

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-077

IN THE MATTER OF
VIJAY M. GOKHALE
AN ATTORNEY AT LAW

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Decision

Argued: July 20, 2000

Decided: February 6, 2001

Sherilyn Pastor appeared on behalf of the District VA Ethics Committee.

Respondent appeared pro se.

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 VA Ethics Committee ("DEC"). The three-count complaint charged respondent with violations of RPC 5.5(a) (unauthorized practice of law), RPC 1.15(d) (failure to comply with recordkeeping provisions), RPC 8.4(b) (criminal act that reflects adversely on

the lawyer's honesty, trustworthiness or fitness as a lawyer) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1983. He maintains a law office in Livingston, New Jersey. He has no history of discipline.

The facts of this matter are not in dispute. Respondent was ineligible to practice law in New Jersey from September 30, 1995 through June 17, 1997 for failure to pay his 1995, 1996 and 1997 annual assessments to the New Jersey Lawyers' Fund for Client Protection ("The Fund"). During this period respondent, nevertheless, practiced law. He alleged that he was unaware of his ineligibility and that he only learned of it when a title company refused to give him a document for a closing because he was on the Fund's list of ineligible attorneys. Respondent claimed that, once the title company alerted him of the problem, he contacted the Fund and immediately paid the arrearages. Respondent asserted that, in part, he neglected to pay the assessment because of his disability at the time, a stroke in 1995 that had left him in a "diminished capacity," and also because of marital problems. According to respondent, both situations contributed to his oversight. He stated that, after he learned of his ineligibility, "I was completely taken by surprise. I was dealing with whatever paper I could, meaning - - I was attempting to deal with paper on a timely basis, and I must confess that the Client Protection Fund letter escaped my attention."

Respondent began his practice of law in 1983. In 1989 his wife joined his office as a bookkeeper. By 1992, the office consisted of two full-time and two part-time employees. Respondent did not explain who the employees were or what their functions entailed. Respondent's wife stopped working for him in November 1992. In May 1995, respondent suffered a stroke and was hospitalized from May 28 through June 3, 1995. Respondent claimed that, since that time, because of the resulting financial downturn in his practice, he was unable to maintain any office staff. He added that, after he was discharged from the hospital, he went directly to his office to deal with matters that had been accumulating prior to his hospitalization. According to respondent, initially he was not capable of working for more than an hour, before needing to rest. Although respondent's condition gradually improved, as of the date of the DEC hearing he apparently had not yet fully recovered.

On June 22, 1995 respondent's wife served him with a divorce complaint. They continued to live together, however, until November 1995, when respondent left the marital home. Respondent agreed to pay \$1,100 in monthly child support. Respondent testified that, because of his limited earning capacity following the stroke, he had to borrow money from his brother to satisfy his support obligations. Eventually, respondent and his ex-wife agreed that she could have the majority of their joint assets and that, in return, his monthly child support obligations could be terminated.

* * *

Count two of the complaint charged respondent with recordkeeping violations.

According to the complaint,

[r]espondent admitted to the OAE Investigator assigned to the matter that he did not keep trust account client ledger cards and was unable to produce trust account receipts or disbursement journals, quarterly reconciliations, properly documented deposit slips and other financial records required to be maintained pursuant to R. 1:21-6.

At the DEC hearing, the OAE investigator admitted that she had asked respondent to produce only his "actual trust account ledger cards for the period January 1st of 1995 through December 31st of 1996." She did not ask him to submit trust account receipts or disbursement journals, quarterly reconciliations, deposit slips or any other financial records. Moreover, respondent's answer stated that he did not attempt to produce any of the "trust account receipts or disbursement journals, etc." because he did not know they were being requested. Respondent did, however, provide the OAE with "escrow control" records that he used to account for client funds. In response to the investigator's request for information, on February 6, 1998 respondent telefaxed her over 100 pages of records. Although the investigator determined that the information was not adequate, she apparently neither informed respondent of that fact nor gave him an opportunity to supplement the information. According to the investigator, the information that respondent had telefaxed her showed only the total trust account balance, instead of a breakdown of each client's balance.

Respondent testified that he did not understand the difference between client ledger cards and the documents that he maintained. Moreover, he claimed that it was not until the

DEC hearing that he learned that the information he had sent to the investigator was inadequate. Respondent explained his recordkeeping practices as follows:

The bank I deal - - that I maintain my attorney trust funds has an escrow control system such as every deposit has to be identified with a unique number. If the number is missing they will not deposit [sic]. They will not make payment against the check. And so any time I either make a deposit to the attorney trust account or make a withdrawal from the attorney trust account with a check, the bank maintains the balances by client or by transaction.

So, if one particular client has two transactions with me, that client has two different account numbers because the two transactions don't get merged. They are maintained separately.

[T34]¹

Respondent stated that he was not aware that his records did not comply with the rules. According to respondent, when he transmitted the information to the investigator, he requested that she let him know whether she needed additional documents. It was his understanding that she had completed her investigation and did not need any additional information from him. Respondent claimed that he believed that the records he had submitted were adequate and that the documents he maintained were equivalent to client ledger cards. Respondent stated that, at the DEC hearing, he realized that he was mistaken.

Respondent's February 6, 1998 reply stated that he would forward additional information to the investigator and that, when he returned from a trip, he would "start on acquiring whatever documents I do not have now or which you determine I must furnish." Respondent further wrote that he wanted to "do the 'right thing' by the Ethics Committee."

¹ T denotes the transcript of the October 14, 1999 DEC hearing.

He asked the investigator to let him know how to help her complete the investigation and how he could receive the "least possible penalty for the unintentional lapse." The investigator did not reply to respondent's request, deeming the documents that were forwarded inadequate. A formal ethics complaint was then filed against respondent.

* * *

Count three charged respondent with "willfully" failing to file income tax returns for the years 1995 and 1996, in violation of RPC 8.4(b) and 8.4(c). Respondent admitted that he failed to file the tax returns, but expressed his intention to rectify the problem. He denied that his failure to file the returns was "willful." He explained that he had requested an extension to file the returns, at which time he had paid estimated taxes. Respondent conceded that, after the deadline expired, he did not file for an additional extension. Although this violation was not charged in the complaint, respondent also admitted that he had not filed income taxes for 1997 or 1998, for which he had also paid estimated taxes.

Respondent attributed his failure to file the income tax returns, in part, on his lack of documentation. He explained that his files had been moved several times and that he was uncertain where to locate the necessary documents. Respondent stated that he also needed certain documents from Chemical Bank, but was uncomfortable seeking its assistance

because of problems that had arisen with the bank while he was its client. He no longer maintains an account with that bank.

Asked why he had not filed his income tax returns for 1997 and 1998, respondent replied that he was "overwhelmed" and "overburdened" by "everything else" that he needed to accomplish. He admitted having difficulties "coping." He claimed, however, that he was trying to "catch up" and correct the problem with his tax returns. Respondent maintained that, although he is anxious to correct his tax return difficulties, he cannot afford the help he needs to complete the returns, presumably the assistance of an accountant. Respondent testified that the stumbling block is the amount of time necessary to prepare the returns. He stated that "I keep hoping that if I do one more piece of work and get paid for it that I will be able to afford something else that I need to do." He described his dire financial problems as follows:

I haven't paid for my rent for October. I haven't paid my rent for September. I am on a payment plan with the phone company. I am on a payment plan with the electric company. I can't even pay my health insurance for this month unless something nice happens in the next two weeks. And if my health insurance is canceled, no one is going to give me health insurance after a stroke that I just barely survived.

[T60-61]

Following his stroke, respondent had to cut back on his work. When asked whether he intended to continue practicing law, respondent replied that he was looking for a job, not necessarily as an attorney, and that, as soon as he found employment, he intended to "farm

out" his work to other attorneys. Respondent did not foreclose the possibility of seeking employment based on his engineering credentials.

* * *

The DEC found that respondent violated RPC 5.5(a) by practicing law while ineligible for failure to pay the Fund's annual assessment. The DEC also found a violation of RPC 1.15(b) for respondent's failure to maintain required records. The DEC noted that, as of the date of the ethics hearing, respondent had not changed his financial reporting system to comply with the requirements of R.1:21-6. Finally, the DEC found violations of RPC 8.4(b) (improperly cited as 8.4(a) in the DEC report) and RPC 8.4(c) for respondent's admitted failure to file state and federal tax returns for calendar years 1995 and 1996. The DEC considered respondent's claim that he did not file the returns because he was missing financial information from the bank, but noted that, as of the date of the ethics hearing, he had not made any effort to obtain the information for "personal reasons."

The DEC also took into account the mitigating factors offered by respondent, including his 1995 stroke, finding that his resulting physical condition severely affected his ability to function and required him to limit his practice. The DEC also considered respondent's marital problems, namely his divorce and the fact that he had to move from the marital residence. The DEC concluded that these problems caused a disruption in

respondent's business and the displacement of some of his office files. Lastly, the DEC considered respondent's prior unblemished record of sixteen years and his sincere remorse and contrition for his wrongdoing.

The DEC balanced those factors against the fact that respondent's physician did not place him under any restrictions or provide continuing care, following his stroke. The DEC remarked that it was not until two years after the stroke that respondent paid his annual assessment to the Fund and that, as of the date of the ethics hearing, he had not yet filed his 1995 and 1996 tax returns or changed his bookkeeping practices. The DEC did not find, thus, that the noted mitigating circumstances prevented respondent from complying with his obligations.

Relying on In re Garcia, 119 N.J. 86 (1990), the DEC recommended a suspension of at least six months. In Garcia, although there was no criminal conviction for the attorney's failure to file income tax returns, the Court for the first time made it clear that, if the proofs established that the omission was due to a "willful" failure to file the returns, a period of suspension would henceforth be imposed. Because Garcia was a case of first impression, in that it did not involve a criminal conviction, the attorney received only a reprimand.

The DEC also recommended that respondent's reinstatement be conditioned on a showing that his federal and state income tax returns for calendar years 1995 and 1996 — and the following years — have been filed and that a "financial reporting system" in compliance with R.1:21-6 is in place. The DEC further recommended that, for a period of

two years following his reinstatement, respondent provide to the OAE quarterly certifications from a certified public accountant attesting that his books and records are maintained in compliance with R. 1:21-6.

* * *

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

The violations are undisputed. Respondent admittedly practiced law while on the ineligible list, failed to maintain records in accordance with R. 1:21-6 and failed to file his federal and state income tax returns for calendar years 1995 and 1996. Prior to 1995, it appears that respondent practiced without any problems, his annual assessments had been paid and his tax returns had been filed.

Between 1992 and 1995, respondent's marital situation began to deteriorate. In 1992, his wife, who had been the office bookkeeper, left the office. Respondent was left with the responsibility of overseeing the day-to-day operations of his law practice. In May 1995, respondent suffered a stroke. Thereafter, he could not afford to employ staff. He was also required to reduce his practice, which resulted in decreased earnings of \$10,000 to \$15,000 a year. Respondent had to borrow money from his brother to meet his child support

obligations. Respondent recognized that his practice was less than successful, concluding that making \$10,000 to \$15,000 a year "[was] not going to maintain his [life]." Respondent testified that, during the course of the divorce proceedings, the judge had informed him that taxi drivers earn more than he, a fact that he recognized as true.

It is clear from the record that respondent was "overwhelmed" with his health and personal problems. Although respondent apparently wishes to remedy his problems, he cannot effectively cope with his day-to-day office operations, as a sole practitioner.

It is undisputed that respondent paid the delinquent annual assessment to the Fund as soon as he became aware of the arrearages. Such violations normally result in the imposition of an admonition or a reprimand. See In the Matter of Edward Wallace, III, Docket No. DRB 97-381 (Dec. 2, 1997) (admonition where attorney appeared twice in a criminal matter while ineligible to practice); and In re Namias, 157 N.J. 15 (1999) (reprimand imposed for lack of diligence, failure to communicate and the unauthorized practice of law; the attorney had forgotten to pay his annual assessment to the Fund). The addition of respondent's recordkeeping violations would not necessarily increase the discipline for his misconduct.

Here, the most serious charges involve respondent's failure to file income tax returns. Respondent testified that he filed for extensions and also paid estimated taxes. This testimony was undisputed. These two factors distinguish this matter from Garcia. There, the attorney had applied to be licensed by the Federal Communication Commission ("FCC")

to locate a radio station in Jersey City. During the course of the FCC proceedings, it came to light that she had failed to file her income tax returns for three years. While initially the attorney claimed that a financial shortfall was the reason for the deficiency, it became clear that she had made a conscious decision not to pay her income taxes, choosing to use the money for other expenses. The FCC concluded that the attorney had violated the provisions of 26 U.S.C.A § 7203², despite the lack of a criminal conviction under that statute. Our Supreme Court found that such a finding, in a collateral proceeding where the standard of proof is different, could not be disregarded in a disciplinary proceeding. The Court stated as follows:

Obviously, the attorney-disciplinary system is not a fiscal agent 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 willfully violated the provisions of law, we can no more blink than if it were a jury verdict.

[In re Garcia, supra, 119 N.J. at 89]

² 26 U.S.C. § 7203 states, 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 willfully 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 . . .

Because it was a case of first impression, the Court imposed only a reprimand in Garcia, but cautioned that, in the future, willful failure to file income tax returns would warrant a suspension.


In another case, In re Vecchione, 159 N.J. 507 (1999), the attorney was suspended for six months for "willfully" violating RPC 8.4(b) and 8.4(c), by failing to file personal tax returns for a period of twelve years. No criminal action was taken against Vecchione. The attorney claimed that he did not file the returns because, if he had not paid the amount he owed, the Internal Revenue Service would have attached whatever he owned, including his home and his bank accounts. According to the attorney, he believed that, if he disclosed that he had income and did not hide it from the IRS, then he was not intentionally trying to evade the payment of taxes. He, therefore, believed that he did not violate any laws, reasoning that, if he had not filed his partnership returns, that would have been a criminal act because he would then have been evading his tax obligations.

Here, we do not find that respondent's conduct was willful. 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). In this case, respondent requested an extension for the filing of income tax returns and paid estimated taxes. His intent was not, therefore, to evade his tax obligations. Because this is not a case where clients were hurt and,

thus, there is no need to protect them from this respondent, we unanimously determined that a reprimand adequately addresses the nature of his infractions. One member recused himself.

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

Dated: 2/6/2001

By: 
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

**DISCIPLINARY REVIEW BOARD
VOTING RECORD**

**In the Matter of Vijay M. Gokhale
Docket No. DRB 00-077**

Argued: July 20, 2000

Decided: February 6, 2001

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			X				
Peterson			X				
Boylan			X				
Brody			X				
Lolla			X				
Maudsley			X				
O'Shaughnessy						X	
Schwartz			X				
Wissinger			X				
Total:			8			1	

Robyn M. Hill 5/22/01
Robyn M. Hill
Chief Counsel