SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-273
District Docket No. XIV-07-040E

IN THE MATTER OF	
JOSÉ VICTOR BERNARDINO a/k/a JOSEPH BERNARDINO	
AN ATTORNEY AT LAW	

Decision

Argued: November 15, 2007

Decided: December 18, 2007

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

David H. Dugan, III appeared on behalf of respondent.

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

This matter came before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE) following respondent's one-year suspension in Pennsylvania for

violations of Pennsylvania RPCs 1.15(a), (b), and (c) and RPC 8.4(c). the charges arose out of respondent's conduct at the time that he was hired by a law firm. Specifically, respondent misrepresented the number and identity of pre-existing clients and client matters that he would continue to handle after he began employment with the firm. Moreover, despite the firm's policy prohibiting its attorneys from maintaining a private practice outside the firm, respondent surreptitiously continued to represent the undisclosed clients and handle the undisclosed matters, retaining one hundred percent of the fees received in those matters.

The OAE sought respondent's disbarment on the ground that he knowingly misused law firm funds. Respondent argued that he merely breached an employment agreement and that he should be reprimanded for retaining fees that he earned, albeit in violation of the firm's policy. For the reasons expressed below, we determine to impose a prospective one-year suspension on respondent.

Respondent was admitted to the practice of law in New Jersey in 1999. A year earlier, he was admitted to the Pennsylvania bar. At the relevant times, respondent practiced with the Philadelphia law firm of Oliver, Caiola & Gowen, LLC

(now Oliver & Caiola, LLC). He did not maintain an office in New Jersey.

Respondent's counsel represented to us that respondent is now practicing law in New Jersey. According to the OAE, respondent's firm is located in Philadelphia, not in New Jersey.

Respondent has no disciplinary history in New Jersey. His disciplinary history in Pennsylvania is limited to the proceeding giving rise to this matter.

The facts are taken from the Pennsylvania Joint Petition in Support of Discipline on Consent under Rule 215(d). On September 30, 2002, respondent started employment with Oliver, Caiola & Gowen, LLC ("the firm"). When he was hired, the firm's partners informed him of the firm's policies with respect to

> attribution of client origination, billing, and other administrative matters affecting compensation, including:
>
> a. the representation and billing of <u>any new client</u> by any attorney employed by the firm <u>must be processed through the firm</u>;
>
> b. <u>firm attorneys are not permitted to</u> maintain a "private" <u>practice outside the firm</u>;
>
> c. clients who come to the firm through Yellow Pages advertisements are deemed "YP" originated clients, and their files are to be so designated;

d. clients who come to the firm generally are deemed to be firm originated clients, and their files are to be so designated;

e. clients who come to a particular attorney in the firm are deemed to be originated by that attorney but are firm clients, however, the attorney is to receive 1/3 of the fee received in the case;

f. clients who contact a particular attorney in the firm and are assigned to another attorney for representation are attributed to the original attorney; and

g. the attorney directing the opening of the file is to advise office personnel in which name to open the file.

[OAEaEx.C,p.2-p.3,¶8 (emphasis supplied).][1]

During the hiring process, respondent informed the partners that he occasionally prepared a collection letter for his parents' medical practice and that he had a few cases from his prior employment that were close to conclusion and required little time to resolve. Respondent added that he was obligated

[1] "OAEa" refers to the appendix attached to the OAE's June 12, 2007 brief. "Ex.C" refers to the September 5, 2006 Joint Petition in Support of Discipline on Consent under Rule 215(d), Pa.R.D.E.

to divide the fees from those cases with his prior employer. The partners agreed to permit respondent to continue handling those matters, on his own, without involving the firm.

Respondent's representations to the partners were false. In fact, he was handling not a few, but numerous collection cases for his parents. He also handled collection cases for other medical practices and represented numerous clients in ongoing matters that were not likely to resolve soon. Respondent never informed the firm that he was representing these clients and never remitted to the firm the fees he received from these matters. Respondent believed that he was entitled to retain the fees for clients that he had represented prior to his employment with the firm.

The parties agreed that, during the course of respondent's employment with the firm, and "in the course of representation of no fewer than thirty clients who retained him personally or who were assigned to him by the firm, he diverted funds or resources from the firm." He admitted that

> a. failed to advise office personnel to open the files as firm, YP, or other attorney origination;
>
> b. failed to advise the firm of his involvement in the case;

c. worked on the case during hours for which he was paid by the firm;

d. utilized firm resources to fund the expenses of the case;

e. directed the client, opposing party, or referral counsel to issue payment to him directly rather than to the firm;

f. received settlement or verdict proceeds which he did not remit to the firm for deposit and disbursement through firm accounts;

g. failed to advise the firm of his receipt of fees from clients, referral counsel, or third parties, in which the firm had an interest, and failed to remit such funds to the firm; and/or

h. maintained records of the representations on a drive of his office computer which was not on the office central drive and/or on his personal laptop computer.

[OAEaEx.C,p.4-p.5,¶14.]

The parties also agreed that, during respondent's employment with the firm, he received "not less than $25,000 in fee income from no fewer than twenty clients, which he deposited into his individual attorney account, individual IOLTA account or his personal account." The petition did not specify whether any of the twenty clients were those whom respondent had represented before he began employment with the firm, or new

clients that had retained him after he joined the firm, or the firm's clients whose cases were assigned to him for handling.

Based on these facts, respondent admitted to having violated Pennsylvania RPC 1.15(a) (*requiring a lawyer to hold* property of clients or third persons in connection with a representation separate from the lawyer's own property and to preserve records of such funds for five years after termination of the representation), RPC 1.15(b) (at the time of respondent's misconduct, requiring a lawyer to promptly notify the client or third person of the receipt of fiduciary funds and to render a full accounting of such funds upon request), RPC 1.15(c) (requiring a lawyer, during the course of a representation, to keep separate property in which the lawyer and another person claim an interest until there is an accounting and a severance of interests), and RPC 8.4(c) (prohibiting an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation). He consented to the imposition of a one-year suspension.

The Pennsylvania Disciplinary Board approved the joint petition and recommended to the Supreme Court that respondent receive a one-year suspension. On December 14, 2006, the Pennsylvania Supreme Court entered an order (effective January

13, 2007) suspending respondent for one year. The order required him to make restitution to Oliver & Caiola in the amount of $17,500 and to dismiss with prejudice a lawsuit that he had instituted against the firm.

On December 22, 2006, respondent notified the OAE of his Pennsylvania suspension.

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline.

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 Pennsylvania Disciplinary Board. Thus, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3).

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

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:
>
> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;

(B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that fall within the scope of subparagraphs (A) through (E). Accordingly, we determine to impose a prospective one-year suspension for respondent's dishonesty, deceit, and misrepresentation.

The conclusively-established facts demonstrate clearly and convincingly that respondent breached the duty of loyalty owed to his employer. Lamorte Burns & Co., Inc. v. Walters, 167 N.J. 285, 302 (2001) ("[a]n employee must not while employed act contrary to the employer's interest," by, for example, competing with his or her employer during the term of employment). When respondent was hired, he was informed of the firm's policies pertaining to "client origination, billing, and other administrative matters affecting compensation." The language of

the joint petition suggests that these policies pertained only to new clients that would seek respondent's representation after he had joined the firm. The policies did not pertain to respondent's existing clients.

When respondent was hired and informed of these policies, he disclosed to the firm the existence of certain matters that he was handling. He informed the firm that he wrote only an occasional collection letter for his parents' medical practice. In response, the firm told respondent that he could continue to handle these matters and write the occasional letter for his parents without its involvement.

Respondent misrepresented to the firm the extent of his client base and the number of pending client matters. Respondent's counsel argued that, by failing to disclose this information and continuing to represent these clients, respondent violated his employment agreement. This argument misses the mark. The employment agreement, however, governed only new client representations.

Unquestionably, though, respondent's conduct was contrary to the interests of the firm. Had the firm known the truth of respondent's client base, it is likely that it would have negotiated an agreement governing the distribution of fees.

Our RPCs do not identify breach of the duty of loyalty to an employer as unethical conduct. Nevertheless, dishonest and deceitful conduct is clearly within the proscriptions of RPC 8.4(c). Respondent violated this rule when he misrepresented to the firm the identity and number of his pre-existing clients when he continued to represent them after joining the firm, and when he retained one hundred percent of the fees.

The OAE strongly urged us to find that respondent knowingly misappropriated law firm funds, arguing that the facts of this case are identical to those in In re Staropoli, 185 N.J. 401 (2005), where an attorney was disbarred for retaining the fee earned in a case that he originated after he became employed as an associate with a law firm. In Staropoli, the attorney worked as an associate at a law firm where the contingent fees received in cases originated by the associates were divided equally between the firm and the associates. In the Matter of Charles C. Staropoli, DRB 04-319 (March 2, 2005) (slip op. at 2). When Staropoli settled a case that he originated while he worked at the firm, he did not inform the firm that the case had settled and that he had received a settlement check. Ibid. Also unbeknownst to the firm, Staropoli deposited the check into his personal account and retained the entire legal fee. Ibid.

After Staropoli left the firm, it learned of the settlement, when the insurance company asked for a release. Id. at 3. Sometime after Staropoli was informed that the firm would be reporting him to the Pennsylvania disciplinary authorities, he made restitution to the firm. Ibid.

When the matter came before us, Staropoli stated that, at the time he took the money, the firm was in the midst of a "bitterly contested dissolution" and that he had been advised that he would soon lose his job. Id. at 6. He stated that, when he settled the case, he kept the money because he had been fired and because he could have referred the case to another firm. Ibid.

We were divided in our finding as to whether Staropoli had knowingly misappropriated law firm funds or had resorted to "self-help" to recover funds that he reasonably believed he was entitled to receive. Those of us who voted in favor of disbarment distinguished Staropoli's conduct from others who had resorted to "self-help:"

> Absent in the record before us is any explanation by respondent for his retention of the legal fee in the *Callen* matter. He did not assert that he misunderstood the firm's policy on division of fees in cases originated by associates of the firm; he did not assert that there was a dispute about

> his entitlement to the entire fee; he did not assert that he resorted to "self help" because the law firm had denied him compensation to which he was entitled. Moreover, he admitted in his brief that he should have tendered $2,000 to the law firm and that his failure to do so was based on financial need and anger at the firm for termination of his employment.
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> [Id. at 19-20.]

In short, those who supported disbarment found that Staropoli did not have "reasonable belief of entitlement to the funds that he withheld from the firm." Id. at 20. The Supreme Court agreed and disbarred Staropoli. In re Staropoli, 185 N.J. at 401.

Here, the OAE claimed that respondent could not have reasonably believed that he was entitled to the funds because his agreement with the firm was clear that he was permitted to continue working only on short-term matters. We are unable to agree with the OAE's position.

As noted above, the employment agreement governed only new clients. It did not apply to pre-existing clients. Given respondent's misrepresentations, the firm did not feel the need to reach an agreement on the parties' responsibilities and obligations regarding these clients. To be sure, the firm did permit respondent to continue working on the pre-existing

matters without its involvement. Respondent's misrepresentations about the extent of his pre-existing client did not affect the terms of the employment agreement.

Moreover, the joint petition itself is too broad, vague, and ambiguous to clearly and convincingly establish that respondent knowingly misappropriated law firm funds or resources. According to the petition, respondent "diverted funds or resources from the firm" in the course of his representation of "no fewer than thirty clients" who either "retained him personally" or "were assigned to him by the firm." Respondent allegedly diverted firm funds or resources by (1) failing to direct personnel to open a firm file for the matter, (2) failing to inform the firm of his involvement in the case, (3) working on the case during the time period for which he was paid by the firm, (4) utilizing firm resources to fund the expenses of the case, (5) directing the issuance of payments to him instead of the firm, (6) failing to remit the payments to the firm, (7) failing to advise the firm of his receipt of the payments, and (8) maintaining records of the representations on either his personal computer or on a non-central drive of his office computer. The lack of specificity in the identity of the clients and their matters and in the date of their retention of

either the firm or respondent makes it difficult to determine whether respondent knowingly misappropriated firm funds, that is, whether he kept fees earned from client matters generated after he became employed by the firm. However, nothing in the petition dates these representations to either the pre- or post-employment period.

As to the undisclosed pre-existing clients and matters, the firm had no ownership interest because no agreement was reached on the issue. They were not covered by the firm policies, which applied only to "new clients" and clients who "c[a]me to the firm" or "c[a]me to a particular attorney."

It is troubling if, with respect to any of respondent's undisclosed, personal representations, he either worked on them during the hours for which the firm paid him to work on its own matters or "utilized firm resources to fund the expenses of the case."

First, the record does not establish, by clear and convincing evidence, that respondent actually worked on his personal cases on "company time," so to speak. Second, although the joint petition's reference to respondent's "utiliz[ing] firm resources to fund the expenses of the case" suggests very strongly that he used firm funds to pay for costs incurred in

his personal cases, the joint petition does not identify the nature or the amount of the expenses. Thus, for example, respondent could have used the firm's postage meter to send a one-ounce letter (forty-one cents), or he could have billed a $15 delivery fee to the firm's account, or he could have had a $10,000 check issued to an expert witness in payment of a fee. Although, in clear-cut cases of knowing misappropriation, the amount of the funds taken is irrelevant,[2] in light of this vague and undeveloped record, we are unwilling to risk disbarring someone for theft of what might have been a postage stamp.

Third, a case for knowing misappropriation cannot be made based on the fact that respondent (1) directed the payment of fees, settlements, and jury awards to him and then failed to remit them to the firm or to inform the firm of his receipt of the monies and (2) "received not less than $25,000 in fee income from no fewer than twenty clients," which he deposited into one

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[2] See, e.g., In re Cassidy, 122 N.J. 1 (1990) (knowing misappropriation of $4962 in client funds); In re Epstein, 181 N.J. 305 (2004) (knowing misappropriation of $6800); In re LeBon, 177 N.J. 515 (2003) (knowing misappropriation of $5900 in law firm funds); and In re Waltershied, 172 N.J. 97 (2002) (disbarment by consent for knowing misappropriation of $1900).

of his personal accounts. Here, a distinction had to be made between the pre-existing cases, where respondent was personally retained to represent the clients, and those cases that "were assigned to him by the firm." If respondent committed these acts with respect to the cases assigned to him by the firm, he would have knowingly misappropriated firm funds. However, if he committed these acts with respect to his pre-existing personal cases and clients, he would not have knowingly misappropriated firm funds, as the employment agreement did not govern these clients and matters. Because the joint petition does not distinguish between matters, it is impossible to know in which matters the conduct took place.

We now address two points made by the OAE. First, with respect to the pre-existing clients, the OAE claimed that, under the terms of the agreement, respondent could not have held a reasonable belief that he was entitled to the fees. In making this argument, the OAE failed to distinguish between the terms of the agreement and the consequences of respondent's dishonesty. The agreement did not cover the undisclosed pre-existing clients and client matters. Thus, the firm had no interest in those fees, and respondent was entitled to them. Nevertheless, the firm's lack of interest in the fees and

respondent's entitlement to them was the result of an outrageous level of deceit.

Second, the OAE sought to prove that respondent knowingly misappropriated firm funds by pointing to the allegations of the petition for discipline filed against respondent in Pennsylvania. For example, counsel pointed to the allegations pertaining to a letter written by respondent about his representation of William Riggs, Jr. Riggs allegedly was a firm client whose case was assigned to respondent. At the conclusion of the matter, respondent directed Riggs to pay him directly and to keep the matter in confidence.

We cannot consider the allegations of the disciplinary petition or respondent's letter to Riggs in determining whether he knowingly misappropriated firm funds. We are limited to the record before us, which consists of the joint petition and which makes no reference to any specific client matter. The complaint and the letter are outside the record.

Finally, on the issue of knowing misappropriation, we note that the analysis in the Pennsylvania joint petition makes no reference to a conversion or misappropriation of funds by respondent. We also note the length of suspension imposed on respondent. The one-year suspension demonstrates that the

Pennsylvania Supreme Court did not believe that his misconduct was such that he should be required to prove his fitness to practice law before reinstatement, as would have been the case if respondent had been suspended for a year-and-a-day.[3]

In our view, respondent cheated the law firm when he misrepresented the number of pre-existing clients and cases. However, there is no proof that he misappropriated firm funds or resources with respect to his representation of clients whose matters were governed by the employment agreement, that is, new clients who retained respondent after his employment had commenced with the firm. Thus, this matter is neither one of knowing misappropriation or self-help. However wrongful respondent's conduct may have been, the record contains no evidence that the firm was legally entitled to the fees. In other words, there is no evidence that the fees belonged to the firm.

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[3] Rule 218 of the Pennsylvania Rules of Disciplinary Enforcement provides that attorneys suspended for more than one year must petition the Supreme Court of Pennsylvania for reinstatement.

Moreover, respondent was not involved in a financial dispute with the firm. Indeed, there could not have been a dispute, inasmuch as he had concealed the very existence of these clients and matters from the firm in the first place. Moreover, respondent's concealment of these matters and his retention of the fees were for the express purpose of self-gain, not for the purpose of equalizing, or righting, a financial wrong that the firm had committed against him. To the contrary, it was respondent who committed a financial injustice against the firm.

While the conduct of attorneys who resort to "self help" is dishonest and deceitful, it is not dishonest and deceitful for the sake of it, but, rather, to right a perceived wrong. See, e.g., In re Nelson, 182 N.J. 323 (2004) (attorney took funds from his law firm while in the midst of a partnership dispute); In re Spector, 178 N.J. 261 (2004) (reprimand; attorney concealed billings and directed clients to pay fees to him instead of to his former law firm); In re Glick, 172 N.J. 319 (2004) (reprimand; without the firm's knowledge and consent, attorney deposited into his own account fees that belonged to the firm for the purpose of compensating himself for what he believed was the firm's failure to pay him the correct amount of

profit sharing); and In re Bromberg, 152 N.J. 382 (1997) (reprimand; in the midst of a compensation dispute with his law firm, attorney intercepted checks made payable to the firm for legal fees, endorsed them in his own name, and deposited them into his personal business account). In this case, however, the firm had committed no financial wrong, and respondent's misconduct was purely for self gain.

In conclusion, we find that respondent violated RPC 8.4(c) when he failed to disclose all of the pre-existing clients that he planned to continue to represent after being hired by the firm.

There remains the determination of the appropriate measure of discipline for respondent's violation of RPC 8.4(c).

A misrepresentation in any context typically results in the imposition of at least a reprimand. The Court has consistently imposed reprimands for misrepresentations to clients, disciplinary authorities, and the courts. See, e.g., In re Kasdan, 115 N.J. 472, 488 (1989) (reprimand for intentionally misrepresenting to a client the status of a lawsuit); In re Sunberg, 156 N.J. 396 (1998) (reprimand for lying to the OAE about the fabrication of an arbitration award and also failing to consult with a client before permitting two matters to be

dismissed; mitigating factors included the attorney's unblemished disciplinary record, the passage of time since the incident, the lack of personal gain and harm to the client, the aberrational nature of the misconduct, and his remorse); In re Powell, 148 N.J. 393 (1997) (reprimand for misrepresenting to the DEC that an appeal had been filed, as well as gross neglect, lack of diligence, and failure to communicate with his client); In re Manns, 171 N.J. 145 (2002) (reprimand for misleading the court in a certification in support of a motion to reinstate a complaint as to the date attorney learned that the complaint had been dismissed, as well as lack of diligence, failure to expedite litigation, and failure to communicate with the client); and In re Kantor, 165 N.J. 572 (2000) (reprimand for attorney who misrepresented to a municipal court judge that his vehicle was insured on the date it was involved in an accident when, in fact, the policy had lapsed for nonpayment of premium).

In this case, however, a reprimand would be insufficient discipline for respondent's misconduct. Respondent's nondisclosure of the extent of his pre-existing client base in the first place prevented the firm from taking steps to protect its interests after respondent became employed there and continued to represent these clients. Moreover, the purpose of

respondent's nondisclosure was self-gain so that he could receive a salary from the law firm, a portion of the fees resulting from new clients that he brought to the firm, and continue his secret practice and retain one hundred percent of the fees in those matters. By his deceit, respondent committed a financial injustice against his firm.

In addition, respondent was admitted to the Pennsylvania bar under the name of José Victor Bernardino. At some point, he began to use the name Joseph Bernardino, without having had his given name legally changed. Respondent did not notify the Pennsylvania authorities of his change of name, and he did not inform them of his change in address when he began employment with the firm.

In mitigation, we recognize that respondent made restitution to the firm in the amount of $17,500. He also reported his Pennsylvania suspension.

Given respondent's deception in failing to disclose to the firm the number and extent of his pre-existing clients for the benefit of personal gain, as well as his other less-than-forthcoming conduct pertaining to his name and address, we see no reason to deviate from the one-year suspension imposed by Pennsylvania. We, therefore, determine to impose a one-year

suspension on respondent for his violation of RPC 8.4(c). The suspension is to take effect prospectively.

Chair O'Shaughnessy and Members Boylan and Frost voted for a prospective three-month suspension. Member Lolla 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.

Disciplinary Review Board
William J. O'Shaughnessy
Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of José Victor Bernardino
Docket No. DRB 07-273

Argued: November 15, 2007

Decided: December 18, 2007

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Three-month Suspension	Dismiss	Disqualified	Did not participate
O'Shaughnessy			X			
Pashman		X				
Baugh		X				
Boylan			X			
Frost			X			
Lolla						X
Neuwirth		X				
Stanton		X				
Wissinger		X				
Total:		5	3			1

Julianne K. DeCore
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Chief Counsel