

IN RE: SIDNEY LANSKY

S.J.C. Order of Suspension entered by Justice Spina on February 24, 2006, with an effective date of March 26, 2006.¹

Memorandum and Judgment

This case was commenced on an information filed by the Board of Bar Overseers, which recommends that the respondent, Sidney Lansky, be suspended for six months for neglect in probating two estates and for engaging in a conflict of interest with respect to one of the two estates.

The board concluded that, with respect to the first estate, the respondent violated Canon One, DR 1-102 (A)(5) (conduct prejudicial to administration of justice), and (6) (conduct adversely reflecting on fitness to practice law); Canon Five, DR 5-101 (A) (except with consent of client after full disclosure, lawyer shall not accept employment if exercise of professional judgment is likely to be affected adversely by his own financial, business, property, or personal interests), and DR 5-105 (A), (B), and (C) (lawyer shall decline proffered employment and shall not continue multiple employment if exercise of independent and professional judgment is likely to be affected adversely by his representation of another client or if it would involve him in representing differing interests except if he can represent adequately each and they consent after full disclosure); Canon Six, DR 6-101 (A)(2) (inadequate preparation); Canon Seven, DR 7-101(A)(1) (intentionally failing to seek out lawful objectives of client), (2) (intentionally failing to carry out contract of employment), and (3) (prejudice or damage), as to conduct occurring before January 1, 1998; and Mass. R. Prof. C. 1.1 (competence), 1.3 (diligence and promptness), and 8.4(d) (conduct prejudicial to administration of justice), after January 1, 1998.

The board concluded that, with respect to the second estate, the respondent violated Mass. R. Prof. C. 1.3 (diligence and promptness), and 8.4(d) (conduct prejudicial to administration of justice), due to his failure to render estate accounts as required by G. L. c. 206, § 1; Mass. R. Prof. C. 1.2(a) (obligation to seek lawful objectives of client), and 1.3 (diligence and promptness) due to the delay, and Mass. R. Prof. C. 1.15(e) (trust account violations) due to his failure to deposit the client's funds into the estate's account.

The respondent does not contest the findings of the board, but contends that a term suspension is markedly disparate from discipline imposed in similar cases involving neglect. He argues that a public reprimand is the appropriate sanction in the circumstances of this case. Bar counsel argues that the appropriate sanction in this case is a suspension of one year and one day, or alternatively, a six-month suspension without the right to automatic reinstatement. The standard for determining the appropriate sanction for discipline is whether it is reasonably consistent with sanctions imposed in similar cases, under what has become known as the "markedly disparate standard." *Matter of Alter*, 389 Mass. 153, 156(1983).

The respondent argues that a public censure is the appropriate sanction for cases involving a pattern of neglect, and that a term suspension is appropriate in such cases only when "the lawyer's misconduct causes serious injury or potentially serious injury to a client or others." *Matter of Kane*, 13 Mass. Att'y Disc. R. 321, 327-328 (1997). He further argues that consideration must be given to the pre-Kane standard discipline for neglect, i.e., a private reprimand, where the majority of the neglect in this case occurred before the Kane standards

were enunciated. See *Matter of Shaughnessy*, BD-2002-061 (2003). Finally, the respondent acknowledges that because he previously had received an admonition for neglect in the administration of two other estates, subsequent discipline for similar violations will be stepped up under the policy of "escalating discipline" in attorney discipline cases. *Matter of Chambers*, 421 Mass. 256, 260 (1995). However, because that policy favors incremental increases, he contends that public censure, the next step above admonition, is the appropriate sanction for his pattern of neglect. *Id.*

It is appropriate to apply the post-Kane standards to this case because at least two years of neglect in one estate, and all of the neglect in the second estate, occurred post-Kane. Moreover, the post-Kane neglect in the first estate occurred after bar counsel commenced an investigation.

This case involves substantial injury to the client and misconduct in addition to neglect. The respondent engaged in an actual conflict of interest without disclosure and consent in the first estate over an eight-year period that began in 1991, when he agreed to serve as co-executor and attorney for the estate. The primary asset of the first estate was a family business for which the respondent also served as director, officer, and legal counsel. He also gave one of the heirs legal advice concerning the exercise of a testamentary option to purchase for \$50,000 the testatrix's interest in the family business, which interest was valued at \$246,000. The will provides that the heir must exercise the option within six months of the date of the executor's appointment, and if the option were not timely exercised, the business would be liquidated under the terms of the will and the proceeds distributed among residuary beneficiaries.

The heir who was granted the option, the testatrix's son, was the only one of her children who actually was involved in the family business. The respondent was aware that the board of directors of the business, of which he was a member, would have to approve the transfer of shares if the option were exercised. The respondent did not file the probate bonds and secure the co-executors' appointments for almost two years after the return date on the probate court citation (no objection had been filed). He delayed seeking appointment for two years to permit the testatrix's son more time to exercise the option to purchase the testatrix's shares. When the testatrix's son did exercise the option, the respondent voted as director to approve the transaction at the discounted price even though the son had not yet paid the \$50,000 option price. Indeed, the son did not pay the option price until nearly four years after he exercised the option, and the respondent never demanded, on behalf of the estate, that he pay the money owed. The respondent improperly favored the interests of the testatrix's son over those of the other beneficiaries, and the estate was deprived of the use of the option funds for years.

The delay also resulted in the late filing of the Massachusetts estate tax return, for which the estate was assessed a penalty and was obligated to pay interest in the total sum of \$41,132. The respondent and his malpractice insurer reimbursed the estate for the penalty and interest paid on the Massachusetts estate tax, but not until two years after beneficiaries complained to bar counsel and after one beneficiary sought the respondent's removal as co-executor in the probate court. In addition, the beneficiaries did not receive their share of the estate assets until more than eight years after the testatrix's death, and they never received any interest for the two years' delay triggering the option period.

The neglect involving the second estate consisted of a delay in making the final distribution of the assets of the estate.

A term suspension is appropriate because the respondent's post-Kane neglect "cause[d] serious injury or potentially serious injury to a client," namely, a \$41,132 liability for penalties and interest on the Massachusetts estate tax return. *Matter of Kane*, supra at 328. There is no merit to the respondent's claim that because the estate was made whole by his reimbursement of the \$41,132 paid by the estate, it did not sustain serious injury. The respondent confuses

restitution, which in certain circumstances may be a factor in mitigation, with injury. Here, the restitution does not even merit mitigating weight because it was made two years after bar counsel commenced the investigation in this case. Compare American Bar Association Standards, § 9.32(d) ("timely good faith effort to make restitution or to rectify consequences" is considered as matter in mitigation), and § 9.4 (a) ("forced or compelled restitution" should not be considered as either aggravating or mitigating factor). See also Matter of Tobin, 1 Mass. Att'y Disc. R. 290, 293 (1991) (lawyer suspended for one year for representing both mortgage and financial backer in second mortgage transactions that violated State truth-in-lending laws, although woman who lost her house as result of conflict was ultimately "made whole" through intervention of Attorney General). Moreover, although the estate was reimbursed the money paid for penalties and interest on its estate tax obligation, the respondent paid no interest for the two years in which the beneficiaries lost the use of their money.

Although the appeal panel found that the respondent's conflict of interest was not "egregious" (the respondent "clearly believed his performance was consistent with [the testatrix's] wishes that her son take over ownership of the family business, provided he pay for it"), it was nevertheless a breach of ethical duty that spanned eight years, two of which occurred during bar counsel's investigation. In addition, the conflict (and neglect) caused both the estate and the beneficiaries "substantial harm." The combination of neglect, conflict of interest, and substantial harm, requires a term suspension. See Matter of Kane, *supra*; Matter of Thurston, 13 Mass. Att'y Disc. R. 776, 791-792 (1997) (six-month suspension for conflict of interest); Matter of Taglino, 9 Mass. Att'y Disc. R. 318 (1993) (six-month suspension for conflict of interest).

I conclude that a six-month suspension is the appropriate sanction in this case. The fact that the respondent did not act for personal gain does not persuade me otherwise. See Matter of Thurston, *supra*; Matter of Taglino, *supra*; Matter of Tobin, *supra*. Nor does the fact that the respondent had a long professional relationship with the testatrix and the family business justify a reduction in the sanction. See Matter of Early, 21 Mass. Att'y Disc. R. ___ (S J.C. No. BD-2005-0017, at 5) (2005).

The respondent is hereby suspended from the practice of law for a term of six months.

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

² Compiled by the Board of Bar Overseers based on the record before the Court.

Please direct all questions to webmaster@massbbo.org.

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