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SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 06-037  
District Docket No. XIV-04-206E

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IN THE MATTER OF :  
JOSEPH R. D'ANDREA :  
AN ATTORNEY AT LAW :  
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Decision

Argued: March 16, 2006

Decided: April 28, 2006

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE) following respondent's one-year suspension in Pennsylvania. For

eighteen-month suspension is the appropriate form of discipline for respondent's misconduct.

Respondent was admitted to the Pennsylvania bar in 1985 and the New Jersey bar in 1987. His New Jersey ethics history is limited to a May 7, 2004 temporary suspension, which was imposed following his March 21, 2003 guilty plea in the United States District Court of the Middle District of Pennsylvania to one count of willfully subscribing to a false 1995 federal income tax return, in violation of 26 U.S.C. § 7206(1). In re D'Andrea, 179 N.J. 508 (2004). Respondent remains suspended.

From 1985 until 1987, respondent was an assistant district attorney in Lackawanna County, Pennsylvania. In 1987, he opened his own office. He concentrated his practice in criminal defense work. From 1995 to 1997, respondent failed to report income from the practice, a large percentage of which was received from clients in the form of cash and checks. Respondent's law office had no accounting system to record check and cash receipts or disbursements.

On March 21, 2003, respondent entered into a plea agreement with the United States Attorney's Office. In exchange for respondent's guilty plea to one count of willfully subscribing to a false 1995 federal income tax return, in violation of 26

U.S.C. § 7206(1), the United States Government agreed to "bring no further criminal charges against defendant . . . based upon his conduct related to the filing of his 1995, 1996 and 1997 income tax returns or his tax liability for those years."

On June 5, 2003, respondent pleaded guilty pursuant to the plea agreement and was sentenced to one-year probation, including six months' house arrest, and fifty hours' community service. In addition, he was ordered to pay a \$10,000 fine and \$34,578 in restitution to the IRS, which he had already done. Respondent satisfied all of the requirements of his sentence and paid the IRS \$69,013.89 in interest and penalties due for the 1995, 1996, and 1997 tax years.

On November 29, 2003, the Supreme Court of Pennsylvania entered an order suspending respondent for one year, retroactive to November 24, 2003. On December 14, 2005, the Pennsylvania high court reinstated him to active status.

The OAE requests the imposition of an eighteen-month suspension, retroactive to May 7, 2004, the date of respondent's temporary suspension in New Jersey. Respondent, who "takes no opposition to the allegations contained" in the OAE's motion for reciprocal discipline, concurs with the OAE's recommendation.

In addition, when respondent appeared before us, he expressed genuine remorse for his misconduct.

Following a review of the record, we determined to grant the OAE's motion for reciprocal discipline. 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:

(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;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(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

(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). However, subparagraph (E) warrants different discipline, inasmuch as the circumstances surrounding respondent's misconduct require an eighteen-month suspension, rather than the one-year suspension imposed by the Supreme Court of Pennsylvania.

"[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).

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 Marqrabia, 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 primary purpose of imposing discipline is not to punish the attorney. In re Gallo, 178 N.J. 115, 122 (2003). Rather, "the purpose of the disciplinary review process is to protect the public from unfit lawyers and promote public confidence in our legal system." Ibid. Even a minor violation of the law may lessen public confidence in the legal profession. In re Addonizio, 95 N.J. 121, 124 (1984).

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.

[In re Gavel, 22 N.J. 248, 265 (1956) (citations omitted).]

Accord In re Katz, 109 N.J. 17, 23 (1987).

A violation of federal tax law is a serious ethics breach. 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) (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).

Attorneys who evade, or seek to evade, the payment of income taxes typically receive two-year suspensions. 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; attorney failed to report the interest paid to him on personal loans on his federal income tax returns); In re Batalla, 142 N.J. 616 (1995) (two-year suspension imposed upon 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; 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 \$7,500 in cash received in payment of legal fees; unblemished record and additional mitigating factors

considered); In re Tuman, 74 N.J. 143 (1977) (attorney convicted of attempting to evade income taxes and filing a false and fraudulent joint tax return merited a two-year suspension from the practice of law); 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 from practice of law for two years); and In re Gurnik, supra, 45 N.J. at 115 (attorney suspended for a period of two years after he pleaded nolo contendere to a charge of tax evasion for one calendar year).

Unlike respondent, the offenses committed by the attorneys in the above-referenced cases were direct attempts at income tax evasion, a more serious offense, and a violation of 26 U.S.C. § 7201. Respondent, however, pleaded guilty to filing a false income tax return, a violation of 26 U.S.C. § 7206. 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.

[26 U.S.C. § 7201 (emphasis supplied).]



26 U.S.C. § 7206(1), on the other hand, provides:

Any person who—

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . .

. . . .

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.

[26 U.S.C. §7201(1) (emphasis supplied).]

The difference between the statutes has been described as follows:

Section 7201 has been described as "the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law." Spies v. United States, 317 U.S. 492, 497, 87 L. Ed. 418, 63 S. Ct. 364 (1943). The elements of a § 7201 violation are (1) willfulness, (2) the existence of a tax deficiency, and (3) an affirmative act constituting an evasion or attempted evasion of the tax. See Sansone, supra at 351. We have also required that the tax deficiency be substantial. United States v. Nunan, 236 F.2d 576, 585 (2d Cir. 1956), cert. denied,

353 U.S. 912, 77 S. Ct. 661, 1 L. Ed. 2d 665 (1957); United States v. Norris, 205 F.2d 828, 829 (2d Cir. 1953); see United States v. Burkhardt, 501 F.2d 993, 995 (6th Cir. 1974), cert. denied, 420 U.S. 946, 95 S. Ct. 1326, 43 L. Ed. 2d 424 (1975).

Section 7206(1) is a lesser-included offense of § 7201. Cf. United States v. LoRusso, 695 F.2d 45, 52 n.3 (2d Cir. 1982), cert. denied, 460 U.S. 1070, 103 S. Ct. 1525, 75 L. Ed. 2d 948 (1983) (a charge is a lesser-included offense when "it is composed of fewer than all of the elements of the [greater] offense charged, and if all of its elements are elements of the [greater] offense charged"). It requires the willful making and subscribing to a tax return that is false in a material matter. See United States v. Hedman, 630 F.2d 1184, 1196 (7th Cir. 1980), cert. denied, 450 U.S. 965, 101 S. Ct. 1481, 67 L. Ed. 2d 614 (1981). As in United States v. Tsanas, 572 F.2d 340, 343 (2d Cir.), cert. denied, 435 U.S. 995, 56 L. Ed. 2d 84, 98 S. Ct. 1647 (1978), in this case "the criminal act charged was the filing of false income tax returns, [and therefore,] the only difference between the two offenses is that § 7201 requires proof of an intention to 'evade or defeat' a tax whereas § 7206(1) penalizes the filing of a false return even though the falsity would not produce tax consequences."

[United States v. Citron, 783 F.2d 307, 312-313 (2d Cir. 1986).]

In short, the filing of a false income tax return is a lesser-included offense of income tax evasion. United States v. Citron, 783 F.2d 307, 312-313 (2d Cir. 1986). For purposes of

discipline, however, we do not distinguish between the two crimes. See, e.g., In re Kirnan, 181 N.J. 337 (2004).

Kirnan is the only case that involves the filing of a false income tax return. In that case, like here, the attorney entered a guilty plea in the United States District Court for the District of New Jersey to an information charging him with filing a false federal tax return, in violation of 26 U.S.C. § 7206(1). In the Matter of Matthew J. Kirnan, Docket No. 04-122 (DRB July 7, 2004) (slip op. at 2). He was sentenced to three years' probation and 300 hours of community service and fined \$3000. Id. at 4.

Upon motion for final discipline, the OAE requested the imposition of an eighteen-month suspension, retroactive to the date of the attorney's temporary suspension. Ibid. We concluded that the attorney's violation of the federal statute was clear and convincing evidence that he had violated RPC 8.4(b). Ibid. We also acknowledged that a two-year suspension would be the appropriate measure of discipline for the attorney's misconduct. Id. at 7. Nevertheless, we took into account his extensive cooperation with a federal corruption investigation and were persuaded that an eighteen-month suspension was sufficient discipline. Id. at 7.

In this case, we are also convinced that an eighteen-month suspension is sufficient discipline. With the exception of this incident, respondent's disciplinary record in Pennsylvania and New Jersey is unblemished; at oral argument before us, we were impressed by his quick expression of genuine remorse for his misconduct, as well as his apologies to us and the disciplinary system for his ethics infractions; the record shows that, prior to his sentencing, respondent paid the taxes on the 1995 unreported income, and the \$10,000 fine shortly thereafter; he also has paid the interest and penalties for tax years 1995, 1996, and 1997; ten years have passed since respondent filed the false 1995 income tax return; and it appears that a large percentage of the unreported income was from respondent's clients, and that his law office had no accounting system set up to record these payments.

Accordingly, we determine that an eighteen-month suspension, retroactive to the May 7, 2004 temporary suspension, is sufficient discipline for his misconduct. Members Pashman and Stanton voted for a two-year suspension, also retroactive to the May 7, 2004 temporary suspension.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board  
Mary J. Maudsley, Chair

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

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SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Joseph R. D'Andrea  
Docket No. DRB 06-037

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Argued: March 16, 2006

Decided: April 28, 2006

Disposition: Eighteen-month suspension

Members	Disbar	Two-year Suspension	Eighteen- month suspension	Dismiss	Disqualified	Did not participate
Maudsley			X			
O'Shaughnessy			X			
Boylan			X			
Holmes			X			
Lolla			X			
Neuwirth			X			
Pashman		X				
Stanton		X				
Wissinger			X			
<b>Total:</b>		2	7			

  
Julianne K. DeCore  
Chief Counsel