

B

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-386

IN THE MATTER OF :
ANDREW P. VECCHIONE, :
AN ATTORNEY AT LAW :
_____ :

Decision

Argued: November 19, 1998
Decided: April 5, 1999

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.
David B. Rubin appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for discipline filed by the District VII Ethics Committee ("DEC"). A one-count complaint charged respondent with violations 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) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). These charges stemmed from respondent's failure to file personal income tax returns for a twelve-year period.

Respondent was admitted to the New Jersey bar in 1969. He maintains a law practice in Spring Lake, New Jersey. Respondent has no history of discipline.

The facts are not in dispute. In April 1997, a Superior Court judge notified the Office of Attorney Ethics ("OAE") of respondent's failure to file federal income tax returns for twelve years. The judge had obtained this information from panelists sitting on an early settlement panel involving respondent's matrimonial matter. On October 1, 1997, the OAE wrote to respondent requesting an explanation for his failure to file the income tax returns. On October 9, 1997, respondent admitted to the OAE that he had been "delinquent" in filing his personal income tax returns. He informed the OAE that the problem had been "rectified" and that all of his tax returns had been filed, including his 1996 return. Respondent also stated that, at the time the judge was made aware of the filing delinquency, respondent was already "meeting" his filing obligation.

At an interview conducted by the OAE on November 22, 1997, respondent gave the OAE copies of the delinquent tax returns for the years 1984 through 1996, which had been prepared by an accounting firm in early 1997. Respondent informed the OAE that the returns had been filed in the fall of 1997.

At the DEC hearing, respondent testified that he had been contacted by the Internal Revenue Service ("IRS") in either 1985 or 1986 about his missing returns. Respondent explained that he had informed the IRS that he was facing financial difficulties and wanted to work out a payment plan. According to respondent, an IRS employee told respondent that he had to file his tax returns before a payment plan could be approved. Respondent

commented that the IRS employee was very understanding. Respondent further testified that, from either 1984 or 1985 to 1990, he had between seven to nine telephone conversations with the IRS, all with different personnel. Respondent stated that he also received letters from the IRS and always replied to its inquiries. Respondent claimed that, at some point, the IRS threatened to file a lien on his house. However, he explained, when he informed IRS personnel that he was trying to get some money together to pay his taxes, the IRS held off on filing the lien. Respondent estimated that the IRS did not file a lien against his property until either 1992 or 1993.

Respondent did not have any documents available to substantiate the content of his contacts with the IRS. He claimed that either his wife had destroyed the information or that it was in the hands of his accountant.

Although respondent admitted that he was not very knowledgeable about tax matters, he denied that he was trying to "evade" the IRS or make misrepresentations to it. According to respondent, the IRS never informed him that his failure to file his income tax returns was a criminal offense. It was his understanding that the IRS was simply pursuing civil remedies. In fact, the IRS attached his bank accounts and filed a lien against his house. Respondent believed that, over a twelve-year period, the IRS recovered about \$10,000 or \$11,000 from him.

According to respondent, because he had a number of personal and financial problems during the years in which he failed to file his tax returns, he had to make a judgment call: either pay his taxes or support his family, which included four children. Respondent testified

that he did not have enough money to do both. He added that he owned a modest home and a modest car, never took any lavish vacations and needed a home equity loan to pay for his children's college tuition.

Respondent outlined his financial problems as follows. In the 1980s, respondent's marriage was not going well. He explained that, in 1984, his in-laws had moved in with him. He was, therefore, supporting eight people and was the only one employed. At the time, his mother-in-law was terminally ill with cancer. Although his father-in-law received a pension, he had a gambling problem and dissipated his entire pension. As a result, there were times when respondent had to loan his father-in-law money. Another expense was his children's parochial school tuition. Moreover, respondent stated, his wife was a spendthrift and refused to seek employment to help out with the expenses.

In addition to these problems, respondent added, in the late 1980s or early 1990s his son had trouble with the law, causing respondent to incur \$10,000 in legal expenses. At some point his oldest, unwed daughter became pregnant and continued to live at home; respondent supported both his daughter and grandchild until his daughter's marriage.

Another daughter contracted lyme disease in the mid-1980s. She was hospitalized approximately twenty times and her medical expenses exceeded \$800,000. Although health insurance covered the majority of the bills, respondent still had to pay off \$10,000 or \$20,000 in unreimbursed medical bills. In addition, respondent had to hire a private tutor for this daughter.

Another of respondent's daughters also became ill and was hospitalized. Even though she was emancipated, she was living in his home and did not have any health insurance. Respondent, therefore, paid for her medical expenses as well. Respondent stated that, based on this series of problems, he was never able to catch up with his expenses.

Respondent explained that, during this time period, his biggest fear was that, if he filed his tax returns without paying his tax liability, the IRS would "grab his house," his only asset; he needed a place for his family to live.

In or before 1997, respondent and his wife separated. He claimed that, because he was trying to get his life back together, he contacted an accountant in either January or February 1997 to begin working on his income tax returns. Respondent stated that this took place prior to the early settlement panel hearing and that, within two or three months after the panel met, he filed his income tax returns.

Respondent's financial problems worsened as a result of his matrimonial problems. He and his wife were divorced in July 1997. Under the property settlement, his wife received the house and car and respondent was required to pay alimony, the credit card debts, the equity line of credit and his wife's car insurance. According to respondent, not only did he have to maintain two households, but two-thirds of his income was spent on his matrimonial obligations.

Respondent knew that his failure to file income tax returns for twelve years would come to light during the divorce proceedings. However, he maintained that his efforts to complete his tax returns had nothing to do with that, as he had begun working on them

months before the divorce action was filed.

Respondent was aware of his obligation to file the income tax returns. He claimed that he filed and paid all the other taxes and only failed to file his personal returns. When asked at the DEC hearing why he had not filed his personal returns, respondent replied as follows:

Because I knew that if I had filed those and didn't pay them, that they would attach whatever it is I owned, including my home and, you know, attach my bank accounts and that sort of thing. So I was in fear. I didn't want to lose my home. I had a lot of expenses on my back and it just got worse instead of better. So, you know, and once I disclosed it to them, you know, it wasn't like I was hiding from them. I was always very candid with them. I told them exactly what the circumstances were.

[T53¹]

Respondent testified that he had been audited by the IRS in the past, in 1979 and either 1981 or 1982. The audits revealed that respondent owed additional monies because of certain disallowances made by the IRS. Respondent did not resolve those problems until 1984.

Respondent did not deny that he earned sufficient income to require the filing of his income tax returns. He explained that he did not attempt to violate 26 U.S.C. § 7203. 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" paying his taxes. He, therefore, felt that he had not violated any laws. He reasoned that, if he had not filed his partnership returns, that would have been a criminal act because he would have been "evading" his tax obligations.

¹ T denotes the transcript of the June 19, 1998 DEC hearing.

The record is silent about whether respondent worked out a payment plan with the IRS or whether he has, in fact, paid any of his delinquent taxes. The OAE calculated that respondent's taxable income for the twelve years in question total \$653,276 (an average of about \$55,000 a year), with taxes due and owing, excluding penalties and interest, in the amount of \$271,963.

* * *

The DEC found that respondent's conduct violated RPC 8.4(b) and RPC 8.4(c). Based on respondent's testimony, the DEC determined that he willfully failed to file his individual income tax returns between at least 1985 and 1996. The applicable statute, 26 U.S.C. § 7203, states in relevant part:

Any person required under this title to pay any estimated tax or tax, 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 such estimated tax or tax, 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

The DEC reasoned that respondent's admissions that he earned sufficient income to require the filing of his tax returns and that he was aware of his duty to file the returns was a violation of the statute. The DEC also underscored respondent's testimony that he had made a conscious decision not to file his individual tax returns because he feared that the IRS would take his only asset, his house, if he did not satisfy his tax liability.

The DEC gave little weight to the fact that respondent had filed his partnership returns during the years in question. The DEC reasoned that respondent could not have done otherwise because his partners would have required him to do so. The DEC gave great weight to the fact that respondent "consistently committed a series of defaults which continued for over ten years in spite of the knowledge that he was required to file his individual returns."

Notwithstanding the absence of a jury verdict, agency determination or any other finding that respondent had violated 26 U.S.C. § 7203, the DEC found clear and convincing evidence that respondent's conduct violated RPC 8.4(b), based on In re Garcia, 119 N.J. 86 (1990). The DEC further found that respondent's decision not to file his returns, despite his knowledge of his duty to do so, was dishonest and deceitful conduct, in violation of RPC 8.4(c). As a result of the foregoing, the DEC recommended a six-month suspension.

* * *

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

Respondent's failure to file income tax returns from 1984 through 1996 was clearly improper. The DEC correctly relied on In re Garcia, 119 N.J. 86 (1990), for the proposition that a criminal conviction is not required for a finding of willful failure to file federal tax

returns. In Garcia, the attorney had applied to be licensed by the Federal Communications 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. § 7203, 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, cannot be disregarded in a disciplinary proceeding. The Court stated the following:

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 119 N.J. 86, 89 (1990)]

“Willfulness” for purposes of prosecution under 26 U.S.C. § 7203 does not require any motive other than a voluntary, intentional violation of a known legal duty. It does not need to be careless, thoughtless, heedless or inadvertent. 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). Under this definition, respondent’s failure to file his income tax returns was a willful act for the purpose of the statute. The Board, thus, found that respondent’s conduct established the

substantive elements of the offense, despite the absence of a jury verdict. See In re Rigolosi, 107 N.J. 192 (1987). Respondent's conduct was, therefore, a violation of RPC 8.4(b), even absent a criminal conviction. It also violated RPC 8.4(c).

It was not without a sense of compassion that the Board concluded that respondent's conduct was unethical. Respondent might have had some legitimate financial difficulties precluding him from paying his taxes. Nevertheless, his conduct was evasive, at a minimum. Respondent testified that, early on, the IRS informed him that he could not establish a payment plan until he filed his tax returns. Yet, respondent did not file those returns for twelve years, alleging that he feared losing his house. Suspiciously enough, his tax returns were prepared about the time the early settlement panel was convened, in or about the spring of 1997, and filed in the fall of 1997. Respondent urged a finding that the timing was coincidental and that at the time he was trying to get his life back on track. Respondent's explanation does not ring true, particularly when it is considered that twelve years had gone by without his filing tax returns. Respondent's conduct was less than honest and his explanation for filing the returns so late was not credible. Notwithstanding respondent's fear that he would lose his home, he was aware of his obligation to file his returns and failed to do so.

Disciplinary cases in New Jersey involving willful failure to file federal income tax returns have uniformly resulted in the imposition of a term of suspension. See In re Leahey, 118 N.J. 578 (1990) (six-month suspension where attorney pleaded guilty to one count of failure to file income tax returns); In re Chester, 117 N.J. 360 (1990) (six-month suspension

where attorney pleaded guilty to willful failure to file income tax returns for one year); In re Hughes, 69 N.J. 116 (1976) (six-month suspension where attorney pleaded nolo contendere to charges of failure to file federal tax returns for three years); In re Knox, 58 N.J. 218 (1971) (six-month suspension where attorney pleaded nolo contendere to failure to file income tax returns for two years); In re Kleinfield, 58 N.J. 217 (1971) (six-month suspension where attorney pleaded nolo contendere to one count of federal income tax evasion); In re Vieser, 56 N.J. 60 (1970) (six-month suspension where attorney pleaded nolo contendere to charges of failure to file income tax returns for two years).

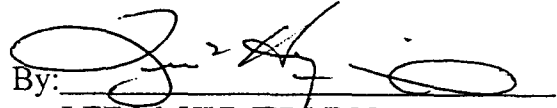
Although all of the above cases involve suspensions based on criminal convictions, respondent's admissions require the imposition of a suspension, under In re Garcia, 119 N.J. 86 (1990), even absent a criminal conviction. In Garcia, a case of first impression, the Court imposed only a reprimand, noting that it was refraining from imposing a suspension because it had not "heretofore made it clear that a finding of willful failure to file income tax returns would merit the same discipline absent a criminal conviction." Id. At 87.

Respondent avoided filing his tax returns for an extensive period of time – twelve years. Moreover, after Garcia, the bar was on notice that a suspension would be imposed for this type of behavior. Yet, respondent continued to avoid his responsibilities for an additional six years after the Garcia case. As an attorney, respondent must be held to a higher standard than ordinary tax-paying citizens. However, although a one-year suspension would not be excessive because of the length of time of the misconduct, the Board unanimously found that the reasons underlying respondent's actions were compelling enough

to justify only a six-month suspension. Three members did not participate.

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

Dated: 4/8/99

By: 
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Andrew P. Vecchione
Docket No. DRB 98-386

Argued: November 19, 1998

Decided: April 5, 1999

Disposition: Six-Month Suspension

Members	Disbar	Six-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		x					
Zazzali							x
Brody		x					
Cole		x					
Lolla		x					
Maudsley							x
Peterson							x
Schwartz		x					
Thompson		x					
Total:		6					3

Robyn M. Hill 4/12/99
Robyn M. Hill
Chief Counsel