

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 246, Disciplinary Docket
Petitioner	:	No. 3 - Supreme Court
	:	
	:	No. 98 DB 96
	:	Disciplinary Board
v.	:	
	:	Attorney Registration No. []
[ANONYMOUS]	:	
Respondent	:	([] County)

AND

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 247, Disciplinary Docket
Petitioner	:	No. 3 - Supreme Court
	:	
	:	No. 99 DB 96
	:	Disciplinary Board
v.	:	
	:	Attorney Registration No. []
[ANONYMOUS]	:	
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 ("Board") herewith submits its findings and recommendations to your Honorable Court with respect to the above-captioned Petition for Discipline.

I. HISTORY OF PROCEEDINGS

On July 31, 1996, this matter was referred to the Disciplinary Board by Order of the Supreme Court based on Respondents' convictions of the crime of willful failure to file tax return in violation of 26 U.S.C. §7203. Office of Disciplinary Counsel filed Petitions for Discipline against Respondents on August 13, 1996. Respondents filed an Answer on September 12, 1996. By Order of the Disciplinary Board dated September 23, 1996, a Joint Motion for Consolidation was granted.

A disciplinary hearing was held on December 12, 1996 before Hearing Committee [] comprised of Chair [], Esquire, and Members [], Esquire, and [], Esquire (Alternate). Respondents were represented by [], Esquire. Petitioner was represented by [], Esquire. The Committee filed a Report on September 26, 1997 and recommended Public censure. A letter Brief on Exceptions was filed by Respondents on October 16, 1997. Petitioner filed a letter Brief Opposing Exceptions on October 23, 1996.

This matter was adjudicated by the Board at the meeting of November 14, 1997.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is now located at Suite 3710, One Oxford Centre, Pittsburgh, Pennsylvania, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement (hereafter Pa.R.D.E.), with the power and the duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of the aforesaid Rules.

2. Respondent, [1], was born on March 10, 1951 and was admitted to practice law in Pennsylvania on November 20, 1979. His registered office address is [].

3. Respondent, [2], was born on November 29, 1955 and was admitted to practice law in Pennsylvania on October 29, 1981. His registered office address is [].

4. On August 13, 1996, Petitioner filed Petitions for Discipline against Respondents. In both Petitions, Petitioner alleged that Respondents had been convicted of a crime which constituted a basis for discipline pursuant to Rule 203(b)(1), Pa.R.D.E. The Petitions further averred that as a result of their criminal convictions Respondents violated RPC 8.4(b). The Petitions were consolidated and a hearing was held on December 12, 1996.

5. On May 8, 1996, Respondents each were convicted of one count of willful failure to file federal income tax returns for calendar year 1991, a misdemeanor punishable by imprisonment up to one year.

6. Respondents are brothers and at all times relevant were partners in the practice of law.

7. Respondents' convictions were based on guilty plea agreements which led to the May 8, 1996 Order of Sentence.

8. Each Respondent was sentenced to probation for two years, with restricted electronic monitoring for the first three months; payment of costs; completion of 100 hours of community service; and restitution in the amount of \$9,160.00 for [Respondent 1] and \$7,442.00 for [Respondent 2].

9. Respondents have completed the three month period of electronic monitoring, have paid the costs of prosecution and have completed the community service.

10. Respondents have an agreement with the IRS to make payments of \$250 per month towards restitution.

11. Respondents acknowledged that in addition to the calendar year 1991, which formed the basis of their criminal conviction, they have not filed federal income tax returns for the years 1985 through 1990. Respondents are currently in negotiations with the IRS regarding civil liability for taxes and assessments for those years.

12. Respondents have also acknowledged that they have not filed federal income tax returns for the years 1992 through 1995, during the IRS criminal investigation, and maintain that their tax liability for those years is part of the ongoing civil negotiations between Respondents and the IRS. Respondents have requested extensions to file their returns for the years 1992 through 1995.

13. Respondents are in contact with the Pennsylvania Department of Revenue in

regard to their civil responsibility for having failed to file state tax returns for periods coinciding with the periods of federal nonfiling.

14. Respondents' failure to file income tax returns grew out of extenuating circumstances, and concomitant financial problems, which they faced during a protracted period of years beginning in 1982.

15. During the period from late 1982 through late 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.

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

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

18. Despite dismissal of the charges on appeal, disciplinary prosecution of Respondents began in April 1988.

19. The Disciplinary Board dismissed the charges against Respondents. *In re Anonymous Nos. 45 & 46 DB 85*, 3 Pa. D. & C. 4th 144 (1989).

20. From the time of Respondents' arrest in 1983 through the dismissal of the disciplinary charges in 1989, Respondents were regularly the subject of news accounts in the print and broadcast media in [] and surrounding counties. This publicity had a substantial adverse impact on Respondents' ability to attract and retain clients.

21. Respondents were faced with difficult financial circumstances and had to prioritize their payments to creditors. Respondents placed higher priority on payments to creditors who represented a more immediate risk of taking their property or closing their law practice.

22. Neither Respondent placed a high priority on filing or paying taxes. Neither Respondent believed failure to file tax returns would result in criminal consequences. Respondents admitted that they did not research the issue or speak to anyone about the consequences of nonfiling.

23. During the time of the criminal and disciplinary proceedings, Respondents experienced emotional and physical turmoil which exacerbated their problems in dealing with their financial condition.

24. Respondents showed remorse for their actions and have cooperated with the government.

25. Respondents have no prior record of discipline.

III. CONCLUSIONS OF LAW

Respondents were convicted of a serious crime, which constitutes an independent ground for discipline pursuant to Rule 203(b)(1), Pa.R.D.E.

IV. DISCUSSION

Rule 214(e), Pa.R.D.E., specifies that a certificate of conviction of an attorney for a serious crime shall be conclusive evidence of that crime. When a disciplinary proceeding is commenced against an attorney, based upon a criminal conviction, the Board does not engage in a retrial of the underlying facts of the crime. The Board's responsibility in this situation is to determine the appropriate measure of discipline relative to the seriousness of the crime. The focal issue in a criminal conviction situation is whether the attorney's character, as shown by his conduct, makes the attorney unfit to practice law. *Office of Disciplinary Counsel v. Casety*, 511 Pa. 177, 512 A.2d 607 (1986). This test balances a concern for the public with a respect for the substantial interest of an attorney in continuing his or her involvement in the practice of law. *Office of Disciplinary Counsel v. Lewis*, 493 Pa. 519, 426 A.2d 1138 (1981). It is appropriate for the Board to examine any aggravating or mitigating circumstances present in this matter.

Respondents were convicted of one count of willful failure to file income tax returns for the tax year 1991. Respondents were sentenced to two years of probation with electronic monitoring for the first three months. Respondents were ordered to complete 100 hours of

community service and make restitution. Respondents have completed the requirements of their community service and paid the costs of prosecution. Respondents have entered into an agreement with the IRS to pay \$250 per month towards their obligation. Respondents are in negotiations with the IRS concerning tax liabilities for the years 1985 to 1990 and 1992 through 1995.

According to Respondents' testimony, their difficulties with the IRS coincided with and were caused by their criminal prosecution in 1983-84 for tampering with evidence and hindering prosecution. This prosecution was based on Respondents' failure to reveal to authorities the existence of a rifle stock found by them during the investigation of their client for murder. Respondents' conviction in [] County in 1984 led to the involvement of the Office of Disciplinary Counsel and concurrent disciplinary proceedings. Although Respondents' convictions were subsequently reversed on appeal in 1987, the disciplinary proceedings continued through 1989. At that time, the Board issued a Report dismissing the charges against Respondents.

Respondents were the subject of a great deal of publicity in [] County, as well as surrounding counties, from the time of their arrest in 1983 to the dismissal of the disciplinary action in 1989. This publicity caused a substantial loss of business for Respondents, whose reputations were certainly damaged by the course of events. In spite of this publicity, Respondents attempted to keep their law practice going. Respondents found themselves in financial straits and did what they could to keep their creditors at bay and their law office open. This meant that filing and paying taxes became much less important than paying the mortgage or other bills. Respondents admit that they did not know criminal consequences could arise from their actions, nor did they attempt to research the issue or consult a professional about the best course of action. Respondents simply

took no action in regard to their tax obligations.

Respondents expressed their belief that they have learned from this episode and are very aware of their obligations. Respondents plan to stay in [] and are attempting to build their law practice. Respondents have no prior history of discipline and assured the Committee that this misconduct will not occur in the future.

The Hearing Committee recommended a Public Censure after reviewing the facts of the case. The Committee stated that the purpose of the disciplinary system would not be served by suspending Respondents from the practice of law. The Committee found that Respondents' tax problems did not render them unqualified to practice law, nor did their problems necessitate removal from the profession to protect the public. Likewise, the Committee stated that a private reprimand was too lenient to maintain the integrity of the disciplinary process, and recommended a public censure. Respondents found the Committee Report to be well-reasoned but requested the Board consider a private reprimand in light of the special circumstances experienced by Respondents. Petitioner urged the Board in its Brief not to consider any sanction less than a public censure.

There are a significant number of prior cases addressing conviction for willful failure to file income tax returns. In most of the cases, public discipline ranging from public censure to a two year period of suspension was imposed. In a very recent case, public censure was imposed. In the case of *In re Anonymous No 63 DB 96* (1997), an attorney was convicted of one count of willful failure to file income tax return. He was sentenced to one year probation and

restitution. This attorney presented several factors existing in his life at the time in question that eroded his ability to function, including the breakup of his law partnership, a breakup with his fiancée, and his father's death. The Board noted that while it considered these factors in the attorney's favor, they did not warrant recommending a sanction less than a public censure, which is what was imposed by the Supreme Court. In the case of *In re Anonymous No. 68 DB 85*, 41 Pa. D. & C. 3d 480 (1986), an attorney convicted of failing to file tax returns presented evidence that his marriage was very troubled at the time in question. The Board recommended a private reprimand; however, the Court imposed a public censure.

In the cases that resulted in suspension, it appears that more than one count of failure to file was involved, as well as either prison time or long periods of probation. *In re Anonymous No. 108 DB 89*, 7 Pa. D. & C. 4th 361 (1990); *In re Anonymous No. 39 DB 88*, 6 Pa. D. & C. 4th 455 (1989); and *In re Anonymous No. 91 DB 87*, 49 Pa. D. & C. 3d 572 (1988). These cases as well do not have the same degree of mitigation as the instant case.

The Board agrees with the Committee's assessment that this case is not a suspension matter. The public does not need protection from Respondents, who have no history of engaging in harm to clients. Suspending Respondents would produce a less than desirable result in this matter, as it would effectively cut off Respondents' means of making restitution to the IRS and quite possibly would induce Respondents to revert to prior behavior. The unfortunate underlying facts of this matter persuade the Board that a sanction more serious than a public censure is not warranted.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania respectfully recommends that the Respondent, [1], receive a Public Censure from the Supreme Court of Pennsylvania.

The Disciplinary Board of the Supreme Court of Pennsylvania respectfully recommends that the Respondent, [2], receive a Public Censure from the Supreme Court of Pennsylvania.

It is further recommended that the Court direct that Respondents [1] and [2] pay all of the necessary expenses incurred in the investigation and processing of this matter pursuant to Pa.R.D.E 208(g).

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: _____
Gregory P. Miller, Member

Date: February 5, 1998

PER CURIAM:

AND NOW, this 14th day of April, 1998, upon consideration of the Report and Recommendations of the Disciplinary Board dated February 5, 1998, it is hereby

ORDERED that [Respondent 1] be subjected to PUBLIC CENSURE by the Supreme Court.

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 14th day of April, 1998, upon consideration of the Report and Recommendations of the Disciplinary Board dated February 5, 1998, it is hereby

ORDERED that [Respondent 2] be subjected to PUBLIC CENSURE by the Supreme Court.

It is further ORDERED that respondent shall pay costs to the Disciplinary Board pursuant to Rule 208(g), Pa.R.D.E.