

## IN RE: BRIAN B. KYDD

S.J.C. Judgment of Term Suspension/Suspended entered by Justice Cordy on March 23, 2009.<sup>1</sup>

MEMORANDUM AND JUDGMENT

This case came before me on an information filed by the Board of Bar Overseers (board), with a recommendation that the respondent, Brian B. Kydd, be suspended for three months from the practice of law principally because of his neglectful conduct. I have reviewed the entirety of the record and the filings in this case, and held a hearing on March 11, 2009. While I agree with the board that the respondent's conduct involved repeated failures to act with due diligence, albeit on a single matter, and that a suspension of three months on that basis might generally be appropriate, I find the conduct to be on the borderline to that which might be appropriately sanctioned by a public reprimand. Considering all of the circumstances, I am imposing a suspension of three months which is further suspended for a period of one year, with the condition that the respondent successfully close the matter (described below) with the Internal Revenue Service (IRS).

1. Background. The following facts were found by the hearing committee and adopted by the board. Kydd was admitted to the Bar of the Commonwealth on July 2, 1990. He began working in his father's firm, practicing only in admiralty and maritime insurance defense. At the request of his father, Kydd agreed to assist one of the firm's clients, Florence B. Patterson, in an estate matter.

On August 2, 2000, Patterson died, leaving an estate of about \$124,000. Her will named Kydd as the executor, and divided the estate between thirty-one charitable organizations, her sister, four nieces, and one nephew. Kydd met with one of the nieces, Janice Corbett, in October 2000 to discuss the estate.

Kydd quickly found himself unprepared to meet the demands of his role as executor of the estate. He misplaced several personal checks made out to the estate, and eventually had to replace their value with his own money. The probate of the estate became delayed, and beneficiaries contacted him several times to ask about his progress; however, he did not consistently return their calls. He learned of a small life insurance policy in 2002, but failed to collect it until 2003. Beginning in September, 2000, Kydd received several monthly interest checks (totalling \$240) from a certificate of deposit (CD) owned by Patterson, but did not deposit them until 2002. He eventually deposited them (and the amounts formerly held in CDs) into an account that did not bear interest. Kydd also contacted the Treasury Department in 2002, asking for information on redeeming Patterson's United States savings bonds, but took no further action until 2004. However, on July 27, 2002, he inaccurately informed Corbett that "the US treasury has received the savings bonds with the necessary documentation and I expect distribution shortly to be made directly to the estate account."

Kydd eventually distributed the estate's assets to the beneficiaries and in satisfaction of the bequests in Patterson's will. However, Kydd's collection and liquidation of the estate's assets produced income that was taxable to the estate. Because Kydd did not understand estate taxation rules, he did not timely file Federal or State income tax returns. When he eventually filed tax returns in April, 2007, he discovered that (with penalties-and interest) the estate

owed more than \$35,000 to the United States IRS. The upshot of this discovery was that the respondent's negligence had resulted in the beneficiaries receiving more money in distributions from the estate than they were entitled to, and the estate was left with insufficient funds remaining to pay the taxes it owed.

The respondent subsequently entered into a settlement agreement with the IRS for the payment of the taxes, which he has done with his own funds,<sup>3</sup> and indemnified the beneficiaries in the remote event that they might have some residual liability.

2. The disciplinary process. In December, 2002, bar counsel received a grievance from Corbett and sent a letter to Kydd requesting a response within twenty days. He failed to respond to that letter, nor did he respond to a second letter. He appeared at the Office of Bar Counsel in response to a subpoena; however, he subsequently failed to respond to a request to provide additional documents. Due to these failures, the Supreme Judicial Court entered an order of administrative suspension against Kydd on May 21, 2003. He later complied, and was reinstated on June 20, 2003.

The Hearing Committee found that by failing to obtain the knowledge necessary to redeem the U.S. savings bonds, failing to act with reasonable diligence and promptness in carrying out his duties as executor, failing to deposit the checks on receipt, misplacing some of the checks for over two years, and failing to hold estate funds in an interest-bearing account, Kydd violated Mass. R. Prof. C. 1.1, 1.2 (a), 1.3, 1.15 (a), and 1.15 (e). By intentionally misrepresenting that he had sent the necessary information to the U.S. Treasury Department, he violated Mass. R. Prof. C. 8.4 (c) and (h). By failing to file timely accountings with the probate court as required by G. L. c. 206, § 1, Kydd violated Mass. R. Prof. C. 1.1, 1.3, 3.4 (c), and 8.4 (d). Finally, by failing to cooperate with bar counsel's investigation, Kydd violated Mass. R. Prof. C. 8.1 (b), (d), (g), (h), and S.J.C. Rule 4:01, § 3. The board adopted these conclusions of law.

The hearing committee recommended that Kydd be suspended for three months or until he could enter a repayment plan with the IRS with releases of the estate and beneficiaries from liability, whichever occurred later. The board modified the proposed disposition, and recommended that Kydd be suspended for three months without further conditions.

3. Discussion. To determine whether the sanction imposed in this case is appropriate, I must decide whether the board's recommendation "is 'markedly disparate' from the sanction imposed in other similar cases." Matter of Brown, 12 Mass. Att'y Discipline Rep. 23, 27 (1996), quoting Matter of Alter, 389 Mass. 153, 156 (1983). Although we give substantial deference to the board's recommendation, each case must be decided "on its own merits." Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984).

In cases involving neglect, absent aggravating and mitigating factors, "[p]ublic 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 lawyer's misconduct causes serious injury or potentially serious injury to a client or others." Matter of Kane, 13 Mass. Att'y Discipline Rep. 321, 327 (1997). "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" (emphasis added). Id. at 328.

In cases where attorneys have repeatedly neglected their duties to multiple estates, suspension has been deemed appropriate. See Matter of Lansky, 22 Mass. Att'y Disc. Rep. 443, 451 (2006). However, public reprimand has been imposed for repeated neglect of a single estate with no resulting harm. Matter of Norton, 19 Mass. Att'y Disc. Rep. 333 (2003).

In this case, Kydd attempted to assist his father's firm by accepting an estate matter with which he had no expertise. He failed to properly inform himself on the applicable law, and his repeated delays harmed the estate in the form of lost interest and late fees imposed by the

IRS and DOR. See Matter of Lansky, *supra* at 450. Further, his misrepresentation regarding the savings bonds and his failures to respond to bar counsel's requests demonstrate an initial unwillingness to take responsibility for his actions. See Matter of Kane, *supra* at 328.

However, I conclude that outright suspension is not appropriate in this case. Kydd's poor handling of Patterson's estate was largely caused by his lack of experience in the realm of probate law; unlike Lansky, there is no evidence that his actions arose from a conflict of interest or a desire to obtain a personal benefit (nor was any personal benefit obtained). See Lansky, *supra* at 448-449 (stake in family business represented conflict of interest, and respondent improperly delayed probate to assist son of testatrix). In the end, the beneficiaries were not harmed by the respondent's conduct, and indeed may have benefited from it at his expense. Finally, there is no risk that the beneficiaries will be held liable for any of the unpaid taxes. Kydd has now paid the taxes owed. At the hearing on March 11, 2009, it was represented (and not contested) that the closure of the IRS tax matter is merely awaiting a final letter from the IRS to that effect, now that the terms of the settlement agreement have been complied with.

For these reasons, I impose a three month suspension, further suspended for one year, with the condition that the respondent successfully pursue the formal closure of the matter of the tax delinquency with the IRS.

#### FOOTNOTES:

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

<sup>2</sup> The estate also owed approximately \$.2,000 to the Massachusetts Department of Revenue, a liability that appears to have been resolved.

<sup>3</sup> It appears that the respondent also waived his outstanding fees in connection with the administration of the estate.

Please direct all questions to [webmaster@massbbo.org](mailto:webmaster@massbbo.org).

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