SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-077
District Docket No. XIV-93-004E

IN THE MATTER OF

ROBERT S. FISHER

AN ATTORNEY AT LAW

Decision

Argued: April 21, 2004

Decided: June 21, 2005

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

Respondent failed to appear, despite proper notice.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE")

following respondent's suspension in Pennsylvania for one year and one day.[1]

Respondent was admitted to the New Jersey and Pennsylvania bars in 1988. He was suspended in New Jersey for three months, effective August 2, 2004, for lack of diligence, failure to communicate with a client, conflict of interest, failure to maintain a bona fide office, and failure to cooperate with disciplinary authorities. In that default matter, after representing the driver and two passengers who were involved in an automobile accident, respondent stopped communicating with the driver, and then filed a lawsuit against the driver (his former client) on behalf of the two passengers. In re Fisher, 180 N.J. 333 (2004). Respondent has not applied for reinstatement.

Respondent's discipline in Pennsylvania was based on his criminal conviction in that jurisdiction. Those criminal proceedings consumed nearly ten years.

The circumstances surrounding respondent's conviction are as follows. On July 16, 1991, a car belonging to respondent's girlfriend (now his wife), Mindy Goldsmith, was stolen.

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[1] Rule 218(a) of the Pennsylvania Rules of Disciplinary Enforcement ("P.R.D.E.") requires attorneys suspended for more than one year to formally petition the Supreme Court of Pennsylvania for reinstatement.

Goldsmith's laptop computer, which had been in the car, was also stolen. On August 7, 1991, respondent and Goldsmith asked Frank Fendell, a family friend who operated an appliance store, to create a phony receipt for the purchase of the computer, although Goldsmith had purchased it elsewhere and Fendell did not sell that type of computer. On August 8, 1991, Goldsmith submitted to White Hall Mutual Insurance Company ("White Hall") an invoice from Fendell, dated February 14, 1990, indicating that Goldsmith had paid $3,500 for the computer and modem.

White Hall took no action on the claim. On November 21, 1991, respondent sued White Hall on Goldsmith's behalf in Philadelphia. White Hall filed an answer and a counterclaim, alleging fraud based on the phony receipt that Goldsmith had submitted to White Hall. Respondent did not attach the receipt to the complaint because he knew it was false. On January 23, 1992, respondent dismissed the lawsuit in return for White Hall's withdrawal of the counterclaim, with prejudice.

On December 2, 1992, respondent was convicted of one count of insurance fraud, a violation of 18 Pa.C.S.A. §4117, one count of forgery, a violation of 18 Pa.C.S.A. §4101, and one count of criminal conspiracy, a violation of 18 Pa.C.S.A. §903. Each of these crimes is a third-degree felony, carrying a punishment of

imprisonment of up to seven years. Respondent was acquitted of one count of attempted theft by deception.

On December 3, 1991, the day after the conviction, respondent filed a motion for a new trial or arrest of judgment. Although, on November 15, 1993, Judge Arthur Kafrissen granted respondent's motion for arrest of judgment, he did not rule on the motion for a new trial. On May 4, 1995, following the Commonwealth's appeal, the Superior Court reversed the order granting the motion for arrest of judgment and remanded for disposition of the motion for a new trial.

On December 4, 1996, Judge Kafrissen granted respondent's motion for a new trial. Again, the Commonwealth appealed. On May 3, 1999, the Superior Court reversed the order granting a new trial and remanded for imposition of sentence. On December 29, 1999, the Supreme Court denied respondent's petition for allowance of appeal.

On August 22, 2000, Judge Kafrissen sentenced respondent, on the forgery count, to 200 hours of community service under the supervision of the Volunteers for the Indigent Program. He imposed no further penalty for the insurance fraud and criminal conspiracy counts. On January 7, 2002, respondent's conviction was affirmed on appeal and, on May 2, 2002, the Supreme Court denied his petition.

On May 10, 2002, about one week after completion of the criminal proceedings, the Pennsylvania Office of Disciplinary Counsel filed a petition for discipline (similar to our motion for final discipline) against respondent.[2] The Pennsylvania Disciplinary Board found that respondent's convictions constituted a per se ground for discipline and determined to suspend him for one year, specifically finding that he should not be required to file a reinstatement petition. Notwithstanding the Disciplinary Board's recommendation, on July 29, 2004, the Supreme Court of Pennsylvania suspended respondent for one year and one day, thus imposing the requirement that he petition for reinstatement at the conclusion of the suspension.

At the disciplinary hearings in Pennsylvania, respondent presented "character testimony" of two clients, two attorneys, and a family friend, all of whom testified that respondent had a reputation in the community as an honest and truthful person.

Had respondent's misconduct occurred in New Jersey, it is likely that the equivalent charges would have been violations of N.J.S.A. 2C:21-4.6, insurance fraud, a third-degree crime;

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[2] P.R.D.E. Rule 203 provides that a conviction of certain crimes shall constitute misconduct and shall be grounds for discipline.

N.J.S.A. 2C:21-1, forgery, a fourth-degree crime; and N.J.S.A. 2C:5-2, conspiracy, a third-degree crime. Pursuant to N.J.S.A. 2C:44-1e, respondent would have been entitled to a presumption of non-imprisonment.

As required by R.1:20-13(a)(2), respondent informed the OAE of the criminal charges as soon as they were filed. The OAE recommended a one-year suspension, and urged that the discipline be imposed prospectively.

Reciprocal discipline proceedings in New Jersey are governed by Rule 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:
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> (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;
> (E) the misconduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (E).

A criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(c)(1); In re Gipson, 103 N.J. 75, 77 (1986). Respondent submitted a phony receipt to an insurance company for the purpose of obtaining insurance proceeds for his girlfriend, whose computer had been stolen. He then filed a complaint against the insurance company, based on the same claim. Respondent was convicted of insurance fraud, forgery, and conspiracy. His conduct violated RPC 8.4(b) (criminal act that reflects adversely on an 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).

The level of discipline imposed in disciplinary matters based on the commission of a crime depends on a number of factors, including the "nature and severity of the crime, whether the crime is related to the practice of law, and any mitigating factors such as respondent's reputation, his prior trustworthy conduct, and general good conduct." In re Lunetta, 118 N.J. 443, 445-46 (1989).

Here, although the crimes for which respondent stands convicted — insurance fraud, forgery, and conspiracy — are serious, a defendant convicted of those crimes in New Jersey would enjoy a presumption of no imprisonment. Moreover, the focus should be on respondent's conduct, not the category of the criminal offense. Although respondent fabricated a receipt to substantiate an insurance claim for his girlfriend, the claim itself was valid. In other words, respondent did not submit a false claim. Rather, it was the proof offered in support of the claim that was bogus.

Attorneys in New Jersey who have been found guilty of insurance fraud have received suspensions ranging from six months to three years. See, e.g., In re Wiss, 181 N.J. 298 (2004) (in a matter brought by way of a motion for reciprocal discipline, a six-month suspension was imposed on an attorney who pleaded guilty to the fifth-degree crime of insurance fraud; the attorney had 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) (six-month suspension based on a motion for reciprocal discipline, where an

attorney forged and falsely notarized his client's signature on a notice of claim that was served after the deadline had expired, and served 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 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 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.

Here, there are several factors in mitigation and aggravation for us to weigh. In mitigation, we consider that the misconduct occurred thirteen to fourteen years ago. The passage of time has been held to be a significant mitigating factor:

> Finally, we are mindful that the events that now call for the exercise of discipline occurred more than eight years ago. In this case, the public interest in proper and prompt discipline is necessarily and irretrievably diluted by the passage of time. Disbarment now would be more vindictive than just.
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> [In re Verdiramo, 96 N.J. 183, 187 (1984).]

At the time of the misconduct, respondent had been admitted to the bar for only three years, and was a young and inexperienced attorney. In addition, he was not motivated by financial gain, but by a desire to help his girlfriend recover the value of property stolen from her car. In contrast to the attorneys in Berger, Sloane, Takacs, and Kerrigan, respondent did not submit a fraudulent claim, but a fabricated receipt to support a valid claim. While we do not intend to minimize the seriousness of his wrongdoing, we note that the conduct is less serious than that of the above attorneys.

We consider as an aggravating factor respondent's disciplinary history, consisting of a three-month suspension in a default matter.

After consideration of the relevant circumstances, we determine that a one-year suspension is the appropriate level of discipline to be imposed in this matter, that a retroactive suspension to July 29, 2004 is appropriate, and that respondent should be reinstated in Pennsylvania before he may seek reinstatement in New Jersey.

In deciding that the suspension should be retroactive, we consider the following chronology of events. On July 29, 2004, respondent was suspended in Pennsylvania for one year and one day. Several days later, on August 2, 2004, he was suspended for three months in New Jersey as a result of his prior ethics matter. Respondent would have been eligible to apply for reinstatement in New Jersey on November 2, 2004. Any such application, however, might have been denied, based on the Pennsylvania suspension and the prospect of reciprocal proceedings. Respondent has not practiced in New Jersey since August 2, 2004. He may apply for reinstatement in Pennsylvania on July 30, 2005. If the suspension is imposed prospectively, respondent would be suspended in New Jersey for about one year after he is eligible for reinstatement in Pennsylvania. Such a result appears unnecessarily punitive. We, thus, determine that the suspension should be imposed

retroactively to July 29, 2004, the date of respondent's Pennsylvania suspension.

To be reinstated in Pennsylvania, a suspended attorney must demonstrate by clear and convincing evidence that

> such person has the moral qualifications, competency and learning in law required for admission to practice in this Commonwealth and that the resumption of the practice of law within the Commonwealth by such person will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest.
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> [P.R.D.E. 218(c).]

Because respondent will be required to demonstrate by clear and convincing evidence that he is a suitable candidate to return to the practice of law in Pennsylvania, he should be required to be reinstated in Pennsylvania before he may seek reinstatement in New Jersey.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Robert S. Fisher
Docket No. DRB 05-077

Argued: April 21, 2005

Decided: June 21, 2005

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Maudsley		X				
O'Shaughnessy		X				
Boylan		X				
Holmes		X				
Lolla		X				
Neuwirth		X				
Pashman		X				
Stanton		X				
Wissinger		X				
Total:		9				

Julianne K. DeCore
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Chief Counsel