



**MICHAEL W. ZINNI**

**Public Reprimand No. 2015-8**

**Order (public reprimand) entered by the Board on August 21, 2015.<sup>1</sup>**

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<sup>1</sup>Compiled by the Board of Bar Overseers based on the record of proceedings before the board.



equally among her three daughters: Jean, Judith and Elizabeth (Beth).<sup>1</sup> In the 1985 will, Kamman named Jean (an attorney and former judge) as executrix and Jean's husband, Peter Burling (also an attorney), as substitute executor. The 1999 will again named Jean as executrix and this time named Judith (an accomplished businesswoman) as her successor. That will was accompanied by a trust, where Kamman provided that the shares of the trust for Jean and Judith were to be paid outright, while Beth's share was to remain in trust for her lifetime, with instructions to the trustees to pay her the net income. Kamman was named trustee of the 1999 trust with a family friend, Roger Feldman, and Jean's husband, Peter, named as secondary and tertiary trustees.

On March 19, 2007, Kamman executed a new will and a first amendment to her inter vivos trust. Kamman was the trustee of the new trust, and Jean and Peter were named secondary and tertiary trustees. The documents were substantially similar to Kamman's 1999 will and trust; Beth's one-third share was again to remain in trust. As in the 1985 will, the 2007 will named Jean executrix, with Peter as her successor. Also on March 17, 2007, Kamman executed a durable power of attorney and a health care proxy, appointing Jean to both positions.

The committee credited Jean's testimony that Kamman felt very strongly about two particular provisions of her will and trust. First, she wanted an equal division of property among her daughters, having found it very hurtful when her brother had taken her own mother's assets and had not divided them equally among the siblings. Second, Kamman wanted Beth's share placed in trust. She feared that without that protection Beth, who did not hold regular employment and was irresponsible with money, would spend the assets and would have nothing left for her needs.

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<sup>1</sup> In the record, Elizabeth is often called Beth. For the sake of consistency, this memorandum will refer to her as Beth.

Retained to Represent Kamman, the Respondent Drafts New Estate Documents

After learning of the provisions of Kamman's 2007 estate planning documents in early 2010, Beth was upset that her sister Jean had control over her one-third share. At some point shortly before July 15, 2010, Beth called the respondent and told him that her mother wanted a consult about her estate planning documents.<sup>2</sup> On July 15, 2010, Beth brought Kamman, who was eighty-eight years old at the time, to the respondent's office. Kamman, Beth and the respondent spoke together briefly, then the respondent asked Beth to step out so that he could speak privately with Kamman.

Once alone with the respondent, Kamman did not say what changes she wanted to make to her estate plan and did not articulate the reason for the appointment. According to the respondent's testimony, which the hearing committee credited, she either signified "yes" or gave a smile or an "um-hum" in response to the respondent's questions. When she had difficulty naming her three children, the respondent began to question her competency, a concern he shared with her and Beth. He told Beth that he needed a letter from a doctor attesting to Kamman's competency. He did not specify the type of doctor or what the letter should say, and he did not articulate exactly what he meant; he did not, for instance, specify the elements of "mental capacity" or "testamentary capacity."

Three days later, on July 19, 2010, Beth caused Kamman's primary care physician, Dr. Krohn, to write a letter. It consisted of two sentences and stated, "To Whom It May Concern: As the Internal Medicine physician for Evelyn Kamman, I have evaluated her today in my office. In my considered medical opinion, Ms. Kamman is sufficiently mentally competent to understand and approve revisions to her last will and testament."

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<sup>2</sup> Beth was a former client; the respondent had represented her sometime in the 1990s, when she had been sued for an outstanding judgment. She had retained him because she was unable to pay a debt.

Beth delivered the letter to the respondent on July 19, 2010. The respondent did not ask what type of mental testing Dr. Krohn had performed and did not ask to speak directly with Dr. Krohn. Instead, he suggested Beth and Kamman come back to meet with him. Later the same day, at approximately 4:00 PM, Beth, Kamman and Kamman's boyfriend, Joe Coburn, came to the office. Although just days earlier Kamman could not name her children, the respondent did not ask her about the appointment earlier that day with Dr. Krohn; did not ask her if she was on medication; and did not consider getting another opinion about competency from a specialist. He left the meeting at least twice to consult with Beth. The meeting concluded at 4:30 PM. The respondent agreed to make the changes immediately and did so. Kamman and Beth returned between 5:30 and 6:00 PM to execute the documents.

Contrary to the 1999 and 2007 estate planning documents, which the respondent claimed he had reviewed, the will and trust he drafted completely eliminated Jean and Judith. Unlike the earlier trusts, the Second Amendment to Trust prepared by the respondent provided that, upon Kamman's death, 65% of her estate was to go, free of all trust, to Beth; the remainder, 35%, was to go to Beth's son, Alexander.<sup>3</sup> Charities, not family members, were to inherit the estate should Beth and Alexander predecease Kamman. Roger Feldman was designated executor of the will, in place of Jean, with the respondent as successor. After Kamman, Feldman and the respondent were designated secondary and tertiary trustees of the trust.

The committee rejected as not credible much of the respondent's testimony about his meeting with Kamman, but it did believe that he was unable to recall anything specific about the conversation except for Kamman's stating "Beth takes care of me"; that Kamman asked him nothing but instead responded to his leading questions with a smile, a "yes" or a shrug of her shoulders; that he learned from Beth, who stood to benefit from the new estate plan, that Jean

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<sup>3</sup> The trust and will made no mention of or provision for Kamman's only other grandchild, Jonathan Burling.

and Judith were wealthy; and that he was aware of no animosity between Kamman and Jean or between Kamman and Judith.

As to his handling of the charitable bequests, the committee found unreasonable the respondent's failure to ask Kamman why, in the event that Beth and Alexander were to predecease her, she would want to donate to charities rather than leave her property to Jean and Judith. It did not believe the respondent's testimony as to how the charities were chosen, finding that Beth provided all the information. It also found that Beth suggested Feldman for the position of secondary trustee and that at no point did the respondent question Kamman about why she would want to make a change from her 2007 designations to prefer Feldman over family members.

Although at the disciplinary hearing the respondent gave lip service to the possibility of undue influence by Beth, he did not understand the standard. He testified that he was not concerned because Kamman did not say, "I don't know why I am here or Beth is making me do this or I really don't want to do this." The hearing committee noted that the respondent knew at the least that: Beth was caring for Kamman; she made all of Kamman's appointments with him in July and August of 2010; she drove Kamman and stayed with her for each appointment; no other family member was ever present; Kamman never initiated any telephone calls to the respondent; each time the respondent telephoned Kamman, Beth answered; during those telephone discussions, the respondent spoke only with Beth; and Beth wrote the respondent checks, on Kamman's account, for the July 15 and July 19 visits.

In other findings, the hearing committee noted that although the respondent should have recognized the clear risk of a will contest, because the estate plan he was drawing up differed dramatically from all of the earlier estate documents and wholly disenfranchised two daughters,

he took virtually no notes of his meeting with Kamman. The respondent never bothered to learn what assets Kamman had, whether she had siblings or relatives, or what she wanted to do with her personal property, which was not mentioned in the documents he drafted but had been specifically provided for in her earlier wills.

At some point after July 19, Beth contacted the respondent about preparing a power of attorney for Kamman. On or about August 31, 2010, Beth brought Kamman back to the respondent's office where, the same day, he prepared and had her sign a new durable power of attorney naming Beth as her attorney-in-fact, with Beth's son, Alexander, as successor. The document, which by its terms was effective immediately, gave Beth full control over Kamman's real and personal property. At the time the document was executed, Alexander was a college student residing in Colorado. The respondent admitted that he did not ask Kamman if she wanted to nominate Jean, Judith or Peter as attorney-in-fact, even though he knew that Jean, with Peter as her successor, had been named in 2007. He was unable to identify anything Kamman said in support of her decision to replace Jean, an attorney and former judge, except for saying "Beth takes care of me."<sup>4</sup>

In detailed conclusions of law, the committee found violations of rule 1.1 (competence), 1.3 (diligence) and 1.4(b) (explain a matter to the extent reasonably necessary for client to make informed decisions). Reviewing the legal standards for testamentary capacity and undue influence, the committee found "no credible evidence" that Kamman understood the extent of her property, what she was doing, or the natural objects of her bounty. While agreeing with the respondent that a disposition in favor of one child is not necessarily unnatural, it rejected that argument here, where nothing Kamman stated indicated that such was her intent. Noting that all the signs of undue influence were present, it found unreasonable the respondent's casual

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<sup>4</sup> The respondent billed for and was paid \$800 for the estate plan documents he prepared.

approach and rejected his suggestion that because Kamman did not recognize and articulate the possibility of undue influence, it did not exist.

### The Probate Court Proceedings

In or around August of 2010, Jean and Judith discovered that new estate planning documents had been created for Kamman. On November 10, 2010, they filed a complaint in Middlesex Probate Court seeking to declare the July 19, 2010 will and trust and the durable power of attorney void on the grounds that Kamman lacked capacity when she signed them and that she signed them as a result of undue influence exercised over her by Beth. Among other things, the complaint alleged that Kamman's health had deteriorated from the period 2008 to the time of filing, and that Kamman suffered from dementia and was unable to recognize Jean or Judith or recall that they were her daughters. It alleged further that Beth had taken undue advantage of Kamman, and that the documents prepared by the respondent were invalid and the result of undue influence. Beth, Kamman and Alexander were named as defendants; the respondent and Feldman were sued in their trustee capacities. A hearing was scheduled for November 15, 2010.

Once he reviewed the complaint, the respondent understood immediately that his actions were going to be a material part of this litigation. He met with Kamman and Beth on November 11, 2010, to discuss representation. He knew at the time that he would be representing himself as well. On November 12, 2010, the respondent and Kamman entered into a written fee agreement wherein he agreed to represent both Kamman and Beth in the lawsuit on an hourly basis. The fee agreement indicated that the respondent was representing Beth in her capacity as "attorney-in-fact." Although the respondent knew that the actions that were the subject of the complaint pre-dated his drafting of the durable power of attorney in Beth's favor, he claimed that

he saw no problem with a fee agreement that would provide for his representation of Beth in her capacity as "attorney-in-fact." The hearing committee found significant that the respondent discussed with Beth and Kamman the allegations of the complaint, but he did not recall telling them that his actions in preparing the estate planning documents were at the heart of the equity action.

Toward the end of the meeting with Kamman and Beth, the respondent "identified" that there could be a conflict and that if there were, he could not represent either of them and they would have to get two different attorneys. The committee found that he did not then appreciate or understand that there was an actual conflict between Beth and Kamman, and between them and himself, as the drafter of the documents, and he did not advise them of any actual conflict. Indeed, he thought he was the best choice to represent both of them.

The hearing committee reviewed the considerable medical evidence of Kamman's dementia and concluded that although he did not have all of it by the time of the November 15, 2010 hearing, the respondent received and reviewed the greater part of it during the course of his representation of Kamman and Beth. Yet he steadfastly refused to withdraw. It noted that before the first court hearing, at which he represented himself, Beth and Kamman, the respondent spoke to Dr. Krohn, Kamman's primary care physician who had opined as to her mental capacity. At the very least, the respondent knew — and argued at the hearing on November 15, 2010 — that Kamman "suffered from moderate Alzheimer's" and was "impaired."

The hearing committee heard a tape of part of the November 15, 2010 hearing, in which Kamman testified. It concluded that she was "completely confused and disoriented, had no awareness of why she was in court, and did not understand what was being addressed. She was

unable to make any intelligible comments.” It also noted that as his representation of Kamman, Beth, and himself progressed, the respondent filed pleadings which quoted selectively from Kamman’s medical records, understating to the court the extent of her Alzheimer’s disease.

The court appointed a temporary guardian for Kamman on January 24, 2011, citing her medical condition, the contentious relationship of the children, and allegations of interference with access and financial misconduct. It denied the respondent’s subsequent request to be appointed Kamman’s attorney, and instead appointed another individual. The respondent continued to represent Beth. During an April 2011 status conference, the court told the respondent that he could not be a witness at the trial while representing Beth, and it set a deadline of May 31 for him to decide about testifying. Although he notified counsel for the plaintiffs that Beth intended to call him as a witness, he refused to withdraw from representing Beth.

The court struck the respondent’s appearance on June 20, 2011: “At hearings before the Court, on more than one occasion, it has come to the attention of the Court that Attorney Michael W. Zinni . . . was a potential witness in the above matters . . . . Attorney Zinni drafted the [documents] that are the subject matter of the above Complaint for Declaratory Judgment. . . . Due to the clear conflict of interest created by his various roles in these proceedings, the Appearance of Attorney Michael W. Zinni in all of the above matters [is] hereby STRICKEN.” Ex. 42 (367) (emphasis in original). On March 6, 2012, the court entered summary judgment in Jean and Judith’s favor, voiding the respondent’s July 2010 estate planning documents.

At the disciplinary hearing, the respondent claimed that Kamman was basically healthy except for urinary tract infections that “occasionally left her confused.” He described any conflict between himself and Kamman and Beth as a “nonissue” because “whatever was decided

by the Court was going to control what I do, and since I hadn't taken any action as a trustee, I didn't see how there could be anything that could come back to compromise me in that regard.”

Reviewing the considerable and irrefutable evidence of Kamman's worsening dementia—a condition consistently described in medical records reviewed by the respondent covering the years 2008 to 2011—the hearing committee rejected as not credible the respondent's claims that Kamman's interests were consistent with Beth's and that his representation of both was not materially limited by his own interests. Its findings led it to conclude that the respondent violated rule 1.7(a) (prohibiting representation of one client if directly adverse to another client, unless lawyer reasonably believes representation will not adversely affect relationship with other client and each client consents after consultation) and 1.7(b) (prohibiting representation of client if it may be materially limited by responsibilities to another client or to lawyer's own interests, unless lawyer reasonably believes representation will not adversely affect relationship with other client and each client consents after consultation).

#### **Mitigation and Aggravation**

The committee made no findings in mitigation of the respondent's conduct. It found several aggravating factors: Kamman was elderly, suffering from dementia and vulnerable, see Matter of Lupo, 447 Mass. 345, 354, 22 Mass. Att'y Disc. R. 513, 528 (2006); the respondent engaged in multiple disciplinary violations, see Matter of Saab, 406 Mass. 315, 326, 6 Mass. Att'y Disc. R. 278, 289-290 (1989); and the respondent lacked insight into his ethical obligations and disciplinary violations. See Matter of Clooney, 403 Mass. 654, 657, 5 Mass. Att'y Disc. R. 59, 67-68 (1988)).

## Discussion

The respondent's central arguments on appeal are: that the hearing committee's findings were clearly erroneous;<sup>5</sup> that Kamman's estate plan made sense and was not the result of Beth's undue influence; that the respondent was justified in relying on Dr. Krohn's note; and that there was no conflict of interest because Kamman, Beth and the respondent had the same interests. He also argues that under rule 1.14, which was not charged by bar counsel and was found by the hearing committee not to help his position, a client with diminished capacity is not permanently incapacitated. Bar counsel defends the report, and argues that the committee was correct in its findings, conclusions and recommended disposition.

### Competence, Diligence and Proper Communication

Standards of competence derive from our case law. In Matter of Reynolds, 15 Mass. Att'y Disc. R. 497 (1999), the lawyer received a public reprimand after changing the estate plan of an elderly woman to remove her niece and substitute her housekeepers, whom he had previously represented. When he met with the testator he "confirmed" that the changes the housekeepers had relayed were consistent with her wishes. He spoke with the testator's neurologist about whether she had testamentary capacity. The board noted that the respondent subjectively believed that the testator had testamentary capacity and that her brother approved of the estate plan in the housekeepers' favor. Nonetheless, the board found a conflict of interest, inadequate preparation and failure to protect his client's interests. The board cited among other factors the testator's age, poor health and complete dependency on the housekeepers; the

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<sup>5</sup> The respondent held himself to an overly rigorous, and incorrect, standard of review. Bar counsel also misstated the applicable standard, writing that the hearing committee's findings must be affirmed if they are supported by substantial evidence. In fact, the board has plenary review of facts and conclusions of law, and license to revise both. BBO Rules, § 3.53. As to credibility findings, it must defer to the hearing committee as the "sole judge of the credibility of the testimony presented at the hearing." SJC Rule 4:01, § 8(5). Applying the correct standard, as discussed in detail below, we find no error.

fundamental change in the testator's estate plan from her niece to non-family members; and the lawyer's failure to make prior inquiries about the housekeepers or their relationship with the testator. See also Matter of Morrow, 23 Mass. Att'y Disc. R. 486, 489 (2007) (public reprimand for conflict of interest and violations of rules 1.1, 1.2(a), 1.3 and 1.4(b) for failing to assure that two elderly sisters understood the documents they signed, agreed to their terms, were competent to sign them, and were not subject to undue influence).

It has long been the rule that a hearing committee does not need expert testimony to establish a standard of care. See, e.g., Matter of Buckley, 2 Mass. Att'y Disc. R. 24, 25 (1980) (rejecting need for evidence as to standard of quality expected in an appellate brief, noting that "[t]he brief speaks for itself in this respect"); Matter of Saab, *supra*, 406 Mass. at 329, 6 Mass. Att'y Disc. R. at 292 (rejecting argument that expert testimony is necessary to show inadequate preparation and incompetent performance and noting that "the respondent's incompetence and lack of preparation are plain from the facts"). The Court has continued to hold that "[e]xpert testimony is not required in bar disciplinary proceedings to establish a rule violation . . . or to establish a standard of care . . . ." Matter of Crossen, 450 Mass. 533, 570, 24 Mass. Att'y Disc. R. 122, 168 (2008). "Indeed, generally, '[e]xpert testimony concerning the fact of an ethical violation is not appropriate' in bar disciplinary proceedings because the fact finder does not need assistance understanding and applying the ethical rules."<sup>6</sup> *Id.* (citation omitted).

In reaching its emphatic and unanimous conclusion that the respondent violated rules 1.1, 1.3, and 1.4(b), the hearing committee discredited much of his testimony, and it plainly did not

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<sup>6</sup> In the Board of Bar Overseers Policies and Practices, paragraph 12 provides in pertinent part that "expert testimony concerning the standard of care applicable to the attorney's conduct may, in the discretion of the committee, be admitted into evidence, subject to the caveat that an expert's opinion to the effect . . . that there has or has not been an ethical violation, is not admissible and must be rejected." The comments note that while expert testimony may well be required in an excessive fee case, in other matters, including incompetence, the committee has the discretion to determine "that expert testimony concerning the applicable standard of care would be relevant and helpful" to it.

agree that Kamman possessed testamentary capacity or that the estate plans he drafted reflected her wishes.<sup>7</sup> In order to affirm those findings and conclusions, we do not need to define the precise point at which legal competence falls short under rule 1.1. Wherever this line is drawn, the respondent's behavior fell substantially below it.

Before drafting a will for Kamman, the respondent was only dimly aware of the requirements for testamentary capacity. Asked directly, he stated: “[T]he testator needs to have an understanding of their, of what they’re giving and needs to know the natural object of their affections.” Tr. 2:7 (Respondent). In fact, the applicable standard provides that at the time of execution of a will, a testator must be “free from delusion and understand the purpose of the will, the nature of her property, and the persons who could claim it.” O’Rourke v. Hunter, 446 Mass. 814, 826-827 (2006). Assuming arguendo that Kamman was mentally competent—a finding the hearing committee did not make and which we would not make on this record—there was no evidence that the respondent investigated whether she met the separate and discrete standard for testamentary capacity. Despite in-depth questioning by bar counsel and the hearing committee, the respondent’s testimony about the July 19 meeting does not reflect that he reviewed the will with Kamman or that she knew its purpose, the nature of her property, and the persons who could claim it. Krohn’s note — which addresses in the briefest possible way Kamman’s competence to “approve revisions to her last will and testament”— does not provide the information necessary to resolve the question of her “testamentary capacity.” The respondent’s

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<sup>7</sup> The respondent has argued that Kamman told Feldman in 2008 that she wanted to change her estate plan to omit Jean and Judith because they were wealthy. Respondent’s Brief, p. 3, n.2. He fails to disclose both that by 2008 she was already suffering from dementia and that one year later, in 2009, Beth brought her to see Attorney Kehoe, who had drafted the 2007 documents. Asked if she wanted to make changes, she stated: “No, I don’t. . . . Beth has been after me to make some changes and I don’t want to . . .” Ex. 62, at 570 (Kehoe). We note that there is no evidence that the respondent was aware of either of these conversations when he made the changes on July 19, 2010.

failure to determine the proper standard, and to make sure Kamman met it, bespeak a lack of legal competence.

Moreover, even if Dr. Krohn's note provided some evidence of Kamman's competency, it wholly failed to address whether Beth had exercised undue influence over Kamman. The respondent did no independent analysis of this question. "Any species of coercion, whether physical, mental or moral, which subverts the sound judgment and genuine desire of the individual, is enough to constitute undue influence." Howe v. Palmer, 80 Mass. App. Ct. 736, 741 (2011) (citation and quotation marks omitted). "When the donor is enfeebled by age or disease, although not reaching to unsoundness of mind, and the relation between the parties is fiduciary or intimate, the transaction ordinarily is subject to careful scrutiny." Neill v. Brackett, 234 Mass. 367, 369-370 (1920).

As the hearing committee observed, all the signs of undue influence were manifest: Kamman was elderly; mentally compromised at least intermittently; dependent on Beth for care and transportation; and was never without Beth in the respondent's presence aside from two very brief meetings where Beth sat outside the room and was periodically consulted. Because Kamman did not say explicitly "I don't know why I am here" or "Beth is making me do this" or "I really don't want to do this," he made no further inquiry. We agree with the hearing committee that it was not incumbent on Kamman to divine that she had been subject to undue influence. The respondent's unreasonably high threshold for inferring undue influence did not serve his client's interests and, again, reflects a failure of legal competence.

Even if we were to find the respondent's meager investigation to be competent, we would still find him lacking in the areas of diligence and proper communication with his client. These rules impose discrete, complementary obligations. A diligent lawyer would have recognized and

acted on the red flags we have identified above. He would have appreciated the sensitivity of the situation and would have made sure to document carefully his client's ascertained intention. He would have been vigilant and insistent about communicating directly with his client, unmediated as far as possible by the interference of a person financially interested in the transaction. The record reflects none of these things, and it amply supports the committee's conclusions.<sup>8</sup>

#### Conflict of Interest

Turning to the charges of conflict of interest, we agree with the hearing committee's analysis and conclusion. The respondent knew or should have known that Kamman's and Beth's interests in the litigation were directly adverse to one another, in violation of rule 1.7(a), since Kamman was entitled to have independent representation to fully air and try the questions of her competence and her genuine desires as to her estate plan. Beth had a directly adverse interest in upholding the documents she had caused the respondent to prepare. These competing interests also violate rule 1.7(b), since the respondent's responsibilities to Kamman materially limited his duties to Beth, and vice versa. As the draftsman of the July 2010 estate planning documents at issue in the litigation, the respondent's own interests materially limited his representation of both Kamman and Beth, also in violation of rule 1.7(b). He knew or should have known that his loyalty to Kamman would be called into question and, at the very least, he had an interest in a finding that she was competent whether or not that served her interests. Finally, the respondent

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<sup>8</sup> We agree with the hearing committee that rule 1.14 is not helpful to the respondent. The fact that "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being" (comment [1]) sheds no light on Kamman's situation. While comment [6] appears to have some bearing, advising that when dealing with a client with diminished capacity a lawyer should "consider and balance" factors including "the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client," there was no evidence that the respondent serially considered these factors. Indeed, he did not try to elucidate and clarify what Kamman wanted and made no comparison with earlier estate plans; rather, instead of protecting Kamman, he got his marching orders from Beth. Simply citing the rule without more does not advance the respondent's position. See generally Matter of McBride, 449 Mass. 154, 166, n.10, 23 Mass. Att'y Disc. R. 444, 459, n.10 (2007).

had a strong interest in resisting any suggestion that he had taken advantage of an incompetent client in favor of another client and in having his documents prevail, as well as an interest in preserving his position, and attendant fees, as back-up executor of the will and tertiary trustee of the trust. The respondent did not discuss, in any meaningful way, at any time before or after the fee agreement was signed, the implications and risks of his representation of both Beth and Kamman. The committee found no evidence that Beth gave her informed consent to the conflict, and it noted that Kamman could not have given meaningful consent at that time.

We are struck by the respondent's steadfast inability, over the course of months, to recognize the glaring conflicts of interest and by his persistent refusal to withdraw from the case. He soldiered on despite his awareness of Kamman's medical condition, and in the face of warnings from the presiding judge that she saw a conflict. We agree with the hearing committee that the respondent violated both rule 1.7(a) and 1.7(b).<sup>9</sup>

#### Recommended Sanction

The presumptive standards in Matter of Kane, 13 Mass. Att'y Disc. R. 321 (1997), drive our analysis of the appropriate sanction for the respondent's failure to represent Kamman competently and zealously. An admonition is appropriate where a lawyer fails to act with reasonable diligence, causing little or no actual or potential injury to the client or others. Id. at 327. A public reprimand is appropriate for want of diligence where the misconduct causes

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<sup>9</sup> The respondent has cited rule 3.7 for the proposition that he did not have to withdraw unless and until he was to be a witness at trial. Rule 3.7 provides, in pertinent part, that a lawyer "shall not act as advocate *at a trial* in which the lawyer is likely to be a necessary witness" (emphasis added). Comment [5] to rule 3.7 provides: "Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9." This comment makes clear that the fact that rule 3.7 bars advocacy at the trial stage does not mean that a lawyer who may be a witness has license to bypass the conflicts proscription in rules 1.7 and 1.9. See generally Smaland Beach Ass'n, Inc. v. Genova 461 Mass. 214, 227, n.20 (2012) ("[w]e recognize that combining the roles of advocate and witness may create a conflict of interest, and note that such situations are governed by Mass. R. Prof. C. 1.7 . . . (conflict of interest), or Mass. R. Prof. C. 1.9 . . . (prior representation), not rule 3.7. See comment [1] and [5] to rule 3.7. As such, total disqualification would be available under those theories.").

serious injury or potentially serious injury to a client or others. Id. While in specific cases it might be difficult to discern whether there has been serious or potentially serious injury, in light of our case law this case is straightforward. Serious injury has been found where a client had to pay over \$41,000 in penalties and interest after the lawyer neglected an estate matter. Matter of Lansky, 22 Mass. Att’y Disc. R. 443, 449-450 (2006). Although the lawyer reimbursed the client, the single justice noted that this did not neutralize the injury suffered, but rather was in the nature of restitution. Id. at 450. Another decision applying Kane describes as “substantial harm” an unreimbursed payment of \$450 in legal fees. Matter of Krabbenhoft, 23 Mass. Att’y Disc. R. 362, 380 & n.17 (2007). Here the respondent billed Kamman \$23,954 and collected \$10,800 for what was essentially worthless representation. Assuming, in light of Lansky and Krabbenhoft, that a payment of money for unnecessary attorney’s fees constitutes serious injury, this conduct alone would warrant a public reprimand under Kane.

Turning to the conflict of interest violations, we agree with the hearing committee that a public reprimand is the typical sanction for a conflict of interest where, as here, other than receipt of a fee, the lawyer has no personal financial interest or selfish motive. Matter of Carnahan, 449 Mass. 1003, 1005, 23 Mass. Att’y Disc. R. 57, 60 (2007) (public reprimand for lawyer who, among other things, drafted estate plan for elderly individual at request of client who stood to benefit from new arrangement and who was present during meetings of lawyer and new client; term suspension not imposed because no selfish motive).

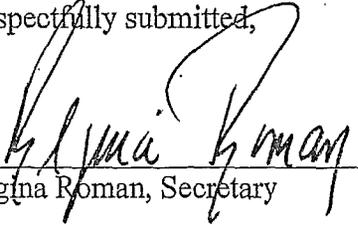
Numerous cases feature fact patterns similar to this one, where lawyers have received public reprimands for preparing estate planning documents in favor of family members or caregivers without ensuring the client’s understanding, capacity or freedom from undue influence. E.g., Matter of Ware, 26 Mass. Att’y Disc. R. 707 (2010) (stipulation to public

reprimand for preparing a will on behalf of testator's daughter and son-in-law, with whom the attorney had a previous relationship that materially limited his representation to client; lawyer failed to meet with testator or communicate directly with her and failed to take steps to ensure that she understood what she was doing, was competent, and was not subject to undue influence); Matter of Warshaw, 24 Mass. Att'y Disc. R. 737 (2008) (stipulation to public reprimand for preparation of will favoring one of several children; misconduct included failure to ensure testator client understood what she was doing, was competent and was not subject to undue influence; board noted that even though lawyer's efforts were in good faith, they were inadequate to fulfill his obligations to provide testator with independent representation); Matter of Morrow, *supra*; Matter of Manelis, 18 Mass. Att'y Disc. R. 375 (2002) (stipulation to public reprimand for lawyer retained by son to prepare a will for his father in which testator left his entire estate to one son and disinherited another; lawyer violated rules on both conflict of interest and zealous representation); Matter of Reynolds, *supra*. See also Matter of Diamond, 27 Mass. Att'y Disc. R. 177 (2011) (stipulation to suspension for six months and a day, and requiring petition for reinstatement, for lawyer who, at niece's bequest, drafted trust and deed in niece's favor for elderly aunt with history of dementia, without meeting aunt and subsequently, when suit was filed, represented aunt, trustee and mortgagee in litigation and made false denials in court; conduct mitigated by age and aggravated by prior discipline including suspension). Contrast Matter of Pike, 408 Mass. 740, 746, 6 Mass. Att'y Disc. R. 256, 261-262 (1990) (six-month suspension for obvious conflict where lawyer had a direct financial interest, acted deliberately for his own benefit and in disregard of his client's interests, and caused prejudice to client; reinstatement conditioned on passing MPRE).

A public reprimand has also been imposed where an attorney continued to represent a client when it should have been obvious that the attorney's testimony would be needed at the client's trial. Matter of Hurley, 17 Mass. Att'y Disc. R. 315, 316-317 (2001) (stipulation to public reprimand for violation of predecessor to rule 3.7(a) aggravated by prior admonition and mitigated by acknowledgment of error, promised prospective cooperation in retrial, and lawyer's discussion of potential conflict with her client and his consent to continued representation); Matter of Carroll, 15 Mass. Att'y Disc. R. 105, 107-108 (2000) (stipulation to public reprimand for conduct including conflict of interest, acceptance of employment when it was apparent lawyer might be called as a witness, and conduct prejudicial to the administration of justice).

Our analysis leads to the inescapable conclusion that the respondent's behavior warrants a public reprimand. This sanction can be sustained either for his lack of competence and diligence or for his failure to recognize a conflict of interest and withdraw. Although we have identified aggravating factors, we decline to recommend an increased sanction. Accordingly, for all of the foregoing reasons, we conclude that the matter be resolved by imposing a public reprimand.<sup>10</sup>

Respectfully submitted,

  
Regina Roman, Secretary

Dated:

8/10/2015

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<sup>10</sup> At the close of the hearing, the respondent filed a motion for a directed finding. There is no provision in our rules for such a motion. We have treated it as a motion to dismiss which, under BBO Rules § 3.32, "shall be forwarded to the Board with the hearing committee's . . . report and the record at the conclusion of the proceedings." The motion raises no points not also addressed on appeal. In light of our disposition of the respondent's appeal, it follows that the motion should be denied.