

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 625, Disciplinary
Petitioner	:	Docket No. 3 - Supreme Court
	:	
v.	:	No. 11 DB 2001 - Disciplinary
	:	Board
	:	
[ANONYMOUS]	:	Attorney Registration No. []
Respondent	:	([] County)
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OFFICE OF DISCIPLINARY COUNSEL,	:	No. 626, Disciplinary
Petitioner	:	Docket No. 3 - Supreme Court
	:	
v.	:	No. 12 DB 2001 – Disciplinary
	:	Board
	:	
[ANONYMOUS]	:	Attorney Registration No. []
Respondent	:	([] County)

REPORT AND RECOMMENDATIONS OF
THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES
OF THE SUPREME COURT OF PENNSYLVANIA:

Pursuant to Rule 208(d)(2)(iii) of the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board of the Supreme Court of Pennsylvania herewith submits its findings and recommendations to your Honorable Court with respect to the above-captioned Petitions for Discipline.

I. HISTORY OF PROCEEDINGS

On February 12, 2001, Petitioner, Office of Disciplinary Counsel, filed Petitions for Discipline against Respondents, [] and [], alleging that Respondents' convictions warranted the imposition of discipline and that their criminal conduct violated Rule of Professional Conduct 8.4(b). Respondents filed a Joint Answer to the Petitions for Discipline, which were consolidated by Order of the Board dated March 15, 2001.

A disciplinary hearing was held on June 28, 2001 before Hearing Committee [] comprised of Chair [], Esquire and Members [], Esquire and [], Esquire. Petitioner was represented by [], Esquire. Respondents were represented by [], Esquire. Petitioner presented no witnesses, but submitted 24 exhibits. Respondents presented the testimony of three character witnesses, testified on their own behalf, and submitted ten exhibits. After the hearing, the parties filed Briefs.

The Hearing Committee filed a Report on November 19, 2001 recommending a one year and one day suspension for both Respondents. Respondents filed a Brief on Exceptions and requested oral argument. Petitioner filed a Brief Opposing these Exceptions. Oral argument was held on April 16, 2002 before a three-member panel consisting of Board Members Stewart, Rudnitsky and Teti.

This matter was adjudicated by the Disciplinary Board at its meeting on May 15, 2002.

II. FINDINGS OF FACT

The Board makes the following findings of facts:

1. Respondent [1] was admitted to practice law in the Commonwealth of Pennsylvania on or about November 20, 1979.

2. Respondent [2] was admitted to practice law in the Commonwealth of Pennsylvania on or about October 29, 1981.

3. Respondents are brothers and have been partners in a law practice since 1981.

4. During the period from late 1982 through 1989, Respondents were subject to highly publicized criminal and disciplinary investigations and prosecutions. The proceedings related to Respondents' representation of a criminal defendant in [] County, and their decision to hold a rifle stock that had been discovered as part of Respondents' investigation of murder charges against their client.

5. Respondents were arrested on charges of tampering with evidence and hindering prosecution. Respondents were subsequently found guilty by a [] County Jury in June 1984.

6. Respondents appealed the conviction, which was ultimately reversed on appeal three years after the jury verdict.

7. Disciplinary proceedings were initiated against Respondents, but eventually dismissed by the Board. In re Anonymous Nos. 45 & 46 DB 85, 3 D. & C.4th (1989).

8. During this time period, Respondents failed to file tax returns or to pay their taxes.

9. In 1992, the IRS began an investigation and audit of Respondents' financial records, and thereafter, federal criminal charges were filed against Respondents.

10. On May 8, 1996, Respondents each pled guilty to one count of willful failure to file federal income tax returns for the calendar year 1991, and were sentenced.

11. In addition, Respondents entered into an agreement with the IRS to file their tax returns and to make monthly payments on the arrearages.

12. As a result of this tax conviction, disciplinary proceedings against Respondents were commenced on August 13, 1996.

13. At the disciplinary hearing on December 12, 1996, Respondents admitted to the misconduct, but sought mitigation on the basis that their prior state criminal conviction, which was now reversed, had had an adverse impact on their law practice and had caused great financial difficulties such that paying taxes was not a high priority. More importantly, Respondents testified that they had learned from the circumstances and understood their obligations, and they assured the Hearing Committee that they would timely file their tax returns henceforth.

14. Respondents each received a Public Censure on November 17, 1998, relating to their federal tax conviction.

15. On June 30, 1999, the Attorney General of the Commonwealth of Pennsylvania filed informations with the Court of Common Pleas, [] County, Pennsylvania captioned: Commonwealth of Pennsylvania v. [Respondent 1], No. [] C D 1999 and Commonwealth of Pennsylvania v. [Respondent 2], No. [] C D 1999, charging Respondents with two counts each of willful failure to file and willful failure to remit Pennsylvania income taxes in violation of 72 P.S. §7353 (c) for the years 1996 and 1997.

16. Respondents pled not guilty and subsequently a jury trial was held before the Honorable [A]. On June 9, 2000, a jury found Respondents guilty of all charges.

17. On August 9, 2000, Judge [A] sentenced each Respondent on count 1 to pay the costs of prosecution, a fine of \$500, and to undergo a period of incarceration in the [] County Prison for not less than one month nor more than twelve months.

18. The prison sentences were staggered by one month so that Respondents would not be imprisoned at the same time.

19. On counts 2 through 4, each Respondent received a combined sentence of 36 months probation, consecutive with the sentence for count 1, and were each ordered to pay additional fines totaling \$1,000. Further, Respondents, were directed to complete at least 400 hours of community service each.

20. Respondents have completed all the terms and conditions of their probation and by Order dated January 31, 2002, Judge [A] terminated Respondents' probations.

21. All of Respondents' outstanding state and federal tax returns through calendar year 1999 have been filed.

22. Respondents are paying past due federal income taxes pursuant to an agreement with the Internal Revenue Service, and are currently in compliance with such agreement.

23. Respondents are paying no amount of the overdue taxes owed to the Commonwealth of Pennsylvania, and have no agreement with the Commonwealth of Pennsylvania regarding said outstanding balance.

24. Respondents' misconduct did not adversely impact their representation of a particular client.

25. Respondents were remorseful.

III. CONCLUSIONS OF LAW

By their conduct as set forth above, Respondents violated the following Pennsylvania Rule of Disciplinary Enforcement and Rule of Professional Conduct:

1. Respondents' convictions for willful failure to file and willful failure to pay Pennsylvania income taxes constitute a serious crime, as defined under Pa. R.D.E. 214(i) and therefore, form an independent basis for discipline.

2. RPC 8.4(b) – It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

IV. DISCUSSION

This matter is before the Disciplinary Board on Petitions for Discipline charging Respondents with the commission of a serious crime, as defined under Pa.R.D.E. 214(i) as well as a violation of RPC 8.4 (b). While Respondents admit to committing the crime, they deny violating RPC 8.4(b) and contend that their state tax conviction is "part and parcel" of the previous federal tax conviction and is the same matter, such that the imposed discipline should, at most, be the same as that for their previous federal tax conviction, i.e., public censure.

A review of Pennsylvania's disciplinary case law reveals that there have been numerous cases involving attorneys convicted of failure to file income tax returns. The precedent established in these cases provides a bench mark for determining the severity of the crime in relation to the discipline which must then be tailored after consideration of aggravating and mitigating circumstances. See In re Anonymous No. 76 DB 92, 24 Pa. D. & C. 4th 169 (1994). In an overwhelming majority of the cases, the Pennsylvania Supreme Court has imposed public discipline for convictions for failure to file tax returns. See In re Anonymous No. 87 DB 93, No. 968, Disciplinary Docket No. 2 (Pa. February 27, 1995) (public censure); In re Anonymous No. 63 DB 96, No. 212, Disciplinary Docket No. 3 (Pa. July 29, 1997) (public censure); In re Anonymous No. 136 DB 97, No. 376, Disciplinary Docket No. 3 (Pa. July 15, 1999) (public censure); In re Anonymous No. 108 DB 89, 7 Pa. D. & C. 4th 361 (1990) (two-year suspension); In re Anonymous No. 38 DB 91, 18 Pa. D. & C. 4th 266 (1992) (a year and a day suspension); and In re Anonymous No. 16 DB 94, No. 7, Disciplinary Docket No. 3 (Pa. August 31, 1995) (three-year suspension).

The issue before the Board in the instant case is whether to recommend that a public censure or a suspension be imposed upon Respondents. The Board finds that the appropriate sanction for Respondents would be a suspension in light of the fact that this is Respondents' second conviction for failure to file tax returns.

The length of suspension warranted is dependent upon the existence of any aggravating and mitigating factors. The Respondents convinced the Hearing Committee and the Disciplinary Board on their first encounter to file tax returns that their nightmare in defending the [] County criminal action was a mitigating factor in the first failure to file case. As a result, the Respondents received a public censure instead of a suspension. The Respondents have tried to achieve the same result in the case with the same argument. Respondents assured the Hearing Committee in the prior case that they would obey the law. Instead, knowing that the failure to file had criminal consequences, the Respondents failed to file their returns and to pay their taxes as they became due. The continued violations after the prior convictions and the assurances to the Hearing Committee in the prior proceeding is significant aggravating circumstance that mandates the imposition of a suspension.

Respondents request that if suspensions are recommended they be staggered so as to permit Respondents to continue operation of their law practice by one brother while the other brother serves out his suspension. The Board finds that this request is inappropriate for several reasons. First, the purpose of a suspension is to protect the public and the integrity of the Bar and Court, and a delay in the imposition of a suspension, merely for the convenience of Respondents, would not serve the purpose of suspensions. As the Court noted in Office of Disciplinary Counsel v. Keller, 509 Pa. 573, 506 A.2d 872 (1986), “the focus is not on the Respondents but rather is directed to the impact of his conduct upon the system and its effects on the perception

of the system by the society it serves.” Id. At 573. Second, the Pennsylvania Rules of Disciplinary Enforcement and Rules of Professional Conduct would not permit the requested staggering of Respondents’ suspensions. Under RPC 5.4(b), where a partner is suspended, the partnership would have to be dissolved since lawyers cannot practice in a partnership with a non-lawyer. Under RPC 7.1 and 7.5(d), the non-suspended partner can no longer practice under the firm name as such would be misleading, and under Pa.R.D.E. 217(j)(4)(i), the suspended lawyer could not do any law related work for the non-suspended lawyer.

For the above reasons, the Board recommends that a nine-month suspension be imposed on each Respondent, to be served simultaneously.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that Respondents, [] and [], be suspended from the practice of law for a period of nine months each, to be served simultaneously.

It is further recommended that the expenses incurred in the investigation and prosecution of this matter be paid by both Respondents.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: _____
Richard W. Stewart, Member

Date: September 26, 2002

Board Member Schultz dissented and would recommend a public censure.

Board Members Morris and Sheerer dissented and would recommend a private reprimand.

Board Members Curran and Wright did not participate in this adjudication.

PER CURIAM:

AND NOW, this 25th day of November, 2002, upon consideration of the Report and Recommendations of the Disciplinary Board dated September 26, 2002, Respondent's Objections and Exceptions and Reply thereto, it is hereby

ORDERED that [Respondent 1] be and he is suspended from the Bar of this Commonwealth for a period of nine months, and he shall comply with all of the provisions of Rule 217, Pa.R.D.E. It is further ORDERED that respondent shall pay costs to the Disciplinary Board pursuant to Rule 208(g), Pa.R.D.E.

PER CURIAM:

AND NOW, this 25th day of November, 2002, upon consideration of the Report and Recommendations of the Disciplinary Board dated September 26, 2002, Respondent's Objections and Exceptions and Reply thereto, it is hereby

ORDERED that [Respondent 2] be and he is suspended from the Bar of this Commonwealth for a period of nine months, and he shall comply with all of the provisions of Rule 217, Pa.R.D.E. It is further ORDERED that respondent shall pay costs to the Disciplinary Board pursuant to Rule 208(g), Pa.R.D.E.