SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-438

IN THE MATTER OF

NEAL J. BERGER

AN ATTORNEY AT LAW

Decision

Argued: January 23, 1997

Decided: March 25, 1997

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

Frank G. Capece appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for discipline filed by the District X Ethics Committee ("DEC"). The complaint charged respondent with

violations of RPC 8.4(b) (commission of criminal acts which reflect adversely on respondent's honesty, trustworthiness, or fitness as a lawyer), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Respondent was admitted to the New Jersey bar in 1977. He has no prior history of discipline.

* * *

Respondent was a partner in the law firm of Poltrock and Berger ("law firm")[1], which rented office space at 15 James Street, Suite 6, Florham Park, New Jersey, from Kelmar Realty Investors ("Kelmar"). Kelmar's president, Michael Farrel, had been a neighbor of Harold Poltrock, a partner in the law firm. Farrel and Poltrock enjoyed a friendly relationship. Because Farrel trusted Poltrock, he did not monitor the rental property closely.

On March 3, 1988, a fire occurred on the premises of Human Affairs International, which maintained an office suite adjacent to the law firm's office. The fire caused damage to the law firm's office and its contents. On March 7, 1988, the law firm submitted a claim to its insurer, Insurance Company of North America ("INA"). The law firm claimed damage

[1] Just at the time that the events surrounding the disciplinary matter were occurring, the law firm was adding a new partner, Yale L. Greenspoon. The law firm's name changed to Poltrock, Berger and Greenspoon.

to furniture, computers, other equipment, furnishings, files and plants. INA settled the claim for $13,692.77.

On April 27, 1988, the law firm submitted a supplemental claim to Horn Insurance Services, its insurance agent. This additional claim was for replacement of trees and shrubbery, rental of alternate office space and loss of papers and records. In support of the supplemental claim, the law firm submitted a copy of a lease purportedly signed by Richard Falkin as managing partner of Offices Unlimited, Inc., as landlord, and Neal Berger, as partner of the law firm. The lease was for office space in Iselin, New Jersey, for a period of twelve months, beginning March 1, 1988. In the claim for office space expenses, the law firm asserted it was moving due to the fire damage at the Florham Park office. INA assigned the claim to R.F. Stump and Associates for routine investigation. Robert Rathman, the investigator for R.F. Stump and Associates, spoke with Ingrid Kvam, the office manager for Offices Unlimited, Inc. Kvam informed Rathman that Richard Falkin was not associated in any way with Offices Unlimited, Inc. and that the form of lease signed by the law firm was obsolete and no longer used by Offices Unlimited, Inc. Rathman determined that the law firm had not relocated, despite having submitted a claim for relocation expenses, and referred the matter to the Fraud Division of the New Jersey Department of Insurance.

Allison Toth investigated the matter on behalf of the Fraud Division. She obtained a copy of INA's file and spoke with Kvam, Richard Falkin, and respondent, among others. Kvam repeated what she had told investigator Rathman, that is, that the purported lease submitted by the law firm was not valid and Falkin was not connected with Offices

Unlimited, Inc. Toth questioned Falkin and respondent about the facts surrounding the lease. Falkin told Toth that respondent had requested a sample lease, which Falkin had supplied to respondent. Falkin denied signing the lease.

By way of explanation, respondent told Toth that the lease had been secured in case the law firm needed to relocate due to the fire damage. Respondent added that he had instructed his secretary to place the lease in a file; however, she had misunderstood his instructions and had submitted the lease as part of the insurance claim. When Toth pointed out to respondent that he had signed the cover letter to Horn Insurance Services and that the letter specifically listed the lease as an enclosure, respondent revised his account of the events, saying that only after the letter had been sent had he realized that the law firm did not need to relocate. Although the record is unclear on this point, either INA or Horn Insurance Services telephoned the law firm to question the claim for office rental, after the law firm did not relocate. As a result of that telephone contact, on May 19, 1988 the law firm sent a letter to Horn Insurance Services withdrawing the supplemental claim.

In addition to the above claims, on May 24, 1988 respondent filed a claim with St. Paul Property and Liability Insurance ("St. Paul") on behalf of the law firm. Among the items claimed as damaged was furniture purchased from a store called "The Mart." With the claim, the law firm submitted a receipt for the furniture showing a purchase price of $1,681.09. Rathman investigated this claim and discovered that the records maintained by The Mart listed the price as $1,081.09, or $600 less. Similarly, the charge slip from the

initial purchase showed a price of $1,081.09. Rathman concluded that the receipt submitted in support of the insurance claim had been altered to reflect a higher purchase price.

Respondent also submitted to St. Paul a claim in behalf of Kelmar for structural damage. Because structural damage had been sustained, there is no allegation that the claim was inflated. Similarly, there is no charge that respondent improperly submitted the claim in behalf of Kelmar. The only issues on this claim are respondent's alleged forgery of Farrel's signature on the release and the check that resulted from that claim and, as seen below, the improper notarization of Farrel's "signature." In any event, in the letter to St. Paul, respondent represented that Kelmar was a client of the law firm. On June 23, 1988, respondent sent to St. Paul a letter enclosing a release purportedly signed by Michael Farrel, as president of Kelmar, and prepared and witnessed by respondent. In response, St. Paul sent a check in the amount of $10,428.15 to the law firm, payable jointly to Kelmar and to the law firm. Respondent endorsed the check on behalf of the law firm. The signature of Michael Farrel on behalf of Kelmar also appeared on the check. The check was deposited into a bank account maintained by the law firm under the name "Springwick, Inc."

At the ethics hearing, Farrel testified that he was not aware of the fire until about a week after it had occurred, when Poltrock told him about it. He did not monitor the property closely because he trusted Poltrock. Farrel had been in the process of negotiating to sell the office space, which was owned as a condominium, to the law firm. At the time of the fire, they had agreed on a sale price, but had not yet signed a contract. After the fire, the property was transferred to the law firm, as contemplated by the parties.

Farrel further testified that he was neither aware of a claim submitted by the law firm in behalf of Kelmar nor of a check and release bearing his signature. Farrel asserted that the first time he saw the check and release was when Toth showed them to him as part of her investigation for the Fraud Division. Farrell denied that the signatures on the check and the release were his. Farrel explained that he did not maintain insurance on the property and had no expectation of receiving any settlement funds.[2]

Daniel Poland, a New Jersey State Trooper, testified as a handwriting expert. He concluded that Farrel's signature on the check and the release had been forged. Trooper Poland was not able to determine who had forged Falkin's signature. He also examined the lease purportedly signed by Falkin on behalf of Offices Unlimited, Inc. Trooper Poland opined that it was "highly probable" that Falkin had not signed the lease.

Respondent testified at the ethics proceeding. He recounted how, after the fire, the partners had decided to proceed with the purchase of the office space from Farrel. He added that Farrel considered the law firm to be the owners of the property and wanted nothing to do with the repairs. Therefore, respondent continued, he had proceeded to file the insurance claims and handle those matters.

Respondent's account of the lease with Offices Unlimited, Inc. was that, immediately after the fire, the partners had considered the possibility of renting other space due to the

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[2] Apparently, the law partners and Farrel considered the law firm to be the equitable owner of the property at the time of the fire, despite the fact that actual title had not yet been transferred to the law firm.

damage to the office. To that end, respondent had contacted Richard Falkin, who he knew was involved in property management, and had requested a sample lease. Upon receiving the lease, respondent had instructed his secretary to fill in basic information, such as the name of the firm. According to respondent, he had signed Falkin's name merely to show his secretary where she should type Falkin's name; respondent contemplated that he would be contacting Falkin, should the need for office space arise.

Respondent explained further that, after the main insurance claim was settled, other items of damage, such as plants and lost documents, were noted. He then instructed his secretary to submit a supplemental claim, based on an extended coverage provision in the insurance policy. Respondent claimed that the lease was mistakenly included with the supplemental claim and that, as soon as it was brought to his attention, he withdrew the supplemental claim.

To corroborate his assertion, respondent attempted to demonstrate that the office space described in the lease would have been inappropriate for the law firm. He pointed out that the office space leased from Kelmar was in Florham Park and constituted 1,100 square feet, while the office space in the lease with Offices Unlimited, Inc. was in Iselin and contemplated the rental of 14,000 square feet.

With regard to the altered furniture receipt, respondent disavowed any knowledge of how that alteration had taken place. He added that there would have been no benefit to submitting the altered receipt because the policy limits had already been paid by the insurance company. According to respondent, the law firm sustained a loss of $21,000 and

the policy limit, after allowing for the deductible and co-pay, was $13,600. Therefore, no additional monies would have been payable to the law firm.

As to Farrel's signature on the release, respondent had no specific recollection of taking the attestation clause or preparing the release. He testified that his policy for taking jurats requires that the person sign the document in his presence. Respondent added that, although it appeared that he had signed the St. Paul check on behalf of the law firm, he did not remember signing it. Respondent denied signing Farrel's name to the check.

On November 21, 1991, an accusation was filed against respondent, charging him with one count of false swearing, a fourth degree offense. The basis of the accusation was respondent's notarization of Farrel's "signature" with the knowledge that Farrel had not appeared before him. As a result of the charge, respondent was admitted into the pre-trial intervention program.

On August 9, 1988, respondent entered into a consent agreement with the Department of Insurance, Fraud Division, in which he agreed to pay a civil penalty of $5,000, while neither admitting nor denying the charge of submitting a false insurance claim. On August 5, 1988, respondent submitted a personal check in the amount of $5,000 to the Department of Insurance. Respondent testified that the Attorney General's Office and the Insurance Fraud Division had sent consent agreements to his two law partners as well, requesting $5,000 from each of them. According to respondent, he agreed to pay the civil penalty because his name appeared on all of the documents involved in the insurance claims. The other law partners did not sign consent agreements or pay a civil penalty. Respondent added

that he agreed to enter the pre-trial intervention program because he understood that, if he were indicted, there would be a lengthy period before trial, during which he would not be permitted to practice law. In addition, he would incur costly legal expenses with no assurance that the matter would not be referred to the Office of Attorney Ethics ("OAE"), even if he were acquitted. Accordingly, he chose to enter the pre-trial intervention program, understanding that he was not admitting to the charge of false swearing.

* * *

The DEC found clear and convincing evidence that respondent forged the lease for office space and submitted it to his insurance agent with the intent to defraud the law firm's insurance carrier out of relocation expenses. The DEC based its findings on the fact that respondent sent the supplemental claim requesting reimbursement for $2,300 for office space and included a copy of a bogus lease, when the law firm had not relocated; that, just days earlier, respondent had obtained a copy of a blank lease as a sample; and that, upon being questioned about the office rental, respondent had withdrawn the claim. The DEC did not find respondent's explanations to be credible, including his testimony that he signed Falkin's name on the lease to show his secretary where to type the name and that the claim was sent by his secretary in error. The DEC made it clear that the above findings had been made independently of the fact that respondent had entered into a consent agreement with the Department of Insurance and paid a civil penalty.

The DEC further found no clear and convincing evidence that respondent had altered the furniture receipt or submitted the receipt with knowledge that it was inflated. The DEC noted that the only evidence presented in support of this charge was the altered receipt itself and the fact that respondent submitted it as part of a claim. The DEC was unable to conclude by clear and convincing evidence that respondent either altered the receipt or submitted the receipt knowing that it was exaggerated.

With regard to the release and check purportedly signed by Farrel, here, too, the DEC found no clear and convincing evidence that respondent had forged Farrel's name. However, the DEC found sufficient proof that respondent falsely witnessed Farrel's signature on the release. The DEC found credible Farrel's testimony that he did not sign the check or the release. The DEC considered, further, that respondent filed a claim on Kelmar's behalf without Farrel's knowledge, that respondent endorsed the settlement check on behalf of the law firm, that the check was deposited into a bank account of the law firm, that State Trooper Daniel Poland testified that Farrel's signatures on the check and release had been forged and that respondent was unable to deny that he had taken the jurat. The DEC did not base its finding on respondent's entry into the pre-trial intervention program, which, it acknowledged, was neither a conviction nor an admission of guilt.

The DEC found that respondent's conduct violated RPCs 8.4(b), 8.4(c) and 8.4(d) and recommended that respondent be suspended for a period of two years.

* * *

Following a de novo review of the record, the Board is satisfied that the DEC's finding of unethical conduct is clearly and convincingly supported by the evidence. Respondent's explanation for submitting the lease in error and signing Falkin's name to show his secretary where to type the name was devoid of credibility. The cover letter to the insurance agent specifically contained a reference to the lease and the amount of the rent, $2,300. Respondent signed that cover letter. Had he wanted to indicate to his secretary where to type Falkin's name, there would have been other ways to accomplish this, such as by placing a check mark next to the signature line or telling her directly. Respondent changed his story when questioned by the OAE investigator, first alleging that the lease had been sent by mistake, then declaring that, only after the lease was submitted, did he conclude that relocation would not be required.

Respondent's explanation that the lease would not have been appropriate for the law firm was not convincing. Although he claimed that the lease was for 14,000 square feet, the lease actually stated that Offices Unlimited, Inc. was in possession of approximately 14,000 square feet of office space and agreed to lease "a portion of the same premises" to the law firm. Furthermore, the lease provided that Offices Unlimited, Inc. permitted the law firm to use office space as shown on an attached Schedule A. Unfortunately, no Schedule A was attached to the lease admitted in evidence. However, the lease does state that, during the term of the lease agreement, Offices Unlimited, Inc. could relocate the law firm to a

"windowed office of no less than 140 square feet." The foregoing makes it clear that the lease did not contemplate the rental of the entire 14,000 square feet of office space to the law firm. With regard to the execution of the jurat, the DEC properly found that respondent had improperly witnessed Farrel's signature. Farrel denied that he signed the release. On the other hand, respondent's testimony on this point was equivocal. He testified that he did not recall taking the signature or preparing and signing the release. Also, respondent admitted that the signature appeared to be his and that he had no reason to doubt that it was his. He would not say for sure that he had signed the release, however. Thus, the DEC was correct to find that the record supported the conclusion that respondent had falsely witnessed Farrel's signature. The DEC was also correct to dismiss the charge that respondent had signed Farrel's name to the release and the check. A suspicion arises that respondent signed Farrel's name, given the fact that respondent signed his own name to the release, submitted it to the insurance company, received and endorsed the check from the insurance company on behalf of the law firm and deposited the check in a bank account of the law firm. Obviously more than a suspicion, however, is required for a finding of unethical conduct. The requisite standard of proof is clear and convincing evidence. The record is devoid of such proof.

Similarly, the DEC properly dismissed the charge that respondent submitted an altered receipt to induce the insurance company to pay an inflated claim for furniture damage. There was not sufficient evidence to find that respondent either altered the furniture receipt or submitted it with knowledge of the alteration.

In cases involving fraud and misrepresentations, suspensions for substantial periods have been imposed. In In re Bateman, 132 N.J. 297 (1993), the attorney was convicted of mail fraud conspiracy and making a false statement on a loan application on behalf of a corporate client. The attorney was a member of the board of directors of the client corporation and assisted in obtaining an inflated appraisal of property, which benefitted the client as well as the attorney personally. He received a two-year suspension.

Also, in a series of related cases, several attorneys pled guilty to mail fraud arising from a scheme to defraud insurance companies. In In re John G. Takacs, — N.J.— (1997), In re Joseph P. Kerrigan, 146 N.J. 557 (1996) and In re David E. Sloane,— N.J.— (1997), the attorneys submitted false claims to insurance companies in which they fraudulently alleged that either they, and/or their clients, sustained personal injury. Sloane had pled guilty to one count of mail fraud and received a two-year suspension, while Takacs was suspended for three years because he had pled guilty to two counts of mail fraud. Kerrigan received an eighteen-month suspension because he was not yet an attorney when he committed the misconduct, and because he promptly notified and cooperated with the disciplinary authorities.

In aggravation, this respondent's misconduct was committed for his personal benefit, in that he attempted to obtain additional and unwarranted insurance proceeds in behalf of his law firm.

Based on the foregoing, the Board unanimously voted to suspend respondent for two years. One member recused herself.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 3/25/97

LEE M. HYMERLING
Chair
Disciplinary Review Board