SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-394
District Docket No. XIV-2010-0252E

IN THE MATTER OF	:
GLENN B. ALLYN	:
AN ATTORNEY AT LAW	:

Decision

Argued: March 21, 2013

Decided: May 2, 2013

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear, despite proper service.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE), based on respondent's disbarment in New York for violations of that state's equivalent to RPC 1.15 (a) (comingling personal funds with client and escrow funds held in the attorney trust

account), RPC 1.8 (a)(conflict of interest: improper business transaction with client), RPC 1.15(d) and R. 1:21-6 (recordkeeping violations), and RPC 8.4(a) (violation or attempt to violate the Rules of Professional Conduct). We determine to impose a three-month suspension.

Respondent was admitted to the New Jersey, New York, and Pennsylvania bars in 1992. In 1993, he was admitted to the Connecticut bar and, in 1995, the Colorado bar. Based on the February 7, 2011 findings in the New York disciplinary matter, respondent was disbarred in Colorado on a motion for default. He was also disbarred in Pennsylvania, on December 21, 2010, for failure to inform the Pennsylvania Supreme Court of the New York discipline, after having been directed to do so in September 2010. Finally, he was disbarred in Connecticut because he did not contest that state's reciprocal disciplinary action.

Respondent has no prior New Jersey discipline. However, his license to practice law in New Jersey was administratively revoked, on September 27, 2010, for failure to pay the New

Jersey Lawyers' Fund for Client Protection (CPF) for seven consecutive years.[1]

Respondent has an ethics history in New York. On September 18, 2009, he was reprimanded for taking "$14,000 of the sale proceeds of real property in which the complainant had an interest before he provided her with an invoice for his services and obtained her consent." On June 16, 2009, he received an admonition for neglect and misrepresentation. On September 30, 2005, respondent received a "letter of caution" for neglecting a client matter.

A thirty-seven count amended petition (complaint) alleged that respondent grossly neglected a New York personal injury action. Counts twenty-nine and thirty-six of the original petition were withdrawn.

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[1] R. 1:28-2(c) provides for the administrative revocation of an attorney's law license when the attorney has been declared ineligible for seven or more consecutive years. Such an order "shall not, however, preclude the exercise of jurisdiction by the disciplinary system in respect of any misconduct that occurred prior to the Order's effective date." Here, the misconduct occurred in New York between 2002 and 2007, well before September 27, 2010, the effective date of the revocation order.

On December 13, 2007, the Grievance Committee for the Ninth Judicial District of New York filed the petition, which had been modified by stipulation on July 11, 2008. It charged respondent with multiple violations of the New York Code of Professional Responsibility, which provisions, according to the OAE, comport with New Jersey RPC 1.8, RPC 1.15 (d), and RPC 8.4(a).

The charges against respondent arose from his representation of Mark Kalan and his involvement with Kalan in a business transaction. Specifically, respondent and Kalan orally agreed that A&H Capital, an entity of which respondent was the sole shareholder, would act as a factor for Kalan's business. Respondent failed to comply with the rule requirements that he advise Kalan to seek independent counsel about the venture and obtain Kalan's written consent after full disclosure.

Respondent was also charged with numerous counts of commingling, which was discovered during a review of his attorney books and records. Specifically, respondent left in his IOLA account [attorney trust account] funds that he had earned from the business venture with Kalan. He also failed to keep track of the balance of those funds being held in that account.

Moreover, respondent left funds in the IOLA account belonging to other clients, specifically, his own family

members, pertaining to business matters with them and made disbursements out of the account for his own personal expenses.

The recordkeeping charges related to the IOLA account. Respondent was alleged to have a) failed to title and identify the account properly; b) failed to maintain required books and records; c) disbursed escrow checks to cash; d) commingled personal and/or business funds with client funds in the IOLA account; e) disbursed funds on deposit in the IOLA account for personal and/or business purposes; and f) made undocumented loans from the IOLA account to various businesses in which he and his family members were principals.

Respondent was alleged to have engaged in similar misconduct with regard to an escrow account for which he kept inadequate records. Specifically, he had a) disbursed escrow checks to cash; b) disbursed funds on deposit in the escrow account for personal and/or business purposes; c) made undocumented loans out of the account to various businesses in which he and family members were principals; d) commingled personal funds with client funds; and e) disbursed a client's trust funds without proper documentation, thereby failing to safeguard funds entrusted to him as a fiduciary, and resulting in a negative balance.

By way of illustration, count thirty-four addressed respondent's handling of a closely-held family company, Congers Realty, Inc. Respondent was the majority owner of Congers Realty, Inc. His mother, sister, and wife owned a combined twenty-one percent of the company. On twenty-five occasions between July 25, 2006 and September 20, 2006, respondent allegedly disbursed funds totaling $35,734.05 from his escrow account to pay personal and business expenses for himself and Congers Realty, Inc.

Respondent entered into a stipulation in the New York matter, admitting numerous facts and denying others. The matter was heard by a special referee on July 15 and October 21, 2008. Using the preponderance of the evidence standard, the special referee sustained all thirty-seven charges against respondent.[2] The special referee further found that respondent's testimony lacked credibility and showed little understanding of "the disciplinary roles relating to escrow accounts and the handling

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[2] Pursuant to R. 1:20-14(a)(5), New Jersey will accept the final adjudication of another jurisdiction, even if the other state uses a different standard of proof.

of client funds." The special referee further discounted the possibility that respondent "learned [any]thing from [the] disciplinary proceeding."

On April 20, 2010, the New York Supreme Court, Appellate Division, Second Judicial Department, delivered an opinion disbarring respondent.[3]

With regard to the five counts dealing with the Kalan representation and conflict of interest, the New York court found that

> [c]harges one through five emanate from the complaint of Mark Kalan, whom the respondent represented with respect to the publication of City Cycle Motorcycle News, a magazine published by Mr. Kalan's company, Motormag Corp. After Mr. Kalan was served with a judgment against that company, he began publishing the magazine through another of his companies, the previously inactive First Hudson Publishing (hereinafter First Hudson). The respondent entered into a business relationship with Mr. Kalan on behalf of the respondent's solely-owned company, A & H Capital Management Group, with regard to funding of First Hudson's magazine publication.

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[3] In New York, disbarment is not permanent. Rule 691.11 allows a disbarred attorney to apply for reinstatement seven years after the effective date of disbarment or removal.

[Ex.C2.]

In its opinion, the court noted that "[t]he Special Referee found particularly disturbing respondent's failure to accept responsibility for or to even understand fully that his actions constituted professional misconduct. The Special Referee took note of the respondent's recently changed procedures, which he termed 'too little, too late,'" referring to respondent's contradictory claims below.

On the one hand, respondent had "acknowledged the 'cloudiness' presented by his simultaneously being an attorney and major operative of his family businesses." On the other hand, he also claimed that "his handling of his IOLA and fiduciary accounts was not improper in that funds belonging to his various business interests were deposited 'incident to his practice of law.'" The New York court found no evidence of knowing misappropriation by respondent.

The New York court also agreed with the special referee's assessment that respondent lacked credibility, that his testimony demonstrated a "weak understanding of the disciplinary roles relating to escrow accounts and the handling of client funds," and that he had "learned nothing from [the] disciplinary

proceeding."

By letter dated May 17, 2010, respondent notified the OAE of his New York disbarment, as required by R. 1:20-14(a)(1). He did not, however, advise the OAE of his subsequent disbarment in Colorado, Connecticut, and Pennsylvania.

In its brief to us, the OAE argued:

> Here, respondent violated numerous provisions of the New York Rules of Professional Conduct, most notably DR 1-102(a)(7), 5-104(a) and 9-102. The corresponding violations in New Jersey are RPC 8.4, 1.8, and 1.15, respectively. Essentially, respondent engaged in a conflict for entering into a business transaction with a current client, failed to safeguard property, engaged in conduct that reflected adversely on his fitness as a lawyer and had multiple recordkeeping violation.
>
> [OAEb5.][4]

The OAE recommends respondent's disbarment, citing a number of cases in which the attorneys were found guilty of very serious misconduct and who displayed such poor character traits that the Court was unable "to conclude that [the attorney] will

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[4] "OAEb" refers to the OAE's November 1, 2012 brief in support of its motion for reciprocal discipline.

improve conduct." In re Cohen, 120 N.J. 304, 308 (1990).

The Court disbarred Cohen because, after having settled with one defendant, he filed suit against the other defendants twelve days after the statute of limitations expired. He then served the complaint with altered filing dates, as though the complaint had been filed timely. When the defendants realized that the case had been filed out of time, motions to dismiss the complaint were filed and granted. Even though the complaint was dismissed, for the next two years, Cohen continued to tell his client that the matter was proceeding apace. Yet, the client's claim had been lost.

Cohen also failed, throughout the disciplinary process, to cooperate with disciplinary authorities, failing to attend the district ethics committee hearing and oral argument before us.

The Court noted that Cohen had previously been suspended for one year for unrelated misconduct and had not complied with the rules governing suspended attorneys, including notifying clients of his suspension. Because Cohen offered no explanation for his actions and continued to be unresponsive to his clients, the courts, and the disciplinary authorities, the Court concluded that his disbarment was required.

Another case cited by the OAE, In re DiLieto, 142 N.J. 492,

507 (1995), involved the disbarment of an attorney after a random audit revealed anomalies in his trust account. Specifically, DiLieto had engaged in a pattern of intentional deception and dishonesty, improperly obtaining his clients' permission to lend their trust account funds out, without revealing to them that he was the actual borrower. In another instance, DiLieto used deposit funds that he held for a real estate transaction for himself, knowing that the agreement called for them to be refunded if the transaction was not completed. He never repaid the deposit. Although DiLieto was not found guilty of knowing misappropriation, he was disbarred for a "pattern of intentional deception and dishonesty" that was "intractable and irremediable," Id. at 507, citing In re Templeton, 99 N.J. 365, 376 (1985).

Upon review of the full record, we determine to grant the OAE's motion. We adopted the findings of the New York court.

Pursuant to R. 1:20-14(a)(5), another jurisdiction's finding of misconduct shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state. We, therefore, adopt the findings of the New York court.

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a) (4), which provides that

> The Board shall recommend imposition of the identical action or discipline unless the Respondent demonstrates, or the Board finds on the face of the record upon which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the Respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (D) the procedure followed in the foreign matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
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> (E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (D). However, with regard to subsection (E), misconduct of this sort, if it had occurred in New Jersey, would have warranted far less severe discipline than the disbarment recommended by the OAE.

In this case, New York authorities found respondent guilty of a conflict of interest with client Kalan, the commingling of

client and personal/business funds, and numerous recordkeeping violations. To be sure, the pervasiveness of respondent's commingling and recordkeeping violations was serious. Between 2002 and 2007, he treated his attorney trust account as though it were his own personal/business account, utilizing it for various family ventures in which he held an ownership interest. Over the five years at hand, the sums that flowed improperly through the trust account for himself and his family were in the hundreds of thousands of dollars. This was commingling on a large scale. The recordkeeping deficiencies, too, were of a magnitude that troubled the New York authorities.

As to the appropriate sanction, though, we cannot find that this is a disbarment case. The cases cited by the OAE involved much more serious violations than are present here. The record does not support a conclusion that respondent's behavior is so intractable or irremediable that he must be disbarred for it.

An admonition is the appropriate measure of discipline for the commingling of personal funds and trust account funds where, as here, negligent misappropriation is not a factor. See, e.g., In the Matter of William P. Deni, Sr., DRB 07-337 (January 23, 2008) (admonition imposed after a random audit disclosed that, between 2004 and 2007, the attorney had routinely deposited

earned legal fees into his trust account, rather than his business account, resulting in the commingling of more than one million dollars of his personal funds with client funds; other recordkeeping deficiencies also found) and In re Farynyk, 143 N.J. 302 (1996) (admonition imposed on attorney who had accumulated almost $431,000 in legal fees in his trust account, which we found to be a passive commingling of personal and client trust funds, in violation of RPC 1.15(a)).

Recordkeeping irregularities, too, ordinarily are met with an admonition, so long as they have not caused a negligent misappropriation of clients' funds. See, e.g., In the Matter of Thomas F. Flynn, III, DRB 08-359 (February 20, 2009); In the Matter of Jeff E. Thakker, DRB 04-258 (September 24, 2004); and In the Matter of Arthur G. D'Alessandro, DRB 01-247 (June 17, 2002).

Where an attorney (or as here, his company, A&H Capital) enters into a loan transaction with a client without observing the safeguards of RPC 1.8(a), the ordinary measure of discipline is also an admonition. See, e.g., In the Matter of Frank J. Shamy, DRB 07-346 (April 15, 2008) (attorney made small, interest-free loans to three clients, without advising them to obtain separate counsel; the attorney also completed an improper

jurat; significant mitigation considered); In the Matter of April Katz, DRB 06-190 (October 5, 2006) (attorney solicited and received a loan from a matrimonial client; the attorney did not comply with the mandates of RPC 1.8(a)); and In the Matter of Frank J. Jess, DRB 96-068 (June 3, 1996) (attorney borrowed $30,000 from client to satisfy a gambling debt; the attorney did not observe the requirements of RPC 1.8(a)).

Here, respondent's were not small, isolated violations. His commingling and recordkeeping violations were of such a rampant nature that the New York disciplinary authorities treated him harshly for it. In fact, the New York Supreme Court agreed with the special referee that respondent's testimony demonstrated a "weak understanding of the disciplinary roles relating to escrow accounts and the handling of client funds." The referee found, too, that respondent had "learned nothing from [the] disciplinary proceeding."

Given the scope of respondent's misconduct, at least a reprimand would be warranted. In aggravation, he has prior discipline in New York, for which the sanction in that state was enhanced. Had respondent's misconduct occurred here, we would have enhanced the sanction, due to the presence of the New York prior discipline (a September 18, 2009 reprimand for taking he

fee in a real estate matter before giving the client an invoice or obtaining consent; a June 16, 2009 admonition for neglect and misrepresentation; and a September 30, 2005 "letter of caution" for neglect of a client matter).

For respondent's failure to learn from prior mistakes, the length of time involved, his obvious lack of appreciation for the sanctity of his attorney trust account, as acknowledged by the New York authorities, and his failure to comply with R. 1:20-14(a)(1), requiring him to notify the OAE of his discipline in Colorado, Connecticut and Pennsylvania, we determine that a three-month suspension is the appropriate sanction. The suspension is to be served in the event that respondent ever applies for re-admission to the New Jersey bar. Respondent is also barred from applying for admission pro hac vice in New Jersey for the period preceding his re-admission.

Member Gallipoli would have disbarred respondent. Vice-Chair Frost and member Baugh did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as

provided in R. 1:20-17. Such payment is to be made following the Court's order of discipline, rather than following re-admission.

Disciplinary Review Board
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Glenn B. Allyn
Docket No. DRB 12-394

Argued: March 21, 2013

Decided: May 2, 2013

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost						X
Baugh						X
Clark		X				
Doremus		X				
Gallipoli	X					
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:	1	6				2

Julianne K. DeCore
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Chief Counsel