SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-401
District Docket No. XIV-2014-0347E

IN THE MATTER OF	:
MERRILL N. RUBIN	:
AN ATTORNEY AT LAW	:

Decision

Argued: March 17, 2016

Decided: August 25, 2016

Steven J. Zweig appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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), following respondent's guilty plea, in New York Superior Court, Rockland County, to one count of tax evasion, in violation of N.Y. Tax Law §1804. The OAE recommends a two-year prospective suspension for his violations of RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty,

trustworthiness, or fitness as a lawyer) and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The OAE notes, in aggravation, that respondent did not notify it of his conviction and subsequent disbarment in New York and, further, did not reply to the OAE's request for information. Should we determine to impose a retroactive suspension, the OAE argues that it should begin no earlier than April 15, 2015, the date that respondent was directed to supply the OAE with information pertaining to his criminal conviction.

For the reasons expressed below, we determine that a prospective two-year suspension is warranted.

Respondent was admitted to the New Jersey bar in 1983 and the New York bar in 1980. He does not have a history of discipline in New Jersey.

A January 23, 2013 information charged respondent with one count of a third degree violation of tax evasion, in violation of the Criminal Tax Fraud Act, N.Y. Tax Law §1804 (a class D felony). According to the information, on or about April 15, 2010, with the intent to evade payment of a tax imposed under Article 22 of the New York State Tax Law for taxable year 2009, respondent failed to remit the required tax within the required time, and, therefore, paid "in excess of ten thousand dollars . . . less than the tax liability" due within a one-year period.

On the same day, respondent entered a guilty plea to the information and admitted that he owed the following amounts for underpayments he had made: for 2007 - $4,916; for 2008 - $9,950; and for 2009 - $13,876, for a total of $26,742.

During the plea, respondent admitted that he failed to file a tax return for the year 2009 by April 15, 2010, and by so doing, under-paid amounts due to the State of New York in excess of $10,000. He understood that he would be required to pay $26,742 in restitution, representing amounts due for the years 2007 to 2009.

The assistant district attorney (ADA) agreed to respondent's conditional discharge, provided that he pay restitution prior to sentencing. If he failed to do so, then the ADA would seek a five-year probationary period.

On February 10, 2014, respondent received a three-year conditional discharge.[1] As a condition to the discharge, he was required "to lead a law-biding [sic] life" and pay the restitution through the District Attorney's Office.

Based on respondent's conviction of criminal tax fraud in the third degree, the Supreme Court of New York, Appellate Division,

[1] By letter dated August 21, 2015, the New York court informed the OAE that the sentencing transcript was not available because the court reporter had passed away.

Second Judicial Department, disbarred him, effective January 23, 2013.

Respondent did not inform the OAE of his out-of-state conviction for tax fraud or of his New York disbarment, as required by R. 1:20-13(a) and R. 1:20-14(a)(1), respectively.[2]

By letter dated April 8, 2015, the OAE notified respondent that it had become aware of the criminal charges that had been filed against him and requested that, within ten days of the disposition of his criminal case, he inform the OAE, in writing, of the disposition. The OAE further requested respondent to provide an explanation for his failure to promptly notify the OAE of the charges against him, as required by R. 1:20-13(a)(1). Respondent did not reply to the request.

On January 5, 2016, respondent filed a brief with us, essentially accepting and adopting the OAE's procedural history and statement of facts. Respondent pointed out that he primarily represented criminal defendants in New York and represented only a few clients per year in New Jersey. He noted that he was also involved in pro bono work and that he counseled a substantial number of clients at reduced fees or at no fee at all.

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[2] The New York disciplinary opinion and order stated that respondent had failed to notify the court of his criminal conviction.

Respondent further remarked that the charges against him did not involve the practice of law and did not result from his making false statements or filing fraudulent documents. He added that he had made full restitution and that, at the time of sentencing, he received a Certificate of Relief from Civil Disabilities, which provided him with "relief from any automatic bars to employment and/or licensure resulting from the felony conviction."

Respondent argued that a two-year suspension is excessive and not generally supported by the cases that the OAE cited. He maintained that those cases involved illegal activity which related to the attorney's practice of law and/or concerned the making of false statements or filing of fraudulent documents. The offense to which respondent pleaded guilty concerned the failure to timely remit taxes due and did not involve the making of any false statements, the filing of any fraudulent documents, or assisting any client in the commission of an offense. Respondent added that, although the charge to which he pleaded guilty concerned the failure to remit taxes, the allocution elicited by the court concerned the failure to file a return.

Although respondent conceded that the commission of the offense reflected poorly on his fitness to practice, he contended that it did not involve the same degree of malfeasance as committed by the attorneys in the cases cited by the OAE.

In addition, respondent offered, as mitigation, his unblemished disciplinary record in his more than thirty years of practice while appearing in at least five states and twenty-two federal districts. He underscored that, because of his felony conviction leading to his automatic disbarment under the New York rules, he will not be able to practice in the state in which he derived the bulk of his income. Moreover, when his New Jersey suspension ends, he will be in the unenviable position of starting a law practice in a state where he has no client base and relatively few contacts with colleagues. As a result of these factors and his "relatively advanced" age, nearly sixty-three, respondent argues that any suspension imposed on him will have a harsher effect than is typical for a suspended attorney who would otherwise be considered similarly situated. Respondent, thus, requested a suspension of a shorter duration than that recommended by the OAE, without suggesting a specific timeframe.

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

Final disciplinary proceedings in New Jersey are governed by R. 1:20-13(c). The existence of 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). Here, respondent entered a guilty plea to one count of tax evasion, which constitutes a violation of RPC 8.4(b).

We also determine that respondent violated RPC 8.4(c) because, by its nature, tax evasion is deceitful, dishonest, and fraudulent. Thus, the sole issue before us is the proper quantum of discipline to impose. 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 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. Many factors must be considered, 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, 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." See also In re Gurnik, 45 N.J. 115, 116-17 (1965). These precepts hold equally true for attorneys who violate the state tax laws.

Cases involving attempted or actual income tax evasion have resulted in suspensions ranging from six months to three years. See, e.g., In re Kleinfield, 58 N.J. 217 (1971) (six-month suspension following a 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; mitigation included the attorney's twenty-nine-year career without a disciplinary record, along with other unspecified factors); In re D'Andrea, 186 N.J. 586 (2006) (eighteen-month retroactive suspension imposed on attorney who pleaded guilty to willfully subscribing to a false federal income tax return; the attorney was sentenced to probation for one year, including six months of house arrest, and fifty hours of community service; the attorney also was ordered to pay a $10,000 fine and $34,578 in restitution to the Internal Revenue Service (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 deliberately filing a joint individual tax return that did not report the receipt of income from the attorney's law practice, resulting in the nonpayment of $31,000 for two tax years; we considered the attorney's cooperation with the criminal authorities as mitigation); 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 of home confinement and three years' probation and was also fined $20,000); In re Batalla, 142 N.J. 616 (1995) (two-year suspension imposed where an attorney 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 $2,000, 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 $7,500 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 $1,000); In re Becker, 69 N.J. 118 (1976) (two-year suspension for attorney who pleaded guilty to having violated one count of 26 U.S.C. §7201; 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); In re Gottesman, 222 N.J. 28 (2015) (three-year retroactive suspension for attorney guilty of tax evasion and willful failure to remit payroll taxes that he withheld from his employees' wages; he used his trust account to conceal the true extent of his income; he was sentenced to concurrent six-month terms of imprisonment on both counts and three years of supervised release; prior censure); In re Klein, 209 N.J. 234 (2012) (three-year suspension for attorney guilty of income tax evasion for eight or nine years and conspiracy to defraud the United States by

counselling clients in tax evasion methods; the attorney had no prior discipline and provided extensive assistance to the prosecution in the investigation and prosecution of others involved in the conspiracy; he failed to promptly report his indictment to the OAE, however); and In re Gillespie, 124 N.J. 81 (1991) (attorney received a three-year retroactive 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).

Here, respondent's circumstances do not warrant the imposition of a three-year retroactive suspension as was the case in Gottesman, where the attorney was not only guilty of tax evasion, but also failed to remit his employees' taxes that he withheld from them. The Klein matter, too, is significantly more serious than respondent's. Klein was guilty of tax evasion for eight or nine years, while this respondent failed to pay sufficient taxes over a three-year period. In addition, Klein counseled his clients in tax evasion methods.

Landi received only a one-year suspension. However, in that matter, mitigating factors considered were the attorney's twenty-nine year unblemished record as well as other factors, which the Court did not enumerate in its Order. That case took place more than forty years ago. Over the course of those years, the Court appears to have treated these types of matters more harshly.

D'Andrea and Kirnan each received eighteen-month retroactive suspensions. In D'Andrea, we considered the attorney's genuine remorse and his sincere apology to us as well as to the disciplinary authorities. In Kirnan, we considered the attorney's immediate expression of remorse and his agreement to cooperate with the government in its ongoing investigation of corruption in Essex County, particularly against someone with whom he maintained close political ties.

Here, absent the sentencing transcript, we are left with a sparse factual record from which we can conclude only that respondent failed to remit the appropriate taxes for a three-year period in amounts totaling $26,742. Although the New York authorities saw fit to disbar respondent,[3] based on the above precedent, we do not find that his conduct warrants permanent disbarment. Rather, respondent's misconduct is most closely

[3] Respondent will be eligible to apply for reinstatement in New York in just shy of four years.

analogous to that in Batalla, supra, 142 N.J. 616 (two-year suspension).

Respondent's mitigation is not compelling, as in the D'Andrea and Kirnan matters. Attorneys in New Jersey are required to provide pro bono services to maintain their licenses, unless they are exempted. Moreover, in aggravation, not only did respondent fail to inform the OAE of both his criminal conviction and disbarment in New York, but he also failed to inform the New York authorities of his felony conviction. He further failed to reply to the OAE's request for information. Under these circumstances, we determine that a two-year prospective suspension is warranted.

Member Singer voted to impose a one-year suspension. Vice-Chair Baugh 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 C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Merrill N. Rubin
Docket No. DRB 15-401

Argued: March 17, 2016

Decided: August 25, 2016

Disposition: Two-year suspension

Members	Disbar	Two-year Suspension	One-year Suspension	Dismiss	Disqualified	Did not participate
Frost		X				
Boyer		X				
Baugh						X
Clark		X				
Gallipoli		X				
Hoberman		X				
Rivera		X				
Singer			X			
Zmirich		X				
Total:		7	1			1

Ellen A. Brodsky
Chief Counsel