NO. BD-2010-092

IN RE: RICHARD C. O'REILLY

S.J.C. Order of Term Suspension entered by Justice Spina on December 3, 2010.[1]

MEMORANDUM AND JUDGMENT

Bar counsel filed a petition for discipline of Richard C. O'Reilly, together with a stipulation of the parties. The stipulation recommended a suspension of the respondent from the practice of law for a period of one year. The parties acknowledged that the board was not bound by the recommendation, but they declared that they would be bound by the stipulation as to the facts and disciplinary violations stated therein.

The board made a preliminary determination that, because the respondent's misconduct involved serious and multiple incidents occurring over a period of time, the board considered the sanction of one year to be insufficient, and that a hearing prior to reinstatement was warranted.[2] The respondent requested reconsideration. Bar counsel did not join in the request, but he renewed his support for a one year suspension. The board then voted to accept the stipulation of facts, but to file an Information with the court recommending that the respondent be suspended from the practice of law for one year and one day.

The issue before me is whether the board's recommended sanction of one year and one day is markedly disparate from sanctions imposed in comparable cases. *Matter of Alter*, 389 Mass. 153, 156 (1983). In applying this standard, "it is appropriate to consider the cumulative effect of the several violations committed by the respondent." *Matter of Palmer*, 413 Mass. 33, 38 (1992). The board's recommendation, while not binding, is entitled to "substantial deference." *Matter of Tobin*, 417 Mass. 81, 88 (1994). We do not give deference to the recommendation of bar counsel made in stipulation with the respondent. See *Matter of Chambers*, 421 Mass, 256, 260-261 (1995), citing *Matter of Luongo*, 416 Mass. 308, 312 (1993).

1. The Stipulation. The facts and disciplinary violations set forth in the stipulation of the parties are summarized as follows. On August 14, 2003, the respondent was appointed executor of the estate of a former client. He thereafter acted both as executor and attorney for the estate. He appropriately marshalled assets, established an estate account, liquidated various bonds, and sold the decedent's real estate. The assets of the estate had a combined value in excess of $2 million. The respondent was paid in full for all services rendered as of November 24, 2003, and there is no issue as to what he had done up to that point.

On or about November 25, 2003, the respondent wrote a check on the estate account payable to himself in the amount of $50,000. He did not deposit any portion of the funds into an IOLTA or client trust account, but deposited the funds into a law office operating account. He subsequently used at least $29,000 of the funds for personal or business purposes unrelated to the purposes of the estate. There is no evidence of an intent to deprive the estate.

The respondent was aware that Massachusetts and Federal estate tax returns would be due on or about February 28, 2004, nine months after the decedent's death (May 28, 2003). He also was aware that estate taxes likely would be due and owing to the Massachusetts Department of Revenue (DOR) and the Internal Revenue Service (IRS). At no time did he file any estate tax returns, pay any estate taxes, or request or obtain any extension to file or pay any estate tax.

On May 19, 2004, the respondent returned to the estate account the sum of $50,000. No beneficiary's share was delayed and no deprivation resulted from his use of the funds.

On March 25, 2005, the respondent sent a letter to a beneficiary enclosing what purported to be a final account of the estate, and a final disbursement check. He knowingly falsely represented in his letter that all estate taxes had been paid, and the final account showed debits for estate taxes paid to both the DOR and the IRS. The respondent never filed a final account with the probate court.

On January 25, 2006, the respondent sent the beneficiary a letter enclosing what purported to be copies of the signature pages to Massachusetts and Federal estate tax returns, copies of correspondence to the DOR and the IRS, and copies of checks to those agencies. The copy of the letter to the DOR requested a waiver of penalties and interest on the estate taxes due.

On March 23, 2006, the respondent sent the beneficiary a letter enclosing copies of letters he purportedly sent to the DOR and the IRS. He wrote in the letter addressed to the DOR that he said he had not received a response to his request for waivers of penalties and interest.

In August, 2006, the beneficiary retained a lawyer to investigate the respondent's handling of the estate. The respondent admitted to the lawyer that he had filed no estate tax returns and had paid no taxes. He resigned as executor.

An administrator with the will annexed was appointed. The administrator prepared the necessary estate tax returns, paid the taxes due, and sought and obtained waivers of all interest and penalties from the DOR and the IRS.

The parties stipulate that the respondent violated the following Disciplinary Rules:

> (a) Rule 1.1 — Competence (a lawyer shall provide competent representation);
> (b) Rule 1.2 (a) — Scope of Representation (a lawyer shall seek the lawful objectives of his client…. A lawyer does not violate this rule .... by being punctual in fulfilling all professional commitments);
> (c) Rule 1.3 — Diligence (a lawyer shall act with reasonable diligence and promptness);
> (d) Rule 1.4 (a) — Communication (a lawyer shall keep a client reasonably informed about the state of a matter);
> (e) Rule 1.4 (b) — Communication (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation);
> (f) Rule 1.15 (b) — Segregation of Trust Property (a lawyer shall hold trust property separate from lawyer's own property);
> (g) Rule 1.15 (c) — Prompt Notice and Delivery of Trust Property to Client or Third Person;
> (h) Rule 8.4 (c) — Misconduct (it is professionally improper for a lawyer to engage in conduct involving misrepresentation);
> (i) Rule 8.4 (h) — Misconduct (it is professionally improper for a lawyer to engage in conduct adversely reflecting on his/her fitness to practice law).

2. Discussion. In *Matter of Keefe*, 21 Mass. Att'y Discipline Rep. 530 (2005), a lawyer who intentionally withdrew funds belonging to two sets of clients from his IOLTA account, commingled the client funds with his own in his business account and intentionally misused the client funds for his own purposes, without intent to deprive any client of funds and with no deprivation resulting, was determined to have violated Mass. R. Prof. C. 1.15 (a), (b), and (d), and 8.4 (c) and (h). In that case, strongly resembling this case with respect to the facts constituting the commingling violations, the primary differences being that that case involved two sets of clients and violations of Mass. R. Prof. C. 7.1 (the lawyer misrepresented himself and his associate as a professional corporation, when the relationship was unincorporated) and

7.5 (the lawyer used a firm name and letterhead that violated Rule 7.1), the lawyer's license to practice law was suspended for nine months. The parties are not in dispute over the "comparable" value of the violations surrounding the commingling of funds.

There is considerable disagreement, however, over the "comparable" value of the violations for neglect and misrepresentation. In *Matter of Kane*, 13 Mass. Att'y Discipline Rep. 321, 327 (1997), the board established guidelines in cases involving neglect, see *Matter of Shaughnessy*, 442 Mass. 1012, 1014 (2004), as follows:

1. Admonition is generally appropriate for neglect resulting in little or no potential injury to a client or others;
2. Public reprimand is generally appropriate for neglect resulting in serious injury or potentially serious injury to a client or others;
3. Suspension is generally appropriate for repeated instances of neglect or a pattern of neglect, and the neglect causes serious injury or potentially serious injury to a client or others;
4. Aggravating factors include:
    a. misrepresentations to a client to conceal the neglect;
    b. prior disciplinary offenses;
    c. failure to cooperate with bar counsel;
    d. refusal to acknowledge the wrongful nature of the conduct;
    e. abandonment of the practice of law;
5. Mitigating factors include:
    a. timely, good-faith effort to make restitution or otherwise rectify the harm;
    b. physical or mental disability contributing to the neglect;
    c. serious personal-or emotional problems contributing to the neglect.

Here, the board based its recommendation on the confluence of three types of misconduct: (1) intentional misuse of client funds (no intent to deprive and no harm); (2) repeated failure to act diligently for nearly three years; and (3) misrepresentation to the client for perhaps as much as two years to conceal his neglect. What the board characterizes as a repeated failure to act diligently for nearly three years is in reality a combination of points (2) and (3). That is, the respondent failed to file Massachusetts and Federal estate tax returns,[3] and concealed this omission for about two and one-half years first by silence and then by three misrepresentations over a period of one year.

Applying the *Kane* analysis, there is essentially one act of neglect, failure to file the estate tax returns. This failure exposed the estate to a potentially serious injury in the form of significant interest and penalties. This misconduct typically would call for a public reprimand (an admonition under current S.J.C. Rule 4.01, § 8 [l][c][i]).[4] See *In re Norton*, 19 Mass. Att'y Discipline Rep. 333 (2003).

Here, there were three separate misrepresentations designed to conceal a single incident of neglect. Under *Kane*, such conduct is considered an aggravating factor. Here the misrepresentations went to the status of the case itself, and therefore are violations of Rule 1.4 (a), (b) of Professional Conduct. A suspension for some period of time for neglect concealed by misrepresentations to the client is the appropriate sanction. See *Matter of McCarthy*, 17 Mass. Att'y Discipline Rep. 411 (2001) (suspension of one year and one day for neglect, misrepresentations to client, and misrepresentations to bar counsel in one case); *Matter of Davidson*, 17 Mass. Att'y Discipline Rep. 161 (2001) (three-year suspension for neglect and misrepresentations to different clients in three cases). The respondent's misconduct pertaining to neglect and the egregious and pervasive misrepresentations to the client warrant a suspension of between six months and one year, in my view.

The respondent argues that, the board has failed to consider substantial mitigation in this case. In particular, he cites (1) the absence of any disciplinary history, (2) his free and full disclosure and cooperation with bar counsel, and also the client's successor counsel, (3) his

demonstrated remorse, and (4) his timely and good faith restitution. However, the first three factors on which he relies are essentially the absence of aggravating factors, and as such, are not mitigating factors. See *Matter of Budnitz*, 425 Mass. 1018, 1019 (1997) (lack of disciplinary history not mitigating factor); *Matter of Anderson*, 416 Mass. 521, 527 (1993) ("Only extraordinary mitigating circumstances should affect a sanction otherwise warranted by an attorney's conduct"). The fourth factor, timely and good faith restitution, is a mitigating factor. *Matter of Kane*, 13 Mass. Att'y Discipline Rep. 321, 328 (1997).

The respondent relies on *In re: Daniels*, 23 Mass. Att'y Discipline Rep. 102 (2007), for support of his argument that a sanction of one year and one day is markedly disparate. Although that case involved a nine-month suspension for many of the same kinds of violations as are present here, plus failure to cooperate with bar counsel's investigation, that case is very different. The misuse and commingling of client funds there was characterized as much by sloppiness as personal gain. Here, there is no suggestion of sloppiness. The magnitude of the funds involved in the *Daniels* case is much smaller than here. In addition, the nature and extent of the misrepresentations in that case were mild and far less elaborate than the misrepresentations here. In balance, I am satisfied that the recommendation of the board is appropriate, and comparable to sanctions imposed for similar misconduct.

The respondent is hereby suspended from the practice of law for a term of one year and one day.

FOOTNOTES:

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

[2] A hearing prior to reinstatement is required after any suspension of more than one year. S.J.C. Rule 4:01, § 18 (2) (c),(5).

[3] The parties have not emphasized the failure to file, a probate account.

[4] I do not believe there were repeated instances of neglect or a pattern of neglect that itself would warrant a suspension under *Matter of Kane*, 13 Mass. Att'y Discipline Rep. 321, 328 (1997). A "pattern" implies three or more incidents. Cf. *Commonwealth v. Welch*, 444 Mass. 80, 89 (2005) (three or more incidents required to show "pattern of conduct" under criminal harassment statute); *Commonwealth v. Kwiatkowski*, 418 Mass. 543, 548 (1994) (same, under criminal stalking statute). "Repeated" conduct connotes conduct occurring more than once. Here, the failure to file the estate tax returns was no more egregious than what occurred in *In re Norton*, 19 Mass. Att'y Discipline Rep. 333 (2003), which involved multiple omissions in the probate of an estate.