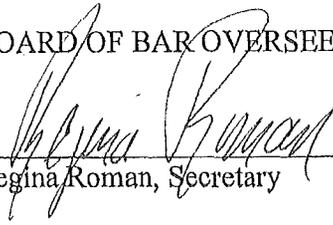
We do not read Kydd to compel a different result. The requirement that Kidd resolve the estate’s matters with the IRS was not an order of restitution. It simply ensured that no subsequent action by the Internal Revenue Service, predicated on the respondent’s neglect, would result in harm to the estate beneficiaries. Without that condition, the respondent’s neglect could have resulted in actual harm, and the stayed suspension in that case would not have been an appropriate outcome.

### Conclusion

For the reasons set forth above, an information shall be filed with the Supreme Judicial Court recommending that the respondent, Mark W. Kasilowski, be suspended for three months, the effective date of which is to commence on and after the respondent has been reinstated from his administrative suspension for failing to provide the board with current contact information, and that any order of reinstatement from his disciplinary suspension require that within two years of his reinstatement he shall (a) take and pass the Multi-State Professional Responsibility Examination; (b) obtain from the Law Office Management Assistance Program an audit of his office practices, implement any recommendations made, and permit bar counsel to review his compliance with those recommendations; and (c) attend in person at least sixteen hours of continuing legal education in subjects pertinent to his practice and provide bar counsel with evidence of his attendance. One of the courses shall be the M.C.L.E. course known as “How To Make Money And Stay Out Of Trouble.”

Respectfully submitted,

BOARD OF BAR OVERSEERS



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Regina Roman, Secretary

Voted: April 13, 2015