

BEFORE THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 563, Disciplinary Docket No. 3
Petitioner	:	Supreme Court
	:	
	:	No. 24 DB 2000
	:	Disciplinary Board
v.	:	
	:	Attorney Registration No. [ ]
[ANONYMOUS]	:	
Respondent	:	([ ])

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

By Supreme Court Order of March 13, 2000, [ ], Respondent in these proceedings, was placed on temporary suspension as a result of his conviction in the United States District Court for the [ ] District of Pennsylvania of three counts of Attempt to Evade or Defeat Tax, in violation of 26 U.S.C. §7201. Office of Disciplinary Counsel, Petitioner, filed a Petition for Discipline against Respondent on March 28, 2000 and charged him with violations of Pa.R.D.E. 203(b)(1) and R.P.C. 8.4(b). Respondent filed an Answer on April 17, 2000.

A disciplinary hearing was held on July 25, 2000 before Hearing Committee [ ] comprised of Chair [ ], Esquire, and Members [ ], Esquire, and [ ], Esquire. Respondent was represented by [ ], Esquire. [ ], Esquire, represented Petitioner.

The Committee filed a Report on May 17, 2001 and recommended a suspension for a period concurrent with Respondent's criminal probation.

No Briefs on Exceptions were filed by the parties.

This matter was adjudicated by the Disciplinary Board at the meeting held on July 24, 2001.

## II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is situated at Suite 3710, One Oxford Centre, Pittsburgh, PA, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement (hereinafter "Pa.R.D.E."), with the power and duty to investigate all matters involving alleged misconduct of any 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 Rules of Disciplinary Enforcement.

2. Respondent was born on January 8, 1962 and was admitted to practice law in the Commonwealth of Pennsylvania on November 5, 1987. Respondent's last registered principal office for the practice of law was located at [ ]. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

3. On April 7, 1999, the United States Attorney's Office filed an Information in the United States District Court for the [ ] District of Pennsylvania in the case of *United States of America v. [Respondent]*, CD No. [ ], charging Respondent with three counts of Attempt to Evade or Defeat Tax, in violation of 26 U.S.C. §7201. The Information alleged that Respondent had diverted legal fee income by cashing settlement checks totaling \$575,569.00 but failing to report that income on his federal income tax returns, thereby allowing Respondent to evade an additional tax of \$197,828.00.

- a. Count one of the Information charged that for the 1993 calendar year, Respondent fraudulently failed to report \$197,549.00 in income resulting in a tax deficiency of \$60,962.
- b. Count two of the Information charged that for the 1994 calendar year, Respondent fraudulently failed to report \$253,615.00 in income resulting in a tax deficiency of \$87,602.00;
- c. Count three of the Information charged that for the 1995 calendar year, Respondent fraudulently failed to report \$124,405.00 in income resulting in a tax deficiency of \$49,264.00.
- 4. On May 27, 1999, Respondent pleaded guilty to all three counts of tax evasion.
- 5. On November 9, 1999, the Honorable [A], United States District Judge, sentenced Respondent, imposing a fine of \$30,000.00, a special assessment of \$150.00, and a period of probation of three years with the following conditions:
  - a. During the first six months of probation Respondent shall be placed in home detention with electronic monitoring;
  - b. Respondent shall cooperate with the IRS in connection with the payment of any taxes, penalties or interest due and shall provide the IRS and the probation officer with all requested financial documentation;
  - c. Respondent shall pay all taxes, interests and penalties owed;
  - d. Respondent shall pay the fine at the rate of one thousand dollars a month plus interest;
  - e. Respondent shall not incur new credit charges or open additional lines of credit without approval from the probation officer;

- f Respondent shall submit to one drug urinalysis within fifteen days after being placed on probation, and a least two periodic urinalysis tests thereafter; and
- g. Respondent shall participate in programs of treatment and testing for drug abuse until released from the program by the U.S. Probation Office. (S-7, P5, P6).

6. Respondent is currently suspended from practicing law in Pennsylvania by Supreme Court Order dated March 13, 2000, due to his criminal conviction.

7. Respondent accomplished his tax evasion scheme in the following manner: he maintained a private escrow account; he received clients' settlement checks and cashed them at a check cashing agency; he then deposited the proceeds from the checks into his private escrow account; he wrote those clients checks from that escrow account; and he kept the remaining cash for himself (N.T. 163-166). Respondent did not report or account for this income to his law firm partners. (N.T. 96-97, 114).

8. At the hearing, Respondent presented the testimony of Dr. [B], M.D., his treating psychiatrist. Dr. [B] is Board certified in addiction psychiatry, addiction medicine, and forensic psychiatry. He is a founding member of the American Academy of Addiction Psychiatrists, a charter member of the Pennsylvania Association of Addiction Medicine, and a member of the American Society of Addiction and Medicine. (N.T.18). Dr. [B] testified that:

- (a) Respondent began using drugs in high school and college (N.T. 24) and began to gamble (N.T. 25);
- (b) Respondent became addicted to amphetamines, stimulants, cocaine, and alcohol (N.T. 24);
- (c) In October 1997, following his indictment Respondent began seeing Dr. [B] (N.T. 19);

- (d) Respondent successfully completed an inpatient rehabilitation program at [C] and has continued working with Dr. [B] on the maintenance of sobriety (N.T. 19-20);
- (e) Respondent has maintained continuous sobriety and has been committed to NA and AA, as a participant and on an organizational level (N.T. 19-20). He attends A.A. meetings on a regular basis (N.T. 21), regularly attends group therapy with Dr. [B] (N.T. 22), and regularly attends weekly individual psychotherapy sessions with Dr. [B] (N.T. 22).

In Dr. [B's] opinion, "were it not for the addiction ... [Respondent] would not have done the kinds of things he did." (N.T. 35).

9. Respondent also presented the testimony of [D], a member of the Bar, who knows Respondent through involvement in an AA lawyers group. (N.T. 57-58). [D] testified to the following facts:

- (a) During his recovery period, Respondent participated actively at AA meetings, including attending meetings every week and speaking at meetings about his problems and recovery (N.T. 60-61);
- (b) Respondent has sponsored others who have experienced problems and takes the NA hot line in [ ] County;
- (c) Respondent has been a speaker at other group meetings at other facilities (N.T. 62-63).

10. Respondent presented the testimony of [E], a member of the Bar, and Respondent's AA sponsor (N.T. 68), who testified that Respondent has attended the lawyers meetings regularly (N.T. 73), and from the time Respondent admitted his problem, he has followed suggestions from others designed to assist his recovery (N.T. 77).

11. Respondent's wife testified that Respondent is totally involved in his recovery program (N.T. 133), has attended 6-7 meetings each week (N.T. 133), and is more involved in the lives of his family, including his children (N.T. 135).

12. Judge [A], in sentencing Respondent in November 1999, granted a downward departure from the applicable Guidelines under *United States v. Sally*, 116 F.3d 76 (3d Cir. 1997). (P8, at Exhibit E (last 2 pages); P6 at 33, 53). In doing so, Judge [A] observed that Respondent "has truly turned his life around" (P6 at 53), and "has demonstrated extraordinary post-offense rehabilitation". (P8, at Exhibit E (last page)).

13. The evidence presented at the hearing demonstrates Respondent's continuing commitment to his recovery and rehabilitation.

14. Respondent has no prior history of discipline.

### III. CONCLUSIONS OF LAW

By his conduct as set forth above, Respondent violated the following Rules of Professional Conduct:

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.

Additionally, the crime of Attempt to Evade or Defeat Tax, being punishable by imprisonment of up to five years, is a "serious crime" as defined by Pa.R.D.E. 214(i), and, pursuant to Rules 203(b)(1), Pa.R.D.E., the Respondent's criminal conviction is an independent ground for the imposition of discipline.

### IV. DISCUSSION

This matter is before the Disciplinary Board upon a Petition for Discipline charging Respondent with violation of the Rules of Professional Conduct and the Rules of Disciplinary Enforcement based on his conviction of tax evasion.

The sole issue to be determined is the extent of final discipline to be imposed since the disciplinary proceeding is based upon Respondent's conviction of a serious crime.

Pa.R.D.E. 214(f)(1). In order to determine the discipline, the events surrounding the criminal charge must be taken into account. Office of Disciplinary Counsel v. Valentino, 730 A.2d 479 (Pa. 1999). All relevant aggravating and mitigating facts must be considered and evaluated. Office of Disciplinary Counsel v. Chung, 695 A.2d 405 (Pa. 1997).

Respondent is 39 years of age, married and the father of two children. He has been practicing law since 1987 and has never been charged with any other violations of the Rules of Professional Conduct. Respondent pleaded guilty to three counts of Attempt to Evade or Defeat Tax. Over a three year period of time, for the tax years 1993, 1994 and 1995, Respondent diverted legal fee income by cashing settlement checks totaling \$575,569 but failed to report that income on his federal income tax returns, thereby allowing Respondent to evade an additional tax of \$197,828. Respondent accomplished this tax evasion scheme by maintaining a private escrow account into which he deposited the proceeds of client settlement checks, which he cashed at a local check cashing agency. Respondent wrote those clients checks from that escrow account and kept the remaining cash for himself. He did not account for this income to his law firm partners.

As a result of his conviction, Respondent was placed on probation for a period of three years, the first six months of which he served in-home detention, fined \$300,000 to be paid at a rate of \$1,000 per month plus interest, ordered to make arrangements to repay all tax, penalties and interest owed to the IRS, and required to submit to regular drug urinalysis and participate in treatment programs for the period of his probation, which will terminate in November of 2002.

Respondent provided evidence at the hearing that he suffered from an addiction to cocaine during the time frame in question. Respondent presented the testimony of [B], M.D., who is Respondent's treating psychiatrist. Dr. [B] began treating Respondent in October of 1997, following Respondent's indictment. Dr. [B] relayed to the Committee Respondent's case history, which was marked by early use of drugs, alcohol and gambling. Respondent's family history is marred by addictive behaviors, including his mother's gambling and alcohol addiction,

his sisters' alcoholism, and his brother's drug addiction and eventual death by drug overdose. Respondent's own use of drugs, and specifically cocaine, escalated during his years as a practicing lawyer. He pursued a chaotic lifestyle driven by his addictions. Respondent often arrived at work late and would close his door and sleep in his office. He would parcel out his commitments to an associate in the office instead of doing the work himself and relied heavily on his secretary to attend to the details of his practice.

After the IRS informed Respondent that he was going to be indicted for tax evasion, Respondent finally realized that he needed to enter a rehabilitation program. He met with Dr. [B] and subsequent to that meeting admitted himself to [C] in [ ], for a three week treatment program. Respondent has not used drugs or alcohol since October of 1997. In November of 1997, he returned home and began attending AA meetings at least six days per week and outpatient therapy on a weekly basis.

Dr. [B] was well-versed in the details of Respondent's misconduct and disciplinary proceedings. He opined that there is a causal connection between Respondent's addictions and his misconduct. (N.T. 35) Respondent was funding his addictions and the addiction itself impacted Respondent's ability to think clearly about the actions he was taking. (N.T. 35-36)

Dr. [B] testified that Respondent has undergone exceptional recovery and his progress has been excellent. (N.T. 29) Respondent is sober and currently is involved in group and individual therapy with Dr. [B] and attends regular AA meetings. Respondent has experienced no relapses, even though according to Dr. [B] cocaine is a fierce relapsing drug. (P-8 p. 4) Dr. [B] stated that he has seldom worked with a person as committed to recovery as the Respondent. (P-8)

For his drug addiction to be considered a mitigating factor in his disciplinary proceeding, Respondent has the burden of establishing by clear and convincing evidence that the addiction was a causal factor in his misconduct. Office of Disciplinary Counsel v. Braun, 520 Pa. 157 553 A.2d 894 (1989). The expert testimony presented by Respondent meets this burden.



Dr. [B] provided a detailed case history of Respondent and was fully apprised of the details of the disciplinary charges against Respondent. He analyzed Respondent's condition as it related to the misconduct and made a causal connection between the condition and the misconduct in a clear and concise manner. The Board finds that Respondent met the Braun standard and is entitled to mitigation.

Petitioner raised the issue of aggravating factors at the hearing. In particular, Petitioner argued that Respondent's failure to make restitution to his law partners constituted an oversight that cannot be ignored. As case law suggests, failure to make restitution is an aggravating factor. In re Anonymous No. 31 DB 90 107 DB 91, 20 Pa. D. & C. 4<sup>th</sup> 368 (1994). However, the facts of this case demonstrate that Respondent has begun the restitution required by court order to the Internal Revenue Service, the Commonwealth of Pennsylvania and the City of [ ]. At the time of the hearing, he had paid \$125,000 towards his IRS obligation of \$197,000. As to the Commonwealth and the City tax authorities, all of the tax returns required have been filed and those authorities are calculating the tax interest and penalty.

[F] is an attorney and one of Respondent's partners at his law firm. He testified at the hearing that he understands that the priority of payment is to the IRS and that he is "on the back burner" at this time. (N.T. 116) [F] further testified that after those obligations are satisfied, the firm would then discuss with Respondent the settlement and resolution of those funds that would have been earmarked for the firm. (N.T. 115). It is clear from this testimony that the firm does not expect immediate restitution and is willing to wait until such time as Respondent takes care of his more pressing tax obligations.

There are seven reported cases in which respondents were convicted of tax evasion. Among these cases the discipline ranged from public censure to a four year suspension. In re Anonymous No. 86 DB 93, 28 Pa. D. & C. 4<sup>th</sup> 390 (1995), In re Anonymous No. 75 DB 83, 36 Pa. D. & C. 3d 314 (1985). The discipline at the lower end of the range involved one count of tax evasion, while the discipline at the higher end of the range involved at least two counts. The Hearing Committee recommended a suspension concurrent to Respondent's probation.

Respondent's temporary suspension was ordered on March 13, 2000 and took effect on April 12, 2000. The probation period ends November of 2002, which means that Respondent would be suspended for approximately thirty-one months. It is the Board's belief that the totality of the facts surrounding Respondent's diversion of partnership funds and conviction for three counts of tax evasion warrants a three year suspension.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, [ ], be suspended from the practice of law in the Commonwealth of Pennsylvania for a period of three (3) years retroactive to March 13, 2000.

It is further recommended that the expenses incurred in the investigation and prosecution of this matter are to be paid by the Respondent.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

By: \_\_\_\_\_  
Richard W. Stewart, Member

Date: December 10, 2001

Board Members Caroselli, Elliott and Peck dissented and would recommend a five (5) year suspension.

Board Member Morris did not participate in the disposition of this matter.

Board Members Schultz and Sheerer did not participate in the adjudication.

PER CURIAM:

AND NOW, this 8<sup>th</sup> day of February, 2002, upon consideration of the Report and Recommendations of the Disciplinary Board dated December 10, 2001, it is hereby

ORDERED that [Respondent] be and he is SUSPENDED from the Bar of this Commonwealth for a period of three (3) years retroactive to March 13, 2000 and he shall comply with all 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.