

Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-218
District Docket No. XIV-2018-0461E

In the Matter of
James Michael Scott, III
An Attorney at Law

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Corrected Decision

Argued: October 17, 2019

Decided: January 17, 2020

Amanda W. Figland appeared on behalf of the Office of Attorney Ethics.

Robert E. Ramsey 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 on a disciplinary stipulation between the Office of Attorney Ethics (OAE) and respondent. Respondent stipulated to having violated RPC 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects).

For the reasons set forth below, we determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1997 and to the Pennsylvania bar in 1998. At the relevant times, he was an Assistant County Prosecutor for the Mercer County Prosecutor's Office (Prosecutor's Office). Respondent has no disciplinary history.

Respondent and the OAE entered into a disciplinary stipulation, dated May 29, 2019, which sets forth the following facts in support of respondent's admitted ethics violations.

Since 2002, respondent has been an Assistant County Prosecutor with the Prosecutor's Office. From 2011 through 2016, he was assigned to the Homicide and Economic Crimes Unit. In 2016, he became a Supervising Assistant Prosecutor. Subsequently, on a date not identified in the record, respondent was offered the position of Special Assistant U.S. Attorney for the Prosecutor's Office. A corresponding background check revealed respondent's failure to file joint income tax returns on behalf of his wife and himself (collectively, the Scotts) for five tax years. Consequently, the offer of the Special Assistant U.S. Attorney position was withdrawn.

On April 27, 2018, respondent filed all of the delinquent tax returns with the Internal Revenue Service (IRS) and the State of New Jersey Division of

Taxation (Division) and paid all taxes, interest, and penalties due to both entities. On August 3, 2018, through counsel, he reported to the OAE and to Doris Galuchi, First Assistant, Mercer County Prosecutor's Office, that he had failed to file joint federal and state income tax returns for tax years 2011, and 2013 through 2016, until rectifying the issue on April 27, 2018.¹

On September 10, 2018, respondent submitted to the OAE proof that all tax returns had been filed with the IRS and the Division and that all taxes, interest, and penalties had been paid. The Scotts' total liability, including penalties and interest, was \$9,521.41.

In respect of the Scotts' 2017 federal and state joint income tax returns, respondent filed them nine days late. The Scotts owed \$1,865 to the IRS and \$0 to the Division. Because the federal return was filed late, the IRS assessed \$96.94 in interest and penalties. For the tax years 2015 through 2017, the Scotts received a total refund of \$483 from the Division.

During the tax years at issue, the Scotts had four children, and they owned a home, subject to a mortgage. They both worked full-time, and received W-2 forms from their employers. From 2011 to 2017, the Scotts' combined annual

¹ The Scotts filed tax returns for tax year 2012 and received refunds from the IRS and the Division.

adjusted gross income ranged from \$190,000 to \$270,000. Their combined withholdings for federal taxes each year ranged from \$30,000 to \$52,000, and their withholdings for state taxes each year ranged from \$10,000 to \$13,000.

Although respondent had assumed responsibility for filing the Scotts' joint income tax returns, he failed to do so because he was busy at work and at home, where he had substantial responsibilities, including caring for his children. Specifically, respondent's normal work hours were 8:30 a.m. to 7:00 p.m., which increased when he was on trial. He claimed that, at various times, he had handled four to six trials at a time, with each trial lasting five to six weeks. Additionally, respondent was on call for homicide matters.

Although respondent acknowledged that his circumstances did not justify his failure to file income tax returns, he believed that he had not deprived any tax authority of income tax revenue during the years he failed to file income tax returns because sufficient income taxes had been withheld from his and his wife's salaries to cover any taxes owed. Indeed, in 2012, the Scotts received a refund from the IRS and the Division. Thus, respondent asserted, his failure to file income tax returns for the above five years was not based on an intention to evade his obligation to pay taxes to the Division or IRS.

At present, respondent's personal tax filings are up to date, and he does not owe either the IRS or the Division any back taxes, penalties, or interest. Neither the IRS nor the Division charged him with having violated any law for failing to file income tax returns, and no income tax liens were imposed on the Scotts for their failure to timely pay income taxes.

Respondent's employer agreed that he had a demanding workload, but denied that his work responsibilities had prevented him from filing personal income tax returns. Respondent's employer believed that respondent could benefit from better time-management skills. At present, respondent remains employed by the Prosecutor's Office.

Based on the above facts, the parties stipulated to respondent's violation of RPC 8.4(b).

In mitigation, the stipulation cites the following factors: respondent (1) reported his conduct to the OAE; (2) has an unblemished disciplinary history; (3) was not criminally charged and is not under investigation by either federal or state income tax authorities; (4) respondent failed to file the income tax returns without any intent to deprive either the federal or state government of income tax revenue; (5) believed that no income taxes were owed due to the substantial tax withheld, and based on the Scotts' history of receiving refunds;

(6) failed to file the returns due to his inability to balance his responsibilities as a prosecutor with his responsibilities as a parent; (7) filed all back returns and paid all taxes, plus penalties and interest, by September 5, 2018; and (8) cooperated with the OAE.

In aggravation, the stipulation cites respondent's knowledge that he was required to file federal and state income tax returns regardless of his obligation to pay taxes, and his failure to file the returns until after a federal background check had uncovered his and his wife's failure to do so.

The OAE seeks a reprimand, plus six hours of OAE-approved time management coursework, to be completed within 180 days of the date of the Court's Order in this case. Respondent requests a reprimand.

Following a review of the record, we are satisfied that the facts contained in the stipulation clearly and convincingly support the finding that respondent violated RPC 8.4(b), by committing a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects. In this case, the applicable federal statute is 26 U.S.C. § 7203, which classifies as a misdemeanor the willful failure to file an income tax return and to pay any tax due. The sole issue left for our determination is the appropriate quantum of discipline to be imposed for respondent's misconduct.

It is well-settled that a violation of either state or federal tax law is a serious ethics breach. In re Queenan, 61 N.J. 578, 580 (1972), and In re Duthie, 121 N.J. 545 (1990). “[D]erelictions of this kind by members of the bar cannot be overlooked.” In re Gurnik, 45 N.J. 115, 116 (1965). “A lawyer’s training obliges him to be acutely sensitive of the need to fulfill his personal obligations under the federal income tax law.” Ibid.

In In re Garcia, 119 N.J. 86, 89 (1990), the Court declared that, even in the absence of a criminal conviction, the willful failure to file an income tax return requires the imposition of a suspension. Willfulness does not require “any motive, other than a voluntary, intentional violation of a known legal duty.” In the Matter of Eugene F. McEnroe, DRB 01-154 (January 29, 2002) (slip op. at 2); In re McEnroe, 172 N.J. 324 (2002). Here, respondent stipulated that he did not file the tax returns because he was busy. Thus, he violated RPC 8.4(b), by failing to file joint federal and state income tax returns for the tax years 2011, and 2013 through 2016.

Generally, since Garcia, terms of suspension have been imposed on attorneys who fail to file income tax returns. See, e.g., In re McEnroe, 172 N.J. 324 (three-month suspension for attorney with no disciplinary history for violations of RPC 8.4(b) and (c), resulting from his seven-year failure to file

joint federal and state income tax returns on behalf of himself and his wife; the attorney's payment of all outstanding federal and state tax obligations was considered as mitigation); In re Vecchione, 159 N.J. 507 (1999) (six-month suspension for attorney's failure to file federal income tax returns for twelve years; compelling mitigating factors); In re Waldron, 193 N.J. 589 (2008) (six-month suspension imposed on attorney who pleaded guilty to one count of knowing and willful failure to file a federal income tax return for a single calendar year, in violation of 26 U.S.C. § 7203); In re Kleinfeld, 58 N.J. 217 (1971) (six-month suspension following plea of nolo contendere to one count of tax evasion, for which a fine was paid; unspecified mitigating circumstances considered); In re Hand, 235 N.J. 367 (2018) (one-year suspension imposed on attorney who pleaded guilty to two counts of failure to file federal income tax returns for two calendar years, in violation of 26 U.S.C. § 7203, resulting in a \$50,588 tax loss to the United States government; the attorney was sentenced to three years' federal probation, which included a five-month period of home confinement, and was ordered to pay \$50,588 in restitution and to provide full cooperation with the IRS, among other things; she also had a disciplinary history); In re Rich, 234 N.J. 21 (2018) (two-year suspension imposed on attorney who pleaded guilty in the New York Supreme Court to one count of

fifth-degree criminal tax fraud, a Class A misdemeanor; he had failed to file state personal income tax returns for the years 2008 through 2013, and, for each year, he had a tax liability of more than \$50,000; he agreed to pay nearly \$1.2 million in back taxes, including penalties and interest); In re McManus, 179 N.J. 415 (2004) (two-year suspension imposed on attorney who pleaded guilty to one count of federal income tax evasion and one count of willful failure to file an income tax return; he failed to file an income tax return in 1993, a year in which he had earned \$313,386; he also underreported his income for the year 1998 by more than \$500,000; he was temporarily suspended following his guilty plea); and In re Gottesman, 222 N.J. 28 (2015) (three-year retroactive suspension for attorney guilty of tax evasion and willful failure to remit payroll taxes withheld from his employees' wages; he also used his trust account to conceal the true extent of his income; he was sentenced to concurrent six-month terms of imprisonment on both counts and three years of supervised release; prior censure).

In support of a reprimand, the OAE relies on two cases – In re Gokhale, ___ N.J. ___ (2001), and In re Williams, 172 N.J. 325 (2002). In our view, however, those cases are distinguishable from the instant matter.

In Gokhale, we determined to impose a reprimand on an attorney who had engaged in the unauthorized practice of law and failed to comply with recordkeeping requirements. Although the attorney had been charged with having violated RPC 8.4(b) and (c), based on his failure to file federal income tax returns for two years, we found that he did not willfully fail to file the returns, because he had obtained extensions and paid estimated taxes. In the Matter of Vijay Gokhale, DRB 00-077 (February 6, 2001) (slip op. at 13-14).

The Court agreed.

Moreover, as we noted in McEnroe, (slip op. at 12):

Gokhale [had] 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.

In Williams, the Court imposed a reprimand on an attorney who had willfully failed to file federal and state income tax returns for tax years 1995 through 1998. In the Matter of Jerome T. Williams, DRB 01-050 (December 31, 2001) (slip op. at 3). He claimed that he had not done so because he suffered

from depression and lethargy due to marital problems. Ibid.

During the four tax years at issue, the attorney had a limited law practice. Ibid. He was employed as a school counselor, however, and claimed that sufficient funds had been withheld from that salary to cover any taxes owed from his law practice. Ibid. Indeed, when the attorney filed the tax returns, it turned out that his law practice had not generated any additional tax liability beyond the amount that he had paid through his school salary. Ibid. Although we viewed the absence of additional liability as a mitigating factor, we determined that a six-month suspension was warranted because the statute rested on the failure to file the returns. Id. at 8.

The Court disagreed and imposed a reprimand, stating that, “under the circumstances in this case, including the facts that respondent owed no additional taxes and incurred no penalties,” a suspension was “not required.” In re Williams, 172 N.J. 325. We interpret the language of the Order to signify that a suspension is not necessary when an attorney files the tax return but does not owe money beyond the amount that had been withheld, and, consequently, incurs no penalties.

In this case, the Scotts failed to file income tax returns for the tax years 2011 and 2013 through 2016. With the exception of 2011, they owed income

taxes to either the IRS or the Division, or both. In addition, the Scotts were assessed penalties and interest for four of the five years, for a total liability of \$9,521.41. To be sure, this amount is substantially less than the amounts at issue in the cases involving long-term suspensions. See, e.g., In re Hand, 235 N.J. 367 (one-year suspension; \$50,588 tax loss to the United States government for two tax years); In re Rich, 234 N.J. 21 (two-year suspension; \$1.2 million in back taxes, penalties, and interest owed to New York State for six tax years); and In re McManus, 179 N.J. 415 (two-year suspension; attorney earned \$313,386 in 1993; in 1998, he underreported his income by more than \$500,000).

At the other end of the spectrum are the reprimand cases, Gokhale and Williams, which also are inapplicable. Unlike the attorney in Gokhale, respondent neither filed for extensions nor paid estimated taxes to either the IRS or the Division. Unlike the attorney in Williams, the Scotts did owe additional taxes and incurred penalties.

We are, thus, left with the choice of imposing a censure or a short suspension. Respondent's circumstances are somewhat comparable to that of the attorney in McEnroe, who received a three-month suspension for his failure to file returns for seven years. Like respondent, McEnroe did not have a disciplinary history, and he paid all outstanding obligations. Unlike respondent,

however, McEnroe had filed for extensions.

Here, the stipulation identifies additional mitigation, that is respondent's report of his conduct to the OAE, and his acceptance of responsibility as demonstrated by his entry into the stipulation. The nobility of respondent's report of his misconduct to the OAE and his cooperation is undercut by the fact that he did so only after he was "caught" and faced being reported by either the Prosecutor's Office or the U.S. Attorney's office or both. In addition to respondent's claim that he believed that the tax authorities had not been deprived of tax revenue, he contended that he should be treated more favorably than other attorneys because his failure to file the tax returns was attributable to his being "busy" with his children and his career. We wholly reject that contention. Many taxpaying Americans stand in those shoes, and they obey the law. Whatever the reason for respondent's failure to file the returns, we cannot attribute it to a matter of poor time-management.

Certain aggravating factors were present in McEnroe, however, that are absent from this record. Throughout the period that McEnroe did not file returns, the IRS persistently attempted to recover the delinquent taxes, interest, and penalties from him, to no avail. McEnroe, DRB 01-154 (slip op. at 3-4). Moreover, at the hearing, McEnroe placed blame on the IRS for having "screwed

up” the tax problem. Id. at 3.

Here, the stipulation cites, in aggravation, respondent’s knowledge that he was obligated to file tax returns irrespective of liability, and his failure to file the returns until after the federal background check had uncovered his and his wife’s disregard of their obligation. Absent, however, is respondent’s role as an assistant prosecutor, a position involving public trust, which also may be considered in aggravation. See, e.g., In re Pariser, 162 N.J. 574 (2000) (six-month suspension for deputy attorney general (DAG) who pleaded guilty to one count of third-degree official misconduct for stealing items, including cash, from co-workers; his conduct was not an isolated incident but viewed as a series of petty thefts occurring over a period of time; the attorney received a three-year probationary term and was ordered to pay a \$5,000 fine, to forfeit his public office as a condition of probation, and to continue psychological counseling until medically discharged; the attorney’s status as a DAG was considered an aggravating factor) and In re Davis, 206 N.J. 557 (2011) (one-year suspension imposed on an assistant prosecutor with the Essex County Prosecutor’s Office who, in connection with a mortgage loan application, submitted to the lender a false certificate of release of federal tax lien; thereafter, she created a false power of attorney purportedly given by her to “T.M.” to support her false claim


to the IRS that it was T.M. who had provided her with the false certificate; in aggravation, we considered the attorney's position, which involved the public trust).

In our view, respondent's position as an assistant country prosecutor is a serious aggravating factor. Yet, his conduct falls short of the recalcitrance demonstrated by McEnroe. Moreover, we note that McEnroe was decided in January 2002, nine months before censure became a recognized form of attorney discipline, pursuant to R. 1:20-15A(a)(4). Considering the facts presented in this case, we determine that a censure is adequate discipline for respondent's misconduct.

Vice-Chair Gallipoli voted to impose a three-month suspension. Member Joseph did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bruce W. Clark, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD


In the Matter of James Michael Scott, III
Docket No. DRB 19-218

Argued: October 17, 2019

Decided: January 17, 2020

Disposition: Censure

<i>Members</i>	Censure	Three-Month Suspension	Recused	Did Not Participate
Clark	X			
Gallipoli		X		
Boyer	X			
Hoberman	X			
Joseph				X
Petrou	X			
Rivera	X			
Singer	X			
Zmirich	X			
Total:	7	1	0	1


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