SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-135
District Docket No. XIV-2009-015E

IN THE MATTER OF	:
JOEL R. WEINER	:
AN ATTORNEY AT LAW	:

Decision

Argued: July 22, 2010

Decided: October 7, 2010

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

Robert J. Alter appeared on respondent's behalf.

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, following respondent's guilty plea in the United States District Court for the District of New Jersey to two counts of willfully preparing and presenting to the Internal Revenue Service (IRS) a false and fraudulent tax return on behalf of a

taxpayer, in violation of 26 U.S.C.A. §7206(2). The OAE recommends a two-year suspension, retroactive to January 27, 2009, the date of respondent's temporary suspension in New Jersey. Respondent urges the imposition of lesser discipline. We agree with the OAE that a two-year retroactive suspension is the appropriate discipline in this case.

Respondent was admitted to the New Jersey bar in 1970. At the relevant times, he maintained an office for the practice of law in Martinsville, New Jersey.

Respondent has no disciplinary history. As mentioned above, however, the Supreme Court temporarily suspended him on January 27, 2009, "pending the final resolution of ethics proceedings pending against him. . . ." In re Weiner, 197 N.J. 431 (2009).

On January 6, 2009, respondent was charged with two counts of knowingly and willfully aiding, advising, procuring, counseling, and assisting in preparing and presenting to the IRS a client's tax returns for years 2001 and 2002 that were "fraudulent and false as to material matters, knowing that the returns were false and fraudulent," a violation of 26 U.S.C.A. § 7206(2). On that same date, respondent entered a guilty plea to the charges.

Specifically, while respondent was in the business of preparing or assisting in the preparation of tax returns, he prepared fraudulent individual tax returns for taxpayer M.A. for

the years 2001 and 2002. He also inflated the amount of business deductions claimed on those returns by approximately $28,212 for tax year 2001 and by approximately $11,995 for tax year 2002. Consequently, the taxpayer's total tax liability for these tax years was understated by approximately $12,263. Respondent acknowledged to the United States district judge that he prepared these false income tax returns knowingly and willfully, with the specific intent to violate the law.

26 U.S.C. §7206(2) provides:

> Any person who . . . [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . shall 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 3 years, or both, together with the costs of prosecution.

On April 21, 2009, respondent was sentenced to a two-year probationary term, which included a six-month period of house arrest, and was ordered to pay a $10,000 fine and a $200 "special assessment." Respondent told the sentencing judge:

> Your Honor, I am embarrassed and humiliated to be before [Y]our Honor today

> and, quite frankly, I never thought in my life something like this would happen. I have no one to blame but myself. I take absolute full responsibility for my being here.
>
> I want to apologize to the Court, to the government, to my clients, to my loyal and dedicated staff whose lives are obviously affected by what happens today, and most of all I would like to apologize to my family. I embarrassed them and humiliated them, caused them great concern because they are concerned about me. I truly am sorry for what I did. It was stupid. I am truly sorry.
>
> [OAEaEx.3p.10,11.10-23.]

Prior to assessing the penalty, the judge made the following observations:

> Mr. Weiner, as I sit here, and perhaps some of my comments will overlap the factors in 3553(a) a bit and not broken down specifically, but this is really a dilemma for the Court as to why you engaged in this activity. When I look at everything that has been submitted on your behalf, the life that you led, and what people who know you professionally, how they speak of you, and the manner in which they look at you, and the respect that they had for you, certainly it's [sic] seems aberrant.
>
> I've just been stymied by why you do these things. But you know by being a professional, not only a tax preparer, but an attorney, and understanding the laws involved, that it is a serious matter and you had a certain ability that you used to engage in this activity. So I start by noting that.
>
> . . . .

Frankly, I think this experience and what you have gone through and as you talked about the humiliation that you had, the tremendous impact it will have on you in a sense that your law license has been suspended, you will likely not ever practice law again, those impacts are tremendous already. And given the individual that you are, certainly they act as a deterrence. I have virtually no concern about future criminal activity.

Furthermore, however, it was offered up by your counsel a mechanism to make sure that [there] is no repetition of this activity, at least during the period of supervision, and that is more than acceptable. As I said, deterrence is really not a concern of the Court at this point.

As an issue of general deterrence, I make that comment because obviously any sentence has to reflect the notion of the seriousness of the offense and that the public understands that anyone who would consider engaging in such activity the sentence the Court metes out reflects that that should act as a deterrence as well to anyone else in the public.

Looking at your personal history and characteristics, I did receive a number of letters on your behalf both from family members as well as colleagues of yours in your profession, otherwise, friends that you have that attest to your generosity, your devotion to your family, both your own daughter, your step-children and others, and that certainly in your professional life until these events that there would have been no reason at any time to question your approach in both your professional and personal life.

[OAEaEx.3;p.15l.11 to OAEaEx.3;p.17l.13.]

Respondent reported his conviction to the OAE.

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). Respondent's guilty plea to two counts of 26 U.S.C.A. §7206(2) establishes his 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 is the extent of discipline to be imposed. R. 1:20-13(c)(2); In re Magid, supra, 139 N.J. at 451-52; In re Principato, supra, 139 N.J. at 460.

In determining the appropriate measure of discipline, the interests of the public, the bar, and 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). 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).

Cases involving attempted or actual income tax evasion have resulted in suspensions ranging from six months to three years, although two-year suspensions are typically imposed. See, e.g., In re Kleinfeld, 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 taken into account); 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 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 considered in mitigation); In re Mischel, 166 N.J. 219 (2001) (two-year suspension for attorney with a prior unblemished record who pleaded guilty in New York to a charge of offering a false instrument for filing; the false instrument was a New York State tax return that the attorney knew contained false and fraudulent deductions); In re Rakov, 155 N.J. 593 (1998) (two-year

suspension imposed on attorney convicted of attempted federal income tax evasion, which he carried out by failing to report interest income on his federal income tax returns for four years); In re Batalla, 142 N.J. 616 (1995) (two-year suspension imposed on attorney who pleaded guilty to one count of income tax evasion; the attorney underreported his taxable income on his individual federal income tax return); In re Nedick, 122 N.J. 96 (1991) (two-year suspension for failing to report $7500 in cash legal fees as taxable income; unblemished record and additional mitigating factors considered); In re Tuman, 74 N.J. 143 (1977) (attorney suspended for two years for evading the income tax on $3295 and filing a false return; the attorney's "otherwise unblemished record at the bar and his other eleemosynary services throughout the years" were considered in mitigation); In re Becker, 69 N.J. 118 (1976) (two-year suspension for willfully attempting to evade the payment of federal income taxes by the filing of a false and fraudulent tax return; the Court found the attorney's offered mitigation "for the most part unimpressive or irrelevant," but noted his unblemished record since his 1938 admission to the bar); In re Gurnik, 45 N.J. 115 (1965) (attorney suspended for two years after he pleaded nolo contendere to filing a false and fraudulent joint tax return on his and his wife's behalf; at the

time of the infraction, the attorney was a municipal court magistrate); and In re Gillespie, 124 N.J. 81 (1991) (attorney received a retroactive three-year suspension after pleading guilty to willfully aiding and assisting in the presentation of false corporate tax returns for a non-client corporation, J.P. Sasso, Inc; the attorney assisted Joseph Sasso and others in diverting nearly $80,000 in corporate funds during a period in excess of three months; the attorney did so by depositing corporate checks in his personal account, issuing eight personal checks, and then giving cash to Sasso; the eight checks were written in individual amounts no greater than $10,000 in order to avoid federal reporting requirements; numerous compelling mitigating factors considered).

Here, too, the mitigating factors are significant. Respondent did not act for personal gain; he was not sentenced to prison; he has enjoyed an unblemished disciplinary history of forty years; he expressed genuine remorse and took full responsibility for his misconduct; the sentencing court found his conduct to be aberrant and unlikely to be repeated; and the sentencing court noted the humiliation that he has suffered as a result of his dereliction.

We do not view respondent's conduct to be as grievous as that of attorney Gillespie, who not only assisted another in the

presentation of false tax returns, but also avoided the filing of currency transaction reports by issuing eight checks under $10,000 from his personal account. In this regard, we note that, each of those eight times, Gillespie formed the mens rea to act criminally.

Nevertheless, respondent's conduct was very serious. He knowingly assisted a taxpayer in avoiding a $12,000 tax liability by inflating the amount of business deductions on two tax returns. In light of the foregoing, we determine that a two-year suspension, the discipline supported by the above-cited precedent and recommended by the OAE, is appropriate in this case. We further determine that the suspension should be retroactive to the date of respondent's temporary suspension, January 27, 2009.

Member Yamner recused himself. Member Clark 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: Isabel Frank
for Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joel R. Weiner
Docket No. DRB 10-135

Argued: June 17, 2010

Decided: October 7, 2010

Disposition: Two-year suspension

Members	Disbar	Two-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:		7			1	1

Julianne K. DeCore
Chief Counsel