SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 01-154

IN THE MATTER OF

EUGENE F. McENROE

AN ATTORNEY AT LAW

Decision

Argued: July 19, 2001

Decided: January 29, 2002

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

Charles J. Uliano appeared on behalf of respondent.

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

This matter was before us based on a recommendation for discipline filed by the District IX Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1971 and has no disciplinary history.

The complaint alleged that respondent wilfully failed to file federal and state income

tax returns for the tax years 1988 through 1994, in violation of 26 U.S.C. 7203, RPC 8.4(b) (criminal acts which adversely reflect on the attorney's trustworthiness) and RPC 8.4(c) (dishonesty and deceit).[1]

* * *

This matter was brought to the attention of the Office of Attorney Ethics ("OAE") by the Office of the Attorney General, after it represented the New Jersey Division of Taxation ("Division of Taxation") in attempting to recover unpaid income taxes from respondent. Thereafter, the OAE conducted a demand audit, at which time it reviewed copies of respondent's tax returns, both state and federal, for the years 1988 through 1994.

With regard to the federal tax returns, respondent gave the OAE unfiled, undated copies, except for the 1990 and 1991 returns, which were dated April 20, 1995 and May 11, 1995, respectively. The OAE later requested copies from the Internal Revenue Service ("IRS") of the filed returns for tax years 1988 through 1994. The record does not reveal if the OAE received those documents.

Respondent testified at the DEC hearing that he customarily prepared the couple's joint tax returns, since their marriage in 1962. Patricia, an Assistant Public Defender, had

---

[1] The complaint further alleged that respondent's wife, a New Jersey attorney, also wilfully failed to file her income tax returns for the same tax years. Those allegations were dismissed, at the conclusion of the DEC hearing, for lack of clear and convincing evidence.

Respondent and his wife, Patricia McEnroe, historically filed joint tax returns. Respondent signed his wife's name, with her authority, on the returns. Therefore, all of the tax obligations herein were joint in nature, although referred to as respondent's.

given respondent the authority to sign her name to those documents. As the DEC hearing unfolded, it became clear from her testimony that respondent had kept his wife completely in the dark about the 1988 through 1994 tax years. She believed that he had done whatever was necessary to pay the taxes for those years.

Respondent admitted that he did not file a federal tax return on the April 15th deadline for any of the years from 1988 through 1994. Rather, he filed for an automatic six-month extension each year. Respondent testified as follows:

> Rather than filing a 1040 at that particular moment, I filed an alternative, which is in effect an automatic extension granted to me by my understanding of the tax code and by law, and as I testified, it clearly in my mind and its purpose is not to avoid or evade, but rather to acknowledge that I have an obligation, and it's just a question of when I file the returns and come to the agreement with the IRS with respect to any monies owed or if they owe me.

Upon the expiration of the six-month extensions, however, respondent did not file the returns. Respondent argued that filing for an extension was equivalent to an admission of his tax obligations and that, thereafter, he could file the actual return whenever he was ready. Respondent also claimed that, for some of the tax years, he paid estimated taxes. Respondent did not support that argument in any way.

Over the ensuing years, from at least early 1992 onward, the IRS persisted in its attempts to recover not only delinquent taxes, but also accrued interest and penalties. The record is replete with IRS letters to the couple, evidencing the complexity of their tax situation, created by the failure to file the tax returns. At the DEC hearing, respondent ridiculed the IRS for having "screwed up" the couple's taxes by estimating their liability for

the years that they had not filed returns. According to respondent, in 1995 he finally "got it straightened out" with the IRS, coming to an agreement about the outstanding tax obligations. Respondent claimed that he had paid all of the outstanding federal tax obligations in 1995, which totaled $20,653.17. There is no evidence in the record to contradict respondent's statement.

Respondent also testified about his New Jersey tax obligations. According to respondent, the extensions to file his federal tax returns also served as automatic extensions to file his New Jersey returns for those years. Here, too, respondent claimed that the extensions served as a recognition of his New Jersey tax obligations and his intent to file tax returns at a future time. Again, respondent did not do so until years later, as seen below.

On May 1, 1997, some nine years after the first return was due, the Division of Taxation sent a letter to respondent about the delinquencies for the years 1988 through 1994. That letter warned respondent that, if he did not reply within thirty days, the Division of Taxation would estimate the couple's tax liability based upon "available information," because it had no actual tax returns. Not hearing from respondent, on June 9, 1997 the Division of Taxation sent him a letter about its estimated tax assessment, in the amount of $59,700.57. The letter further stated that, barring a reply from respondent, that amount would become fixed ninety days later. Again, respondent did not acknowledge the Division of Taxation's request for a reply.

On November 13, 1997 the Division of Taxation filed "certificates of debt" against

respondent and his wife. In early December 1997, the Division of Taxation levied upon a joint bank account held by the couple at Sovereign Bank and a separate Fleet Bank savings account belonging solely to Patricia. According to Patricia, she had set up the account to save for retirement. Although she recalled telling respondent about her intention to open a savings account, she never told respondent that she had followed through with her plan. Likewise, respondent testified that he was unaware of the account's existence until the tax levy. The total amount seized from the accounts was $65,670.63.

Finally, on December 15, 1997, respondent filed the state income tax returns for the seven delinquent years. The additional tax liability for those years totaled $3,444.97.[2]

When pressed, respondent admitted that he did not timely file the returns in order to free up his "cash flow" for family expenses, including college tuition for their daughter. Respondent added that he was "tight on cash." Respondent insisted, however, that, by the date of the DEC hearing, the delinquent federal and state taxes had been paid in full.

Another aspect of respondent's handling of the couple's taxes came to light at the DEC hearing. It was evident that respondent did not disclose to his wife that he had not filed the income tax returns. Indeed, Patricia testified that, had she known about the outstanding tax obligations, she would have paid them immediately, out of her own funds. After all, she reasoned, it made no sense for her to let the Division of Taxation levy upon her bank

---

[2]It is not entirely clear that this amount is correct. Elsewhere in the record, respondent stated that the Division of Taxation returned only $40,000 of the $65,000 it seized.

accounts to avoid $3,444.97 in taxes.

* * *

Respondent made several ancillary arguments for the dismissal of the ethics complaint. According to respondent, the Attorney General's referral of the matter to the OAE was improper. Respondent based his argument on an agreement with the Division of Taxation, which included a confidentiality clause. Respondent's arguments in this regard are best expressed in his answer to the complaint:

> 3. The referral of the within matter to the OAE by Assistant Attorney General Mary C. Jacobson, on behalf of the New Jersey Department of Public Safety, Division of Law, in direct contravention to and in direct violation of the terms and conditions of a certain confidential 'Closing Agreement' and release, prepared on December 14, 1997, under the provisions of N.J.S. 54:53-1, et seq. and N.J.A.C. 18:33-1.1, et seq. between the Director of the New Jersey Division of Taxation and both respondents actually prepared and negotiated by the very same, Department of Law and Public Safety and requiring 'The parties and their representatives shall strictly observe the confidentiality of this Closing Agreement and they hereby specifically agree not to disclose the contents or terms of the Closing Agreement.'*** 'The matters determined by this Closing Agreement shall be final, conclusive between the parties, [sic] *** 'The actions of Ms. Jacobson, under the foregoing circumstances and without the prior consent of the Department's client, in the release of tax information on respondents, constituted an Attorney Ethics violation under RPC 1.6.
> 4. The foregoing actions of the Department of Law and Public Safety and Assistant Attorney General Mary C. Jacobson, in the referral of the within matter to the OAE and the furnishing of tax information respecting respondents and their Federal and State affairs, constituted a wilfull criminal violation under the provisions of N.J.S. 54:50-8 and N.J.S. 54:50-9.
> 5. The filing of the within action by the OAE and against respondents, on the referral of the Department of Law and Public Safety and Ms. Jacobson constitutes a violation of both respondents [sic] United States and New Jersey Constitutional Rights, in as much as, both respondents are prohibited and unable to exercise their appropriate defense to the charges against them

because of the legal and ethical constraints imposed against them under the terms and conditions of the aforesaid 'Closing Agreement'.

6. The referral of the within matter to the OAE, by the Department of Law and Public Safety and Ms. Jacobson and the publication and dissemination of copies of respondents [sic] Federal and State tax returns, income information, social security numbers, tax identification numbers and the like as part of the within complaint, by the OAE, and without redacting such private and proprietary information before distribution constituted an egregious violation of both respondents [sic] rights to privacy and with such actions clearly 'an unwarranted invasion of privacy' under the Federal and State Constitutions and the provisions of 5 U.S.C.A. sec.522(a). The complaint under such circumstances, ought to be dismissed and copies of all such private and proprietary information returned to respondents.

7. Any alleged late filing of Federal and State tax returns by respondents after the filing of requests for extensions of all returns and any and all assessments thereafter, whether for taxes, interest and penalties, constituted 'civil penalties' and did not constitute a wilfull criminal violation, under 26 U.S.C. 7203, as alleged in the complaint.

* * *

Finally, respondent served the Attorney General with a subpoena, in an attempt to obtain the Division of Taxation's file for use in this matter and to compel the testimony of the Assistant Attorney General assigned to the case. The OAE wrote a letter to the hearing panel chair in support of the Attorney General's motion to quash the subpoena, which was later granted. One aspect of the letter bears mention. In that letter, the OAE noted that the Attorney General had a duty under RPC 8.3(a), to report the alleged misconduct to the OAE. RPC 8.3(a) states as follows, in relevant part:

> A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

* * *

The DEC found that respondent violated RPC 8.4(c) because, although he requested extensions for each of the years 1988 through 1994, he did nothing further to file tax returns for those years until the New Jersey taxing authorities levied upon the couple's bank accounts. According to the DEC, respondent considered the timely payment of his taxes secondary to other family expenses. Although the DEC also sympathized "somewhat" with respondent over the Attorney General's disclosure of his conduct to ethics authorities, in the presence of the confidentiality clause in the closing agreement, it did not agree that such disclosure warranted the dismissal of the complaint.

The DEC recommended that respondent receive a reprimand, citing In re Garcia, 119 N.J. 86 (1990). There, in imposing only a reprimand, the Supreme Court warned New Jersey attorneys that, in the future, the wilfull failure to file income tax returns, even without a criminal conviction under 26 U.S.C. 7203, would warrant the imposition of a suspension. The DEC believed that, notwithstanding the pronouncement in Garcia about a suspension, this case warranted a reprimand for the following reasons: (1) respondent filed for extensions for each of the tax years in question; (2) at least half of the couple's total tax obligations had been withheld from Patricia's salary; and (3) respondent had made partial tax payments to the IRS when he filed for several of the extensions.

The DEC made no findings with regard to the allegation that respondent violated RPC 8.4(b).

* * *

Upon a de novo review of the record, we were satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

The DEC correctly found that respondent's failure to file tax returns for the years 1988 through 1994 was wilfull and, therefore, unethical and in violation of RPC 8.4(c).

26 U.S.C. §7203 states as follows, in relevant part:

> Any person required under this title to pay any estimated tax or taxes, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information who wilfully fails to pay estimated tax or taxes, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor . . .

Willfulness has been described as not requiring any motive, other than a voluntary, intentional violation of a known legal duty. See United States v. Rothbart, 723 F. 2d 752 (10th Cir. 1983); United States v. Francisco, 614 F. 2d 617 (8th Cir. 1980), cert. denied 446 U.S. 922 (1980); and Haner v. United States, 315 F. 2d 792 (5th Cir. 1963).

Respondent argued that his yearly filing of extension requests evidenced an intent to later file the actual tax returns. However, the extensions only evidence a request for additional time – six months – to file the tax returns. In none of those years did respondent file a return upon the expiration of the six-month extension. Respondent admittedly did not file the federal or state tax returns for 1988 through 1994, upon the expiration of the

extensions. It is not clear from this record when the federal tax returns were finally filed, because respondent did not produce signed and dated copies of his tax returns for all of those years. With respect to his New Jersey taxes, however, it is undisputed that respondent did not file the 1988 through 1994 returns until 1997, some nine years after the first of those was due and then only after the Attorney General threatened litigation. Moreover, respondent admitted that his purpose in not filing the returns was to free up his "cash flow" and to pay college tuition for the couple's daughter. There can be no doubt, thus, that his failure to file the tax returns was wilfull.

Respondent's various arguments that the complaint should be dismissed are also without merit. As correctly pointed out by the OAE, RPC 8.3(a) required the Attorney General to disclose respondent's misconduct to the ethics authorities. Moreover, it would be against public policy to stymie disciplinary proceedings, even in the face of a confidentiality clause.

Ordinarily, a conviction for the wilfull failure to file tax returns under 26 U.S.C. 7203 results in the imposition of a six-month suspension. See, e.g., In re Tuohey, 156 N.J. 547 (1999) (six-month suspension imposed where the attorney pled guilty to a criminal complaint filed in the United States District Court for the District of New Jersey, charging him with wilfull failure to file a federal corporate income tax return for 1991, in violation of 26 U.S.C. 7203); and In re Gaskins 146 N.J. 572 (1996) (six-month suspension imposed where the attorney pled guilty in the United States District Court for the District of New

Jersey to one count of failure to file a federal income tax return for 1987, in violation of 26 U.S.C. 7203; the attorney also admitted wilfully failing to file income tax returns for calendar years 1988 through 1990).

In Garcia, the Court took a further step, announcing that a wilfull failure to file tax returns, even in the absence of a criminal conviction under U.S.C. 7203, will warrant a term of suspension. There, the attorney applied to the Federal Communications Commission ("FCC") for a radio station license. In the application, the attorney stated that she was a member of the bar in good standing. Her position as an attorney was considered as a positive factor in the initial review proceedings, helping her application to stand out from the others. Later, it was learned that Garcia had not filed income tax returns for three consecutive years. When cross-examined about her failure to file the tax returns, Garcia admitted that she had simply "spent the money elsewhere. [My] priorities were wrong." The Court quoted the FCC findings as follows: "Garcia's admitted failure to file income tax returns for three consecutive years is at a minimum an uncontested violation of 26 *U.S.C.* § 7203." The Court also noted the FCC's further finding that "an intent to report and pay tax in the future does not vitiate the wilfullness requirements under federal law." Id. at 88. In finding Garcia guilty of ethics infractions, the Court reasoned as follows:

> Obviously, the attorney-disciplinary system is not a fiscal arm of the Treasury. But when the private affairs of an attorney have been put in issue and it has been plainly established, by the attorney's own admissions or by the collateral findings of another tribunal of government, that the attorney has wilfully violated the provisions of law, we can no more blink than if it

were a jury verdict.

[In re Garcia, 119 N.J. 86, 89 (1990)]

In a post-Garcia case, In re Vecchione, 159 N.J. 507 (1999), the attorney wilfully failed to file federal income tax returns for a period of twelve years. As in Garcia, Vecchione was not criminally prosecuted under 26 U.S.C. 7203. The Court still imposed a six-month suspension, based on the fact that the attorney had consistently committed a series of defaults that continued for a period of more than ten years, in spite of the attorney's knowledge that he was required to file his tax returns. In a more recent matter, however, In the Matter of Vijay Gokhale, DRB 00-077 (February 6, 2001), we voted to impose a reprimand where the attorney had filed for automatic extensions for four consecutive tax years. Like this respondent, Gokhale did not file his tax returns upon the expiration of the extensions or request further extensions. Gokhale, however, advanced compelling mitigating circumstances: (1) his failure to file the tax returns was attributable to a lack of documentation – his files had been moved several times; he was uncertain where they were located and needed other papers from his bank; (2) he was overwhelmed and overburdened by his dire financial problems; (3) he suffered a serious stroke and was unable to cope with his practice and personal obligations while in recuperation; (4) several weeks after the stroke, his wife filed for divorce; and (5) when he requested extensions, he paid estimated taxes. Persuaded that Gokhale's conduct had not been wilfull, that is, that his intent had not been to evade his tax obligations, we voted for a reprimand.

Here, the only mitigating factors are that respondent filed for extensions and

eventually paid all of the couple's outstanding federal and state tax obligations. His conduct may not have been as serious as in Garcia and Vecchione, but it was wilfull, in that he intended to avoid his tax obligations – perhaps not forever – for each delinquent tax year. On that basis, a four-member majority voted for the imposition of a three-month suspension, recognizing the mandate in Garcia of a term of suspension for the wilful failure to file tax returns. Three members would have imposed a reprimand. Two members did not participate.

With regard to the unresolved issue of respondent's alleged violation of RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects), since there is no evidence that respondent was charged with a crime, we dismissed that charge.

We also required respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Eugene F. McEnroe
Docket No. DRB 01-154

Argued: July 19, 2001

Decided: January 29, 2002

Disposition: Three-month suspension

Members	*Disbar*	*Three-month Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson		X					
Maudsley		X					
Boylan			X				
Brody		X					
Lolla							X
O'Shaughnessy			X				
Pashman		X					
Schwartz							X
Wissinger			X				
Total:		4	3				2

Robyn M. Hill 2/11/02
Robyn M. Hill
Chief Counsel