SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 97-333

IN THE MATTER OF	:
KENNETH M. SUNBERG	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 20, 1997

Decided: June 8, 1998

Joann G. Eyler appeared on behalf of the Office of Attorney Ethics.

Angelo J. Genova 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 VC Ethics Committee ("DEC"). The matter was presented originally as a motion for discipline by consent, which the Board denied on July 2, 1996. As a result, the case was remanded to the DEC for a hearing. The formal complaint charged respondent with violations of RPC 1.2(a) (failure to consult with client as to means by which objectives of representation are to be pursued), RPC 8.1(a) (false statement of material fact in connection

with a disciplinary matter) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1978. He has no prior history of discipline.

* * *

In 1985 Fred Walker and his wife, Luevert Walker, retained Stanley J. Hausman to represent them in connection with two automobile accidents involving Mr. Walker. At that time, Hausman was a sole practitioner; respondent joined Hausman as a partner in 1987. Hausman filed two separate complaints on behalf of the Walkers: one against Robert Cunningham and CTS Leasing Company and another against Mitchell Rinsky. Alleging negligence by the respective defendants, the complaints sought damages for Mr. Walker's injuries and for Mrs. Walker's loss of consortium. Mr. Walker signed contingent fee agreements with Hausman, who had represented the Walkers in other matters before these two accidents.

When respondent joined Hausman's firm in 1987, he assumed responsibility for all of the personal injury files in the firm, including the two *Walker* matters. Mr. Walker died on April 1, 1988. The *Rinsky* and *Cunningham* matters were consolidated for trial on April 18, 1988; however, both complaints were dismissed before trial. The *Rinsky* complaint was

dismissed on January 6, 1989 for failure to answer interrogatories. Respondent did not file any opposition to that motion. Furthermore, he did not consult with Mrs. Walker before permitting the dismissal of the complaint. In the *Cunningham* matter, respondent entered into a stipulation of dismissal with prejudice on June 1, 1989. Once again, respondent did not consult with Mrs. Walker before entering into the stipulation of dismissal.

In a letter to Mrs. Walker dated August 23, 1989, Hausman notified her of the dismissal of the *Rinsky* matter for failure to answer interrogatories. However, instead of informing Mrs. Walker that the *Cunningham* matter had been dismissed by stipulation, Hausman told her that the case had been arbitrated and that the arbitrator had found Mr. Walker, not the defendant, liable for the automobile accident. Hausman's statement to Mrs. Walker about the arbitration was based on a phony arbitration award placed in the file by respondent. After entering into the stipulation of dismissal, respondent had misgivings over the propriety of such action. Concerned that Hausman might think that the agreement to dismiss the complaint was ill-advised, respondent created a fictitious arbitration award. He obtained a blank arbitration form from the courthouse, filled it out, ripped the bottom portion of the page where the arbitrator's signature would have appeared and placed the form in the file. Respondent's intent was to mislead Hausman into thinking that the matter had been unfavorably resolved through arbitration, rather than dismissed by respondent's agreement.

When Mrs. Walker contacted the DEC about the *Rinsky* and *Cunningham* matters, she believed that Hausman had been handling the files. Indeed, she testified that Hausman had

represented her and her husband before and that, because respondent had never contacted her, she was not aware that he had taken over the two personal injury cases. Mrs. Walker was adamant that respondent had never communicated with her in any manner. Accordingly, when the DEC investigated the matter, Hausman was the focus of the inquiry.

After the OAE assumed responsibility for the investigation from the DEC, it scheduled a meeting with Hausman on April 18, 1995. Respondent, who had voluntarily attended the meeting, began answering questions about the *Rinsky* and *Cunningham* matters. Because Hausman had turned those files over to the DEC three years earlier without retaining copies, he and respondent had not reviewed the files for several years.

At the April 18, 1995 meeting respondent could not explain why the *Cunningham* matter had been arbitrated after dismissal. At first, he asserted that, at an arbitration proceeding, the arbitrator had determined that there was no cause of action because Mr. Walker, rather than the defendant, was liable. After being shown the stipulation of dismissal that predated the arbitration award, respondent suggested that he and his adversary might have agreed to an informal arbitration. When the OAE investigator asked why Hausman had told Mrs. Walker that the matter had been arbitrated, when actually it had been dismissed by stipulation, respondent interjected that, although Hausman had sent the letter to Mrs. Walker, he had relied on information given by respondent. Respondent also suggested that the bottom of the arbitration award form had not been torn off when he turned the file over to the DEC, implying that he had not been responsible for the damage to the document. Later

in the interview, respondent speculated that the court, unaware that the matter had been dismissed, might have scheduled the *Cunningham* matter for arbitration.

As a result of the April 18, 1995 interview, the OAE notified respondent that he was now the target of the investigation. The OAE then notified Hausman that it was dismissing the grievance against him. At a November 1, 1995 meeting with the OAE, respondent acknowledged that he had created the false arbitration award to deceive Hausman.

In his answer to the formal complaint, respondent admitted that (1) he assumed responsibility for the *Rinsky* and *Cunningham* matters; (2) he permitted the complaint in the *Rinsky* matter to be dismissed for failure to answer interrogatories; (3) he did not consult with Mrs. Walker about the decision to allow the *Rinsky* matter to be dismissed; (4) he did not consult with Mrs. Walker about the decision to stipulate to the dismissal of the *Cunningham* matter and (5) he created the arbitration award after the *Cunningham* matter had been dismissed to conceal the dismissal from Hausman.

Respondent testified that, although he had a "vague recollection of having some conversation with Mrs. Walker" – contrary to her testimony that she had never talked to him – she generally preferred dealing with Hausman. Respondent claimed that he had explained to Mrs. Walker that, because there were no other witnesses to the automobile accidents, her husband's death had seriously weakened the personal injury cases and that he would try to settle the cases.

Respondent explained that he had permitted the *Rinsky* matter to be dismissed because interrogatories could not be answered in light of Mr. Walker's death. He asserted that, although in 1989 *Rule* 4:17-4 was amended to permit an agent to sign answers to interrogatories, at the time of the motion the court rules required the party to sign them. Rather than inform his adversary that his client had died, respondent tried to settle the case. When the presenter observed that the order of dismissal was signed in January 1989 and that the court rule amendments took effect on January 2, 1989, respondent conceded that, as of January 2, 1989, an agent could have signed the interrogatories. Respondent also acknowledged that, because the complaint was dismissed without prejudice, he could have filed a motion to reinstate it.

According to respondent, his adversary in the *Cunningham* matter had served a notice to take Mr. Walker's deposition. As in the *Rinsky* matter, respondent had not revealed that Mr. Walker had died. After defendant's counsel requested that he sign the stipulation of dismissal to avoid the necessity of filing a motion, respondent acquiesced. Sometime thereafter, respondent began to doubt whether he should have agreed to a dismissal. He became concerned that Hausman would discover what he had done and would disapprove of it. It was then, respondent testified, that

> I took a form, and in order to make my partner think that I hadn't done something about the dismissal, I put the names of Walker and . . . Cunningham on the Arbitration Form, made it out to a no-cause, meaning that there was no claim, and put it in the file.

At the ethics hearing, respondent explained that, at his first meeting with the OAE, he had not recalled that he had fabricated the arbitration award. According to respondent, he had been confused by the existence of both a stipulation of dismissal and an arbitration award, particularly since he had not seen the *Walker* files since 1989. Therefore, he contended, he had not misrepresented the facts to the OAE, but rather had very little memory of the events at that time. Respondent explained that, although he had been given an opportunity by the OAE to review the *Walker* files, he had felt pressured by keeping the OAE investigators waiting and, therefore, had not spent more than five or ten minutes looking at the files. Respondent testified that, after the initial meeting, he had tried to recall what had occurred in the *Cunningham* matter, even telephoning his adversary for information. Respondent claimed that, between the first and second meetings with the OAE the "pieces of the puzzle" had fit together and he had recalled having manufactured the arbitration award. Respondent stated that he had not so informed the OAE because he had thought that, by telling his attorney, he had fulfilled any reporting requirement under the rules.

Respondent presented the testimony of James S. Wulach, a clinical psychologist who is also an attorney. Dr. Wulach opined that respondent's behavior was influenced by several factors. First, respondent had a demanding mother and, feeling that he could not measure up to her high standards, became an overachiever. Respondent felt that he was not "quite good enough" and that he never satisfied authority figures. Second, before respondent joined the Hausman firm, he had a very acrimonious parting from the law firm in which he had been

a partner. The law firm filed a lawsuit against both respondent and Hausman. As a result, respondent felt pressured to prove himself to Hausman. Third, respondent was under additional stress because, at the time of the *Walker* dismissals, his wife had recently given birth to a child.

According to Dr. Wulach, although respondent suffered from anxiety and depression, he did not have deep psychological problems, character flaws, antisocial traits or psychological deficits. In Dr. Wulach's opinion, respondent committed an error in judgment in placing the arbitration form in the file because of the above external pressures. Dr. Wulach opined that it was unlikely that respondent would engage in similar behavior again.

On cross-examination, Dr. Wulach expressed "mild" surprise that respondent's misconduct had occurred two years after respondent joined the Hausman firm. It was Dr. Wulach's understanding that the arbitration award had been fabricated only several months after respondent had become Hausman's partner. Dr. Wulach explained that, although the creation of a false document is a very significant event to a person who does not ordinarily engage in such conduct, respondent may have repressed that memory because it caused him embarrassment. However, Dr. Wulach could not offer a definitive opinion that respondent had in fact repressed the memory of creating the false document, explaining that his belief did not reach the level of a scientific opinion. Dr. Wulach acknowledged that it is not peculiar or abnormal for people to have conflicts relating to childhood experiences and relationships with their parents.

Respondent offered the following as mitigating factors: the passage of time since the occurrence of the event; his otherwise unblemished record; his professional achievements, including his receipt of the Essex County Civil Trial Attorney Achievement Award in 1996; his participation in a variety of bench/bar committees; his *pro bono* contributions; his mental state, as testified by Dr. Wulach and as discussed in Dr. Wulach's report; the lack of harm caused to Mrs. Walker; his lack of financial gain; and his contrition and remorse.

* * *

The DEC found clear and convincing evidence that respondent violated each of the *Rules of Professional Conduct* charged in the complaint: RPC 1.2(a), RPC 8.1(a) and RPC 8.4(c).

The DEC determined that respondent's failure to consult with Mrs. Walker prior to dismissing the *Rinsky* and *Cunningham* matters constituted a violation of RPC 1.2(a). The DEC also found that respondent's statement to the OAE that the *Cunningham* matter had been arbitrated was a false statement of material fact made in a disciplinary matter, contrary to RPC 8.1(a). The DEC reasoned that, because respondent was aware that he had fabricated the arbitration award, he knew that his statement to the OAE that the matter had been arbitrated and "no-caused" was false. Finally, the DEC found that respondent violated RPC 8.4(c) by placing the false arbitration award in the *Cunningham* file to deceive Hausman into

believing that the matter had been arbitrated. The DEC also found a violation of RPC 8.4(c) in respondent's statement to the OAE that the case had been arbitrated, when he knew that it had been dismissed.

The DEC rejected respondent's suggestion that he was under special episodic pressures that affected his judgment. The DEC noted that, when respondent created the false arbitration award, the lawsuit filed by his former law firm had been resolved. The DEC was not persuaded that respondent's inability to earn his mother's approval caused him to anxiously seek approval of authority figures, noting Dr. Wulach's acknowledgment that it is not uncommon for people to have unresolved conflicts with their parents. Along the same lines, the DEC commented that Dr. Wulach could not explain how the birth of a child created special stress in respondent's life.

In recommending a reprimand, the DEC considered the mitigating factors listed by respondent. One panel member filed a minority report agreeing with the majority, but suggesting that respondent should be required "to attend mediation programs to learn proper legal conduct in order to prevent future lapses of unprofessional behavior in his continuing practice of law."

* * *

Following a *de novo* review of the record, the Board is satisfied that the DEC's finding of unethical conduct was supported by clear and convincing evidence.

Respondent virtually conceded that he violated RPC 1.2(a), admitting in his answer to the formal complaint that he had not consulted with Mrs. Walker before permitting the two personal injury complaints to be dismissed. Respondent's defense – that the claims were severely compromised by the death of Mr. Walker – was not persuasive. Respondent had several options available to him, such as substituting the estate as a party and having the interrogatories answered by an agent. In addition, although Mr. Walker was the only witness from the plaintiff's side in the *Rinsky* matter, the defendant also was not available to testify. Accordingly, both sides were in the same predicament, that is, in the same weak position. Regardless of the strength of the personal injury cases, respondent should have discussed the matters with Mrs. Walker before permitting their dismissal. His failure to do so violated RPC 1.2(a).

Respondent also violated RPC 8.1(a) and RPC 8.4(c). Respondent conceded that he created a false arbitration award and placed it in the *Cunningham* file to lead his partner to believe that the case had been arbitrated, instead of dismissed by stipulation. Such deceit constituted a violation of RPC 8.4(c). Respondent's contention that he had forgotten about the false arbitration award when he told the OAE that the *Cunningham* matter had been arbitrated was not credible. When confronted with the stipulation of dismissal, respondent gave a variety of explanations, none of them truthful. He suggested that his adversary had

agreed to conduct an informal arbitration, that the arbitration award form was not ripped when he turned the file over to the DEC and that the court itself had scheduled the arbitration, unaware that the matter had been dismissed. Finally, at the November 1, 1995 meeting with the OAE, respondent confessed that he had created the false arbitration award.

The Board rejected respondent's defense that he had forgotten about the fictitious award. If respondent were as honest and trustworthy as he claimed to be, his creation of a false arbitration award would be an event that he would not easily forget. Also, respondent's expert, Dr. James S. Wulach, could not testify to any professional certainty that respondent had repressed the memory of creating the false award. Thus, the Board found that respondent remembered that event and committed a misrepresentation of fact, in violation of both RPC 8.1(a) and RPC 8.4(c), when he told the OAE that the matter had been arbitrated and "no-caused."

In sum, respondent failed to consult with a client before permitting two matters to be dismissed, created a phony arbitration award to mislead his partner and lied to the OAE. Respondent's purpose for creating the false arbitration award was to mislead his partner to believe that the *Walker v. Cunningham* matter had been arbitrated because he feared that Hausman would be disappointed if he learned that respondent had dismissed the case. Although respondent's concern was perhaps understandable, his conduct in concealing the truth was not. "Truth is not a matter of convenience. Sometimes lawyers may find it

inconvenient, embarrassing, or even painful to tell the truth." *In re Scavone*, 106 *N.J.* 542, 553 (1987).

For conduct similar to respondent's, discipline has ranged from a reprimand to a suspension. In *In re Park*, 152 *N.J.* 27 (1997), the attorney was reprimanded after he failed to keep his clients informed about their cases, misrepresented the status of their cases, and failed to cooperate with the disciplinary authorities. Similarly, in *In re Strupp*, 147 *N.J.* 267 (1997), an attorney who exhibited a lack of candor toward a tribunal, misrepresented that he was authorized to practice law in New Jersey when he was on inactive status and failed to maintain a *bona fide* office in New Jersey received a reprimand. In *In re Lewis*, 138 *N.J.* 33 (1994), the attorney induced a repairman to change the date on a work order to mislead the municipal court to believe that the attorney had corrected a code violation before the summons had issued. Because the court had not actually been deceived and because no injury resulted from the attorney's misconduct, a reprimand was imposed. In contrast, in *In re Mark*, 132 *N.J.* 268 (1993), the attorney received a three-month suspension for misrepresenting to the court that his adversary had been supplied with an expert's report and then creating another report when he could not find the original. In mitigation, the Court considered that the attorney was not aware that his statement was untrue and that the attorney was under considerable stress from assuming the caseloads of three attorneys who had recently left the firm.

Here, respondent presented a number of factors to be considered in mitigation. His prior unblemished record of nineteen years is a substantial consideration, as is the passage of time. These events occurred in 1989, almost ten years ago. In addition, respondent did not personally gain from his misconduct, which was apparently aberrational. Moreover, respondent's misconduct did not cause harm to Mrs. Walker. Lastly, he appeared genuinely contrite and remorseful. The Board, thus, was persuaded that a suspension is not required in this matter. The purpose of discipline is to protect the public, not to punish the attorney. *In re Rutledge*, 101 *N.J.* 493, 498 (1986). The "principal reason for discipline is to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general." *In re Wilson*, 81 *N.J.* 451, 456 (1979). The Board was not convinced that, under these circumstances, the public needs protection from this respondent, whose misconduct was a departure from his usual behavior and is unlikely to recur.

Based on the foregoing, a six-member majority of the Board determined to impose a reprimand. One member voted for a three-month suspension. Two members did not participate.

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

Dated: 6/8/98

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD VOTING RECORD

In the Matter of Kenneth M. Sunberg
Docket No. DRB 97-333

Argued: November 20, 1997

Decided: June 8, 1998

Disposition: Reprimand

Members	Disbar	Three-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling						x	
Zazzali			x				
Brody			x				
Cole		x					
Lolla			x				
Maudsley			x				
Peterson							x
Schwartz			x				
Thompson			x				
Total:		1	6			1	1

Robyn M. Hill 6/30/98
Robyn M. Hill
Chief Counsel