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Sanctions for Lawyers Who Commit Tax Crimes

Attorneys convicted of failure to file taxes, tax evasion or tax fraud usually face collateral consequences impacting their ability to practice law. Thus, regardless of whether the tax offense occurred in connection with her professional practice, the attorney will almost certainly face the same level of professional discipline.

A recent decision from the U.S. Court of Appeals for the Fourth Circuit highlights the issues raised in these types of cases and gives occasion to provide an update on professional sanctions for tax offenses.[1]

Furthermore, an attorney may be censured, suspended or disbarred from practice before the Internal Revenue Service (IRS) for any conduct shown to be "disreputable," which includes the commission of a tax crime. IRS Circular 230 §10.51(a).

New York Law

New York lawyers facing disciplinary actions for tax crimes face a wide range of sanctions, from censure to possible disbarment. New York's Judiciary Law empowers the Appellate Division in each department to "censure, suspend from practice or remove from office any attorney…admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor…."[2] As defined in the statute, this means an attorney is automatically disbarred if he is convicted of a felony in New York or a felony in another state or federal court where that crime also would constitute a felony in New York.[3]

The statute further provides that an attorney convicted of a "serious crime" shall be suspended "upon receipt by the [A]ppellate [D]ivision…of the record of such conviction until a final order" regarding sanctions is made. This interim suspension can be set aside "when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interest of justice." However, the interim suspensionv

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usually remains in place until there is a full hearing on the issues, after which the Appellate Division "may impose such discipline as it deems proper under the facts and circumstances," which, as set forth below, may include censure, suspension or disbarment.[4]

A "serious crime" is defined as "any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime."[5]

Thus, where an attorney has been convicted of a felony in federal court or the court of another state, and the offense does not constitute a felony under New York state law, the attorney's conviction will be treated as a "serious crime" usually resulting in an interim suspension and the possibility of additional sanction. The extent of discipline imposed will depend on the type of mitigating factors presented by the attorney. Mitigating factors may include physical or psychiatric illness, the attorney's character and reputation in the community, military and community service prior history of complaints against the attorney or lack of such and pro bono work.

An attorney disbarred as a result of a tax offense conviction may seek reinstatement after a period of seven years provided he has not been convicted of another crime during such seven-year period.[6] Similarly, a suspended attorney may seek reinstatement at the expiration of the period of suspension. Reinstatement in these cases is discretionary and may be granted if the petitioner has fully complied with the provisions of disbarment or suspension and other requirements set forth in each appellate division's rules.[7]

Fourth Circuit: 'U.S. v. Wray'

In *United States v. Wray*,[8] the defendant, an attorney, pleaded guilty to a misdemeanor count of willful failure to pay income taxes. In sentencing Mr. Wray to one-year of imprisonment to be served in a half-way house, the court stated that it did not object to him being allowed to continue his profession during business hours, finding that there was no evidence that Mr. Wray had attempted to defraud the United States.[9] As a result of the tax conviction, however, the U.S. District Court for the Eastern District of Virginia instituted disciplinary proceedings against Mr. Wray. That case was heard by a different district court judge who determined that Mr. Wray should be disbarred from practicing law before the court on the grounds that he had committed a "serious crime" under Federal Rule of Disciplinary Enforcement I.B, a local rule. Mr. Wray appealed this determination, arguing that his misdemeanor offense did not constitute a "serious crime" within the meaning of the rule.

The rule defines a "serious crime" as "any felony and any lesser crime a necessary element of which, as determined by the statutory or common-law definition of such crime in the jurisdiction where the judgment was entered, involves false swearing, misrepresentation, fraud, willful failure to file income tax returns, [or] deceit…." The U.S. Court of Appeals for the Fourth Circuit found that Mr. Wray's conviction did not fall within the definition of "serious crime," observing that it was neither a felony nor a lesser crime containing one of the delineated elements. Specifically, the court noted that the rule encompassed lesser crimes including a willful failure to file income tax returns, while Mr. Wray was convicted for willful failure to pay income taxes.

Conceding that Mr. Wray did not commit fraud or conceal income in an attempt to avoid tax liability, the prosecutor argued that Mr. Wray's offense constituted a "serious crime" because it involved deceit. The Circuit Court rejected this argument, stating that "[t]he question is not whether [Mr.] Wray's conduct involved deceit; it is whether deceit is a necessary element of the crime of willful failure to pay taxes."

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To prove willful failure to pay taxes, the government need only show that the defendant willfully failed to pay a tax that was due and owing—deceit is not an element of the crime. Accordingly, the district court's judgment disbarring Mr. Wray was reversed. Mr. Wray's disbarment (although ultimately overturned) shows how the professional sanctions imposed on attorneys in tax cases may, in some ways, be more devastating than the criminal sentence itself.

Failure to File Cases

Under §1801(a) of New York State Tax Law, the failure to file state tax returns in a given year is a misdemeanor. Accordingly, discipline for convictions under this statute occur under the "serious crimes" provision, §90(4)(d) of the Judiciary Law. In *In re Shenkman*, an attorney with no history of prior disciplinary violations in his 30-year legal career was convicted of failure to file state tax returns and was issued a public censure.[10] The repeated failure to file personal returns in New York may be a felony, however, resulting in more serious professional sanctions. Under §1802(a) of New York State Tax Law, the failure to file a return for three consecutive taxable years is a felony where the individual had an unpaid tax liability for each of the three years. In *In re Roswick*, the respondent was sentenced to five years probation for his conviction under §1802(a), but was automatically disbarred by virtue of the felony conviction.[11]

The failure to file federal tax returns in violation of 26 USC §7203, also is a misdemeanor under federal law. Accordingly, New York attorneys convicted under this statute can only be disciplined for the commission of a "serious crime." Unlike the crime committed in the *Wray* case, the willful failure to file tax returns falls expressly within the stautory definition of "serious crime." Recent failure to file cases show that the most frequent sanction imposed is suspension from the practice of law. In *In re Tenzer*, the Second Department imposed a one-year suspension for the respondent's conviction under §7203, notwithstanding respondent's excellent reputation, that he expressed remorse and humiliation and made efforts to achieve an offer in compromise with the IRS.[12] The respondent in *In re Mulholland*, pleaded guilty in the U.S. District Court for the Eastern District of New York for failure to file federal income tax returns. Finding this conviction amounted to a serious crime, the Appellate Division held that a one-year suspension was warranted after considering mitigating factors such as respondent's weakened physical and emotional conditions, the devastation caused by the murder of his closest friend and confidant, his significant drinking problem, his unblemished disciplinary history, his expressed remorse, and his dire financial circumstances.[13]

Evasion and Fraud Cases

Unlike cases involving the failure to file returns, tax evasion and fraud cases are more likely to result in federal felony convictions. This does not necessarily mean that the resulting professional sanction is disbarment, however, as these federal felonies generally are not classified as felonies under New York law. More often than not, the less severe sanction of suspension is imposed.[14]

For instance, in *In re Pirro*, the respondent was found guilty of conspiracy, four counts of tax evasion and 29 counts of tax fraud, all federal felonies. As a result, he was sentenced to 29 months in prison, followed by three years of supervised release. Because there was no corresponding felony under New York law, the Disciplinary Committee could only seek professional sanctions against Mr. Pirro under the "serious crime" provisions of the Judiciary Law. Finding that Mr. Pirro's misconduct did not involve the practice of law or impact his clients, and that he had an unblemished record and excellent reputation, the Appellate Division suspended respondent from the practice of law for three years.[15]

Despite the fact that conviction of these federal felonies may not result in automatic disbarment in New York, a court still has the authority to determine that disbarment is the appropriate sanction. In *In re Gray*, the respondent was indicted in the U.S. District Court for the Eastern District of Missouri on numerous counts of fraud and in the U.S. District Court for the District of Connecticut for one count of tax evasion. In an action consolidating the two cases, Mr. Gray pleaded guilty to making a materially false statement under oath in a bankruptcy matter and tax evasion. Before he was sentenced in the criminal case, the Disciplinary Committee sought an order striking respondent's name from the roll of attorneys. Finding that Mr. Gray's guilty plea to making a false statement under oath in a bankruptcy matter was the equivalent of New York's felony perjury statute, the Court granted the petitioner's request for Mr. Gray's disbarment. Separately addressing respondent's tax evasion conviction, however, the court noted that "this Court has consistently regarded this federal offense as a 'serious crime' under Judiciary Law § 90(4)(d), which does not bring automatic disbarment." However, because the filing of the fraudulent tax return occurred in the context of a larger illegal scheme and respondent had concealed from the IRS the nature, extent and location of his assets and prepared and signed false financial statements, the Appellate Division found that disbarment was the appropriate remedy with respect to that conviction as well.[16]

Finally, there are instances in which the federal felony has an analogous New York felony, which although not identical is similar enough to result in automatic disbarment. In *In re Levine*, an attorney was convicted in federal court on 10 counts of filing false income tax refund claims, a felony. The court found that this federal felony was cognizable in New York as the crime of first-degree offering a false instrument of filing, also a felony. Accordingly, the court found that Mr. Levine's disbarment was automatic upon his felony conviction pursuant to Judiciary Law §90(4)(a).[17]

Conclusion

Many years ago a number of legal commentators questioned the justification for the application of both criminal and professional sanctions in cases where an attorney commits a tax offense unrelated to his role as a lawyer or his work with clients.[18] For instance, these commentaries query whether it is fair that a lawyer who fails to file his personal tax returns be subject to professional consequences. They argue that "since a state's interest in deterrence or retribution with regard to nonprofessional misconduct is precisely the same whether the conduct is done by a lawyer or by another, lawyers cannot be singled out for special punishment, consistent with the equal protection clause of the 14th Amendment."[19]

Although there seems to be little chance in persuading courts that attorneys should not be professionally sanctioned for misconduct that calls into question a lawyer's character and integrity, these arguments may be put forth to persuade a court toward a lesser sanction where appropriate. There is no question, however, that disciplinary committees and the courts charged with monitoring the professional standards of the bar take seriously an attorney's conviction for tax offenses, whether related to their professional work or not.

1. See, John J. Tigue and Linda A. Lacewell, "Professional Sanctions for Tax Offenses," New York Law Journal (Jan. 19, 1995).
2. New York Judiciary Law §90(2).
3. Id. §90(4)(a)&(e).
4. Id. §90(4)(f-g).
5. Id. §90(4)(d).
6. New York Judiciary Law §90(5)(b).
7. See, Supreme Court, Appellate Division, First Department Rules §603.14; Supreme Court, Appellate Division, Second Department Rules §691.11; Supreme Court, Appellate Division, Third Department Rules §806.12; Supreme Court, Appellate Division, Fourth Department Rules §1022.28.
8. 433 F3d 376 (4th Cir. 2005).
9. See Petitioner's Brief, 2005 WL 882109, *8 (March 28, 2005).
10. 740 NYS2d 711 (2nd Dept. 2002).
11. 782 NYS2d 274 (1st Dept. 2004).
12. 726 NYS2d 711 (2nd Dept. 2001).
13. 712 NYS2d 632 (2nd Dept. 2000); see also, *Matter of Levitt*, 675 NYS2d 339 (1st Dept. 1998) (public censure, not private reprimand, imposed for conviction for failure to file federal, state and city tax returns); *Matter of Everett*, 674 N.Y.S.2d 45 (1st Dept. 1998) (conviction for failure to file federal and state tax returns warranted public censure where there was mitigating evidence of attorney's obsessive-compulsive disorder).
14. See, e.g., *In re Klarman*, 802 NYS2d 267 (3rd Dept. 2005) (one-year suspension for filing a false federal personal income tax return); *In re DeCurtis*, 732 N.Y.S.2d 81 (2nd Dept. 2002) (two-year suspension for conviction for filing a false federal income tax return); *In re Bertel,* 706 N.Y.S.2d 101 (1st Dept. 2000) (suspension for greater of three years or duration of attorney's probationary period warranted for federal convictions for conspiracy to defraud the United States and the IRS and filing fraudulent tax returns); *In re Di Nardo*, 728 N.Y.S.2d 617 (4th Dept. 2001) (three-year suspension imposed for conviction for falsely subscribing a federal corporate tax return for which there was no corresponding state felony).
15. 759 NYS2d 527 (2nd Dept. 2003).
16. 752 NYS2d 44 (1st Dept. 2002).
17. 776 NYS2d 299 (2nd Dept. 2004).
18. See, e.g., Stoddard and Stutsman, "Income Tax Offenses by Lawyers: An Ethical Problem," 58 ABAJ 842 (1972); Weckstein, "Maintaining the Integrity and Competence of the Legal Profession," 48 Texas L. Rev. 267 (1970); Selinger and Schoen, "To Purify the Bar: A Constitutional Approach to Non-Professional Misconduct," 5 Nat. Rev. J. 299 (1965).
19. "Federal Income Tax Conviction as Constituting Nonprofessional Misconduct Warranting Disciplinary Action Against Attorney," 63 A.L.R.3d 512 (2006).

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