SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-242

IN THE MATTER OF :
:
WILLIAM E. McMANUS, II :
:
AN ATTORNEY AT LAW :

Decision

Argued: November 20, 2003

Decided: February 3, 2004

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

Thomas R. Curtin 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 motion for final discipline filed by the Office of Attorney Ethics ("OAE") based upon respondent's conviction for attempted tax evasion, and for failure to file a tax return.

Respondent was admitted to the practice of law in New Jersey in 1982. He was admitted to the Connecticut bar in 1990. He was temporarily suspended by Order dated December 10, 2002, following his guilty plea to willfully attempting to evade income tax and failure to file an income tax return. In re McManus, 174 N.J. 559 (2002). His suspension remains in effect.[1]

[1] Respondent did not advise the OAE of his criminal conviction, as required by R.1:20-13(a), although his counsel indicated at sentencing that such notification would take place. The OAE learned of his conviction in October 2002, when notified by Connecticut disciplinary authorities that respondent had received a three-year suspension in Connecticut.

Respondent has been ineligible to practice law since September 25, 2000, for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection.

On March 16, 2001, respondent, pursuant to a plea agreement, entered a guilty plea in the United States District Court for the District of Connecticut to a Superseding Information charging him with one count of income tax evasion (26 U.S.C.A. 7201) and one count of willful failure to file an income tax return (26 U.S.C.A. 7203).

At the plea hearing, the factual basis for the plea was elicited by the Honorable Janet C. Hall, U.S.D.J. with the assistance of Assistant United States Attorney John A. Marrella and respondent's counsel, Jo Anne C. Adlerstein:

> MR. MARRELLA: Thank you, your Honor. As to Count One of the superceding information, willfully attempting to evade or defeat a tax in violation of Title 26, United States Code, Section 7201, the government must prove the following facts beyond a reasonable doubt:
>
> First, the defendant engaged in affirmative active evasion or attempted evasion of his federal income tax for the calendar year 1998. Second, there was a substantial tax deficiency for that year. And third, the defendant acted willfully.
>
> The government would, if this case were to go to trial, the government would prove the following facts beyond a reasonable doubt:
>
> During the year 1998, the defendant was an attorney who earned income from the practice of law. The defendant willfully attempted to evade his federal income tax for 1998 by filing a false U.S. individual income tax return on or about April 15th, 1999. On his 1998 U.S. individual income tax return, form 1040, which was prepared in the District of Connecticut and filed with the Internal Revenue Service, the defendant falsely stated that his taxable income for 1998 amounted to $287,241 and that the amount of tax due and owing thereon was the sum of $67,387.
>
> In fact, the defendant willfully failed to report income received in 1998 in the total amount $510,000. The

result of the defendant's failure to report this amount of income resulted in a substantial tax deficiency.

As to Count Two of the superceding information . . . willfully failing to file income tax return in violation of Title 26, United States Code, Section 7203, the government would need to prove the following elements beyond a reasonable doubt:

First, pursuant to Title 26, United States Code, Section 6012(a), the defendant was a person required to file individual income tax return for the calendar year 1993 by virtue of the fact his gross income was greater than the statutory exemption amount, which was $6,050 in that year.

Second, the defendant failed to file a 1993 individual income tax return at the time required.

Third, the defendant's failure to file a 1993 individual income tax return was willful.

If this case were to go to trial, the government would prove the following facts beyond a reasonable doubt:

During the calendar year 1993, the defendant was an attorney practicing law in Essex, Connecticut, and elsewhere. During the year 1993, the defendant earned gross income in the amount of $313,386. Because the defendant's income in 1993 exceeded the statutory exemption amount of $6,050, he was required by law to file a 1993 U.S. individual income tax return form 1040.

The defendant did not file a U.S. individual income tax return for 1993 at the time he was required to do so and even though he understood his obligation to file a form 1040, the defendant willfully failed to file an individual income tax return for 1993 at the time he was required to do so.

THE COURT: All right.
I'm assuming there were no extensions filed in connection with the '93 failure.

MS. ADLERSTEIN: No.

MR. MARRELLA: I think for '93, there was an extension until October of '94.

THE COURT: Okay. Yes, Attorney Adlerstein?

MS. ADLERSTEIN: Yeah. These factors are included in good measure in the stipulations but just for clarity, Mr. Marrella represented that with respect to the evasion count, that Mr. McManus's income was from his law practice. We wanted to be clear that he had other sources of income during that year.

The Court will also note that $510,000 was reported the following year, although that's a subject of how it was characterized, is still in dispute. And with respect to the return that was not timely filed in a willful manner, the Court should be aware, as the stipulation articulates, that that return was ultimately filed and the taxes exclusive of penalties and interest were paid.

THE COURT: That's on the '93? Which year was that?

MS. ADLERSTEIN: '93. I'm sorry -- well, '92 and '93.

THE COURT: With the additions or comments by counsel, Mr. McManus, is there anything that you would disagree with as to what the government's counsel has laid out as sort of the basic proof that they would adduce at trial to prove the two offenses against you?

THE DEFENDANT: No, your Honor.

THE COURT: All right. So is it, in fact, the case that during calendar year 1993, you received gross income in the approximate amount of $313,000, for which you were required by law to make an income tax return and that you willfully failed to make that income tax return on time, as required by law?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is it also correct that on or about -- I guess was the tax return filed on or about April 15th of '99, on the evasion one?

MR. MARRELLA: Yes, your Honor.

THE COURT: Okay. That on or about April 15th of 1999, in the District of Connecticut, that you

prepared and caused to be filed an individual income tax return with the Internal Revenue Service which stated that your income for calendar year taxable income for calendar year '98 was approximately $287,000, and failed to include additional income of at least the amounts of $510,000, as income in that year for the year covered by the return, and that you did so willfully?

THE DEFENDANT: I caused the tax return to be prepared and, well, the income was captured the following year.

THE COURT: All right. It's the government's contention, I believe, that the tax return for '98 was false, however, because --

THE DEFENDANT: Yes.

THE COURT: -- the income, at least the total income of $510,000 should have been reported on the tax return for '98.

THE DEFENDANT: That's correct.

THE COURT: And I need, therefore, to ask you whether the fact that it was not so reported on the '98 return was a willful act on your part to fail to report in that year that income that should have been reported?

(Ms. Adlerstein conferring with the defendant.)

THE DEFENDANT: Yes.

[Exhibit C to the OAE's brief at 47-52.]

A more concise synopsis of the offenses to which respondent pleaded guilty is contained in the Stipulation Concerning Offense Conduct, appended to the plea agreement:

The United States of America and the defendant, William E. McManus, II, hereby stipulate and agree that:

1. In 1993, the defendant received income from the practice of law.

2. The defendant was a person required to file a U.S. Individual Income Tax Return for the year 1993 by virtue of having received gross income in that year in

the amount of $313,386. The defendant willfully failed to file a tax return for the year 1993, in violation of 26 U.S.C. § 7203. The defendant's 1993 tax deficiency amounted to $65,743. The defendant filed a 1993 tax return on or about May 29, 1996. All income reported on this return was derived from lawful sources and was accurately reported. The defendant paid his outstanding 1993 tax deficiency (excluding penalties and interest) in 1998.

3. On or about April 15, 1999, the defendant willfully attempted to evade his 1998 federal income tax, in violation of 26 U.S.C. § 7201, by willfully filing a false 1998 U.S. Individual Income Tax Return. On his 1998 tax return the defendant willfully failed to report certain amounts of income, in the form of two checks, in the amounts of $350,000 and $160,000, which were received in September and October of 1998, respectively.

4. The defendant's 1998 tax return was false because the defendant willfully omitted approximately $510,000 (checks for $160,000 and $350,000). The defendant's willful attempt to evade his 1998 income tax resulted in a substantial tax deficiency for that year. All income reported on his 1998 tax return was derived from lawful sources.

5. The Government contends that the defendant's 1998 tax return was also false in that he willfully mischaracterized as a long-term capital gain another check that he had received in 1998 in the amount of $222,500. The Government contends that the defendant received the check (and the two checks identified in the preceding paragraph) as compensation for legal services rendered to a client, and not as the proceeds of the sale in 1998 of a capital asset held by the defendant. Accordingly, the Government contends that the check should have been reported as ordinary income on the defendant's Schedule C (not as a long-term capital gain on Schedule D, which is how the defendant reported it). Treating this check and the two checks identified in the preceding paragraph as ordinary income would result in a total tax deficiency for 1998 in the amount of $245,374. The defendant contends that all three checks are long-term capital gains. The treatment of these three checks (ordinary

income or capital gain) is the only dispute between the parties relating to tax loss.[2]

[Exhibit A to the OAE's brief.][3]

On August 23, 2001, Judge Hall sentenced respondent to a total of fourteen months imprisonment to be followed by a three-year term of supervised release. Prior to imposing sentence, Judge Hall denied respondent's request for a downward departure due to extraordinary rehabilitation and diminished capacity.

The OAE urged us to impose a two-year suspension, retroactive to the date of respondent's temporary suspension, December 10, 2002.

Following a de novo review of the record, we determined to grant the OAE's motion for final discipline. The existence of a criminal conviction is conclusive evidence of respondent's guilt. R.1:20-13(c)(1); In re Gipson, 103 N.J. 75, 77 (1986). Respondent's guilty plea to one count of attempted income tax evasion, and one count of willful failure to file an income tax return, constituted a violation of RPC 8.4(b) (commission of a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer), as well as a violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). Only the quantum of discipline to be imposed remains at issue. R.1:20-13(c)(2); In re Lunetta, 118 N.J. 443, 445 (1989).

The level of discipline imposed in disciplinary matters involving the commission of a crime depends on numerous factors, including the "nature and severity of the crime, whether the crime is related to the practice of law, and any mitigating factors such as respondent's reputation, his prior trustworthy conduct, and general good conduct." In re Lunetta, supra, 118 N.J. at 445-

[2] At sentencing, the three checks were treated as capital gains in determining the amount of the tax loss.

[3] A more detailed analysis of the underlying misconduct is contained in respondent's Presentence Report.

446. Discipline is imposed even though an attorney's offense was not related to the practice of law. In re Kinnear, 105 N.J. 391, 395 (1987).

As the OAE noted, a violation of federal tax law is a serious ethical breach. In re Queenan, 61 N.J. 579, 580 (1972). "[D]erlictions 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 (1965). See also In re Landi, 65 N.J. 322 (1974) (one year suspension for income tax evasion; mitigating factors included prior unblemished record); and In re Kleinfeld, 58 N.J. 217 (1971) (six-month suspension following plea of nolo contendere to one count of tax evasion, for which fine was paid; unspecified mitigating circumstances considered).

Although the level of discipline imposed for violation of federal tax law depends on the underlying circumstances of the matter, in more recent years, when an attorney has been guilty of tax evasion, a two-year suspension has been deemed the standard measure of discipline, even where the attorney has not been previously disciplined. See, e.g., In re Mischel, 166 N.J. 219 (2001) (two-year suspension for an attorney with a prior unblemished history, who pleaded guilty in the Supreme Court of the State of New York to a charge of offering a false instrument for filing; the false instrument was a New York State tax return which she knew contained false and fraudulent deductions); In re Rakov, 155 N.J. 593 (1998) (two-year suspension for an attorney with a prior unblemished disciplinary record, convicted of five counts of attempted income tax evasion; 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) (attorney suspended for two years for evading $39,066 in taxes by underreporting his earned income in 1990 and 1991; prior unblemished record); and In re Nedick, 122 N.J. 96 (1991) (two-year suspension for failing to report $7,500 in cash legal fees in his taxable income; prior unblemished record and additional

mitigating factors). See also In re Tuman, 74 N.J. 143 (1977) (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) (a plea of guilty to the filing of false and fraudulent tax returns warranted suspension 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).[4]

In cases of more egregious conduct, particularly those in which the attorney had prior disciplinary problems, the Court did not hesitate to impose disbarment. The OAE directed our attention to several cases where disbarment was the result. In re Cardone, 175 N.J. 155 (2003) (attorney disbarred after a guilty plea to a charge of attempted income tax evasion; attorney had filed income tax returns acknowledging taxes owed, but after filing the returns took various steps designed to prevent the Internal Revenue Service from collecting the taxes; previous three-year suspension for engaging in fraudulent conduct in three separate business transactions with a client); In re Bok, 163 N.J. 499 (2000) (disbarment after a conviction for income tax evasion, and for filing false corporate income tax returns; attorney had been temporarily suspended since 1987, as a result of his failure to respond to the OAE's request for the production of his books and records in connection with a separate ethics matter); and In re Braun, 149 N.J. 414 (1997) (disbarment for attorney who pleaded guilty to one count of income tax evasion, specifically, at least $116,310 in federal income taxes during a five-year period; prior three-month suspension following a conviction for reckless endangerment).

In the OAE's view, which placed particular emphasis on respondent's prior unblemished disciplinary history, this matter is more akin to Batalla, Nedick, Rakov, and Mischel, than to

[4] In our Decision in Rakov, we stated that "there were no mitigating factors present sufficient to persuade the Board that a lesser measure of discipline than the two-year suspension ordinarily meted out in tax evasion cases was warranted." Similarly, in Mischel, we saw "no reason to stray from precedent."

Bok, Cardone, and Braun. The OAE, therefore, submitted that a two-year suspension is appropriate discipline.

We agree with the OAE's assessment. There are no factors in this matter sufficient to cause us to vary from precedent. We unanimously determined to impose a two-year suspension, retroactive to December 10, 2002, the date of respondent's temporary suspension. Four members did not participate.

We further determined to 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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of William E. McManus, II
Docket No. DRB 03-242

Argued: November 20, 2003

Decided: January 30, 2004

Disposition: Two-year suspension

Members	*Disbar*	*Two-year Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley		X					
O'Shaughnessy							X
Boylan							X
Holmes							X
Lolla		X					
Pashman		X					
Schwartz							X
Stanton		X					
Wissinger		X					
Total:		5					4

Julianne K. DeCore
Chief Counsel