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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-241
District Docket No. XIV-07-079E

IN THE MATTER OF	
KEVIN JOHN FLYNN	
AN ATTORNEY AT LAW	

Decision

Argued: October 18, 2007

Decided: December 12, 2007

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

Respondent waived appearance.

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 New York for mishandling eight client matters. In five of the matters,

respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. The totality of his misconduct resulted in a finding that he had engaged in conduct that adversely reflected on his fitness as a lawyer.

The OAE seeks a one-year suspension for respondent's misconduct. We agree that a one-year suspension is the appropriate degree of discipline in this matter.

Respondent was admitted to the practice of law in New Jersey in 1987 and, a year later, in New York. At the relevant times, he was a member of Rosenblith & Flynn, LLP, a New York City law firm. He has no disciplinary history in New Jersey. His disciplinary history in New York is limited to the proceeding giving rise to this matter.

In 2006, respondent formally retired from the practice of law in New Jersey. As of at least October 2005, he no longer practiced law in New York.

When respondent and Mr. Rosenblith formed their partnership, each worked on his own cases. The eight underlying disciplinary matters now before us arose out of respondent's representation of Chase Manhattan Bank in individual cases involving claims totaling less than $25,000 each. At the disciplinary hearing in New York, these matters were identified

by the plaintiff's names: Andrusier, Bandler, Bennin, Lipchick, McCollister, Pell, Safe & Secure, and Wagner.

In issuing his report, the referee relied, in large part, upon the parties' September 13, 2005 pre-hearing stipulation of facts and exhibits. The referee's report described respondent's misconduct as follows:

> In the Pell case respondent failed to inform Chase that a partial summary judgment was entered against Chase in the amount of $8,800 and failed to discuss possibilities of appeal. When Chase learned there was an unsatisfied judgment he misrepresented that the case was still active and obtained authorization to settle the case for $4,000. He settled the case with $7,266 of his own funds, satisfying the judgment and accumulated interest. He falsified entries in the firm's books so as to indicate the payments were his own draw.
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> Respondent received a demand for discovery in the Bennin case in December, 2002 but did not forward them [sic] to Chase or take other action for nearly five months. In May, 2003, after plaintiff moved to strike Chase's answer, respondent stipulated to his answer being stricken without further order of the court if discovery was not provided by June 4, 2003. When respondent failed to comply the plaintiff moved again on July 16, 2003 and respondent was ordered to provide discovery by August 1, 2003 and to appear for a court conference on August 6, 2003. Failing to do either, Chase's answer was stricken and the case was settled for $5,250, and which he paid, again using his own draw from the firm to pay the

settlement without informing Chase or his partner.

On August 27, 2001, the court in the Lipchick case granted a conditional order striking Chase's answer unless Chase responded to the discovery demands within thirty days. Respondent failed to do so and Chase's answer was stricken. On July 31, 2003 respondent settled the case for $13,750 with his own money and in the same manner.

McCollister was a case ready for trial but Respondent failed to notify Chase and Chase was not prepared for trial; in April, 2004 respondent settled the case for $1,000, once more without the knowledge of Chase and using his own partnership draw to conceal the fact that his own moneys were used to settle the case.

In the Safe & Secure case he again failed to respond to a demand for discovery, and the answer was stricken when he failed to provide discovery within 30 days as he had stipulated on July 17, 2001. Without Chase's knowledge he settled the case for $11,000 of his own money on June 23, 2002 disguising the payment as being his draw.

Chase's answer was again stricken, in the Wagner case, for failure to respond to a discovery demand and an inquest was scheduled for October 30, 2001 at which time the court directed the parties to stipulate to facts supporting their positions by December 1, 2001. When respondent failed to do so, the plaintiff was awarded a judgment of 47,790.18.

In Andrusier respondent was again forced to consent to a conditional order for

> discovery and on his failure to comply a judgment was entered in the amount of $22,037.06. However by then respondent's firm was dissolved and his former partner Mr. Rosenblith obtained an order vacating the judgment on the payment of $750 costs to plaintiff.
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> On April 14, 2004 a judgment was entered against Chase in the amount of $23,534.59 in the Bandler case because of respondent's failure to respond to interrogatories, produce documents and appear for a deposition. Once more, Chase was not informed of any of these developments. However, the judgment resulted from respondent's default on a motion, which he understood plaintiff had agreed to adjourn, [sic] respondent obtained an order to show cause to vacate the judgment and this matter is still open.
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> [Referee Report at 2-4 (record citations omitted).]

Based on these facts, the referee found that respondent had violated New York DR 6-101(A)(3) (neglecting a legal matter entrusted to the lawyer) in the Bennin, Lipchick, Safe & Secure, Wagner, Andrusier, and Bandler matters, and DR 6-101(A)(2) (handling a legal matter without preparation adequate in the circumstances) in the McCollister matter.

The referee further found that respondent had violated DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) in the Pell, Bennin, Lipchick,

McCollister, and Safe & Secure matters for the following reasons: by failing to inform Chase of "the true reasons for settling cases or the true status of the cases," by obtaining settlement authority upon the misrepresentation that the Pell matter was still active, and by altering the firm's accounts to disguise the settlement payments as partnership draws.

With respect to the alteration of the firm's records to disguise the settlement payments, the record contains a stipulation that describes respondent's actions.

In the Bennin matter, for example, after respondent had failed to comply with the plaintiff's discovery requests, causing Chase's answer to be stricken, he settled the case for $13,750 on September 23, 2003. Respondent did not disclose to Chase that he had settled the case or that its answer had been stricken for his failure to comply with discovery requests.

On November 2, 2003, respondent issued a $5250 business account check to plaintiff's counsel.[1] However, when he recorded

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[1] The stipulation does not explain how the $8500 difference between the $13,750 settlement and the $5250 payment out of the firm's funds was paid.

the check number in the firm's ledger system, he identified the check as a partnership draw, payable to himself, in the amount of $2500. The ledger apparently did not account for the $2750 difference between the actual amount of the check ($5250) and the amount recorded in the ledger ($2500). Presumably, the $2750 came out of business account funds to which respondent alone was not entitled, that is, partnership funds.

According to the stipulation, respondent "reconciled" the $2750 discrepancy "between the actual withdrawal and altered ledger entry by not cashing partnership draw checks subsequently issued to him and to which he was entitled." Presumably, respondent was entitled to take the $2500 "draw."

Respondent engaged in similar conduct in the Pell, Lipchick, McCollister, and Safe & Secure matters. He advanced firm funds to himself in amounts greater than what he was entitled to receive. Moreover, he doctored the firm's books to conceal the actual amount of the check and the identity of the

payee and to reflect that the amount of the "draw" recorded was all that he had taken from the firm's account.[2]

Before the referee assessed discipline for respondent's misconduct, he reviewed some of respondent's testimony. According to respondent, before he entered into a partnership with Rosenblith, he had never worked without supervision. By contrast, he and Rosenblith worked independently, had no secretary, and each kept his own diary and tracked his own cases.

Respondent admitted that he had mishandled the matters, which he attributed to having more work than he could handle and to his procrastination. Respondent stated: "I really have no excuse for my behavior other than I let things lapse, and I tried to make up for it, and it was the wrong thing to do." Although respondent claimed that he was overwhelmed by stress at the time, and had been treated for mental illness in the past, he did not seek psychiatric help during the relevant time.

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[2] Respondent was not charged with misappropriation, and the New York tribunals did not find that he misappropriated law firm funds. To the contrary, the tribunals found that respondent used his own money to pay the settlements.

Respondent noted that, ultimately, he had spent his own money to settle the cases. Moreover, he stated that he is not currently practicing law and that he does not intend to practice law in New York.

In fashioning the appropriate measure of discipline, the referee noted the following mitigating factors: (1) respondent's unblemished disciplinary record, (2) his full cooperation with the disciplinary authorities; (3) his candor, contrition, and "acknowledgement of his personal failure;" and (4) the lack of evidence that the payments ultimately required of Chase "were in excess of what Chase might otherwise have been expected to pay, although one must concede that Respondent's conduct might have had an adverse effect."

The referee noted that, ordinarily, a censure would be appropriate for respondent's misconduct. Because however, respondent had not paid his biennial registration fee since 2000, the referee recommended a three-month suspension. The referee did not state how many payments respondent had failed to make.

The hearing panel reviewed the referee's report and affirmed his findings of misconduct. In addition to the mitigating factors noted by the referee, the hearing panel

observed that "for the most part it appears that Chase did not suffer any significant financial loss as a result of Respondent's misconduct." Moreover, there was no evidence that respondent "acted with any bad motive," but rather that he was overwhelmed and "simply could not cope with his responsibilities."

The panel rejected the referee's recommended three-month suspension. Instead, the panel believed that, given the "duration and seriousness" of respondent's misconduct, he should be suspended for seven months, which would require him to file a formal petition for reinstatement.

The Appellate Division agreed that respondent had neglected six matters, violations of DR 6-101(A)(3); inadequately prepared a seventh matter, a violation of DR 6-101(A)(4); and misrepresented the status of the matter in five of the matters, a violation of DR 1-102(A)(4). The Appellate Division also agreed that respondent's misconduct adversely reflected on his fitness to practice law.

The Appellate Division rejected the referee's and the hearing panel's recommended terms of suspension and, instead, suspended respondent for one year:

> Here, respondent engaged in a pattern of misconduct over three and a half years involving the neglect of eight client matters and concealed his neglect by failing to inform Chase about the status of nearly all of those matters (including that he had entered into settlements and pleadings were stricken or judgments entered against it), and by making an affirmative misrepresentation in one matter that the case was still active. Respondent also falsified his firm's financial records to conceal his misconduct from his partner. However, respondent fully cooperated with the Committee, he admitted the relevant allegations of misconduct, he expressed sincere remorse for his non-venal conduct, he has no prior discipline, he no longer is practicing law and does not plan to practice in New York in the future and, notably, he used $38,000 of his own money to resolve the problems he created.
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> [Appellate Division Order, dated February 8, 2007, at 5-6.]

Respondent's one-year suspension was effective March 8, 2007. Respondent did not notify the OAE of his New York suspension, as required by R. 1:20-14(a).

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

conclusively establish the facts on which it rests for purposes of a disciplinary proceeding in this State. We, therefore, adopt the findings of the Appellate Division.[3]

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

> 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:
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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 disciplinary 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.

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[3] Although the Appellate Division disagreed with the recommended terms of suspension, it did not disagree with the referee's findings of fact.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (E). Thus, we need not deviate from New York's determination that a one-year suspension is in order.

Here, the conclusively-established facts demonstrate that respondent violated rules comparable to New Jersey RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.2(a) (failure to consult with the client as to the means by which the objectives of the representation are to be pursued, that is, settling cases without the client's authorization), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep the client reasonably informed about the status of a matter), RPC 1.4(c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Further, as the New York Appellate Division noted, respondent engaged in a pattern of misconduct spanning more than three years. He repeatedly exhibited gross neglect; he repeatedly failed to communicate with his client; and he repeatedly settled cases without his client's consent. In addition, he engaged in a multi-leveled pattern of

misrepresentation by failing to inform Chase that its answers had been stricken and that judgments had been entered against it, and by falsifying law firm records to reflect that the settlement payments issued on business account checks were, instead, personal partnership draws.

We now turn to the appropriate measure of discipline for respondent's pattern of gross neglect and failure to communicate with the client in all eight matters, his settlement of five cases without his client's consent, his failure to disclose the settlements to Chase,[4] and his pattern of fabricating firm business account records to cover up his five unauthorized settlements.

Typically, attorneys who settle cases without their clients' consent are either admonished or reprimanded. See, e.g., In the Matter of John S. Giava, DRB 01-455 (March 15, 2002) (admonition imposed on attorney who was hired to obtain a wage execution against a defaulting real estate purchaser but

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[4] Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984) (sometimes "silence can be no less a misrepresentation than words").

instead entered into a settlement agreement with the buyer without the clients' consent); In the Matter of Thomas A. Harley, DRB 95-215 (July 26, 1995) (attorney was admonished for settling case without his client's authority and representing to the other parties and the court that he had such authority); In re McKenna, 172 N.J. 644 (2002) (reprimand by consent imposed on attorney who failed to act with diligence in a wrongful termination matter and then settled the case despite his client's objections); In re Kane, 170 N.J. 625 (2002) (reprimand for attorney who was retained in connection with a lawsuit to recover damages from tenants; without the client's knowledge or consent, the attorney settled the case, received a check, put it in his file, and did nothing further; he then moved his practice without informing the client or giving her his new address; the attorney also misrepresented the status of the case to the client and failed to utilize a retainer agreement); and In re Ellenport, 152 N.J. 156 (1998) (reprimand imposed on attorney who settled litigation without his client's authorization and who engaged in conflict of interest; ethics history consisted of an admonition).

In this case, the totality of respondent's misconduct warrants nothing less than a suspension. Cases that involve

ethics infractions similar to respondent's, in the same or approximate number of matters, and of comparable duration, generally result in suspensions of either six months or one year. See, e.g., In re LaVergne, 168 N.J. 410 (2001) (six-month suspension for attorney who mishandled eight client matters; the attorney lacked diligence in six of them, failed to communicate with his clients in five, grossly neglected four, and failed to turn over the file upon termination of the representation in three; in addition, in one of the matters, the attorney failed to notify medical providers that the cases had been settled and failed to pay their bills; in one other matter, the attorney misrepresented the status of the case to the client; the attorney also was guilty of a pattern of neglect and recordkeeping violations); In re Lester, 148 N.J. 86 (1997) (six-month suspension for attorney who displayed a lack of diligence, gross neglect, a pattern of neglect, and failed to communicate in six matters, failed to cooperate with the investigation of the grievances, and allowed the disciplinary matter to proceed as a default; in one of the matters, the attorney misrepresented, in a letter to his adversary, that the adversary's secretary had consented to extend the time to file the answer; the attorney had received a reprimand in 1990 and

another reprimand in 1996); In re Bosies, 138 N.J. 169 (1994) (six-month suspension imposed on attorney who, in various combinations of four matters, engaged in gross neglect and a pattern of neglect, lacked diligence, failed to communicate with the client, and engaged in conduct prejudicial to the administration of justice; attorney also engaged in dishonesty in one matter by undertaking an elaborate scheme to avoid deposing a witness); In re Brown, 167 N.J. 611 (2001) (in a default matter, one-year suspension for attorney who, as an associate in a law firm, mishandled twenty to thirty files by failing to conduct discovery, to file pleadings, motions and legal briefs, and to generally prepare for trials; the attorney also misrepresented the status of cases to his supervisors and misrepresented his whereabouts, when questioned by his supervisors, to conceal the status of matters entrusted to him; the attorney had been reprimanded before); In re Marum, 157 N.J. 625 (1999) (attorney suspended for one year for serious misconduct in eleven matters, including lack of diligence, gross neglect, failure to communicate with clients, failure to explain the matter to clients in detail to allow them to make informed decisions about the representation, misrepresentation to clients and to his law partners, which included entering a fictitious

trial date on the firm's trial diary, and pattern of neglect; the attorney also lied to three clients that their matters had been settled and paid the "settlements" with his own funds; the attorney's misconduct spanned a period of eleven years; in aggravation, the attorney had two prior admonitions, failed to recognize his mistakes and blamed clients and courts therefor); In re Lawnick, 162 N.J. 113 (1999) (in a default matter, one-year suspension for attorney who agreed to represent clients in six matters and took no action, despite having accepted retainers in five of them; the attorney also failed to communicate with the clients and to cooperate with the investigation of the ethics grievances); and In re Herron, 140 N.J. 229 (1995) (one-year suspension for attorney who engaged in unethical conduct in seven matters; the attorney either grossly neglected them or failed to act with diligence, failed to keep the clients *informed* of the progress of their matters and, in two cases, misrepresented their status to the clients; the attorney also failed to cooperate with disciplinary authorities by failing to reply to inquiries during the ethics investigation).

In this case, respondent committed multiple infractions in eight client matters over a three-year period. At least, then,

a six-month suspension would be warranted. However, respondent also engaged in a pattern of misrepresentations when he failed to inform Chase that several cases had been dismissed and that a number of judgments had been entered against Chase. Moreover, he falsified law firm records to conceal from his partner the amount and the nature of firm funds he withdrew to cover his mistakes. In this respect, respondent also engaged in a pattern of deceit.

In other contexts, attorneys who fail to disclose material information or cover up their mistakes are met with suspensions. See, e.g., In re Rinaldi, 149 N.J. 22 (1997) (three-month suspension where the attorney did not diligently pursue a matter, made misrepresentations to the client about the status of the matter, and submitted three fictitious letters to the ethics committee in an attempt to show that he had worked on the matter); In re Poreda, 139 N.J. 435 (1995) (three-month suspension for an attorney who presented a forged insurance identification card to a police officer and also to a court); and In re Telson, 138 N.J. 47 (1994) (six-month suspension where attorney altered a court document by whiting out a section to conceal the fact that his client's divorce complaint had been dismissed; thereafter, he submitted the uncontested case to

another judge, who granted the divorce; several weeks later, the attorney denied to a third judge that he had altered the document). Respondent's cover up of his repeated mistakes in five client matters alone would warrant a suspension of at least three months.

We must also take into account, as an aggravating factor, that respondent did not inform the OAE of his New York suspension.

We are aware that there are some mitigating factors in this case. As the New York tribunals found, respondent's disciplinary record is unblemished, he admitted his wrongdoing, expressed remorse, and he (eventually) used personal funds to resolve the cases.

After conducting a balance of respondent's grievous conduct and the mitigating and aggravating circumstances present in this case, we see no reason to deviate from the discipline imposed by our sister jurisdiction. Accordingly, we determine to impose a one-year suspension, retroactive to March 8, 2007, the effective date of respondent's suspension in New York.

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 Kevin J. Flynn
Docket No. DRB 07-241

Argued: October 18, 2007

Decided: December 12, 2007

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Reprimand	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:		8				1

Julianne K. DeCore
Chief Counsel