SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-449
District Docket No. XIV-2007-310E

IN THE MATTER OF

JOSEPH A. FOGLIA

AN ATTORNEY AT LAW

Decision

Argued: March 17, 2011

Decided: June 23, 2011

Charles Centinaro appeared on behalf of the Office of Attorney Ethics.

Raymond F. Flood appeared on behalf of respondent.

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

This matter came before us on a motion for final discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-13, following respondent's guilty plea to attempted income tax evasion, in violation of 26 U.S.C. § 7201, and false

statements to a federal agency, in violation of 18 U.S.C. § 1001 and § 1002. The OAE recommends a two-year suspension, retroactive to December 10, 2007, the date of respondent's temporary suspension. Respondent agrees with the OAE's recommendation, which he characterizes as "fair."

For the reasons set forth below, we accept the OAE's recommendation and impose a two-year suspension on respondent, retroactive to December 10, 2007.

Respondent was admitted to the New Jersey bar in 1975. He also is a member of the New York bar. At the relevant times, he maintained an office for the practice of law in Montvale.

Respondent has no disciplinary history. However, on December 10, 2007, he was temporarily suspended as a result of the allegations against him in this matter. In re Foglia, 193 N.J. 305 (2007).

The conduct that gave rise to this disciplinary matter against respondent was as follows: From 1999 through 2001, respondent practiced law in Montvale. His primary client was a group of companies referred to as the Wellesley entities. He received a salary from the Wellesley entities and was reimbursed for certain travel, meal, and entertainment expenses incurred when he was working on their behalf.

For the tax year 1999, respondent retained a New Jersey accountant to prepare his federal personal income tax return. He provided the accountant with a list of false business expenses that he claimed to have incurred during the course of his work as an attorney, in the year 1999.

Respondent submitted the false expenses to the accountant knowing that the accountant would rely on them, in preparing respondent's tax return. In fact, the accountant did rely on the false expenses in preparing the tax return. As a result, respondent's income was "substantially understated" on the return. Nevertheless, respondent signed the income tax return knowing that it had been prepared based on false business expenses and with the intention of avoiding the payment of a "substantial portion" of the tax due for the year 1999.

At a date not identified in the record, the Internal Revenue Service (the IRS) audited respondent's 1999 income tax return. Respondent retained a different accountant to represent him during that audit. Respondent transmitted his bank and credit card records to the accountant so that the accountant could prepare a general ledger of respondent's claimed business expenses for the year 1999. Respondent transmitted these records knowing that they reflected expenses incurred by him for

"purely personal reasons." Thus, when the accountant prepared the general ledger, it included as business expenses "tens of thousands of dollars" in gifts to respondent's daughter.

Based on the information reflected in the general ledger, the IRS agreed to adjust the 1999 income tax return. Respondent testified that he did "all of this" knowingly and with the intent to deceive the IRS.

On November 27, 2007, respondent appeared in the United States District Court for the District of New Jersey and pleaded guilty to one count of willfully attempting to evade the payment of federal income tax (26 U.S.C. § 7201) and one count of knowingly or willfully making "any materially false, fictitious or fraudulent statement or representation" (18 U.S.C. § 1001).

26 U.S.C. § 7201 provides:

> 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.

18 U.S.C. § 1001 provides, in pertinent part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331 [18 USCS § 2331]), imprisoned not more than 8 years, or both.

18 U.S.C. § 1002 provides, in pertinent part:

Whoever, knowingly and with intent to defraud the United States, or any agency thereof, possesses any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money, shall be fined under this title or imprisoned not more than five years, or both.

Respondent was sentenced on September 26, 2008. He received a one-year-and-one-day sentence for each count, to be served concurrently. Thereafter, he was to be placed on supervised release for two years for each count, also to run concurrently.

At sentencing, respondent expressed his "heart-felt concern, deep regret and remorse in the matter." In addition, multiple character letters were submitted to the federal court on respondent's behalf, attesting to his honesty, generosity, kindness, and skill as an attorney. Many similar letters also have been submitted to us.

In a January 14, 2011 letter to us, respondent accepted the OAE's recommended two-year retroactive suspension and asserted that all taxes owed to the federal government have been paid through 2009 and that all withholding taxes for the year ended December 31, 2010 have been properly withheld. He claimed that he is trying to repay family members who loaned him money so that he could satisfy his outstanding tax liability. He described himself as having been "thoroughly and forever stained by [his] own misdeeds." He expressed his "deepest regret for [his] crime."

Following a review of the full 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 the rule, a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(c)(1); In re Maqid, 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). Pursuant to that rule, it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." Hence, the sole issue before us is the extent of discipline to be imposed on respondent for his violation of RPC 8.4(b). R. 1:20-13(c)(2); In re Maqid, 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." In re Principato, supra, 139 N.J. at 460 (citations omitted). 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). Yet, even if the misconduct is not related to the practice of law, we must keep 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 fined $20,000); In re Batalla, 142 N.J. 616 (1995) (two-year suspension imposed on attorney who pleaded guilty to one count 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 one count 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 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); and In re Gurnik, supra, 45 N.J. 115 (attorney suspended for a period of 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).

Here, there is no reason for us to deviate from the typical measure of discipline imposed in cases similar to this: a two-year suspension, the discipline accepted by respondent. Even though respondent had an unblemished disciplinary history of twenty-four years, prior to the incident giving rise to this matter, in many of the two-year-suspension cases, the attorneys also had unblemished disciplinary records. Moreover, although respondent has expressed remorse for his misdeeds, we note that he did not solely attempt to evade the payment of income tax. He also involved innocent third parties in his scheme by providing his first accountant with fabricated expenses, on which the accountant relied in the preparation of respondent's income tax return, and by providing his second accountant with records that purportedly substantiated the expenses.

We determine, thus, that respondent should receive a two-year suspension, retroactive to the date of his temporary suspension, December 10, 2007.

Member Doremus 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
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joseph A. Foglia
Docket No. DRB 10-449

Argued: March 17, 2011

Decided: June 23, 2011

Disposition: Two-year retroactive suspension

Members	Disbar	Two-year Retroactive 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:		8				1

Julianne K. DeCore
Chief Counsel