

BEFORE THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 9, Disciplinary  
Petitioner : Docket No. 3  
 :  
v. : No. 18 DB 1994  
 :  
 : Attorney Regis. 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 November 22, 1993, Petitioner sent to the Supreme Court of Pennsylvania documentation evidencing Respondent's federal criminal conviction for tax evasion in violation of 26 U. S. C.

Section 7201. On February 2, 1994, the Supreme Court referred this matter to the Disciplinary Board pursuant to Rule 214 (f) (1) , Pa. R.D.E.

On March 1, 1994, Office of Disciplinary Counsel filed a Petition for Discipline against Respondent on the basis of his conviction. Respondent filed an Answer on June 6, 1994. A hearing was held on October 27, 1994 before Hearing Committee [ ] comprised of Chairperson [ ], Esquire, and Members [ ], Esquire, and [ ], Esquire. Respondent appeared on his own behalf. Office of Disciplinary Counsel was represented by [ ], Esquire. The Committee filed its Report on June 21, 1995 and recommended that no further discipline be imposed based on the fact that Respondent is currently suspended from the practice of law, has changed careers, and public discipline would harm Respondent's efforts to turn his life away from the practice of law. Petitioner filed a Brief on Exceptions on July 12, 1995. Respondent filed a Brief Opposing Exceptions on August 18, 1995 and requested oral argument. Oral argument was heard on September 22, 1995 before a three member panel of the Board.

This matter was adjudicated by the Disciplinary Board at the meeting of October 6, 1995.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at Suite 400, Union Trust Building, 501 Grant Street, 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, [ ], Esquire, was admitted to practice law in the Commonwealth of Pennsylvania in 1979, and his mailing address is [ ]. (Stipulated to by the parties.)

3. On March 24, 1993, Respondent was indicted by a federal grand jury in the United States District Court for the [ ] District of Pennsylvania on two counts of tax evasion, in violation of 26 U.S.C.A. §7201. Tax evasion is punishable by a maximum imprisonment of five years. A copy of the indictment is attached hereto as Petitioner's Exhibit 1-A. (Stipulated to by the parties.)

4. Count 1 of the indictment charged the Respondent with three offenses of Title 26, United States Code, §7201, as follows:

a. The willful attempt to evade and defeat income tax due and owing by the Respondent to the United States of America for the calendar year 1986 by failing to make

an income tax return on or before April 15, 1987;

b. The willful attempt to evade and defeat the income tax due and owing by the Respondent to the United States of America for the calendar year 1986 by failing to pay to the Internal Revenue Service the income tax then due and owing; and

c. Between on or about January 1, 1986 and January 15, 1993, the willful attempt to evade and defeat the income tax due and owing by the Respondent to the United States of America for the calendar year 1986 by making false statements to agents of the Internal Revenue Service in an attempt to conceal the fact that the Respondent had not filed his income tax return for 1986 and in an attempt to conceal his true and correct income from proper officers of the United States of America.

5. Count 2 of the indictment charged the Respondent with three offenses of Title 26, United States Code, §7201, as follows:

a. The willful attempt to evade and defeat income tax due and owing by the Respondent to the United States of America for the calendar year 1987 by failing to make an income tax return on or before April 15, 1988;

b. The willful attempt to evade and defeat the income tax due and owing by the Respondent to the United States of America for the calendar year 1987 by failing to pay to the Internal Revenue Service the income tax then due and owing; and

c. Between on or about January 1, 1987 and January 15,

1993, the willful attempt to evade and defeat the income tax due and owing by the Respondent to the United States of America for the calendar year 1987 by making false statements to agents of the Internal Revenue Service in an attempt to conceal the fact that the Respondent had not filed his income tax return for 1987 and in an attempt to conceal his true and correct income from proper officers of the United States of America.

6. On July 23, 1993, pursuant to a plea agreement, Respondent entered a plea of guilty to Count 2 of the indictment. (Stipulated to by the parties.)

7. On September 27, 1993, pursuant to Respondent's plea of guilty, the court entered its Memorandum Order and Tentative Findings and Rulings in which it specified, inter alia, that:

- a. The total amount of tax loss caused by Respondent's conduct was \$15,515.00.
- b. The offense to which Respondent had pled guilty was a class D felony.

8. On that same date, Respondent was sentenced to a period of imprisonment for three months, with work release, to be served in a community treatment center, and ordered to pay the costs of prosecution of \$37.00. He was also to pay a special assessment of \$50.00. Further, upon release from imprisonment, Respondent was to be placed on supervised release for a term of two years, a condition of which is that he is to pay \$15,515.00 in back taxes, at the rate of 10% of his monthly income, and provide 200

hours of community service. (Stipulated to by the parties.)

9. On February 2, 1994, the Supreme Court of Pennsylvania entered an order directing that, as a result of Respondent having been convicted in the United States District Court for the [ ] District of Pennsylvania of the offense of income tax evasion, the matter be referred to the Disciplinary Board pursuant to Rule 214(f)(1), Pa.R.D.E. (Stipulated to by the parties.)

10. By order of the Supreme Court dated August 21, 1991, which order was effective September 30, 1991, Respondent was suspended from the practice of law for a period of two years pursuant to earlier disciplinary proceedings. (See Petitioner's Exhibit 2.)

11. Respondent's two year suspension arose out of a course of conduct that was "indicative of a basic lack of understanding on his part of the duties and obligations of an attorney to himself and to his clients." (See page 15 of Petitioner's Exhibit 4.) None of these multiple charges of a basic lack of understanding involved tax evasion which is the subject of the current petition for discipline. (See Petitioner's Exhibit 4.)

12. Respondent was ordered to appear for private reprimand on February 25, 1988 as a result of his having been found guilty of transgressing the following disciplinary rules of the Code of Professional Responsibility:

a. DR 1-102(A) (4) - (engaging in conduct involving dishonesty, fraud, deceit, or

misrepresentation);

b. DR 6-101(A)(3) - (neglecting a legal matter entrusted to an attorney);

c. DR 9-102 (B) (1) - (failing to promptly notify a client of the receipt of his funds, securities, or other properties);

d. DR 9-102(B) (3) - (failing to maintain complete records of all funds, securities, and other properties of a client coming into a lawyer's possession and render appropriate accounts to your client regarding them); and

e. DR 9-102(B) (4) - (failing to promptly pay or deliver to a client as requested by the client the funds, securities, or other properties in your possession which the client is entitled to receive).

III. CONCLUSIONS OF LAW

The Disciplinary Board makes the following conclusions of law:

1. The Petition for Discipline filed by the ODC is governed in all respects by the Pennsylvania Rules of Disciplinary Enforcement and by the Disciplinary Board Rules and Procedures.

2. The Supreme Court of Pennsylvania has exclusive jurisdiction of the Petition for Discipline.

3. Pa.R.D.E. 201(a) (3) states that jurisdiction extends to any formerly admitted attorney with respect to acts prior to suspension, disbarment, or transfer to inactive status, or with respect to acts subsequent thereto which amount to the practice of law or constitute the violation of these Rules or Rules of the Board adopted pursuant hereto.

4. Pursuant to Rule 201, Pa.R.D.E., a formerly admitted attorney is defined as an attorney who is either disbarred, suspended, or inactive.

5. Respondent is currently suspended from the practice of law effective in 1991. He is therefore a formerly admitted attorney within the meaning of the Rules.

6. Respondent committed the instant acts of misconduct between 1986 and 1993.

7. The acts of misconduct committed prior to Respondent's 1991 suspension are within the jurisdiction of the Disciplinary Board pursuant to Rule 201(a)(3).

8. Respondent was convicted of a serious crime in 1993. Pursuant to Rule 214(f), Pa.R.D.E., the Supreme Court may refer such convictions to the Board for action. As a formerly admitted attorney, Respondent is still an attorney within the



meaning of Rule 214, and his conviction was properly referred to the Board.

9. Pursuant to Rule 203(b)(1), Pa.R.D.E., conviction of a serious crime is grounds for independent discipline.

10. Respondent's criminal conviction subsequent to his 1991 suspension constitutes a violation of the Rules and is within the exclusive jurisdiction of the Board pursuant to Rule 201 (a) (3) Pa.R.D.E.

11. The Petition for Discipline was brought within the four year period prescribed by Disciplinary Board Rule §85.10(a) inasmuch as the conviction for the crime occurred on July 23, 1993 when Respondent entered a plea of guilty to Count 2 of the Federal Court indictment.

12. Respondent entered a plea of guilty to a crime and therefore the four year limitation set forth in subsection (a) of Disciplinary Board Rule §85.10 is not applicable in this case.

13. The sole issue to be determined by the Disciplinary Board is the extent of the final discipline to be imposed on the Respondent arising out of his conviction of a serious crime in accordance with Pa.R.D.E. 214(f)(1).

#### IV. DISCUSSION

The issue before the Disciplinary Board is the appropriate discipline to be imposed on Respondent in response to his conviction in federal court for tax evasion. A threshold question relative to jurisdiction was raised by Respondent at the hearing. It is Respondent's position that his status as a suspended attorney who has not petitioned for reinstatement after his period of suspension is over renders him outside the jurisdiction of this Board. Respondent was convicted of tax evasion subsequent to his 1991 suspension. According to Rule 201 (a) (3) , the Board has jurisdiction over formerly admitted attorneys with respect to acts subsequent to a suspension which amount to either the practice of law or a violation of the Enforcement Rules. Respondent contends he did not violate any Rules, as the applicable Rules 214 and 203(b)(1) pertain to "attorneys", not formerly admitted attorneys. This position is incorrect, as a formerly admitted attorney by definition is an attorney who is either suspended, disbarred or inactive. Rule 102, Pa.R.D.E. Respondent remains an attorney whose actions may subject him to disciplinary proceedings. The Rules of Disciplinary Enforcement apply to all attorneys, whether they are presently or formerly admitted. Respondent's criminal conviction constitutes a violation of the Rules, as conviction of a serious crime which may result in suspension under Rule 214 is a ground for discipline. Rule 203(b)(1), Pa.R.D.E. The instant matter is properly within the jurisdictional ambit of the Disciplinary Board.

The Hearing Committee recommended that no discipline be imposed, even though it found that Respondent's conviction

constituted an independent basis for discipline. The Committee stated that it was cognizant that Respondent's criminal conviction was a serious matter ordinarily warranting suspension from practice. The Committee rationalized its recommendation by emphasizing what it considered to be the unique facts of the case.

Respondent was suspended from the practice of law for two years retroactive to September 30, 1991. This suspension arose due to Respondent's consistent neglect of the affairs of his clients. Respondent has never petitioned for reinstatement. Respondent currently provides religious instruction at his synagogue and is the manager of a Jewish cemetery. Respondent testified that he has no intention of returning to the practice of law. The Committee found Respondent's testimony, as well as the testimony of his wife, to be credible as to his efforts to turn his life in a new direction. Respondent and his wife also testified to psychological problems he has experienced and the help he has sought. Respondent introduced into evidence the deposition testimony of [A], his psychiatrist. This testimony was taken in 1990 relative to the disciplinary proceeding that resulted in the 1991 suspension. The Committee weighed these psychological problems and determined that such problems rendered Respondent presently unfit to practice law. Respondent expressed his concern that public discipline would harm his attempts to change his life. The Committee agreed with this concern and stated that attorney discipline is imposed to protect the public from lawyer misconduct. It is not imposed purely for its punitive elements. In consideration of this stated purpose, the Committee was not persuaded that public discipline would further such a goal. For all of the above reasons, the Committee recommended that no further discipline be imposed.

The Board does not agree with the Hearing Committee's assessment of this case. The Board perceives that a dangerous precedent would be set if the Board waived the imposition of discipline in situations where an attorney indicates his intention to quit the practice of law. An attorney's assurances that he will not practice law in the future will not suffice to excuse the original misconduct. While it is understandable that Respondent is anxious to move forward with his life, the reality of this case is that Respondent was convicted of a serious crime. Regardless of the fact that Respondent is currently suspended and has no desire to resume the practice of law, he must be disciplined in a manner appropriate to the severity of his crime.

The Board does not find the Committee's reference to psychological problems persuasive or relevant. Although the Committee relied on evidence of Respondent's psychological problems in making its recommendation, it rendered no findings of fact as to a causal connection between a mental infirmity and Respondent's misconduct. The Committee's statement in its discussion was based on the testimony of Respondent and his wife, as well as the deposition testimony of Respondent's doctor. This deposition testimony was taken in 1990 relative to a prior disciplinary proceeding. No new evidence was presented that Respondent suffered from a mental infirmity for the time period beyond 1990, which is when a portion of the instant misconduct occurred. The testimony of Respondent and his wife pertained only to the time period up to 1989. The Board finds that no causal

connection was established between Respondent's psychological problems and the instant misconduct. As the standard set forth in Office of Disciplinary Counsel v. Braun, 520 Pa. 157, 553 A. 2d 894 (1989), has not been met, Respondent's mental condition cannot be considered in mitigation.

Review of prior tax evasion cases indicates that some length of suspension is an appropriate discipline. In the case of In re Anonymous No. 108 DB 89, 7 Pa. D. & C. 4th 361 (1990), an attorney was convicted of willfully failing to file income tax returns. The Disciplinary Board recommended a three month suspension; however, the Supreme Court rejected this recommendation and imposed a two year suspension retroactive to the date of the criminal conviction. In the case of In re Anonymous No. 75 DB 83, 36 Pa. D. & C. 3d 314 (1985), an attorney who was convicted of tax evasion was suspended from December 1983 to February 1987, which was the duration of his criminal probation. In the case of In re Anonymous No. 15 DB 83, 28 Pa. D. & C. 3d 609 (1983), an attorney who pleaded guilty to failure to file income taxes received a one year, six day suspension. In the case of In re Anonymous No. 39 DB 88, 6 Pa. D. & C. 4th 455 (1989), an attorney who pleaded guilty to failure to file income taxes received a three month and one day suspension. It should be noted that in 1989, attorneys suspended for more than three months had to petition for reinstatement. Thus, the Board recognized the serious nature of the conviction.

The Board is cognizant that Respondent has a prior history of discipline. Respondent received a private reprimand in 1988 for general neglect of client matters. Respondent was

suspended for two years on August 21, 1991 based on a similar pattern of client neglect. Respondent's recidivism must be weighed accordingly when determining the appropriate disciplinary sanction.

Based on the facts of this case, the pertinent case law, Respondent's recidivism, and the lack of mitigating circumstances, the Board recommends a two year suspension retroactive to the date of the criminal conviction.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, [ ], be suspended from the practice of law for a period of two years retroactive to September 27, 1993, the date of his conviction.

It is further recommended that the Court direct that Respondent pay all of the necessary expenses incurred in the investigation and processing of this matter pursuant to Rule 208(g), Pa.R.D.E.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

By: Michael Witherel, Member

Date: February 12, 1996

Ms. Lieber recused herself.

Board members Paris and George did not participate in the October 6, 1995 adjudication.

O R D E R

PER CURIAM:

AND NOW, this 13th day of March, 1996, upon consideration of the Report and Recommendations of the Disciplinary Board dated February 12, 1996, it is hereby

ORDERED that [RESPONDENT], be and he is SUSPENDED from the Bar of this Commonwealth for a period of two (2) years retroactive to September 27, 1993, 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.