SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 90-200

IN THE MATTER OF :
DANIEL P. DUTHIE, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 26, 1990

Decided: October 23, 1990

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

John H. Schunke, Jr. appeared on behalf of respondent.

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

This matter is before the Board on a Motion for Final Discipline based upon a criminal conviction filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-6(c)(2)(i).

Respondent was admitted to the New Jersey bar in 1989. He has been a member of the New York bar since 1977. On March 29, 1990, an information was filed in Albany City Court charging respondent with the Class E felony of repeated failure to file personal income and earnings taxes for the calendar years 1985, 1986, and 1987, in violation of § 1802(a) of the tax law of the State of New York.

On April 26, 1990, respondent pleaded guilty to two misdemeanor counts of failure to file New York State tax returns

for the calendar years 1986 and 1987, in violation of § 1801(a) of the tax laws of the State of New York. Respondent's tax liability in those years totalled $14,146.11 and $11,367.88, respectively.

On May 24, 1990, respondent was sentenced to sixty days in jail and fined $10,000.[1]

The OAE is seeking respondent's suspension, without specifying its duration.

CONCLUSION AND RECOMMENDATION

A criminal conviction is conclusive evidence of guilt in disciplinary proceedings. Once an attorney is convicted of a crime, the sole question remaining is the measure of discipline to be imposed. In re Rosen, 88 N.J. 1, 3 (1981); Matter of Kaufman, 104 N.J. 509, 510 (1986). The goal is to protect the interests of the public and the bar while giving due consideration to the interests of the individual involved. In re Mischlich, 60 N.J. 590, 593 (1972). In determining the proper discipline to be imposed, many factors have to be considered, including the nature and severity of the crime and whether the crime was related to the practice of law. Evidence that does not dispute the crime but that shows mitigating circumstances is also considered, such as the attorney's good reputation, prior trustworthy professional conduct,

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[1] The maximum penalty for a class A misdemeanor is imprisonment for one year. N.Y. Penal Law § 70.15 (McKinney 1990).

and general good character. In re Infinito, 94 N.J. 50, 57 (1983).

There is no hard and fast rule that requires a certain penalty to be imposed upon conviction of a certain crime. Every disciplinary matter is factually different and judged on its own merits. In re Infinito, supra, 94 N.J. at 57.

Disciplinary cases in New Jersey involving willful failure to file federal income tax returns have uniformly resulted in a term of suspension from the practice of law.

> . . .[we] have many times said that the delericti on [failure to file a federal income tax return] is a serious one on the part of any member of the bar, no matter what the excuse, and that a period of suspension is required in all such cases.
> [In re Spritzer 63 N.J. 532, 533 (1973) citations omitted).]

As a rule, the guilty party is suspended for a period of six months or one year in the absence of additional misconduct or aggravating circumstances. See, e.g., Matter of Hall, 117 N.J. 675 (1989); In re Hyra, 73 N.J. 18 (1977); In re Spritzer, supra, 63 N.J. 532 (1973); In re Queenan, 61 N.J. 579 (1972); In re Hartman, 54 N.J. 372 (1969); In re James, 26 N.J. 392 (1958) (one year suspension); See, also, Matter of Leahy, 118 N.J. 578 (1990); Matter of Chester, 117 N.J. 360 (1990); Matter of Willis, 114 N.J. 42 (1989); In re Hughes, 69 N.J. 116 (1976); In re Kleinfeld, 58 N.J. 217 (1971); In re Knox, 58 N.J. 281 (1971); In re Vieser, 56 N.J. 60 (1970) (six-

month suspension).

In his brief and at oral argument before the Board, respondent's counsel vigorously argued that respondent's conduct is distinguishable from the conduct exhibited in the aforementioned cases, namely willful failure to file federal income tax returns. First, counsel contended, respondent was convicted of a New York State misdemeanor, not of a federal felony. Accordingly, if the law views respondent's offense in a less serious light, so too should the Board for the purpose of recommending the appropriate discipline. Second, in the cases cited, the attorneys intended to avoid their tax obligations, whereas here respondent merely procrastinated the payment of the taxes, as demonstrated by his numerous requests for an extension of time within which to file the state returns. Third, respondent cooperated fully with the New York tax authorities who investigated him, even before the information was filed, and paid his tax liability, albeit late. Lastly, in New York, as in New Jersey, willful failure to file tax returns is a serious crime; respondent would have been automatically temporarily suspended in New York, had he committed that crime; the fact that New York State did not seek his suspension shows that it does not place the offense of late payment of taxes on the same footing as willful failure to file tax returns.

The Board has carefully considered counsel's argument. As to the alleged different treatment of the offense by federal and state laws, i.e., the felony/misdemeanor distinction, a review of both

statutes reveals that willful failure to file federal income tax returns is also a **misdemeanor**, not a **felony**, as argued by counsel. Indeed, 26 U.S.C. § 7203 provides as follows:

> Any person required under this title to pay any estimated tax or . . . to make a return . . . , who willfully fails to pay such estimated tax or . . . make such return . . . at the time or times required by law . . . shall, in addition to other penalties provided by law, be guilty of a **misdemeanor** . . . (emphasis supplied).

The Board sees no reason to view the failure to file New York state income tax returns differently from the failure to file federal income tax returns. They are both serious ethical offenses, treated as misdemeanors by the criminal law, and accompanied by the requisite element of intent on the part of the offender.[2]

The Board, however, did consider in mitigation that respondent cooperated with the tax authorities and ultimately satisfied his tax obligations. The Board also considered that (1) respondent was beset by serious personal problems, including the death of his mother and brother; (2) respondent lost his position as a partner

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[2] § 1801 (a) of the Tax Law of the State of New York provides that: Any person who, with intent to evade any tax imposed under article twenty-two of this chapter or any related income or earnings tax statute, or any requirement thereof or any lawful requirement of the tax commission thereunder, shall fail to make, render, sign, certify or file any return, or to supply any information within the time required by or under the provisions of such article or any such statute, or who, with like intent, shall supply any false or fraudulent information, shall be guilty of a misdemeanor.

in one of New York's most prestigious law firms; and (3) numerous letters contained in the record attested to respondent's prior good reputation and trustworthiness.

The Board rejected respondent's explanation that he was overwhelmed by his busy practice of law and by the time-consuming renovation of the farmhouse in which he and his wife reside. Those factors provide no justification for his dereliction, which the Board deems serious.

After weighing the nature of the offense and the mitigating circumstances advanced by respondent, the requisite majority of the Board recommends that he be suspended for a period of six months. One member would impose a one-year suspension. One member voted for a private reprimand.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: _____ By: _____
Raymond R. Trombadore
Chair
Disciplinary Review Board