

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-003
District Docket No. XIV-08-005E

IN THE MATTER OF
MARK A. BAILEY
AN ATTORNEY AT LAW

Decision

Argued: May 21, 2009

Decided: July 27, 2009

Christina Blunda Kennedy appeared on behalf of the Office of Attorney Ethics.

Robert J. DeGroot appeared on behalf of respondent.

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

This matter was before us on a stipulation between respondent and the Office of Attorney Ethics ("OAE"). Respondent admitted that he violated RPC 8.4(b) (criminal act that reflects adversely on the attorney'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). We determine to impose a six-month suspension.

Respondent was admitted to the New Jersey bar in 2003. He has no history of discipline. During the relevant time, he was employed as a public defender in Union County.

On July 3, 2007, respondent reported to the Plainfield, New Jersey Police Department and to Geico Insurance Company that his 2005 Ford Expedition and its contents had been stolen. The claim was not paid. Because respondent was in financial straits, he set the vehicle on fire, in Newark, on July 4, 2007. He was assisted by Paula Woodhouse in setting the vehicle on fire and leaving the scene. The crime was discovered when Woodhouse called police anonymously, on August 24, 2007, after seeing respondent with another woman.¹

The stipulation and respondent's counsel's brief state that respondent was charged with third degree arson and third degree

¹ Although the stipulation states that Woodhouse called the police, exhibit C indicates that the call was to Geico.

insurance fraud.² Respondent admitted his actions in a videotaped statement to the Union County Prosecutor's Office. He was admitted into the Pre-Trial Intervention Program ("PTI"). As a condition of his admission into PTI, respondent forfeited his position as a public defender and is barred from holding public office in New Jersey. Respondent was assessed \$5,000 in civil penalties and, as part of PTI, completed sixty hours of community service.

In mitigation, the stipulation pointed to respondent's lack of prior disciplinary and criminal history, as well as his cooperation with both the OAE and the Union County Prosecutor's Office. Respondent's position as a public servant was cited as an aggravating factor.

Respondent's counsel submitted a brief setting forth respondent's unfortunate personal history. Respondent and his three siblings were raised by a single mother in extreme

² The criminal accusation, exhibit D, cites only the third degree arson charge, a violation of N.J.S.A. 2C:17-1b. Respondent's counsel cited N.J.S.A. 2C:21-4.6, which defines the crime of insurance fraud.

poverty. To escape his situation, respondent went to live with his father, who had been absent from his life for most of his childhood. Respondent's stepmother grew tired of raising a child that was not hers and sent respondent home after one year. Respondent returned to his previous high school but was expelled. He was accepted into Union Catholic High School, based on the grades he received while living with his father. Respondent was doing well in school until he was involved in a serious car accident, while a passenger in a friend's vehicle. Respondent was not expected to survive his injuries. He never returned to high school and took a job in a supermarket.

Respondent fathered his first child at sixteen. Soon after giving birth, the child's mother became addicted to heroin. Respondent and his grandmother raised the child. Respondent received custody of her when she was twelve. The child is currently a junior in college.

At twenty-one, respondent earned his GED and enrolled in Union County College, where he had a 3.8 GPA. After earning an associate degree with honors, he accepted a job in Michigan, where he worked full-time, attended school full-time, and supported his daughter. When respondent's employer went bankrupt, respondent returned home and enrolled in Rutgers

University, which he attended at night, while working full-time. While at Rutgers, respondent fathered his second child. After graduating with honors, he enrolled in Rutgers Law School. During his third year, he married the mother of his second child. After clerking for one year for a Superior Court judge, respondent secured employment with a small law firm. He stayed there for two years and then left for a position with the Public Defender's Office. During his first year there, his third child was born.

Respondent saved enough money to buy a two-family house for his family. His wife, however, wanted a bigger home. To appease her, they bought a house in North Carolina, with the intent that respondent would commute back and forth until he took the North Carolina bar exam and found a job. Respondent began to experience more and more financial difficulties and became unable to afford his trips to North Carolina. Eventually, his wife told him that she wanted a divorce. Respondent recognized that his psychological state was not good. He asked his supervisor to remove him from the trial team and place him on the client intake team, realizing that he was not able to do trial work. Respondent was depressed and began to

drink heavily. He borrowed \$5,000 from a friend to pay his expenses.

With regard to respondent's criminal conduct, counsel stated:

He began to look for things to reduce his financial load. At first, setting fire to his truck was a distant thought that he dismissed as ridiculous. But as his financial situation grew increasingly worse, the seed of criminality began to take hold. He began to convince himself that he had no other choice because of his precarious situation. He struggled with his thoughts as he drank some nights. Soberly, he decided against this course of action. As time passed, however, psychologically he became grew [sic] worse. In fact, he began to see a doctor concerning his anxiety and depression. She prescribed Zanax to take away the anxiety and help Respondent sleep. He began popping Zanax and drinking heavily. Soon the loan Respondent's friend extended to him was spent. He could not pay his mortgage. This, along with his drinking and drug abuse, convinced Respondent that he had to set fire to his truck to obtain cash.

[RB at 6 to 7.]³

³ RB refers to respondent's counsel's brief, dated April 17, 2009.

The OAE recommended that respondent receive a two-year suspension.⁴ Respondent's counsel urged a six-month suspension, citing the mitigating factors discussed previously, as well as the financial pressures that led to respondent's conduct. Counsel also pointed to respondent's remorse and his good reputation among his clients and other attorneys.

Upon a de novo review of the record, we are satisfied that the stipulated facts support a finding that respondent's conduct was unethical. Respondent stipulated that he violated RPC 8.4(b), RPC 8.4(c), and RPC 8.4(d). The record supports the conclusion that respondent violated each of those rules, when he committed arson and attempted insurance fraud.

Attorneys in New Jersey who have been found guilty of insurance fraud have received a wide range of suspensions. See, e.g., In re Fisher, 185 N.J. 238 (2005) (one-year suspension in a reciprocal discipline matter from Pennsylvania, where attorney submitted a phony receipt to an insurance company for the purpose

⁴ In the stipulation, the OAE contended that the appropriate level of discipline was a one- to two-year suspension. However, in its cover letter transmitting this matter to us, the OAE recommended a two-year suspension.

of obtaining insurance proceeds for his girlfriend, whose computer had been stolen, and then filed a complaint against the insurance company, based on the same claim; the attorney was convicted of insurance fraud, forgery, and conspiracy; prior three-month suspension considered in aggravation; passage of time, attorney's inexperience at time of violation, and lack of financial motivation considered in mitigation); In re Wiss, 181 N.J. 298 (2004) (in a motion for reciprocal discipline, an attorney who pleaded guilty to the fifth degree crime of insurance fraud received a six-month suspension; the attorney directed a member of his staff to falsely notarize a client's signature on forms that were then submitted to an insurance company, made misrepresentations on a court form about the source of the client referral, and failed to supervise his staff, resulting in misrepresentations designed to improperly obtain insurance payments); In re Eskin, 158 N.J. 259 (1999) (in motion for reciprocal discipline, an attorney received a six-month suspension for forgery and falsely notarizing his client's signature on a notice of claim that was served after the deadline had expired and for serving a second notice of claim misrepresenting the date of the injury to give the appearance that the notice had been timely filed); and In re Berger, 151 N.J. 476 (1997) (two-year suspension

imposed on an attorney who submitted false information to his insurance agent, including an improper jurat, with the intent to defraud the law firm's insurance carrier in connection with a fire loss).

In a series of related cases, three attorneys pleaded guilty to mail fraud arising from a scheme to defraud insurance companies. In In re Sloane, 147 N.J. 279 (1997), In re Takacs, 147 N.J. 277 (1997), and In re Kerrigan, 146 N.J. 557 (1996), the attorneys submitted false claims to insurance companies in which they fraudulently alleged that either they or their clients had sustained personal injury. Sloane pleaded guilty to one count of mail fraud and received a two-year suspension; Takacs was suspended for three years, after pleading guilty to two counts of mail fraud; and Kerrigan was suspended for eighteen months because, at the time of the misconduct, he was not yet an attorney and because he promptly notified and cooperated with disciplinary authorities.

Attorneys have also been suspended for crimes involving arson. See, e.g., In re Couture, 170 N.J. 189 (2001) (in a reciprocal proceeding, fourteen-month suspension imposed, the same term imposed in New York, following the attorney's guilty plea to first degree arson after he started a fire in a friend's bathroom

in a botched attempt to self-immolate) and In re Litwin, 104 N.J. 362 (1986) (five-year suspension retroactive to the date of the attorney's temporary suspension, following his guilty plea to second degree aggravated arson; mitigating psychiatric evidence, prior unblemished record, and the fact that crime was unrelated to practice of law were taken into account).

Respondent's conduct seems to fall between that of the attorneys in In re Berger, supra, 151 N.J. 476, and In re Fisher, supra, 185 N.J. 238. Berger submitted false information to an insurance company with the intent to defraud the company, following a fire loss. He acted for personal gain in his attempt to secure undue insurance proceeds for his law firm. Our decision cited no mitigating factors. What mostly distinguishes this case from Berger is that Berger was moved by greed. In turn, this respondent acted out of desperation.

In Fisher, the attorney submitted a phony receipt to obtain insurance proceeds for a computer that had actually been lost. Fisher sought to recover a real loss, albeit by fraudulent means. Contrarily, respondent created a loss for which he sought a recovery.

Without any additional considerations, it would appear, thus, that respondent's conduct should be met with a suspension

no shorter than one year and possibly longer. When we take into account the compelling mitigating circumstances present in this case, however, we are convinced that a six-month suspension is sufficient discipline for respondent's offenses. Indeed, he climbed from abject poverty to a position as a respected public defender. The numerous obstacles that he had to overcome are spelled out in his counsel's brief to us. Regrettably, when faced with the breakup of his family and his inability to meet his financial obligations, respondent turned to alcohol, the abuse of prescription medication, and to criminal and unethical conduct.

Unquestionably, respondent's actions were deplorable. They did not, however, approach those of the attorney in In re Asbell, 135 N.J. 446 (1994), who received a two-year suspension. Asbell, then the Camden County Prosecutor, staged an assassination attempt on his life by firing bullets into the County-owned car that he had driven to a deserted area. For the next three days, Asbell gave the police a false account of the shooting incident. Based on Asbell's version of the events, a massive investigation ensued. When confronted with what police deemed to be overwhelming evidence against him, Asbell at first denied any wrongdoing. He did so even after being informed that


the police had located an eyewitness to the shooting incident. Only when told that the police had prepared an application for a warrant to search his home for the gun did Asbell cave in. He confessed that he had staged an assassination hoax. Our decision noted that, "[a]s the chief law enforcement officer in the County, by his actions [respondent] cast an adverse reflection on other holders of public office and, specifically, on other County Prosecutors. He also betrayed the public, who reposed confidence in him." In the Matter of Samuel Asbell, DRB 93-155 (November 9, 1993) (slip op. at 50). In mitigation, we considered Asbell's lengthy and prior unblemished career, his service and dedication to the profession, his extreme commitment to his position as prosecutor, and the "aberrational nature of his conduct — a product of psychological impairment and poor judgment" Ibid.

Although we are aware that, as a government attorney, respondent is held to a higher standard, In re Magid, 139 N.J. 449, 455 (1995), we are persuaded that the extensive, compelling mitigating circumstances cited above, coupled with respondent's forfeiture of his position as public defender, prohibition from holding any public office in the future, the difficulty that he will have to face in establishing a new professional career, and

his cooperation with the Union County Prosecutor's Office and the OAE, do not require that he be suspended for a period longer than six months. We, thus, vote for the imposition of a six-month suspension.

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
Louis Pashman, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

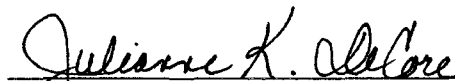
In the Matter of Mark A. Bailey
Docket No. DRB 09-003

Argued: May 21, 2009

Decided: July 27, 2009

Disposition: Six-month suspension

Members	Disbar	Six-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Clark		X				
Doremus		X				
Stanton		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		9				


Julianne K. DeCore
Chief Counsel