SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-356
District Docket No. XIV-2011-0636E
and
Docket No. DRB 13-357
District Docket No. XIV-2011-0637E

IN THE MATTER OF	
DONALD J. GRASSO	
AN ATTORNEY AT LAW	

IN THE MATTER OF	
DALE S. ORLOVSKY	
AN ATTORNEY AT LAW	

Decision

Argued: February 20, 2014

Decided: April 29, 2014

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

Robert C. Scrivo appeared on behalf of respondents.

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

These matters were before us on a motion for final discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-13, following respondents' guilty pleas to one count of conspiracy to defraud the United States by conspiring to conceal from the Internal Revenue Service (IRS) income generated through a restaurant known as Mulligan's, contrary to 18 U.S.C. § 371. Because respondents were indicted together and the facts underlying their pleas are nearly identical, the two matters will be addressed together.

The OAE seeks a two-year suspension for each respondent. Neither respondent opposes the two-year suspension, but requests that it be retroactive to the date of their temporary suspensions. We determine to impose a two-year suspension on both respondents, retroactive to the date of their temporary suspensions in New Jersey, May 10, 2012 (respondent Grasso) and May 11, 2012 (respondent Orlovsky).

Respondent Grasso was admitted to the New Jersey bar in 1972 and the Florida bar in 1988. He has no history of final discipline in New Jersey. Because of his guilty plea, however, he was temporarily suspended in New Jersey, effective May 10, 2012. In re Grasso, 210 N.J. 153 (2012)

Respondent Orlovsky was admitted to the New Jersey bar in 1977 and the Florida bar in 1976. He has no disciplinary history in New Jersey, although he was temporarily suspended here, on May 11, 2012, as a result of his guilty plea. In re Orlovsky, 210 N.J. 156 (2012).

On April 26, 2012, respondents appeared before the Honorable Joel A. Pisano, in the United States District Court for the District of New Jersey, and pleaded guilty to conspiracy to defraud the United States by conspiring to conceal certain income from the IRS.

The conduct that gave rise to respondents' guilty plea was as follows:[1]

Respondents admitted that, from 2003 through 2005, they were each fifty percent owners of Mulligan's Bar and Restaurant, in Farmingdale, New Jersey. At their direction, substantial amounts of cash were removed from Mulligan's receipts and were not reported in the sales reports "used as the basis for reporting income for federal income tax purposes."

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[1] The general facts of this matter are applicable to both respondents. Facts applicable to only one of the respondents will be indicated as such, where appropriate.

Respondents received some of the cash that was removed from Mulligan's and intentionally failed to report that money as personal income on their federal income tax returns. Respondents also directed the payment of a portion of the unreported cash to some of the bar's employees, with the "intent and understanding" that the cash would not be reported as personal income on the federal income tax returns filed by those employees.

Additionally, respondents filed federal tax forms 1120 and 941 for the calendar years 2003, 2004, and 2005 that were materially false. In 2003, 2004, and 2005, respondents failed to report approximately $125,892, $199,363, and $192,987, respectively, in cash payroll.

Respondent Grasso also filed materially false personal federal income tax returns for those years. In 2003, 2004, and 2005, he failed to report approximately $62,000, $23,000, and $4,000, respectively, in gross income. He stipulated that the amount of tax loss for which he was responsible was $156,443.22.

Respondent Orlovsky, too, filed materially false personal federal income tax returns for those years. In 2003, 2004, and 2005, he failed to report approximately $58,000, $23,000, and $4,000, respectively, in gross income. He stipulated that the amount of tax loss for which he was responsible was $153,755.22.

At sentencing, on August 22, 2012, Judge Pisano placed respondents on probation for two years, with special conditions, including one year of home detention, electronic monitoring, and 200 hours per year of mandatory community service.[2]

During the sentencing proceeding, defense counsel pointed out that respondent Grasso had taken responsibility for his actions and had made full restitution to the federal government. Prior to sentencing, respondent Grasso paid $131,000 to the government, representing his share of the payroll tax loss. Defense counsel described respondent Grasso as a "workaholic" and a "kind man" who, for example, had opened his home to a family of four displaced by a fire and counseled a young man who eventually became a lawyer.

Defense counsel pointed out that respondent Orlovsky, too, had taken responsibility for his actions and had made full restitution to the federal government. Defense counsel described

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[2] On June 18, 2013, respondents appeared before Judge Pisano to request early termination of the electronic monitoring condition. The court granted that request, finding it reasonable that both the electronic monitoring and house arrest conditions be terminated.

respondent Orlovsky as "a community lawyer" who "helped people realize their dreams of purchasing their first home, opening their business." He was also described as a devoted family man, who volunteered with youth football and mentored some of the players. He expressed extreme sadness that his law firm was disbanded and would no longer be able to offer employment to its secretaries, paralegals, and other assistants.

The prosecutor reminded the court that, although tax evasion was considered epidemic in the restaurant industry, the frequency of the crime did not make it any less wrong for respondents to participate in it. The prosecutor also pointed out that not only did respondents underreport the cash payroll, but they also took cash out of the business and underreported those earnings on their personal income tax returns. Further, respondents were individuals who "should have know[n] better."

On the other hand, the prosecutor noted that respondents had no prior criminal history and had been contributing members of society. He was not concerned about any risk of recidivism on their part, but asked the judge to consider general deterrence, when imposing sentence. The prosecutor asked the court to treat both respondents similarly.

In sentencing respondent Grasso, the court noted that his conduct was very close to one that would justify a custodial sentence, but ultimately determined that a non-custodial sentence was appropriate. The court remarked that, had the tax loss been any higher, a custodial sentence would have been imposed. In mitigation, the court noted that respondent Grasso was a "very well educated, extremely responsible contributing member of his community," who "spent his entire adult life in legitimate businesses, including the practice of law." The court also noted that respondent Grasso did not act for substantial financial gain, as he derived a substantial income from the practice of law and the restaurant/bar was legitimately profitable.

The court imposed the same sentence on respondent Orlovsky, noting that many of the same considerations listed above applied to both defendants. Further, the court considered that respondent Orlovsky had adult children, including one who is a lawyer, a circumstance that made it undoubtedly difficult for respondent Orlovsky to address his criminal conviction with them. The court incorporated by reference the factors discussed at respondent Grasso's sentencing.

Additionally, the court found that (1) respondents were not the engineers of the scheme but, rather, relied on the people who

were in charge of the daily operations of the business; (2) they were sincerely remorseful and had taken responsibility for their actions; (3) they had already lost their reputations in the legal community; and (4) they had embarrassed their co-workers, family, friends, and the entire legal community. The court found the mitigating factors to be substantial, but also noted aggravating factors, including that this case involved "an intentional, systematic tax fraud committed by people who should have known better" and "who were lawyers." The court determined that a two-year probationary sentence was appropriate for both respondents.

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

Under R. 1:20-13(c), 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). 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 was the extent of discipline to be imposed upon each respondent for his

violation of RPC 8.4(b). 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 fashioning the appropriate measure of discipline, we must consider "the interests of the public, the bar, and 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, supra, 139 N.J. at 460 (citations omitted). We must take into consideration 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 the ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 167, 173 (1997). The obligation of an attorney to maintain the high standard of conduct required of a member of the bar applies even to activities that may not directly involve the practice of law or affect the attorney's clients. In re Schaffer, 140 N.J. 148, 156 (1995). "To the public he is a lawyer whether he acts in a representative capacity or otherwise." In re Gavel, 22 N.J. 248, 265 (1956). Thus, offenses that evidence ethics

shortcomings, although not committed in the attorney's professional capacity, will, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995).

As indicated above, the OAE recommended a two-year suspension for each respondent. Respondents consented to a two-year suspension, but requested that it be retroactive to the date of their temporary suspensions.

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).

Here, respondents pleaded guilty to conspiracy to defraud the United States government by conspiring to conceal certain income from the IRS. In essence, they were guilty of income tax evasion.

Cases involving an attorney's attempted or actual income tax evasion have resulted in discipline ranging from a six-month suspension to disbarment, although two-year suspensions are

imposed most often. See, e.g., In re Kleinfield, 58 N.J. 217 (1971) (six-month prospective 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 prospective 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)[3]; 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 one-year probation, including house arrest for six months and fifty hours' community service; also, the attorney 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

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[3] Neither Kleinfield nor Landi had been temporarily suspended. Therefore, the suspension was prospective.

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 Foglia, 207 N.J. 62 (2011) (two-year retroactive suspension imposed on attorney who pleaded guilty to attempted tax evasion, in violation of 26 U.S.C. § 7201, and making false statements to a federal agency, in violation of 18 U.S.C. § 1001 and § 1002; the attorney was sentenced to one-year-and-one-day 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); In re Weiner, 204 N.J. 589 (2011) (two-year retroactive 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; also, the attorney was ordered to pay a $10,000 fine and a $200 "special assessment"); In re Rakov, 155 N.J. 593 (1998) (two-year retroactive 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 Klein, 209 N.J. 234 (2012) (three-year suspension for an attorney who pleaded guilty to income tax evasion, in violation of 18 U.S.C.A. §7201, and criminal conspiracy to defraud the United States, in violation of 18 U.S.C.A. § 371; aggravating factors included evidence in the record that the attorney had assisted multiple clients in the commission of criminal activities and had set up an enterprise with a client for the sole purpose of evading taxes, a scheme that lasted eight years; the attorney's unblemished disciplinary record did not serve as mitigation since his criminal activity began one year after his admission to the bar (it remained undetected for an extended period of time)); In re Cooper, 139 N.J. 260 (1995) (three-year retroactive suspension for attorney who pleaded guilty to bank fraud, conspiracy to defraud the United States, and aiding and abetting income tax evasion; attorney played a major role in a sophisticated criminal enterprise that lasted over three years; mitigating factors included a long history of personal and familial mental illness); In re Braun, 149 N.J. 414 (1997)

(disbarment for attorney who plead guilty to income tax evasion, in violation of 26 U.S.C.A. § 7201; in aggravation, it was noted that the attorney's actions evidenced a criminal conspiracy extending over a long period of time, that the tax evasion exceeded $100,000, that the conduct was not episodic, and that it was motivated by personal greed, that the attorney had an ethics history, and that he failed to inform the OAE of his criminal conviction); and In re Bok, 163 N.J. 499 (2000) (disbarment for attorney convicted of federal income tax evasion, in violation of 26 U.S.C.A. § 7201, and filing of a false corporate income tax return, in violation of 26 U.S.C.A. § 7206(1); the attorney failed to include nearly $200,000 in his personal tax return and intentionally evaded corporate income taxes by underreporting gross receipts by more than $4 million, causing the government a tax loss of nearly $1,500,000; fraud of this magnitude was considered grounds for disbarment; in further aggravation, the attorney had been temporarily suspended, at the time of his conviction, for his failure to comply with the OAE's request for the production of books and records in connection with another disciplinary matter).

In the present cases, we find, in aggravation, that they involved a significant tax loss of approximately $155,000 each and

that both cash payroll from the restaurant and personal income tax evasion were part of the conspiracy. Further, the conspiracy took place over a three-year period. Finally, respondents were very successful attorneys and businesspersons, who were sophisticated enough to understand the consequences of their unlawful actions.

In mitigation, we find that respondents had unblemished records spanning over thirty years each in the practice of law, that they showed contrition at their sentencing, that reoccurrence of their unlawful actions is unlikely, and that both respondents have made full restitution.

After weighing the aggravating and mitigating factors present in this case, we find no reason to deviate from the typical measure of discipline imposed in analogous cases, a two-year retroactive suspension. In many of the two-year-suspension cases, the attorneys, like respondents, had lengthy unblemished disciplinary records. Further, cases warranting greater discipline than two-year suspensions generally included aggravating factors, such as extensive criminal conspiracies, that are not present in these matters.

Member Gallipoli filed a separate dissent, voting for disbarment. Member Doremus voted for a two-year prospective suspension. Member Yamner recused himself.

We further determine to require respondents 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: Isabel Frank
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matters of Donald J. Grasso
Docket Nos. DRB 13-356

Argued: February 20, 2014

Decided: April 29, 2014

Disposition: Two-year Retroactive Suspension

Members	Disbar	Two-year prospective Suspension	Two-year Retroactive Suspension	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh			X			
Clark			X			
Doremus		X				
Gallipoli	X					
Hoberman			X			
Singer			X			
Yamner					X	
Zmirich			X			
Total:	1	1	6		1	

Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matters of Dale S. Orlovsky
Docket Nos. DRB 13-357

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Decided: April 29, 2014

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Gallipoli	X					
Hoberman			X			
Singer			X			
Yamner					X	
Zmirich			X			
Total:	1	1	6		1	

Isabel Frank
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