Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-356
District Docket No. XIV-2018-0664E

In the Matter of

Susan Penny Halpern

An Attorney at Law

Decision

Argued: February 20, 2020

Decided: June 4, 2020

Amanda W. Figland appeared on behalf of the Office of Attorney Ethics.

Suzanne M. McSorley appeared on behalf of Susan Penny Halpern.

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 pleas in the United States District Court for the Eastern

District of Pennsylvania (EDPA), to two misdemeanor violations of 26 U.S.C. § 7203 (willful failure to pay tax). These offenses constitute violations of RPC 8.4(b) (criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons set forth below, we determine to grant the motion for final discipline and impose a censure.

Respondent earned admission to the New Jersey bar in 1986 and to the Pennsylvania bar in 1984. At the relevant time, she maintained an office for the practice of law in Philadelphia, Pennsylvania. She has no history of discipline in New Jersey. In Pennsylvania, she received a public reprimand for the convictions at issue. Office of Disciplinary Counsel v. Susan P. Halpern, No. 144 DB 2019 (D.Bd. Rpt. 8/2/2019) (S.Ct. Order 9/12/2019).

On April 11, 2017, a grand jury for the EDPA charged respondent and her estranged husband, Edward Millstein, with tax offenses. Respondent was charged with two misdemeanor counts of failure to pay taxes to the Internal Revenue Service (IRS), for tax years 2010 and 2011, in violation of 26 U.S.C. § 7203. Millstein, who also is an attorney, was charged with felony tax evasion, in violation of 26 U.S.C. § 7201, and two misdemeanor counts of failure to pay taxes, in violation of 26 U.S.C. § 7203.

The indictment alleged that, in 2010, respondent and Millstein willfully failed to pay $143,473.35 in taxes, and that, in 2011, they willfully failed to pay $153,560.69 in taxes. Only Millstein was charged with tax evasion, however. The indictment alleged that he willfully attempted to evade the payment of a total of $444,225.53 in income taxes that he and respondent owed to the IRS, for calendar years 2007 through 2011, by attempting to conceal or actually concealing the nature and extent of his assets from the IRS, and by making false statements to IRS agents.

On November 5, 2018, respondent appeared for trial before the Honorable Cynthia M. Rufe, U.S.D.J. Rather than proceed with the trial, respondent entered guilty pleas to two misdemeanor counts of failure to pay income tax. During the change of plea hearing, the Assistant United States Attorney (AUSA) read to respondent the elements of the counts, which specifically included the willful nature of her failure to pay. The AUSA explained that "willfulness means that the defendant acted in a voluntary and intentional way to violate a known legal duty, that is, to pay her taxes." In response to questioning by Judge Rufe, respondent admitted that her conduct was "willful." Judge Rufe confirmed that respondent understood the elements of the charged offenses and accepted her decision to knowingly and voluntarily plead guilty.

During the criminal proceedings, and before us, respondent and her counsel proffered, in mitigation, that respondent and her husband married in 1996; that he was the main source of income in their household; and that after the birth of their twin daughters, respondent assumed primary responsibility for parenting, while also operating her solo law practice. Respondent has repeatedly asserted that she had been unaware of the issues with the IRS, because her husband served as the primary point of contact for their financial affairs. Respondent, thus, has claimed that she lacked knowledge regarding the full extent of the tax liability issues, and had relied on Millstein in respect of their taxes.

In 2011, respondent and Millstein separated, leaving her without the same financial support or stability. Respondent asserted a belief that, despite their separation, Millstein was continuing to work toward resolving their outstanding tax liabilities. She also claimed that she continued to be unaware of the details of their issues with the IRS.

On April 4, 2019, respondent and Millstein appeared before Judge Rufe for sentencing. The AUSA offered the stipulated testimony of an IRS agent who would have testified that, from 1999 through 2002, respondent had individual tax-related liabilities that resulted in her filing an offer of compromise with the IRS, which was rejected, and ultimately led to her filing for bankruptcy. Further,

thereafter, respondent and Millstein had joint tax liabilities that remained unresolved. This stipulated testimony was offered to establish that respondent had a more sophisticated understanding of tax issues than she claimed.

Following the government’s stipulated testimony, three character witnesses testified in behalf of respondent. Each witness testified that she was a loving mother and a good friend, was loyal, had a good reputation for integrity and hard work, and was involved in her community. Respondent’s sister and brother-in-law, Cindy and Stephen Kramer, testified that respondent had received significant sums of money – at least $100,000 – from their family a few months prior to sentencing, intended to help respondent satisfy her outstanding tax obligations. Cindy also testified that their mother had provided money to respondent, over prior years, as additional support.

Respondent testified that she was remorseful for her actions, accepted responsibility for them, and recognized the pain that she had caused others, including her family and children. She asked the court to take into consideration her whole life when imposing a sentence.

Respondent’s counsel sought a variance from the sentencing guidelines, based on respondent’s character letters, her charitable endeavors, her lesser culpability than Millstein’s, and her willingness to cooperate with the government.

In assessing the nature and circumstances of respondent's offenses, the AUSA contended that she was more sophisticated in her understanding of the underlying facts and tax issues than she represented and, that, despite having the means to do so, she had continuously failed to pay her debts. The AUSA also disputed respondent's contention that she was unaware of the full extent of the amount of taxes owed, emphasizing that the IRS had placed a levy on her bank account; she had met three times with certified public accountants who informed her of these tax issues; and the IRS had mailed seven letters to her home, which detailed the tax debts. The AUSA asserted that, despite these notices, respondent had continued to spend lavishly, without regard to her tax debt.

In addition, the AUSA asserted that respondent's life experiences did not excuse her crime. He expressed empathy for her separation from her husband, but argued that her circumstances did not excuse her failure to pay taxes over a series of years, especially in light of the significant personal support she received from her family. He observed that, nevertheless, respondent was able to act as a responsible parent and to maintain her law practice. Further, the AUSA noted that respondent is a very intelligent and sophisticated attorney, and based on her life experience and professional accomplishments, her failure to pay taxes was the antithesis of her professional life. Despite these negative

points, when comparing respondent's conduct to Millstein's, the AUSA acknowledged that respondent was less criminally culpable.

Judge Rufe found that respondent was deeply remorseful, but concluded that she understood her role in the tax offenses, and at times was "possibly downplaying" her culpability. Although Judge Rufe recognized that respondent was not charged with attempting to evade taxes, she found that respondent had a "rather consistent deflection of her own responsibility" and had not addressed these issues, despite "her keen mind and educational background and resources." She found that respondent had a "willful ignorance of the legal obligations of every citizen to pay taxes."

While recognizing that respondent was "her own worst enemy," Judge Rufe concluded that respondent deserved consideration for her role as a supportive mother and daughter, and for her years of service to the community and the profession of law. However, Judge Rufe remarked that respondent had been "periodically evasive, if not entirely honest," and failed to consider "that her varying statements to one official or another" would "come back to haunt her." Still, Judge Rufe agreed with the prosecution that respondent was less culpable than Millstein, whose tactics were "more deceptive and calculating" than respondent's. Ultimately, in addressing both respondent and Millstein, Judge Rufe stated that these tax offenses occurred "because you two were so

busy fighting, and trying to avoid the inevitable, you paid lip service to the law. Two lawyers paid lip service in law. You should be ashamed of yourselves."

Judge Rufe sentenced respondent to a five-year term of probation on each of the two misdemeanor counts, to run concurrently; required respondent to properly report all correct taxable income to the IRS; and, as restitution, accepted respondent's check for $100,000 in full satisfaction of the remainder of respondent's portion of the tax debt.

In its brief, the OAE urged the imposition of an eighteen-month or two-year suspension, emphasizing that respondent had failed to file her income tax returns for two years; had significant tax liability for income earned; was motivated by greed; and failed to proffer any convincing mitigation for her failure to file income tax returns or to pay income taxes, while also failing to satisfy her obligations to the IRS from 2007 through 2011. Additionally, the OAE maintained that respondent had been less than forthcoming, responsive, or honest with the IRS agents. Finally, the OAE described respondent and Millstein as evasive toward the IRS, and asserted that they took steps to avoid having their considerable assets levied upon by the government.

In respondent's brief, she conceded having violated RPC 8.4(b), but contended that she had not violated RPC 8.4(c). Specifically, respondent argued that there was insufficient evidence that she had been convicted of a crime

involving dishonesty, fraud, deceit or misrepresentation. She contended that her convictions for failure to pay taxes were materially different from convictions for failure to file tax returns, although both offenses fall under 26 U.S.C. § 7203. Respondent asserted that a conviction for "failure to file tax returns has been determined to have embedded within it the element of deceit," but reiterated that she had not been charged with or convicted of failure to file tax returns.

Respondent argued that no attorney has been disciplined in New Jersey for failure to pay taxes, and therefore, based on the dearth of authority, and lack of evidence to support a violation of RPC 8.4(c), this charge should be dismissed. She contended that she should receive a reprimand for having violated only RPC 8.4(b).

Respondent also refuted the OAE's contention that she had conspired with Millstein to evade paying taxes. Additionally, she maintained that the cases that the OAE cited in support of suspension are factually dissimilar, because the conduct of the attorneys was either more egregious than hers, or significant aggravating factors had been found, warranting lengthy suspensions.

Respondent cited one New Jersey case in support of a reprimand – In re McEnroe, 172 N.J. 324 (2002). However, rather than compare her conduct to that of the attorney in McEnroe, respondent compared herself to McEnroe's wife, an attorney who originally was accused of failure to file taxes, but, because

she was wholly unaware that her husband was not filing their joint tax returns, was exonerated.

In respect of mitigation, respondent urged us to consider the following: she has filed all tax returns for all years since 2011, and paid her portion of all taxes due; she is the sole source of support for herself and two daughters; for fifteen years, she relied on her husband for financial support and he took full responsibility for all tax-related matters; her husband was the "exclusive channel of communication with the IRS;" she never received direct communication from their tax preparer; she experienced significant upheaval in her life due to her separation from Millstein, which occurred at the same time she was experiencing issues with the IRS; she has a long and unblemished disciplinary record; she reported her misconduct; she has an excellent reputation as a lawyer and member of the community; and she was diagnosed with personality disorders.

Along with her brief, respondent submitted her certification to provide "context, explanation and evidence in mitigation" in connection with her conviction, but not to contest her guilty pleas to the offense. However, in the certification, respondent denied any knowledge of Millstein's finances and claimed that she had neither access to any of his financial information nor any meaningful knowledge of their joint tax situation, because Millstein and the accountants he hired handled all such matters. She further asserted that

"[v]irtually all communications regarding the matters which were subject of the indictment excluded" her, so that she had "almost no opportunity to become aware of, let alone to take action to address, the tax situation."

Respondent alleged that she first learned of issues with her taxes in late 2009, when she learned that her and Millstein's joint tax returns for 2007, 2008, and 2009 had not been filed in a timely fashion. She claimed that, thereafter, Millstein had assured her that an extension request had been submitted. She further alleged that, later, when these tax returns were submitted, she had not reviewed the tax returns before signing them to ascertain whether the taxes had been paid.

Respondent acknowledged attending an hour-long meeting with Millstein and IRS revenue officer, Kelli Hanson, on January 8, 2013, where she provided Hanson a statement of income and expenses, but denied receiving further notices from the IRS thereafter. She claimed she did not realize that there was an ongoing issue with the IRS until February 10, 2015, when she was served with a target notice indicating that she was about to be indicted. Respondent failed to acknowledge, however, that she was not indicted until April 11, 2017, well over two years after she first received notice that she was a target of a criminal investigation.

Respondent concluded her certification by stating that she recognized that the tax offense to which she pleaded guilty is "a serious offense, especially for a lawyer who holds a position of trust and is therefore held to a higher standard than an ordinary member of the public."

Following a review of the record, we determine to grant the OAE's motion for final discipline. Final discipline proceedings in New Jersey are governed by R. 1:20-13(c). Under that 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).

This is a case of first impression, as respondent noted, because the Court has never disciplined a New Jersey attorney solely for the failure to pay income taxes, in violation of 26 U.S.C. § 7203. In our view, however, both the reasoning and the appropriate quantum of discipline for respondent's offenses are well-charted by the Court's precedent for failure to file income tax returns, a violation of the same applicable statute.

In relevant part, 26 U.S.C. § 7203 provides

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or

> regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor.
> [Emphasis added.]

Under this statute, the failure to file federal income tax returns, and the failure to pay taxes, are both punishable as misdemeanor tax offenses.

The facts and circumstances of respondent's misdemeanor convictions of failure to pay income taxes, in violation of 26 U.S.C. § 7203, thus, establish violations of RPC 8.4(b) and RPC 8.4(c). Under New Jersey precedent, an attorney's failure to file tax returns has not always resulted in findings of violations of both RPC 8.4(b) and RPC 8.4(c). In some instances, only RPC 8.4(b) was charged and found. See, In re Leahey, 118 N.J. 578 (1990). But, when both RPC 8.4(b) and RPC 8.4(c) have been charged, we have consistently found the failure to file tax returns to be a violation of both Rules. See, e.g., In re Cattani, 186 N.J. 268 (2006); In re McEnroe, 172 N.J. 324; In re Williams, 172 N.J. 325 (2002); and In re Vecchione, 159 N.J. 507 (1999).

In this case, despite respondent's argument that she did not violate RPC 8.4(c) because she was convicted only of failing to pay taxes, rather than failing to file tax returns, we find that the record supports violations of both RPC 8.4(b) and RPC 8.4(c). We reject respondent's argument for two reasons. First, the evidence in the record supports a finding that respondent's conduct was dishonest, in violation of RPC 8.4(c), based primarily on Judge Rufe's findings.

After accepting respondent’s plea that she failed to pay her taxes willfully, Judge Rufe heard arguments from both the AUSA and respondent’s counsel. Judge Rufe then specifically found that respondent was “downplaying” her role in the tax offenses, and attempting to deflect her own responsibility, “despite her keen mind and educational background.” Judge Rufe concluded that respondent had displayed a “willful ignorance of the legal obligations of every citizen to pay taxes,” and that, although it was undisputed that respondent was less culpable than Millstein, respondent had been “periodically evasive.” Further, Judge Rufe found that, even though Millstein’s tactics were “more deceptive” than respondent’s, they both “paid lip service” to the law and “should be ashamed.” Thus, there is sufficient evidence in the record for us to determine that respondent’s conduct violated RPC 8.4(c).

Second, respondent implicitly argued that her failure to pay was not willful, and therefore, her conduct could not violate RPC 8.4(c). She repeatedly asserted a belief that Millstein had been actively working to resolve their IRS issues, and that she had no real or significant contact with the IRS. Although respondent could have asserted this defense if she had proceeded to trial, instead, she entered guilty pleas to two counts of failure to pay income tax. As detailed above, willfulness to not pay her taxes is an element of that offense, and respondent knowingly and voluntarily allocuted to such willfulness during her

plea proceeding. Despite her repeated attempts to do so in these ethics proceedings, she cannot credibly distance herself from that admission. We, thus, determine that, in light of the facts and circumstances of this case, respondent's misdemeanor convictions of failure to pay income taxes violated both RPC 8.4(b) and RPC 8.4(c).

In determining the appropriate measure of discipline, we must consider the interests of the public, the bar, and the respondent. "The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." In re Principato, 139 N.J. at 460 (citations omitted). Fashioning the appropriate penalty involves a consideration of many 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).

That an attorney's conduct did not involve the practice of law or arise from a client relationship will not excuse an ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 165, 173 (1997). Offenses that evidence ethics shortcomings, although not committed in the attorney's professional capacity, may, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995). The obligation of an attorney to maintain the high

standard of conduct required by a member of the bar applies even to activities that may not directly involve the practice of law or affect his or her clients. In re Schaffer, 140 N.J. 148, 156 (1995).

In sum, we find that respondent violated RPC 8.4(b) and RPC 8.4(c). The only remaining issue is the appropriate quantum of discipline to be imposed for respondent's misconduct.

The OAE urges the imposition of a suspension in the range of eighteen months to two years. Respondent requests a reprimand.

Violations of federal tax laws by attorneys constitute serious ethics breaches. In re Queenan, 61 N.J. 579, 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).

Broadly, there are two types of tax offenses – tax evasion and failure to file tax returns – for us to consider in determining the appropriate quantum of discipline to impose. The OAE's brief relies on the line of cases addressing tax evasion, rather than the failure to file tax returns. This precedent supports lengthy multi-year suspensions, as evidenced by the OAE's recommendation of an eighteen-month to two-year suspension. As respondent rightly pointed out in her brief, this line of cases is both factually and legally distinguishable, because

respondent was not convicted of tax evasion. As a result, we do not rely on the line of precedent for tax evasion, but, instead, consider the closest analogous precedent, which is the failure to file tax returns, discussed below.

In In re Garcia, 119 N.J. 86, 89, the Court declared that, even in the absence of a criminal conviction, the willful failure to file an income tax return requires the imposition of a suspension. Willfulness does not require "any motive, other than a voluntary, intentional violation of a known legal duty." In the Matter of Eugene F. McEnroe, DRB 01-154 (January 29, 2002) (slip op. at 2); In re McEnroe, 172 N.J. 324.

Generally, since Garcia, terms of suspension have been imposed on attorneys who fail to file income tax returns. Cases involving willful failure to file federal income tax returns for one tax year have almost uniformly resulted in the imposition of a six-month suspension. See, e.g., In re Waldron, 193 N.J. 589 (2008); In re Gaskins, 146 N.J. 572 (1996); In re Silverman, 143 N.J. 134 (1996); In re Doyle, 132 N.J. 98 (1993); In re Leahey, 118 N.J. 578 (1990); and In re Chester, 117 N.J. 360 (1990).

Attorneys who fail to file multiple income tax returns generally receive a suspension of at least one year. See e.g., In re Hand, 235 N.J. 367 (2018) (one-year suspension imposed on attorney who pleaded guilty to two counts of failure to file federal income tax returns for two calendar years, in violation of 26

U.S.C. § 7203, resulting in a $50,588 tax loss to the United States government; the attorney was sentenced to three years' federal probation, which included a five-month period of home confinement, and was ordered to pay $50,588 in restitution and fully cooperate with the IRS, among other things; she also had a disciplinary history); In re Cattani, 186 N.J. 268 (one-year suspension for failure to file federal and state income tax returns for eight years); and In re Spritzer, 63 N.J. 532 (1973) (after concluding that proffered mitigating circumstances did not justify attorney's failure to file federal income tax returns for ten years, the Court imposed a one-year suspension).

Discipline short of a one-year suspension has been imposed only when the attorney who fails to file multiple tax returns did not owe any taxes or presented compelling mitigation. See, e.g., In re Williams, 172 N.J. 325 (reprimand for willful failure to file income tax returns for four years; attorney did not owe any taxes and had incurred no penalties); In re McEnroe, 172 N.J. 324 (three-month suspension for attorney with no disciplinary history for violations of RPC 8.4(b) and RPC 8.4(c), resulting from his seven-year failure to file joint federal and state income tax returns on behalf of himself and his wife; the attorney's payment of all outstanding federal and state tax obligations was considered as mitigation); and In re Vecchione, 159 N.J. 507 (compelling mitigating factors

justified a six-month suspension for the attorney's failure to file federal income tax returns for twelve years).

Based on the foregoing precedent, the baseline level of discipline for respondent's violations is a one-year suspension, because she was convicted of failure to pay her income taxes for multiple years and, as part of her guilty plea allocution, admitted to doing so willfully. However, to craft the appropriate discipline in this case, we must consider both mitigating and aggravating factors.

In mitigation, we consider respondent's lack of prior discipline; her good reputation and character, as demonstrated by the evidence presented in her behalf during her sentencing hearing; her service to the community; her expression of remorse and contrition; and her eventual cooperation with the government, whereby she satisfied her outstanding tax debt. In aggravation, at various points, respondent had the financial means to pay her tax liability, but willfully failed to do so.

In light of the above precedent and the compelling mitigation presented by respondent, we determine that a suspension is not warranted. Respondent has satisfied her outstanding tax liability, and has presented significant mitigation, as in Vecchione. Further, although factual similarities are evident, she does not have a disciplinary history like similarly situated attorneys who received a one-year suspension, as in Hand. Moreover, we note that Williams was decided in

December 2001, before censure became a recognized form of attorney discipline, pursuant to R. 1:20-15A(a)(4).

We determine that, on balance, a censure is the quantum of discipline necessary to protect the public and preserve confidence in the bar.

Members Hoberman and Zmirich voted to impose a six-month suspension. Vice-Chair Gallipoli and Members Joseph and Petrou 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
Bruce W. Clark, Chair

By: **/s/ Ellen A. Brodsky**
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Susan Penny Halpern
Docket No. DRB 19-356

Argued: February 20, 2020

Decided: June 4, 2020

Disposition: Censure

Members	Censure	Six-Month Suspension	Recused	Did Not Participate
Clark	X			
Boyer	X			
Gallipoli				X
Hoberman		X		
Joseph				X
Petrou				X
Rivera	X			
Singer	X			
Zmirich		X		
Total:	4	2	0	3

/s/ Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel