SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-137
District Docket No. XIV-2009-0330E

IN THE MATTER OF	
MICHAEL SCOTT KLEIN	
AN ATTORNEY AT LAW	

Decision

Argued: July 21, 2011

Decided: November 1, 2011

Janice Richter appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us on a motion for final discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-13(c)(2). The motion arose out of respondent's guilty plea to income tax evasion and conspiracy to defraud the United States. The OAE recommended that respondent receive a two-year

suspension. We determined that a three-year suspension is the appropriate degree of discipline in this case.

Respondent was admitted to the New Jersey and Pennsylvania bars in 1994. He was admitted to the Florida bar in 1998. He has no history of discipline in New Jersey. He retired from the practice of law in New Jersey in April 2008.

In November 2007, a federal grand jury returned an indictment against respondent and ten other defendants in the United States District Court for the Eastern District of Pennsylvania. The indictment charged respondent with one count of tax evasion, in violation of 26 U.S.C. §7201, and one count of criminal conspiracy to defraud the United States, in violation of 18 U.S.C. §371. The indictment was sealed by court order.

In December 2007, respondent pleaded guilty to the charges of tax evasion and criminal conspiracy to defraud the United States. During the proceeding, the court elicited the following factual basis for respondent's plea:

> THE DEFENDANT: I worked for an attorney named Jay Bagdis when I got out of law school in 1994. And, beginning in 1995 through 2003, I agreed with Mr. Bagdis for him to pay me my salary without withholding any taxes from my pay, that he would pay the taxes to me, and I would put my income into

my bank account for my own business, professional corporation, that I created under his suggestion, and I did not file taxes nor pay taxes from 1995 through 2003 while I worked for Mr. Bagdis.

THE COURT: Obviously, you knew that you were required to pay income taxes on income that you earned during the course of your employment?

THE DEFENDANT: Yes, I did, Your Honor.

THE COURT: And I take it, sir, you didn't just start working with this attorney Mr. Bagdis. You had prior employment?

THE DEFENDDANT: I had prior part-time employment when I was in school, growing up, yes, Your Honor.

THE COURT: So you knew that it was required that the federal government will take their share of your income to pay for income tax?

THE DEFENDANT: Yes, I did, Your Honor.

THE COURT: And you knew, by getting into this arrangement with Mr. Bagdis, of setting up your own corporation to pay for whatever expenses that you had out of this corporation, that you were avoiding the duty and responsibility of each of the taxpayers, which is to pay taxes?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You entered into this agreement with Mr. Bagdis.
Was there anyone else that you associated with in this arrangement?

THE DEFENDANT: No, Your Honor.

THE COURT: Just Mr. Bagdis?

THE DEFENDANT: Yes, Your Honor.

THE COURT: How long did you remain employed with him?

THE DEFENDANT: From 1994, when I graduated in 1994 through October of 2004.

[OAEB Ex.1 at 18-18 to 20-13.][1]

At respondent's May 2009 sentencing hearing, he expressed remorse for his conduct.

THE DEFENDANT: Your Honor, I struggled for the last four and a half years trying to reconcile in my own head why I would have done this, why I would have done it for so long, why I would have risked everything that I've risked, why would I have risked my freedom, why would I put my family on the line, and I can't provide myself with an answer that is satisfactory.

I didn't just do it for economic reasons. The harm that I was putting myself and my family in the way of far exceeds any benefit that I ever received.

THE COURT: The amount of the tax evasion itself is miniscule, compared to the other defendants in this conspiracy case.

THE DEFENDANT: Your Honor, I have struggled with this. I have my family and friends, Your Honor, to explain to you and to my

[1] OAEB refers to the OAE's brief, dated April 26, 2011.

> attorneys, to everybody that I've spoken to, I am ashamed of what I did, and I have attempted to be completely honest, not just with myself but with everybody, and I haven't been able to give any better reason than I was very foolish and exercised bad judgment and was stupid.
>
> I don't have a better answer for that, Your Honor. I know what I did was wrong. I knew at the time that it was wrong, and I knew that I was doing that as an officer of the Court.
>
> I know that these things were wrong. I don't think that I fully comprehended the consequences of my actions at the time because in hindsight now I don't understand why I did these things.
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> [OAEBEx.2 at 28-9 to 29-17.]

The government urged a significant downward departure from the sentencing guidelines based on respondent's substantial assistance to the government in the investigation and prosecution of other individuals involved in the conspiracy.

The court sentenced respondent to a five-year term of probation for each count, to run concurrently, including a nine-month period of house arrest. He was also ordered to pay restitution in the sum of $74,446.

By letter dated May 26, 2009, respondent's attorney advised Pennsylvania's Office of Disciplinary Counsel (ODC) of respondent's guilty plea and pending sentencing. The letter was copied to the OAE and to the Director of Lawyer Regulation for

the Florida bar. By subsequent letter dated June 11, 2009, respondent's attorney provided a copy of respondent's sentencing order to the same authorities.

The OAE argued that respondent's conviction of tax evasion and conspiracy to defraud the United States violated RPC 8.4(b) (commission of a criminal act that adversely reflects on the attorney's honesty, trustworthiness or fitness as a lawyer) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

In mitigation, the OAE pointed to respondent's "extensive assistance" to the government in the prosecution of his former employer. Balanced against that, however, in aggravation, was respondent's failure to promptly disclose his indictment to the OAE, as required by R. 1:20-13(a)(1). Instead, he retired from the practice of law. As noted previously, the OAE recommended that we impose a two-year suspension.

Following a review of the record, we determine to grant the OAE's motion for final discipline.

Respondent entered a guilty plea to tax evasion and criminal conspiracy to defraud the United States. Final discipline proceedings in New Jersey are governed by R. 1:20-13(c). Under the rule, a criminal conviction is conclusive

evidence of guilt in a disciplinary proceeding. R. 1:20-13(c)(1); In re Magid, 139 N.J. 449, 451 (1995); In re Principato, 139 N.J. 456, 460 (1995). Specifically, the conviction establishes a violation of RPC 8.4(b). Here, respondent also violated RPC 8.4(c) when he failed to pay his income taxes, from 1995 to 2003, by entering into an arrangement with his employer to avoid his obligation. Hence, the sole issue before us is the extent of discipline to be imposed. R. 1:20-13(c)(2); In re Magid, supra, 139 N.J. at 451-52; In re Principato, supra, 139 N.J. at 460.

In determining the appropriate measure of discipline, the interests of the public, the bar, and the respondent must be considered. "The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." Ibid. Rather, many factors must be taken into consideration, 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). Even if the misconduct is not related to the practice of law, it must be kept in mind that an attorney "is bound even in the absence of the attorney-client

relation to a more rigid standard of conduct than required of laymen." In re Gavel, 22 N.J. 248, 265 (1956). "To the public he is a lawyer whether he acts in a representative capacity or otherwise." Ibid.

A violation of federal tax law is a serious ethics breach. In re Queenan, 61 N.J. 578, 580 (1972). "[D]erelictions of this kind by members of the bar cannot be overlooked. A lawyer's training obliges him to be acutely sensitive of the need to fulfill his personal obligations under the federal income tax law." In re Gurnik, 45 N.J. 115, 116-17 (1965) (two-year suspension for plea of nolo contendere to willfully and knowingly attempting to evade and defeat a part of the income tax due and owing by attorney and his wife).

Cases involving an attorney's attempted or actual income tax evasion have resulted in suspensions ranging from six months to three years, although two-year suspensions are imposed most often. See, e.g., In re Kleinfield, 58 N.J. 217 (1971) (six-month suspension following plea of nolo contendere to one count of tax evasion, for which a fine was paid; unspecified mitigating circumstances considered); In re Landi, 65 N.J. 322 (1974) (one-year suspension for filing a false and fraudulent joint income tax return for one calendar year; the attorney was

found guilty of income tax evasion; twenty-nine-year career without a disciplinary record considered in mitigation, along with other unspecified factors); In re D'Andrea, 186 N.J. 586 (2006) (eighteen-month suspension imposed on attorney who pleaded guilty to willfully subscribing to a false federal income tax return; the attorney was sentenced to one-year probation, including six months of house arrest and fifty hours' community service; the attorney also was ordered to pay a $10,000 fine and $34,578 in restitution to the IRS; mitigating factors were the attorney's unblemished disciplinary history, his genuine remorse, the deficiencies in his law office's accounting system, and the passage of ten years since he had filed the return); In re Kirnan, 181 N.J. 337 (2004) (eighteen-month retroactive suspension for filing a joint individual tax return that deliberately did not report the receipt of income from the attorney's law practice, resulting in the nonpayment of $31,000 for two tax years; the attorney's cooperation with the criminal authorities was considered in mitigation); In re Weiner, 204 N.J. 589 (2011) (two-year suspension imposed on attorney who pleaded guilty to two counts of willfully preparing and presenting to the IRS a false and fraudulent tax return on behalf of a taxpayer, in violation of 26 U.S.C. §7206(2); the

attorney was sentenced to a two-year probationary term, which included six months of house arrest; the attorney also was ordered to pay a $10,00 fine and a $200 "special assessment"); In re Rakov, 155 N.J. 593 (1998) (two-year suspension for an attorney with an unblemished disciplinary record convicted of five counts of attempted income tax evasion, in violation of 26 U.S.C. §7201; the attorney failed to report on his federal income tax returns the interest paid to him on personal loans; he was sentenced to six months' home confinement and three years' probation and was also fined $20,000); In re Batalla, 142 N.J. 616 (1995) (two-year suspension imposed on attorney who pleaded guilty to a violation of 26 U.S.C. § 7201 for evading $39,066 in taxes by underreporting his earned income in 1990 and 1991; the attorney pleaded guilty to one count of income tax evasion, was sentenced to a one-year probationary period, fined $2000, and ordered to satisfy all debts owed to the IRS; prior unblemished record); In re Nedick, 122 N.J. 96 (1991) (two-year suspension for attorney who pleaded guilty to a one-count violation of 26 U.S.C. §7201 after failing to report as taxable income $7500 in cash received in payment of legal fees; the attorney was sentenced to two years in prison, with all but three months of the sentence suspended, followed by nine months'

probation; unblemished record and additional mitigating factors considered); In re Tuman, 74 N.J. 143 (1977) (two-year suspension imposed on attorney who was convicted of attempting to evade federal income taxes and filing a false and fraudulent joint federal income tax return; the attorney received a one-year suspended sentence, was placed on probation for three years, and was fined $1000); In re Becker, 69 N.J. 118 (1976) (attorney who pleaded guilty to having violated one count of 26 U.S.C. §7201 was suspended from the practice of law for two years; the Court found the attorney's proffered mitigation "for the most part unimpressive or irrelevant," but noted his unblemished disciplinary record since his 1938 admission to the bar); In re Gurnik, supra, 45 N.J. 115 (attorney suspended for two years after he pleaded nolo contendere to filing a false and fraudulent joint tax return on his and his wife's behalf; at the time of the infraction, the attorney was a municipal court magistrate); and In re Gillespie, 124 N.J. 81 (1991) (attorney received a retroactive three-year suspension after pleading guilty to willfully aiding and assisting in the presentation of false corporate tax returns for a non-client corporation, J.P. Sasso, Inc; the attorney assisted Joseph Sasso and others in diverting nearly $80,000 in corporate funds during a period in

excess of three months; the attorney did so by depositing corporate checks in his personal account, issuing eight personal checks, and then giving cash to Sasso; the eight checks were written in amounts no greater than $10,000 in order to avoid federal reporting requirements; numerous compelling mitigating factors considered).

Arguably, respondent's previously unblemished record is a mitigating factor. However, in light of the fact that his dishonest conduct began one year after his admission to the bar, it is by sheer luck and the years it took for the criminal prosecution that his record has been blemish-free until now. We, thus, have not considered his lack of disciplinary history to be a mitigating factor.

As to aggravation, and as pointed out by the OAE, respondent failed to report his indictment to the OAE, as required by R. 1:20-13(a)(1). There is, moreover, an additional aggravating factor, as seen below.

In In re Spina, 121 N.J. 378, 379 (1990), also a motion for final discipline, the Court ruled that the ethics authorities and the Court may be required to review "any transcripts of a trial or a plea and sentencing proceeding, pre-sentence report,

and any other relevant documents in order to obtain the full picture." The Court held that

> it is appropriate to consider "evidence [that] does not dispute the crime but shows mitigating circumstances [relevant to] the issue of whether the nature of the conviction merits discipline and if so, the extent thereof." [Citations omitted]. That principle suggests that it is appropriate as well to examine the totality of circumstances, including the details of the offense, the background of respondent, and the pre-sentence report in reaching an appropriate decision that gives due consideration to the interests of the attorney involved and to the protection of the public.
>
> In this case we do no violence to the procedures that govern our disciplinary function nor to notions of due process when we take into consideration respondent's acknowledged misuse of funds. . . . Respondent's acknowledgement of his conversions of many other checks and cash beyond the . . . $15,000 check was part of his plea agreement, and the various documents that put flesh on the bare bones of respondent's conversions were all made part of the sentencing court's record and were referred to in these disciplinary proceedings.
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> [Id. at 389-390.]

In In re Nedick, 122 N.J. 96, 103 (1991), the Court, in adopting our decision in its entirety and incorporating it into its order as an appendix, confirmed the propriety of considering

more than a guilty plea in a motion for final discipline. As we noted in our decision,

> [t]he Board is also aware that its review is not limited to the four corners of the plea of guilty in recommending the appropriate discipline to be imposed. All relevant documents that will assist in creating the "full picture" are considered. These include the pre-sentence report, the plea agreement, and the sentencing court's record.
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> [In the Matter of Michael J. Nedick, DRB 90-149 (October 1, 1990) (slip op. at 8.)

Thus, under Spina and Nedick, it is appropriate for us to consider not only respondent's guilty plea to evading taxes and conspiracy, but also additional misconduct, outside of his guilty plea, revealed by the record. To that end, we take into account that, in addition to respondent's personal tax evasion, he assisted Bagdis' clients in similar conduct. During sentencing, respondent's involvement with Bagdis' clients was discussed:

> When it comes to a sentencing recommendation, Mr. Klein -- there are basically two things the Court, I think, needs to consider. One is the significance of Mr. Klein's conduct, that, indeed, just from his own tax evasion, it was going on for a period of about eight or nine years while he was working for Mr. Bagdis. He was also involved to some extent with Mr. Bagdis' dealings with his clients.

> Now, as the Court heard during his testimony, Mr. Klein was not privy to all the discussions between Mr. Bagdis and individual clients that were trying to evade their taxes, but he was privy to some discussions and he certainly provided some services to Bagdis and his clients, such as getting records from the IRS and preparing tax returns that were indeed false.
>
> I'd like to point out one thing to the Court; that Mr. Klein has not been charged with conduct relating to other clients, and that's in large part because much of the evidence that the government got about Mr. Klein's involvement with those other clients came from Mr. Klein himself and did not come from others.
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> [OAEB Ex.2 at 5-10 to 6-10.]

As seen from the above, respondent not only conspired with Bagdis in his illegal enterprises, but he assisted clients in the commission of criminal activities. Individuals who came to the Bagdis firm for sound, legal counsel were instead advised to violate the tax laws.

In In re Gillespie, supra, 124 N.J. 81, the attorney received a three-year suspension, in light of compelling mitigation, for counseling a non-client corporation in the preparation of false tax returns. Here, unlike Gillespie's involvement with the corporation, respondent's involvement with Bagdis' clients was not extensive. At the same time, unlike

Gillespie, he does not have "compelling" mitigating factors. The difference notwithstanding, this case is analogous to Gillespie and deserves strict discipline. This is not a situation where an attorney simply did not file a tax return. This is a case where respondent and Bagdis had the mens rea to set up corporations to aid them in evading their tax obligations. Moreover, this was not a one-time event. Rather, this was an ongoing enterprise, from 1995 to 2003. It was not until the government's involvement that respondent "found religion" and cooperated with authorities. Stronger discipline than the recommended two-year suspension is, thus, required. In the Board majority's view, the three-year suspension imposed in Gillespie is appropriate here as well.

Member Doremus dissented. In her opinion, the conduct in this case warrants the ultimate penalty of disbarment for the following reasons: (1) respondent's misconduct did not spring from a momentary lapse; he was not acting on impulse or responding to the exigencies of the moment, which would not condone, but might explain his behavior; (2) rather, he had the forethought to set up a business entity to shield his misconduct, which spanned eight years, from 1995 to 2003; (3) each year that he failed to file his taxes, he formed the

mens rea to commit a crime; (4) egregiously, he involved others in the scheme by facilitating his clients' participation in a criminal enterprise; (5) although he was not the mastermind of this scheme, he was a willing participant in the fraud; and (6) notwithstanding his contrition, the public's confidence in the bar is shaken by his offenses.

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: for Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael S. Klein
Docket No. DRB 11-137

Argued: July 21, 2011

Decided: November 1, 2011

Disposition: Three-year suspension

Members	Disbar	Three-year 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:	1	8				

Julianne K. DeCore
Chief Counsel