SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-052
District Docket No. XIV-07-516E

IN THE MATTER OF	
JEFFREY L. KRAIN	
AN ATTORNEY AT LAW	

Decision

Argued: May 21, 2009

Decided: July 23, 2009

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

Katherine D. Hartman 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 reciprocal discipline filed by the Office of Attorney Ethics ("OAE"), following the Supreme Court of Pennsylvania's imposition of a four-year suspension on respondent for practicing law while

inactive (RPC 5.5(a) and (b)), conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)), and conduct prejudicial to the administration of justice (RPC 8.4(d)). The disciplinary charges stemmed from respondent's appearance in the Philadelphia courts in approximately 339 cases, after he had been placed on inactive status, and his guilty plea to sixteen counts of state tax law violations with respect to a Philadelphia restaurant that he owned.

The OAE urges a one-year suspension for respondent's ethics violations. Respondent requests no discipline, seeking instead "the opportunity to present his defense against reciprocal discipline." For the reasons set forth below, we determine to impose a one-year prospective suspension on respondent for his misconduct.

Respondent was admitted to the New Jersey bar in 1978, a year after he had been admitted to the bar of Pennsylvania. At the relevant times, he maintained an office for the practice of law in Philadelphia.

Respondent has no disciplinary history in New Jersey. He was on the list of ineligible attorneys for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection during the following periods: October 28, 1988 to

January 31, 1991; September 20, 1993 to June 23, 1994; September 21, 1998 to February 16, 1999; and September 20, 1999 to June 11, 2004.

The facts are taken from the July 23, 2008 Report and Recommendations of the Disciplinary Board of the Supreme Court of Pennsylvania.

By Order dated November 17, 2000, effective December 17, 2000, the Supreme Court of Pennsylvania placed respondent on inactive status due to his failure to comply with the requirements of the Pennsylvania Rules of Continuing Legal Education. On November 17, 2000, Elaine M. Bixler, Secretary of the Pennsylvania Board, wrote a letter to respondent, which

a. advised respondent that he had been transferred to inactive status;

b. advised respondent of his responsibilities under Pa.R.D.E. 217 and Rule 91.91 through 91.99 of the Disciplinary Board Rules;

c. enclosed Forms DB23(i) and DB-24(i) (Non-litigation and Litigation Notice of Disbarment, Suspension or Transfer to Inactive Status) and Form DB 25(i) (Statement of Compliance); and

d. informed respondent that in order to resume active status he was required to comply with the Pennsylvania Rules of continuing Legal Education before a request

for reinstatement to the Disciplinary Board would be considered.

[OAEaEx.E¶5.[1]]

Respondent received the letter. Therefore, he was aware that he had been transferred to inactive status. Despite the instructions in the letter, respondent failed to file a verified statement of compliance within ten days after the effective date of the transfer to inactive status, as required by Pa.R.D.E. Rule 217(e).

Between 2000 and 2006, respondent received an annual letter from the Pennsylvania Continuing Legal Education Board, advising him that he was on inactive status and was not authorized to practice law in Pennsylvania. As of the date of the Pennsylvania Board's decision (July 23, 2008), respondent remained on inactive status.

Notwithstanding respondent's ineligibility to practice law in Pennsylvania, on August 14, 2006, he filed a civil action on behalf of a client in the Court of Common Pleas of Philadelphia

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[1] "OAEa" refers to the appendix to the OAE's brief. Ex.E is the July 23, 2008 Report and Recommendation of the Disciplinary Board of the Supreme Court of Pennsylvania.

County. He failed to advise opposing counsel that he was on inactive status.

On October 16, 2006, opposing counsel filed a motion to disqualify respondent. Two days later, respondent withdrew his appearance in the matter.

On September 6, 2006, respondent filed a civil action on behalf of another client in the same court. Again, he did not inform opposing counsel that he was on inactive status.

On October 19, 2006, opposing counsel filed a motion to disqualify respondent. On November 13, 2006, the court granted the motion to disqualify. Respondent withdrew his appearance a week later.

From December 17, 2000, the effective date of respondent's transfer to inactive status, to July 23, 2008, respondent entered his appearance and/or actively engaged in the practice of law in approximately 339 cases in either the Court of Common Pleas of Philadelphia County or the Orphan's Court of

Philadelphia County.[2] In four matters, he subsequently withdrew his appearance.

In every court case, respondent failed to notify the court and opposing counsel that he was on inactive status. In some of the cases, he also received, disbursed or otherwise handled client funds.

From 1997 through 2002, respondent owned and operated a Philadelphia restaurant called Italia Restaurante and Pizza Company. Between October 21, 2001 and February 20, 2002, respondent failed to file five monthly Pennsylvania state sales tax returns and remit payment in the amount of $14,657.70. Between October 20, 2001 and February 20, 2002, respondent failed to file three quarterly state withholding tax returns and remit payment to the amount of $3,222.45. Consequently, criminal charges were brought against him.

On June 14, 2004, in the Court of Common Pleas of Dauphin County, respondent entered a guilty plea to five counts of willful failure to file sales tax returns, in violation of 72

[2] Respondent also represented clients in non-litigation matters.

P.S.C.A. §7268(b); five counts of willful failure to remit sales tax, in violation of 72 P.S.C.A. §7268(b); three counts of willful failure to file employer withholding tax returns, 72 P.S.C.A. §7353(c); and three counts of willful failure to pay over withheld state income tax, in violation of 72 P.S.C.A. §353(b). The crimes of which respondent was convicted are misdemeanors punishable by a maximum term of imprisonment and a fine as follows: willful failure to file sales tax returns -- one year, $1,000; willful failure to remit sales tax -- one year, $1,000; willful failure to file employer withholding tax returns -- two years, $5,000; and willful failure to pay over withheld state income tax -- two years, $25,000. In addition, each crime constituted a "serious crime," as defined by Pa.R.D.E. 214(i).

On October 7, 2004, respondent was sentenced to eighteen months' probation on each count, to run concurrently, and ordered to pay a $1200 fine and $492 in court costs. By order dated April 18, 2005, respondent was granted early discharge from probation.

Respondent failed to report his convictions to the secretary of the Pennsylvania Board, as required by Pa.R.D.E.

214(a). He also failed to promptly report his convictions to the New Jersey disciplinary authorities, pursuant to R. 1:20-13.[3]

As of the date of the Pennsylvania Board's decision, respondent had seven open judgments in the Court of Common Pleas of Philadelphia County. He had satisfied two IRS judgments in the same court.

At the time respondent was notified of his transfer to inactive status, his practice of law was his only source of income. Notwithstanding the above notification, respondent decided against closing his practice because he needed money for his restaurant and for his family, to pay debts to the IRS, and to pay his mortgage. Respondent engaged other lawyers to handle his cases but acknowledged that too many cases went unattended and required litigation where a timely settlement might otherwise have been possible.

Respondent's personal life involved the care of his elderly father, who suffered from kidney disease and required daily

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[3] Under R. 1:20-13(a)(1), respondent should have notified the Director of the OAE that charges were brought against him in December 2003, when the information was filed in the Court of Common Pleas of Dauphin County, Pennsylvania, Criminal Division.

assistance from 2000 to 2004. During this period, respondent cared for his father approximately three days a week.

Although respondent expressed remorse to the Pennsylvania hearing committee, the committee had found it to be "insubstantial and unconvincing."

The Pennsylvania Board concluded that the facts established that respondent had violated RPC 5.5(a) and (b), RPC 8.4(c), and RPC 8.4(d), in addition to several Pennsylvania rules of disciplinary enforcement. For these violations, the Pennsylvania Board recommended that respondent receive a four-year suspension, noting that the circumstances of the unauthorized-practice-of-law violation and the conviction of serious crimes each warranted a suspension. Of the unauthorized-practice-of-law violation, the Pennsylvania Board observed:

> This was not a situation where Respondent had no notice of his inactive status, or failed to comprehend the meaning of his transfer to inactive status. Respondent knew full well that he was not permitted to practice law. Tellingly, he explained that as his law practice was his sole source of income he decided against closing his practice as he needed to pay various bills. Respondent made an informed choice to ignore a Supreme Court Order prohibiting him from practicing law. At the time Respondent was placed on inactive status he thought that he

> would try and attain his credits but he failed to do so in a prompt manner, and remains on inactive status at the current time, some seven years later. At the hearing Respondent testified that he had approximately 22 credits pending.
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> [OAEaEx.E§IV,p.11-p.12.]

The Pennsylvania Board rejected respondent's father's illness, the demands it placed on respondent, and his financial obligations as justification for respondent's "flagrant violation of a court order," noting that respondent had "made no effort to curtail his misconduct or remedy his inactive status." Nevertheless, the Pennsylvania Board did not agree with the hearing committee's recommendation that respondent be disbarred.

On November 18, 2008, the Supreme Court of Pennsylvania entered an order suspending respondent for four years. The following month, respondent notified the OAE of his suspension.

In respondent's submission to us, he "respectfully requests the opportunity to present his defense against reciprocal discipline." He raises a number of facts and arguments that he believes we must take into account in determining the measure of discipline to be imposed in New Jersey.

Specifically, respondent claims that the Pennsylvania Board and the hearing committee "ignored" his attempt to remedy his

inactive status; the Pennsylvania presenter knew that respondent had been practicing while on inactive status and, yet, argued that he had deceptively continued to practice law; thus, the presenter engaged in prosecutorial misconduct in arguing that respondent should be disbarred; and the hearing committee "refused" to consider respondent's evidence pertaining to his claim that he had been ineffectively represented by his defense counsel in the criminal matter.

Respondent also seeks to have us consider additional facts, such as the alleged conflict of interest involving the presenter and one of the hearing committee members, both of whom lecture for the Pennsylvania continuing legal education program.

Respondent further claims that he was denied due process for the following reasons: his transfer to inactive status without a hearing, contrary to Pennsylvania CLE regulations that "implicitly" require a hearing; bias on the part of the hearing committee chair; the presenter's failure to admit that she knew that he had been practicing while on inactive status; the Pennsylvania Supreme Court's failure to separate the finders of fact from the "apparent influence of the prosecution;" the presenter's continued reliance on "inaccurate evidence;" the restriction or inhibition of respondent's property right to

practice law for failing to maintain CLE status; and the improper extension of the CLE rule violation to an enforcement rule.

Finally, respondent claims that the Pennsylvania Board made several inaccurate factual findings and that it erred as a matter of law on a number of points. As explained below, we need not consider any of these claims.

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline. Pursuant to R. 1:20-14(a)(5), another jurisdiction's finding of misconduct shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state. We, therefore, adopt the findings of the Disciplinary Board of the Supreme Court of Pennsylvania, which were approved by the Court.

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;

> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
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> (E) the unethical conduct established warrants substantially different discipline.

We are satisfied that the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (D). Subsection (E), however, applies in this matter because respondent's unethical conduct warrants substantially different discipline from that meted out in Pennsylvania. In New Jersey, a one-year suspension would be the appropriate measure of discipline for respondent's violations of RPC 5.5(a) and (b) and RPC 8.4(c) and (d).

"[A] final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state."

R. 1:20-14(a)(5). Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3). Accordingly, we cannot consider respondent's assertions that the Pennsylvania hearing committee and Pennsylvania Board erred as a matter of fact and as a matter of law.

Moreover, although deprivation of due process in the disciplinary proceeding of another state will prevent the imposition of reciprocal discipline here (R. 1:14(a)(4)(D)), the particular lack of due process identified by the rule is either in the lack of notice of the proceeding or the opportunity to be heard. Here, respondent does not argue that he was denied due process for either reason. Because R. 1:14(a)(4)(D) does not apply under the circumstances, we are permitted to impose discipline on respondent based on his misconduct in Pennsylvania.

In this case, respondent was found to have violated RPC 5.5(a) and (b) and RPC 8.4(c) and (d). Typically, attorneys who practice law while inactive or ineligible are reprimanded in New Jersey, when they are aware of their inactive or ineligible status and practice anyway. See, e.g., In re Marzano, 195 N.J.

9 (2008) (attorney represented three clients after she was placed on inactive status in Pennsylvania; the attorney was aware of her ineligibility); In re Davis, 194 N.J. 555 (2007) (attorney represented a client in Pennsylvania while the attorney was ineligible to practice law in that jurisdiction as a non-resident active attorney, and later, as an inactive attorney; the attorney also misrepresented his status to the court, to his adversary, and to disciplinary authorities; extensive mitigation considered); In re Coleman, 185 N.J. 336 (2005) (attorney who was aware of his ineligibility to practice law in Pennsylvania for nine years signed hundreds of pleadings and received in excess of $7,000 for those services); and In re Forman, 178 N.J. 5 (2003) (for a period of twelve years, the attorney practiced law in Pennsylvania while on the inactive list; compelling mitigating factors considered, including the attorney's lack of knowledge of his ineligibility).

In this case, respondent was aware of his inactive status but made a calculated decision to practice law anyway. He practiced law extensively, having entered his appearance in more than 300 cases during a seven-and-a-half-year period. The Pennsylvania disciplinary authorities rejected his claim that

his conduct had been caused by his father's illness and noted that he had not expressed sincere remorse for his conduct.

As the Pennsylvania Board recognized, respondent's misconduct was not a matter of neglect, but rather consisted of a "flagrant violation of a court order" and that he had "made no effort to curtail his misconduct or remedy his inactive status." Thus, given these aggravating factors, for respondent's violations of RPC 5.5(a) and (b), standing alone, we would impose at least a censure. But see In re Coleman, supra, 185 N.J. 335 (Court imposed reprimand despite our recommended one-year suspension, which had been based on the attorney's knowledge of his ineligibility, the extensive number of pleadings signed by him while he was aware of the ineligibility, the material gain, and his lack of candor to the hearing committee during the Pennsylvania disciplinary proceeding). However, we must also take into account respondent's criminal misconduct in our determination of the appropriate measure of discipline for the totality of his misdeeds.

With respect to respondent's criminal convictions, RPC 8.4(b) states that "[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in

other respects." In New Jersey, an attorney who commits a crime violates RPC 8.4(b). In re Margrabia, 150 N.J. 198, 201 (1997). The attorney also violates his or her professional duty to uphold and honor the law. In re Bricker, 90 N.J. 6, 11 (1982).

That respondent's convictions do not relate directly to the practice of law does not negate the need for discipline. The Supreme Court has described the reasons for disciplining attorneys whose illegal conduct is not related to the practice of law:

> In addition to the duties and obligations of an attorney to his client, he is responsible to the courts, to the profession of the law, and to the public[.] He is bound even in the absence of the attorney-client relation to a more rigid standard of conduct than required of laymen. To the public he is a lawyer whether he acts in a representative capacity or otherwise.
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> [In re Gavel, 22 N.J. 248, 265 (1956) (citations omitted).]
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> Accord In re Katz, 109 N.J. 17, 23 (1987).

In In re Willis, 114 N.J. 42, 48 (1989), the Supreme Court stated unequivocally: "The failure of a lawyer to file an income tax return is a serious transgression, regardless of mitigating circumstances, In re Queenan, 61 N.J. 579, 580 (1972), and cannot be redressed by a public reprimand, In re Van

Arsdale, 44 N.J. 318, 319 (1965)." Case law demonstrates that tax crimes typically result in at least a six-month suspension.

Attorneys convicted of willful failure to file one or two personal or corporate income tax returns generally receive a six-month suspension. In re Touhey, 156 N.J. 547 (1999) (failure to file a federal corporate income tax return); In re Gaskins, 146 N.J. 572 (1996) (failure to file an income tax return); In re Silverman, 143 N.J. 134 (1996) (failure to file a personal income tax return); In re Doyle, 132 N.J. 98 (1993) (failure to file one income tax return); In re Chester, 117 N.J. 360 (1990) (failure to file one income tax return); In re Leahy, 118 N.J. 578 (1990) (failure to file a tax return); and In re Willis, supra, 114 N.J. 42 (one federal income tax return).

A suspension is still in order even when there are mitigating factors. See, e.g., In re Touhey, supra, 156 N.J. 547 (attorney cooperated with disciplinary authorities) and In re Silverman, supra, 143 N.J. 134 (1996) (several mitigating circumstances considered, including the attorney's cooperation with the OAE, the financial and emotional distress caused by his wife's and mother-in-law's medical conditions, and the absence of intent to evade his tax obligations).

Absent strong mitigating circumstances, attorneys who repeatedly fail to file federal income tax returns generally receive a suspension of at least a year. In re Chester, supra, 117 N.J. at 364. See also In re Cattani, 186 N.J. 268 (2006) (one-year suspension for failure to file federal and state income tax returns for eight years) and In re Spritzer, 63 N.J. 621 (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).

When an attorney fails to file multiple tax returns, the Supreme Court has imposed less than a one-year suspension only in limited circumstances. In In re McEnroe, 172 N.J. 324 (2002), the Supreme Court imposed a three-month suspension on an 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. In the Matter of Eugene F. McEnroe, DRB 01-154 (January 29, 2002) (slip op. at 1, 8). In that case, however, the attorney had paid all outstanding federal and state tax obligations, which was considered in mitigation. Id. at 12-13.

In In re Williams, 172 N.J. 375 (2002), the attorney was reprimanded because, notwithstanding his willful failure to file the returns, he did not owe any tax and had incurred no penalties. In In re Vecchione, 159 N.J. 507 (1999), compelling, but unidentified, reasons justified a six-month suspension for the attorney's failure to file federal income tax returns for twelve years. In the Matter of Andrew P. Vecchione, DRB 98-386, slip op. at 11-12. See also In re Stenhach, 177 N.J. 559 (2003) (on motion for reciprocal discipline from Pennsylvania, attorney received a nine-month suspension for his guilty plea to one count of willful failure to file one federal income tax return; the attorney actually had failed to file tax returns and to pay taxes from 1982 through 1989; a jury also found the attorney guilty of two counts of willful failure to file Pennsylvania income tax returns and willful failure to remit income tax for the years 1996 and 1997; we saw no reason to deviate from the discipline imposed in Pennsylvania, given that the willful failure to file income tax returns typically results in a suspension in this state).

Here, respondent did not willfully fail to file personal income tax returns. Rather, he failed to file Pennsylvania monthly sales tax returns for a five-month period, as well as

three quarterly Pennsylvania withholding tax returns. Although respondent's convictions involve state tax returns, instead of federal tax returns, this is of no consequence, as the obligation to comply with these obligations is the same. He was responsible for filing the returns and remitting the payments for the restaurant regardless of his claim to have delegated the responsibility to someone else.

In keeping with the Court's pronouncement in Willis, suspensions have been imposed in cases involving the non-filing of corporate returns and the non-remitting of tax payments. In cases where no criminal charges were filed against the attorney, we have imposed discipline on the ground that the attorney had failed to keep taxes segregated and intact and to pay to the government that which the attorney was holding on its behalf. See, e.g., In re Gold, 149 N.J. 23 (1997) (six-month suspension on attorney who failed to safeguard funds as the result of his failure to remit to the federal government payroll taxes that he had withheld from his secretary's salary; we did not find a violation of RPC 8.4(c) or RPC 8.4(d) because there was insufficient evidence to determine whether the attorney or his secretary were responsible for sending the payments to the government and there was no evidence that the failure was

intentional on his part; instead we found that the attorney had "violated his fiduciary obligation to properly remit his employee's funds to the governmental authorities" and that he had failed to keep the taxes segregated and intact, as required by RPC 1.15(b); we warned that, in the future, "such misconduct will be met with stern discipline;" the attorney also engaged in two conflicts of interest by (1) entering into a loan transaction with his secretary, whom he had also represented in the purchase of her residence, and (2) representing both parties to a loan agreement) and In re Olitsky, 149 N.J. 27 (1997) (attorney was suspended for three months for intentionally commingling client funds, business funds, and personal funds in his trust account to avoid an IRS levy, in violation of RPC 8.4(c); although the attorney filed the required federal and state quarterly employment tax returns, he did not remit the required payments for an employee's social security and withholding taxes for six quarters; no criminal charges were brought against the attorney).

If the attorney is convicted of a crime as the result of the failure to file returns and pay taxes, a suspension of at least six months will generally be imposed. In In re Esposito, 96 N.J. 122 (1984), the Court agreed with our determination to

impose a six-month suspension on an attorney who pleaded guilty to one count of willful failure to pay income and Social Security taxes on behalf of his employees and Social Security taxes on behalf of the employer. The attorney had been charged with having failed to remit these payments on the required quarterly basis from July 1976 through December 1978. Id. at 128.

In making our determination for discipline in Esposito, we took into consideration that the attorney's conduct was "not marked by any attempt at personal gain," that the funds due to the IRS "were at all times available in [his] business account," and that the attorney was "under severe emotional distress during much of the period that the taxes remained unpaid due to his mother's lengthy illness and consequent death." Id. at 132.

In support of the six-month suspension, we cited In re Hughes, 69 N.J. 116 (1976), in which an attorney was suspended for the same length of time after he had pleaded nolo contendere to one count of a multi-count federal information for failure to file, within time, income tax returns for the years 1967, 1968 and 1969, in addition to the employer's quarterly federal tax returns during the period September 30, 1967 to December 31, 1969. By the time of his disciplinary hearing, all returns had

been filed and all taxes were either paid or in the process of being paid. Id. at 117.

The Hughes decision suggests quite strongly that the failure to file the returns and to pay the taxes in Esposito stemmed from a very serious illness. Id. at 117-18. Moreover, during the time of his illness and non-compliance with the tax laws, the attorney had every intention of meeting his obligations as soon as he recovered; and, in fact, he voluntarily pointed out his delinquencies to the IRS during an audit. Id. at 118.

We are aware that a few attorneys who have failed to file tax returns and remit tax payments with respect to the income of their law firms have received reprimands. See, e.g., In the Matter of Christian A. Pemberton, DRB 04-271 (October 25, 2004) (on motion for discipline by consent, attorney did not pay quarterly federal withholding taxes between 1995 and 2003 and, for several years, filed tax reports only sporadically, while misrepresenting on his employees' W-2 forms that he had paid the taxes; although the attorney entered into a payment plan with the IRS to reduce the overdue tax debt, he eventually did not have enough money to follow through, but he continued to work with the IRS in resolving the debt; multiple mitigating factors

were considered, including the inadvertent error that resulted in an overage in amount due to the IRS, his lack of disciplinary history, his cooperation with the OAE, the absence of evidence that he had used the money irresponsibly to "wine and dine" clients, and, as in a similar case, his attempt to resolve the matter with the IRS) and In re Frohling, 153 N.J. 27 (1998) (attorney failed to pay all or part of federal withholding taxes for five years and state unemployment taxes for two years; the attorney presented his employees with W-2 forms indicating that certain sums had been deducted from their gross salaries and either had been or would be paid to the government; unlike the attorney in Pemberton, Frohling did use those funds to "wine and dine" his clients; no criminal charges were filed against Frohling, and we viewed the matter as a breach of his duty to turn over payroll taxes to the government; moreover, we determined that Frohling's impropriety "lay in his misrepresentation to the employees and to the government that certain sums had been set aside for the payment of taxes").

In the case before us, however, precedent requires the imposition of nothing less than a suspension. Unlike the attorney in Frohling, respondent was convicted of both failing to file returns and failing to remit payments for multiple tax

periods. In addition, unlike the attorney in Pemberton, there is no evidence that respondent had "over-calculated" the amount due or that he had worked with the Pennsylvania tax authorities in resolving the issues.

Moreover, the crimes committed by respondent were "serious crimes," as determined by the Pennsylvania Board, pursuant to that jurisdiction's rules. We are bound by those findings.

Furthermore, the attorneys in Frohling and Pemberton did not practice while ineligible. Finally, Pennsylvania judged respondent's misconduct to be so serious that it suspended him for four years. Thus, a reprimand would not be sufficient discipline for respondent's misdeeds.

A three-month suspension also would be insufficient. Unlike the attorney in Olitsky, respondent was convicted of four different tax-related offenses, failed to file the returns (whereas Olitsky had failed only to remit the payments), and also engaged in other misconduct, namely practicing while on inactive status.

The same holds true for a six-month suspension. As stated previously, absent strong mitigating factors, attorneys who repeatedly fail to file federal income tax returns generally receive a one-year suspension. In those cases where an attorney

has been convicted of a crime as the result of failure to comply with state employer tax laws, suspensions of less than a year were imposed in matters involving less egregious behavior than here. For example, in Esposito, the attorney had only failed to remit payment. There was no evidence that he had failed to file the returns. In addition, the funds due to the taxation authorities were available in his business account at all times. Although the attorney in Hughes failed to file returns and remit taxes, he was very ill at the time, and his dereliction stemmed from his own illness. Moreover, the evidence established that he had never intended to deprive the government of the taxes. In addition, the attorney self-reported his delinquencies and, by the time of the disciplinary hearing, had filed all returns and remitted (or was in the process of remitting) all payments.

In this case, there are insufficient mitigating factors to justify a suspension of less than a year. First, respondent was convicted of failing to file multiple returns and to remit multiple payments; there is no evidence that he has satisfied

all of his obligations to the taxation authorities;[4] there is no evidence that he has ever cooperated with the taxation authorities; and there is no evidence in mitigation, other than respondent's lack of disciplinary history. Moreover, in Esposito and Silverman there was no intent on either attorney's part to evade his tax obligations, as the funds due were at all times available in his business account. Not so here.

Other factors, too, militate against the imposition of less than a one-year suspension. Respondent failed to report to the OAE that he had been charged with crimes in Pennsylvania; he also practiced while on inactive status in Pennsylvania; and his expression of remorse to the hearing committee was determined to be "unconvincing."

For the totality of respondent's misconduct in knowingly practicing while on inactive status to a significant degree in Pennsylvania, in being convicted of several serious tax-related crimes in Pennsylvania, in failing to report the criminal

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[4] The Pennsylvania Board's decision contains insufficient findings upon which to conclude whether respondent did or did not owe money to the Commonwealth of Pennsylvania and, if so, whether he has satisfied his obligations.

charges to the OAE, and in failing to express sincere remorse for his misconduct, we determine to impose a prospective one-year suspension on him.

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: Isabel Frank
for Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Jeffrey L. Krain
Docket No. DRB 09-052

Argued: May 21, 2009

Decided: July 23, 2009

Disposition: One-year suspension

Members	Disbar	One-year 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:		9				

By Julianne K. DeCore
Chief Counsel