SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-410
District Docket No. XIV-2010-0544E

IN THE MATTER OF	
DAVID A. LEWIS	
AN ATTORNEY AT LAW	

Decision

Argued: April 18, 2013

Decided: June 19, 2013

Missy Urban appeared on behalf of the Office of Attorney Ethics.

Thomas Ambrosio 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 motion for final discipline filed by the Office of Attorney Ethics (OAE), based on respondent's guilty plea and criminal conviction in New Jersey of subscribing to a false tax return, in violation of 26 U.S.C.A. §7206(1). The OAE recommends a three-year suspension.

We determine to impose a two-year suspension, retroactive to December 15, 2011, In re Lewis, 208 N.J. 436 (2011).

Respondent was admitted to the New Jersey bar in 1985. He has no history of final discipline.

On February 28, 2011, respondent entered a guilty plea in the United States District Court for the District of New Jersey (DNJ) to an indictment charging him with willfully and knowingly subscribing to a false individual tax return, in violation of 26 U.S.C.A. §7206(1), which provides, in pertinent part:

> Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.[1]

[1] The plea agreement referred to the maximum fine as $250,000.

At the plea hearing, the Honorable Dickinson R. Debevoise, Senior United States District Court Judge, elicited the following facts from respondent:

> THE COURT: And it charges that on or about April 15th, 2004, you knowingly and willfully made and subscribed to 2003 U.S. individual income tax return form 1040, that you did not believe to be true and correct to every material matter in that you failed to report more than $300,000 in income that you had received from your law practice in violation of Title 26, United States Code Section 72061, and you understand that that is the charge contained in the indictment?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And am I correct that you propose to enter a plea of guilty to the indictment?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And is this a voluntary plea on your behalf?
>
> THE DEFENDANT: Yes, it is.
>
> THE COURT: And do you understand that you have a right to plead not guilty or persist in a plea of not guilty and to have a trial?
>
> THE DEFENDANT: I understand.
>
> THE COURT: I've been furnished with a copy of the -- the original plea agreement between yourself and the Government, and I ask you if you read that carefully before you signed it?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Does it set forth all the terms of the agreement between yourself and the Government?
>
> THE DEFENDANT: Yes.

> THE COURT: Is there anything that you think the Government has agreed to which is not contained in the plea agreement?
>
> THE DEFENDANT: No.
>
> [Ex.C4-5 to C5-10.][2]

Pursuant to the plea agreement, by admitting to knowingly subscribing to a false 2003 federal individual tax return, respondent faced a statutory maximum prison sentence of three years and a maximum fine of $250,000.

On August 15, 2011, Judge Debevoise sentenced respondent to eighteen months in federal prison and three years of supervised release. Respondent was also ordered to pay the United States a special assessment of $100 dollars and to make restitution payments to the IRS. The judge waived the potentially substantial fine

> because of the the [sic] rather large amount of payments that will be owing to the Government. I don't think it will be practical or make any sense to add an additional $5,000 or more to the sentence. So the fine is waived because of the

---

[2] "Ex.C" refers to an exhibit to the OAE's brief in support of the motion for final discipline. All references to exhibits herein are to exhibits to the OAE brief.

inability to pay in addition to restitution.

[Ex.D8-9 to 14.]

The conduct that gave rise to respondent's criminal offense was as follows:

Respondent had been certified as a public accountant and held an LLM degree in tax law. Between 2003 and 2005, he practiced law as a sole practitioner, focusing on estate planning. Respondent's office methods included depositing legal fees into a business account at Bank of America, where he also had a personal account. His staff utilized a QuickBooks software program, specifically designed to track the firm's receipts and disbursements into the business account.

From 2003 to 2005, however, respondent did not deposit all of the client payments for fees into his business account. He also failed to provide his office staff, responsible for making entries into the QuickBooks program, with all of the records necessary to track deposits into that account.

Respondent deposited some client fees into his personal account, but failed to advise staff of his actions. Therefore, staff had no records of the deposits. As a result, the law firm's books and records did not accurately reflect the total receipts from clients.

Respondent's unreported income and IRS tax ramifications for the years 2003 through 2005, the years for which he pleaded guilty, are reflected in the following grid:

Tax Year	Unreported Income	Tax Due	Interest	Penalties
2003	$369,653.00	$120,780.20	$104,257.28	$90,507.00
2004	$286,005.00	$96,684.00	$71,694.90	$72,513.00
2005	$298,101.00	$102,418.00	$49,794.28	$76,814.50
2006	$445,761.00	$118,180.00	$25,851.16	$29,452.34
2007	$507,201.00	$138,767.88	$15,154.45	$19,288.05
OAE Total	$1,906,721.00	$576,830.08	$266,752.07	$288,574.89
2003-2005 Total	**$953,759.00**	**$319,882.20**	**$225,746.46**	**$239,834.50**

[OAEb3.][3]

[3] "OAEb" refers to the OAE's brief in support of the motion for final discipline.

The OAE included figures for 2006 and 2007, as shown in the shaded portion of the above graph. At sentencing, respondent's attorney urged Judge Debevoise to disregard all of the information in the graph pertaining to 2006 and 2007. The judge agreed. He declined to consider that information and concluded that "the 2006 and 2007 [tax returns] ultimately were correctly filed, even though the tax wasn't paid. That involves a civil liability and not a criminal liability."

The OAE seeks a three-year suspension, arguing that this case is more serious than In re Batalla, 142 N.J. 616 (1995), where the attorney received a two-year suspension for tax evasion, a violation of 26 U.S.C. §7201, but not as serious as In re Bok, 163 N.J. 499 (1999), where the attorney was disbarred for tax evasion and filing false corporate income tax returns for his wholly owned company.

In a January 14, 2013 brief to us, respondent's counsel, Thomas Ambrosio, urged us to impose an eighteen-month suspension. He drew a distinction between the OAE's tax evasion cases under 26 U.S.C. §7201 and cases under 26 U.S.C. §7206(1), like this one, where the attorney has been found guilty only of filing a false tax return. Counsel cited In re D'Andrea, 186 N.J. 586 (2006), where an attorney received an eighteen-month

suspension for filing a false tax return, which we considered "a lesser-included offense of income tax evasion." In the Matter of Joseph R. D'Andrea, DRB 06-037 (April 28, 2006) (slip op. at 10) (citing United States v. Citron, 783 F.2d 307, 312-313 (2d Cir. 1986). Counsel noted that, in D'Andrea, we had relied upon an earlier case, In re Kirnan, 181 N.J. 337 (2004), another false tax return case involving a violation of 26 U.S.C. §7206. Kirnan, too, received an eighteen-month suspension for a single violation of the lesser offense of filing a false tax return.

Here, respondent was convicted of one count of knowingly and willfully subscribing to a false federal income tax return, in contravention of 26 U.S.C.A. §7206(1), for having failed to report over $950,000 in income derived from his law practice from 2003 through 2005 and for which he owed in excess of $300,000 in federal taxes.

The existence of a criminal conviction is conclusive evidence of respondent's guilt. R. 1:20-13(c)(1); In re Gipson, 103 N.J. 75, 77 (1986). Respondent's criminal conviction constitutes a violation of RPC 8.4(b) (commission of a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer). Only the quantum of discipline to be

imposed remains at issue. R. 1:20-13(c)(2); In re Lunetta, 118 N.J. 443, 445 (1989).

The sanction imposed in disciplinary matters involving the commission of a crime depends on numerous 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, supra, 118 N.J. at 445-46. Discipline is imposed even when the attorney's offense is not related to the practice of law. In re Kinnear, 105 N.J. 391 (1987).

Attorneys who evade, or seek to evade, the payment of income taxes typically receive two-year suspensions. In re Rakov, 155 N.J. 593 (1998); In re Batalla, supra, 142 N.J. 616; In re Nedick, 122 N.J. 96 (1991); In re Tuman, 74 N.J. 143 (1977); and In re Becker, 69 N.J. 118 (1976).

However, as correctly pointed out by respondent's counsel, here, respondent did not engage in a direct attempt to evade taxes, a more serious offense addressed under 26 U.S.C.A. §7201. That section of the statute states as follows:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in

> addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

An eighteen-month suspension was imposed on the attorney in D'Andrea, who filed a false tax return. D'Andrea was sentenced to one year's probation, including six-months' house arrest, fifty hours' community service, restitution of almost $35,000 to the IRS, and a $10,000 fine. In our decision, we quoted United States v. Citron, 783 F.2d 307, 312-313 (2d Cir. 1986), which described the difference between the two sections of the statute:

> Section 7201 has been described as "the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law." Spies v. United States, 317 U.S. 492, 497, 87 L. Ed. 418, 63 S. Ct. 364 (1943). The elements of a §7201 violation are (1) willfulness, (2) the existence of a tax deficiency, and (3) an affirmative act constituting an evasion or attempted evasion of the tax. See Sansone, supra at 351. We have also required that the tax deficiency be substantial. United States v. Nunan, 236 F.2d 576, 585 (2d Cir. 1956), cert. denied, 353 U.S. 912, 77 S. Ct. 661, 1 L. Ed. 2d 665 (1957); United States v. Norris, 205 F.2d 828, 829 (2d Cir. 1953); see United States v. Burkhart, 501 F.2d 993, 995 (6th Cir.

1974), cert. denied, 420 U.S. 946, 95 S. Ct. 1326, 43 L. Ed. 2d 424 (1975).

Section 7206(1) is a lesser-included offense of §7201. Cf. United States v. LoRusso, 695 F.2d 45, 52 n.3 (2d Cir. 1982), cert. denied, 460 U.S. 1070, 103 S. Ct. 1525, 75 L. Ed. 2d 948 (1983) (a charge is a lesser-included offense when "it is composed of fewer than all of the elements of the [greater] offense charged, and if all of its elements are elements of the [greater] offense charged"). It requires the willful making and subscribing to a tax return that is false in a material matter. See United States v. Hedman, 630 F.2d 1184, 1196 (7th Cir. 1980), cert. denied, 450 U.S. 965, 101 S. Ct. 1481, 67 L. Ed. 2d 614 (1981). As in United States v. Tsanas, 572 F.2d 340, 343 (2d Cir.), cert. denied, 435 U.S. 995, 56 L. Ed. 2d 84, 98 S. Ct. 1647 (1978), in this case "the criminal act charged was the filing of false income tax returns, [and therefore,] the only difference between the two offenses is that §7201 requires proof of an intention to 'evade or defeat' a tax whereas §7206(1) penalizes the filing of a false return even though the falsity would not produce tax consequences."

[In the Matter of Joseph R. D'Andrea, DRB 06-037 (April 28, 2006) (slip op. at 10-11).]

In D'Andrea, we and the Court determined that, consistent with Citron, the filing of a false income tax return is a lesser-included offense of income tax evasion. However, we also concluded that, "for purposes of discipline . . . we do not distinguish between the two crimes," citing In re Kirnan, supra,

181 N.J. 337. In the Matter of Joseph R. D'Andrea, supra, DRB 06-037 (slip op. at 11).

The attorney in Kirnan, too, was found guilty of filing a false tax return, in violation of 26 U.S.C.A. §7206(1). Kirnan received three years' probation, 300 hours' community service and a $3,000 fine. In the Matter of Matthew J. Kirnan, DRB 04-122 (July 7, 2004) (slip op. at 2,4). We concluded that a two-year suspension was the appropriate measure of discipline, where there were no mitigating factors for our consideration. In Kirnan, we reduced the sanction to an eighteen-month suspension, retroactive to the attorney's temporary suspension in New Jersey, based on mitigation, that is, the attorney's lack of prior discipline and his extensive cooperation with a federal corruption investigation. Id. at 7.

D'Andrea, too, received an eighteen-month suspension (retroactive to his temporary suspension in New Jersey), due to mitigating factors: no prior discipline; his payment of the outstanding back taxes, a fine with interest, and penalties; the passage of time (ten years); his deep remorse; and his law office's lack of an accounting system to properly record the payments that went unreported.

Here, respondent is guilty of the same crime as D'Andrea and Kirnan, both of whom received eighteen-month suspensions, retroactive to their New Jersey temporary suspensions. Like them, respondent has no prior discipline in almost thirty years at the bar. So, too, respondent's counsel furnished sixty-seven letters from clients, fellow attorneys, members of respondent's community, and others who have attested to respondent's good deeds and the value that he brings to the legal community and to his own local community.

In aggravation, however, respondent failed to disclose almost $1,000,000 in fees over three years, depositing them into his personal account to avoid his office's software accounting system, which would have recorded the receipts. And unlike D'Andrea and Kirnan, respondent was sentenced to a custodial prison term (eighteen months). Therefore, we determine that a two-year suspension is the appropriate sanction in this case. We also determine to make the suspension retroactive to respondent's December 15, 2011 temporary suspension.

Member Clark did not participate.

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
Bonnie Frost, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David A. Lewis
Docket No. DRB 12-410

Argued: April 18, 2013

Decided: June 19, 2013

Disposition: Two-year retroactive suspension

Members	Disbar	Two-year retroactive Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh		X				
Clark						X
Doremus		X				
Gallipoli		X				
Yamner		X				
Zmirich		X				
Total:		6				1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel