



**IN RE: KEVIN W. KIRBY**

**Public Reprimand No. 2013-2**

**Order (public reprimand) entered by the Board on February 20, 2013.**

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

\_\_\_\_\_)  
BAR COUNSEL, )  
Petitioner, )  
vs. )  
KEVIN W. KIRBY, ESQ., )  
Respondent )  
\_\_\_\_\_)

BOARD MEMORANDUM

The respondent appeals from a hearing committee's findings of fact, conclusions of law and recommendation that the respondent, Kevin W. Kirby, be suspended for nine months, that a reinstatement hearing be required, and that the respondent's reinstatement be subject to (1) if appropriate, evaluation by LOMAP, and (2) participation in LCL and AA. Oral argument was held before the full board on September 10, 2012.

On appeal, the respondent contends (1) that the conditions on reinstatement were improper; (2) that, in considering factors in aggravation, the committee misapplied the concept of "multiple violations"; and (3) that the committee improperly found a violation of a rule not charged in the petition.

We adopt the hearing committee's findings and conclusions, except as modified below, and we modify its recommended sanction. We recommend that the respondent be publicly reprimanded.

### Summary of Facts and Conclusions of Law

The respondent was admitted to the Massachusetts bar on December 19, 1996. From 2006 to the present, he was associated with a two-person law firm in Quincy. Most of the respondent's income came from court-appointed work through the Committee for Public Counsel Services. His law practice also consisted of family law that included two to five open divorce cases at a time.

In June 2007, the respondent was retained by a wife to handle her divorce. The wife told him that the matter would be resolved between the two parties – they were still discussing alimony – and that she just needed him to walk her through the divorce process and draft a settlement agreement. The respondent advised her that he would handle an agreed-upon divorce for a flat fee of \$2,500, but that a contested divorce would be handled on an hourly basis. The wife paid the respondent \$2,500. Instead of depositing the retainer check into a trust account, the respondent cashed it. At that point he had not earned the entire retainer, and he did not notify his client that he had paid himself the entire fee.

At some point prior to June 15, 2007, the respondent spoke with the husband and confirmed that the issue of alimony remained unresolved. On June 15, 2007, the respondent filed a complaint for a contested divorce. The hearing committee found that at this point, communication broke down between the respondent and his client, his client assuming that the divorce remained an uncontested one that would be completed for a flat fee of \$2,500 and the respondent believing that it was contested and was subject to an hourly fee.

In early July 2007, the respondent presented the wife with a fee agreement, which she signed, providing that the wife would pay a retainer of \$2,500 towards fees charged at \$195 per

hour. Notwithstanding the written fee agreement, the hearing committee concluded that the wife and the respondent still failed to communicate with each other concerning the case and the fees, and the wife continued to believe the divorce would be handled for a flat fee of \$2,500.

During July and August 2007, the alimony issue remained unresolved and the respondent began to draft a separation agreement from a template. Around the same time, the husband was laid-off and the wife requested that the respondent not proceed with the divorce until the husband was re-hired.

Around the end of October 2007, the respondent suffered a relapse and began abusing drugs and alcohol again. By the end of December, his substance abuse was interfering with his practice and at the end of January 2008, he entered a residential program. Sometime after January 21, 2008, after a number of unsuccessful efforts to reach the respondent, the wife called his office and learned of his leave of absence. Within a week of his admission, the respondent began to contact his private clients and arranged for another attorney to cover his CPCS clients.

About three or four weeks after his admission, the respondent called the wife and told her he would be on leave for about two months and referred her to the attorney who was helping cover his cases.

The respondent met with the wife in late May and explained the reason for his leave of absence. He assured her that he could complete her case. She agreed.

During June and July 2008, the respondent prepared a draft separation agreement. In mid-July, he sent the draft to the wife, with various issues remaining outstanding, including alimony and the division of assets. In early September 2008, he prepared a final draft of the separation agreement and a bill for the wife. In late September, the parties sold their house, and shortly thereafter reached final agreement on the terms for their divorce.

One of the provisions of the final agreement was that the husband would transfer to the wife half of the value of his retirement plan with his former employer using a Qualified Domestic Relations Order. The parties agreed to divide equally the cost of preparing the QDRO, up to \$500, and it was understood that the respondent would not be drafting the QDRO but would retain and pay another attorney to do so.

After hearing on October 2, 2008, the court granted a divorce  *nisi*. That same day, the wife gave the respondent a check for \$500. The hearing committee found that both husband and wife believed that the respondent told them this money was to pay for the preparation of the QDRO. However, the committee also noted that the wife noted on the check "final divorce payment", which she explained by stating she thought the QDRO was part of the divorce. The hearing committee made the following findings concerning this check: (1) the respondent's fees exceeded \$3,000; (2) he offered to accept an additional \$500 as total payment of his fee; and (3) the wife gave the respondent the check for \$500 expecting it would be the last payment for the divorce and would pay for preparation of the QDRO. The committee concluded that the respondent and the parties had a different understanding as to the purpose of the \$500 payment and failed to communicate clearly.

After receiving the check, the respondent did not place it in a trust account, but used it for his own purposes.

Post-divorce, although the respondent knew from his other cases of an attorney who prepared QDROs, he failed to contact that attorney or anyone else to prepare the QDRO for over three months after the divorce, despite frequent calls from the wife. Indeed, the respondent falsely told the wife that the paperwork had been sent to the QDRO preparer, and then later, falsely told her that the preparer had been in a car accident and the matter would be handled by

an assistant.

Eventually on February 21, 2009, the wife discharged the respondent and requested her file. When she picked it up, the file contained copies of what purported to be the following: (1) a cover letter to the QDRO preparer, dated December 22, 2008, stating that an engagement letter was enclosed and (2) an engagement letter on the QDRO preparer's letterhead, dated October 30, 2008, requesting a \$500 fee to prepare the QDRO, counter-signed and dated December 22, 2008 by the respondent, and containing, in handwriting the note "Please call me" with the respondent's telephone number. The purported engagement letter was similar to those used by the QDRO preparer, but it referenced a different pension (one that had been the subject of a QDRO in another of the respondent's cases).

The hearing committee did not credit the respondent's testimony that he used a form from another matter on which he had engaged the same QDRO preparer to prepare an engagement letter, and that he sent it to the QDRO preparer. The hearing committee also did not credit the respondent's testimony that he did not follow up with the QDRO preparer because he had offered the wife the option of him preparing the QDRO and she accepted. Our authority to set aside a hearing committee's credibility determinations is very narrow. See SJC Rule 4:01, § 8(3). They must be upheld unless it "can be said with certainty" that they are "irreconcilable with the committee's other findings." Matter of Barrett, 447 Mass. 453, 460, 22 Mass. Att'y Disc. R. 58, 67 (2006), quoting Matter of Hachey, 11 Mass. Att'y Disc. R. 102, 103 (1995). We do not disturb these credibility findings.

After obtaining her file, the wife contacted the QDRO preparer, told her that she had already paid her the \$500 fee for the QDRO and had not yet received the QDRO. The QDRO preparer explained to the wife that she had no information about the QDRO nor had she been

paid for this matter. The preparer also stated that her flat fee for preparing a QDRO had increased to \$600. The wife then called the respondent and demanded a return of the \$500 she had paid in October, and called bar counsel's office to complain.

The wife then retained the QDRO preparer and paid the \$600 fee. The preparer drafted the QDRO and then filed a motion for its approval and issuance, which the court did in September 2009.

In February 2011, the respondent, in response to advice from bar counsel, refunded \$500 to the wife.

Based on these findings, the committee addressed the charged rule violations and concluded the following:

(1) The respondent's conduct did not violate Mass. R. Prof. C. 1.1 (competence), 1.2(a) (pursue client's lawful objectives through reasonable means) or 1.3 (diligence) because the husband and wife were in charge of their own negotiations and did not resolve the issues in their divorce until September 2008;

(2) The respondent failed to advise the wife promptly that he could not handle her divorce case because of his mental and physical condition and also failed to respond to her inquiries in violation of Mass. R. Prof. C. 1.4(a) (communication with client) and (b) (explain matters to client sufficiently for informed decisions);

(3) The respondent's failure to withdraw from representation when his physical and mental condition materially impaired his ability to represent his client violated Mass. R. Prof. C. 1.16(a)(2) (duty to withdraw when physical or mental condition materially impairs ability to represent client);

(4) The respondent's failure to deposit the wife's check for \$2,500 into a trust account

violated Mass. R. Prof. C. 1.15(b) (segregate trust property from lawyer's personal property);

(5) The respondent's failure to send notice to the wife that he had paid himself his fee and to account for the funds violated Mass. R. Prof. C. 1.15(d)(2) (duty to account for and inform client);

(6) The respondent's cashing of the fee check was not fraudulent or dishonest because he expected to earn it fully and promptly and therefore he did not convert the funds and did not violate Mass. R. Prof. C. 8.4(c) (dishonesty);

(7) The respondent's failure to promptly hire the QDRO preparer and pay the \$500 to her did not violate Mass. R. Prof. C. 1.15(c) (prompt notice and delivery of trust property) because the respondent and the wife did not agree on the purpose of the check and therefore the preparer was not "entitled" to it; however, the use of the \$500 constituted a negligent failure to segregate trust funds from personal funds in violation of Mass. R. Prof. C. 1.15(b) (segregate trust property from lawyer's personal property);

(8) The respondent's failure to take reasonable steps to have a QDRO prepared and filed on behalf of his client violated Mass. R. Prof. C. 1.1 (competence), 1.2(a) (pursue client's objectives) and 1.3 (diligence);

(9) The respondent's failure to inform the wife that he was not attending to the preparation of a QDRO on her behalf violated Mass. R. Prof. C. 1.4(a) (communication with client) and (b) (explain matters to client sufficiently for informed decisions);

(10) The respondent's intentional misrepresentations to the wife and her ex-husband that he had retained a QDRO preparer, and his placement of fabricated documents in the client's file to support these misrepresentations violated Mass. R. Prof. 1.4 (communication with client) and 8.4(c) (honesty) and (h) (conducting reflecting adversely on fitness to practice).

(11) The hearing committee found that bar counsel had failed to prove that (a) the respondent's statements that the \$500 was to pay his fee rather than to pay for preparation of the QDRO were false and (b) he provided inflated and false time records to support that false information. As a result, the committee concluded that bar counsel had failed to prove violations of Mass. R. Prof. C. 8.1(a) (knowingly made false statement of material fact in connection with disciplinary matter) and 8.4(c) (honesty) and (d) based on this conduct. The committee did find that the respondent's office practices were inadequate and contributed to his misconduct, including his failure to have contemporaneous time records.

In mitigation, the hearing committee found that the respondent's temporary disability – his relapse into substance abuse and his admission to a recovery program – contributed to his failure to withdraw and failure to communicate with the client during this time. His attendance at two seminars, trust accounting and “How to Make Money and Stay out of Trouble”, at bar counsel's suggestion, were found to be “typical mitigation” with little impact on the proposed sanction.

In aggravation, the committee found that the respondent committed multiple rule violations, his delay in preparing or having the QDRO prepared increased the risk of harm by possible dissipation of assets, and his testimony before the hearing committee lacked candor, particularly with respect to the circumstances surrounding the creation of the fabricated engagement letter.

#### Discussion

On appeal, the respondent asserts that (1) in considering factors in aggravation, the committee misapplied the concept of “multiple violations”; (2) the committee improperly found a violation of a rule not charged in the petition; and (3) the conditions on reinstatement were

improper. The respondent maintains that the appropriate sanction in this case is a suspended suspension of six months to a year with appropriate conditions addressing the hearing committee's concerns. We address below each of the respondent's assertions finding them without merit and recommend a public reprimand as the appropriate sanction.

The hearing committee appropriately considered in aggravation the cumulative effect of the several violations committed by the respondent. Matter of Saab, 406 Mass. 315, 326-327, 6 Mass. Att'y Disc. R. 278, 289-290 (1989); ABA Standards for Imposing Discipline, §9.22(d) (1992). Such consideration is appropriate regardless of whether the respondent faced only a single – not multiple - count petition for discipline and the allegations of misconduct involved only one client – not multiple clients. See Matter of Tobin, 417 Mass. 81 (1994); Matter of Palmer, 413 Mass. 33 (1992). The lack of multiple counts and multiple clients may affect, however, the weight given the cumulative effect.

A hearing committee's finding of a rule violation where the rule was not charged in the petition for discipline may appropriately be considered as a matter in aggravation. Matter of Daniels, 23 Mass. Att'y Disc. R. 102 (2007); Matter of Ferguson, 21 Mass. Att'y Disc. R. 231 (2005). We, however, reject the hearing committee's finding of commingling of the \$500, see discussion below, thus making this issue moot. Similarly, because we do not adopt the hearing committee's recommended sanction of suspension, we need not address the issue of pre-reinstatement conditions.

With regard to the \$2,500 given to the respondent by his client, the hearing committee found that the respondent's failure to deposit these funds into a trust account violated Mass. R. Prof. C. 1.15(b) and his failure to send notice to his client that he had withdrawn funds from a trust account violated Mass. R. Prof. C. 1.15(d)(2). We disagree.

At the time that the respondent accepted the \$2,500, it was unclear to him whether it was a flat fee or a retainer against hourly fees. If the divorce were uncontested, which the respondent initially reasonably believed was a possibility; it would be a flat fee. The client believed throughout the engagement that the payment was a flat fee. Based on the understanding of the respondent and his client at the outset of the representation, it appears that the respondent properly treated the \$2,500 as a flat fee, or at least his cashing of the payment was not a clear violation of the disciplinary rules. Flat fees occupy a middle ground between an advance retainer for services to be performed that must be deposited into a trust account (an IOLTA or other interest-bearing client funds account) and an earned fee that may not be deposited into or held in a client funds account. Mass. R. Prof. C. 1.15(b)(1). Bar counsel's position is that flat fees can be deposited into a trust account and withdrawn as earned or deposited to a personal or operating account subject to refund where required.<sup>1</sup> Under these circumstances of uncertainty and ambiguity, we decline to uphold the committee's finding that the respondent violated Rule 1.15(b) and 1.15(d)(2).

With regard to the \$500 given to the respondent, the hearing committee found that at the time when the respondent accepted the \$500 he had earned a fee in excess of \$3,000 (\$500 more than his \$2,500 anticipated fee) and he offered to accept the \$500 in satisfaction of all of his work. His client believed that the \$500 would be the last payment for the divorce and that this payment would include the preparation of the QDRO. The hearing committee concluded that the respondent and his client had a different understanding of the purpose of the \$500 and each failed to communicate and clarify with each other their respective understanding. Nevertheless, the hearing committee found that the respondent failed to segregate the \$500 from his personal

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<sup>1</sup> Warner, Robert. "Don't 'Take the Money and Run.'" March 2002  
<http://www.mass.gov/obcbbbo/moneyandrun.htm> (Accessed February 12, 2013.)

property in violation of Rule 1.15(b). We disagree.

Regardless of whether the respondent accepted the \$500 as payment for his fee for legal services completed or as an advance for payment to the QDRO preparer, he was not obligated to place the \$500 in a trust account. The Massachusetts Rules of Professional Conduct require that funds advanced for payment of fees for legal services be held in a client trust account until earned but permit funds advanced for the payment of expenses to be held in an attorney's operating account or business account, even though both are considered client trust funds. Mass. R. Prof. C. 1.15(b)(1). "When a client advances funds to an attorney, it may not always be clear whether the funds are intended as an advance for fees or for expenses, or for both, and therefore may not be clear where the funds should be deposited." Matter of Sharif, 459 Mass. 558, 569 (2011). Given the lack of clarity that surrounded the respondent's receipt of the \$500, we decline to uphold the hearing committee's finding that the respondent violated Mass. R. Prof. C. 1.15(b) by failing to deposit the \$500 in a trust account.

#### The Appropriate Sanction

As discussed above, we have concluded that the most serious charges of misconduct, i.e. the respondent's handling of the \$2,500 and the \$500, are unwarranted. Since the hearing committee rejected the charges of lack of competence, lack of diligence, dishonesty, fraud, deceit, or misrepresentation with regard to the respondent's handling of the divorce, we focus on the remaining charges of misrepresentations regarding the QDRO preparation and the altered and fabricated documents that were in the client file. The hearing committee found that the fabrication of documents and their placement in the file were done to cover up neglect. The hearing committee found the respondent's office practices to be "sorely lacking." H.R. p. 25. The respondent's office practices appear to have substantially contributed to the respondent's

neglect – neglect that the hearing committee found was “limited to one matter, the harm is limited, and the respondent participated fully in the disciplinary process.” H.R. pg. 30. We agree.

Under Matter of Kane, 13 Mass. Att’y Disc. R. 321, 327, 328 (1997), the presumptive sanctions for neglect, absent aggravating or mitigating factors are:

1. Admonition is generally appropriate when a lawyer has failed to act with reasonable diligence in representing a client or otherwise has neglected a legal matter, and the lawyer’s misconduct causes little or no actual or potential injury to client or others.
2. Public reprimand is generally appropriate where a lawyer has failed to act with reasonable diligence in representing a client or otherwise has neglected a legal matter and the lawyers’ misconduct causes serious injury or potentially serious injury to a client or others.
3. Suspension is generally appropriate for misconduct involving repeated failures to act with reasonable diligence, or when a lawyer has engaged in a pattern of neglect, and the lawyer’s misconduct causes serious injury or potentially serious injury to a client or others.

Some examples of aggravating factors are:

1. Making misrepresentations to a client to conceal the neglect or lack of diligence.
2. Prior disciplinary offenses.
3. Failure to cooperate with Bar Counsel or the Board of Bar Overseers.
4. Refusal to acknowledge the wrongful nature of conduct [footnote omitted].
5. Abandonment of the practice.

We find that under Kane, but for the aggravating circumstances of trying to conceal his neglect, an admonition would be the appropriate sanction. Disciplinary matters where attorneys’ misconduct included failure to communicate with clients and delay in obtaining or preparing QDROs resulted in admonitions. AD-2010-17, 26 Mass. Att’y Disc. R. 792 (2010), (attorney failed to communicate to client the limits of her representation and that she would not be causing the QDRO to be prepared and received an admonition); AD- 2008-07, 24 Mass. Att’y Disc. R. 852 (2008)(attorney failed to return client’s telephone calls and keep her reasonably informed of the reasons for delay in obtaining the QDRO and received an admonition conditioned upon his

attendance at a CLE course despite receiving a private reprimand in 1991).

Taking into account that the hearing committee determined that the misrepresentations “were all part of the same effort to hide a single act of neglect; they were not repeated across several matters,” (H.P. pp. 30-31), we recommend a public reprimand.

Public reprimands have been imposed in matters where there were findings of serious misconduct - even on multiple counts – and findings in aggravation of lack of candor during the disciplinary hearings. In Matter of Hoicka, 18 Mass. Att’y Disc. R. 306 (2002), the attorney received a public reprimand where he was found to have engaged in two distinct conflicts of interest acting adversely toward two different clients in separate transactions and to have lacked candor at the disciplinary hearing received a public reprimand. Similarly, in Matter of Shanley, - Mass. Att’y Disc. R. -- (2011), the attorney received a letter from the Office of Bar Counsel asking about his availability to testify at a disciplinary hearing regarding another lawyer with whom he had a very strained relationship. He altered the letter by redacting the address and salutation and distributed the letter to a number of chiropractors with whom both he and the other attorney did business. The altered letter made it appear that the recipients of the letter were to appear at the other lawyer’s disciplinary hearing. Shanley was found to have engaged in dishonest and deceitful conduct that adversely reflected on his fitness to practice law. In addition, the hearing committee found in aggravation that he did not acknowledge his misconduct; had pursued a default judgment in a fee dispute against the other lawyer even after learning that no settlement had been reached or fee received; and lacked candor at the hearing. He received a public reprimand.

We believe that a public reprimand is the appropriate sanction for the respondent’s misconduct, taking into account the disciplinary rules that were violated, the finding in

mitigation that the respondent's temporary disability contributed to his failure to withdraw and to communicate with his client during his residential treatment, and the finding in aggravation that the respondent lacked candor during the hearing, which the hearing committee properly considered. Matter of Crossen, 450 Mass. 533, 580, 24 Mass. Att'y Disc. R. 122, 179-180 (2008); Matter of Eisenhower, 426 Mass. 448, 456, 14 Mass. Att'y Disc. R. 251, 261, cert. denied 524 U.S. 919 (1998); American Bar Association Standards for Imposing Lawyer Sanctions, § 9.22(f)(1992).

### Conclusion

For the foregoing reasons, and with the exceptions noted above, we adopt the hearing committee's findings of fact, and conclusions of law. We recommend that the respondent, Kevin W. Kirby, be publicly reprimanded.

Respectfully submitted,

THE BOARD OF BAR OVERSEERS

By: 

Mary B. Strother  
Secretary

Voted: 2/11/13