

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: Phyllis McCoy-Jacien, Esq.
PRB File No. 2016-023

Decision No. 196

Respondent is hereby publicly reprimanded with six months of probation for violation of Rule 8.4(c) of the Vermont Rules of Professional Conduct. Respondent violated Rule 8.4(c) by failing to file her Vermont income tax returns for calendar years 2011, 2012, 2013 and 2014.

Hearing Panel No. 8, consisting of Elizabeth Novotny, Esq., Chair, Andrew D. Manitsky, Esq. and Ms. Jeanne Collins, has received and considered Disciplinary Counsel's and Respondent's written submissions. Disciplinary Counsel and Respondent jointly requested that this disciplinary matter be resolved by public reprimand, followed by a period of probation. Based upon the parties' submissions, including the *Stipulation of Facts*, *Supplemental Stipulation*, *Joint Recommendation as to Conclusions of Law*, *Disciplinary Counsel's Memorandum of Law*, and *Joint Recommendation for Public Reprimand*, the Hearing Panel makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Respondent is an attorney licensed to practice law in the State of Vermont. Respondent was admitted to the practice of law in Vermont in 1989 and works full time as a sole practitioner.

Respondent failed to file her Vermont income tax returns for the calendar years of 2011, 2012, 2013, and 2014. Respondent engaged the services of a certified public accountant to assist her in preparing her past due tax returns, as well as her tax return for 2015.¹ To date, the Vermont Department of Taxes has not taken any enforcement action against Respondent for

¹ At the time the parties submitted their joint request for public reprimand, Respondent's income tax return for 2015 was not yet due.

failure to file her tax returns.

Respondent's failure to file her tax returns did not cause injury to any client. At the time each of Respondent's tax returns became due, Respondent believed she did not owe taxes to the State of Vermont. Currently, Respondent believes she does not owe taxes for tax years 2011, 2012, 2013 and 2014.

Respondent's failure to file her tax returns on time caused injury to the legal profession. When a lawyer fails to perform a duty imposed by law, the lawyer's breach adversely reflects upon the lawyer's fitness to practice, and on the profession as a whole.

Respondent's mental state when she failed to file her tax returns was "knowing," as Respondent knew her tax returns were due, but did not file the tax returns when due. This was not a single instance of oversight. Respondent failed to file tax years for four successive years, being tax years 2011, 2012, 2013 and 2014.

Respondent's failure to file her tax returns was due, in part, to a series of personal tragedies and difficulties. In January 2012, Respondent's parents were murdered in their Wilder, Vermont home by Respondent's stepbrother, who then took his own life. The murders, suicide and related events caused Respondent great emotional distress and personal upheaval.

In 2014, Respondent's spouse moved out of the marital home and filed for divorce. The divorce has been highly contentious,² prolonging Respondent's emotional distress. The divorce is a lesser factor than the murder/suicide, described above, contributing to the emotional distress that impaired Respondent's ability to file her Vermont tax returns. The contentiousness of the divorce, however, contributed to Respondent's inability to file the tax returns.

² Respondent's husband filed the complaint that led to this disciplinary action.

Respondent and her husband filed joint income tax returns during their marriage. Although separated, Respondent still plans to file the 2011, 2012, 2013 and 2014 tax returns as joint returns. Due to the contentious nature of Respondent's divorce proceedings, Respondent and her husband have not been able to communicate effectively, thereby further delaying the filing of their joint tax returns.

II. CONCLUSIONS OF LAW

A. Applicable Legal Standards

“In general, the [Rules of Professional Conduct] are ‘intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar.’” *In re PRB Docket No. 2006-167*, 2007 VT 50, ¶¶ 9-10, 181 Vt. 625, 626-27, 925 A.2d 1026, 1028-29 (citing *In re Berk*, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991) (per curiam)); accord *In re PRB Docket No. 2006-167*, 2007 VT 50, ¶ 9, 181 Vt. 625, 626, 925 A.2d 1026, 1028 (although *Berk* referred particularly to sanctions, it is clear that these are the overarching goals of the rules).

The Hearing Panel's findings as to each element of a charge of professional misconduct must be supported by clear and convincing evidence. A.O. 9, Rule 16(C); *In re McCarty*, 2013 VT 47, ¶ 12, 194 Vt. 109, 115, 75 A.3d 589, 593 (“All formal charges of misconduct “shall be established by clear and convincing evidence.”). “The burden of proof in proceedings seeking discipline or transfer to disability inactive status is on disciplinary counsel.” A.O. 9, Rule 16(D).

If the Hearing Panel finds a violation of the Rules of Professional Conduct by clear and convincing evidence, the Hearing Panel may impose one or more sanctions. A.O. 9, Rule 8. The purpose of sanctions is not “to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct.” *In re Obregon*, 2016 VT 32, ¶ 19 (citing *In re Hunter*, 167 Vt. 219, 226, 704 A.2d 1154, 1158 (1997)); *In re*

Warren, 167 Vt. 259, 263, 704 A.2d 789, 792 (1997)); *see also In re Neisner*, 2010 VT 102, ¶ 24, 189 Vt. 145, 156, 16 A.3d 587, 594.

B. Violation of Rule 8.4(c)

Rule 8.4 of the Rules of Professional Conduct prohibits a lawyer from engaging in “professional misconduct.” V.R.P.C. Rule 8.4. Rule 8.4(c) states “professional misconduct” includes a lawyer engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation.” *Id.* Rule 8.4(c) has been interpreted more broadly than the plain language of the Rule might suggest. “Generally, [Rule 8.4(c)] prohibits lawyers from engaging in unethical conduct ‘that calls into question an attorney’s fitness to practice law.’” *In re Obregon*, 2016 VT 32, ¶ 20) (*citing In re PRB Docket No. 2007-046*, 2009 VT 115, ¶ 9, 187 Vt. 35, 989 A.2d 523).

The *Comments* to Rule 8.4 provide guidance on the proper interpretation of Rule 8.4(c):

Many kinds of illegal conduct reflect adversely on fitness to practice law, such offenses involving fraud and the offense of willful failure to file an income tax return. . . . Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Comment 2, Rule 8.4 (*emphasis added*).

The Vermont Supreme Court has held that failure to file income tax returns is a violation of Rule 8.4(c). *In re Obregon*, 2016 VT 32, ¶ 21. The *Obregon* Court explained:

The Vermont Rules of Professional Conduct specifically provide that ‘[e]very lawyer is responsible for observance of the Rules of Professional Conduct.’ V.R.P.C. *Preamble*. Rule 8.4(c) prohibits lawyers from ‘engag[ing] in conduct involving dishonesty, fraud, deceit and/or misrepresentation.’ Generally, the rule prohibits lawyers from engaging in unethical conduct ‘that

calls into question an attorney's fitness to practice law.' *In re PRB Docket No. 2007-046*, 2009 VT 115, ¶ 9, 187 Vt. 35, 989 A.2d 523. We added in *PRB Docket No. 2007-046* that 'many kinds of illegal conduct reflect adversely on fitness to practice law, such as . . . the offense of willful failure to file an income tax return.' *Id.*, ¶ 13 (*quotations and citations omitted*).

Failure to file an income tax return is a crime. 32 V.S.A. § 5894(b). In *In re Calhoun*, we noted that the failure to file income tax returns is professional misconduct because "not only [is it] a failure to perform a duty imposed by law on income-earning citizens generally, it is a breach of responsibility that tends to discredit the legal profession which the respondent, as a member of the bar, is obligated to uphold with strict fidelity." 127 Vt. 220, 220, 245 A.2d 560, 560 (1968) (*per curiam*).

Id. at ¶¶ 20-21.

In *In re Calhoun* the Supreme Court could not have been clearer on the lawyer's duty to file tax returns. 127 Vt. 220, 245 A.2d 560, (1968) (*per curiam*). The first sentence of the *Calhoun* decision states: "So that there may be no uncertainty, it should be understood that this Court holds the offense of failing to file income tax returns to be professional misconduct." 127 Vt. at 220, 245 A.2d at 560; *accord In re McShane*, 122 Vt. 442 (1961) (lawyer's failure to file income tax returns constitutes professional misconduct); *In re Knapp*, 127 Vt. 222 (1968) (lawyer's license suspended for four months for failure to file income tax returns). The failure to file income tax returns reflects adversely on a lawyer's fitness to practice law. *See In re Obregon*, 2016 VT 32, ¶ 21; *In re Massucco*, PCB Decision No. 31 (May 10, 1992) (violation of DR 1-102(A)(7) (conduct adversely reflecting on the lawyer's fitness to practice law)); and *In re Free*, PCB Decision No. 35 (Aug. 28, 1992) (violation of DR 1-102(A)(7) (conduct adversely reflecting on the lawyer's fitness to practice law)).

The lawyer's failure to file a personal income tax return is not an act performed in the course of providing professional services for a client. This fact, however, does not take the

lawyer's failure outside the scope of the Rules of Professional Conduct. "The *ABA Standards* generally impose a duty upon attorneys to maintain personal integrity" as an attorney's personal integrity reflects upon the lawyer's honesty, trustworthiness, and fitness as a lawyer. *In re Obregon*, 2016 VT 32, ¶ 23 (citing *ABA Standard* § 5.1); see also *In re Doherty*, 162 Vt. 631, 633, 650 A.2d 522, 524 (1994) (*per curiam*) (*dissent*) ("An attorney acts in a position of public trust and is an officer of the court . . . [and] has a duty to the profession and the administration of justice, especially to uphold the laws of the state in which [the lawyer] practices.")

Here, the facts are not in dispute. Respondent knowingly failed to file her Vermont income tax returns for four years. Accordingly, there is clear and convincing evidence that Respondent violated Rule 8.4(c) by failing to file her tax returns for 2011, 2012, 2013 and 2014.

C. Applicability of the *ABA Standards for Imposing Lawyer Sanctions*

The Vermont Supreme Court has ruled:

When sanctioning attorney misconduct, we have adopted the *ABA Standards for Imposing Lawyer Discipline* which requires us to weigh the duty violated, the attorney's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors.

In re Andres, 2004 VT 71, ¶ 14, 177 Vt. 511, 513, 857 A.2d 803, 807; accord *In re Blais*, 174 Vt. 628, 817 A.2d 1266 (2002). Accordingly, the Hearing Panel employed the *ABA Standards* as a tool to determine the appropriate sanction to impose in Respondent's case.

1. The Duty Violated – Rule 8.4(c)

Respondent's failure to file her income tax return for four years constitutes a violation of Rule 8.4(c). *In re Obregon*, 2016 VT 32, ¶ 21. The breach of Respondent's duty is serious, as failure "to file an income tax return is a crime." *Id.* at ¶¶ 20-21 (citing 32 V.S.A. § 5894(b)), and adversely reflects on Respondent's fitness to practice law. See *In re Obregon*, 2016 VT 32, ¶ 21;

In re Massucco, PCB Decision No. 31 (May 10, 1992) (violation of DR 1-102(A)(7) (conduct adversely reflecting on the lawyer’s fitness to practice law)); and *In re Free*, PCB Decision No. 35 (Aug. 28, 1992) (violation of DR 1-102(A)(7) (conduct adversely reflecting on the lawyer’s fitness to practice law)).

2. Lawyer’s Mental State

The second factor to be considered under the *ABA Standards* is the lawyer’s mental state.

ABA Standards, §3.0. The *ABA Standards* describe the mental states to be considered as:

The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence.

ABA Standards, Theoretical Framework §II, at 6.

Respondent acted knowingly when she failed to file her personal income tax returns for four years. “Knowledge” is defined in the *ABA Standards* as “the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *ABA Standards IV, Definitions*. While Respondent acted with knowledge, her failure to file her income tax returns was, in part, due to a series of personal traumas and losses. The parties stipulated that Respondent believed she did not owe any taxes when her tax returns were due. Accordingly, the Hearing Panel concludes Respondent acted knowingly, but without the intent to avoid filing her tax returns or to evade the payment of her tax obligations.

3. Injury & Potential Injury

The *ABA Standards* next consider the level of injury or potential injury associated with the lawyer's conduct. No client was injured as a result of Respondent's conduct. Respondent did, however, injure the legal profession when she failed to meet her legal obligation to file her annual tax returns. *In re Obregon*, 2016 VT 32, ¶ 23; *see also In re Calhoun*, 127 Vt. 220, 220 (1968) ("It is not only a failure to perform a duty imposed by law on income-earning citizens generally, it is a breach of responsibility that tends to discredit the legal profession which the respondent, as a member of the bar, is obligated to uphold with strict fidelity.").

4. Presumptive Sanction under the ABA Standards

Respondent's misconduct falls within § 5.1 of the *ABA Standards*, being the duty to maintain personal integrity. *In re Obregon*, 2016 VT 32, ¶ 22-23. The *Obregon* Court explained:

ABA Standard § 5.1 provides that sanctions are generally appropriate in cases involving conduct "that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Section 5.12 states that suspension is appropriate when a lawyer knowingly engages in non-serious conduct that "seriously adversely reflects on the lawyer's fitness to practice." Further, § 7.2 notes that suspension is also an appropriate sanction "when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to ... the legal system."

Id. at ¶ 22; *see also ABA Standards For Imposing Lawyer Sanctions* (approved February 1986 and amended February 1992).³

Sections 5.11 through 5.14 (being subsections of § 5.1) provide the criteria for determining the appropriate sanction for a lawyer who has violated the duty to maintain personal

³ American Bar Association (website visited June 30, 2016). http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf

integrity. Section 5.12 states that “suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer’s fitness to practice.” *Id.* In contrast, Section 5.13 states a “reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer’s fitness to practice law.” The distinction between § 5.12 and § 5.13 is that § 5.12 refers to criminal conduct and § 5.13 does not. *Id.*⁴

In this case, the presumptive sanction is suspension. “Failure to file an income tax return is a crime. 32 V.S.A. § 5894(b).” *In re Obregon*, 2016 VT 32, ¶ 21. Respondent acknowledges that her conduct was knowing, meaning she understood that she had a duty to file her tax returns, and did not do so. In *In re Obregon*, the Vermont Supreme Court considered a disciplinary matter with very similar facts. 2016 VT 32. In *Obregon*, the lawyer failed to file income tax returns for four years, and the Court concluded that a suspension was the presumptive sanction under the *ABA Standards*. *Id.* at ¶ 22. The Court further noted that § 7.2 of the *ABA Standards* applied, finding that suspension is an appropriate sanction “when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to . . . the legal system.” *Id.* Accordingly, § 5.12, rather than § 5.13 of the *ABA Standards* applies, and suspension is the presumptive sanction.

5. Aggravating & Mitigating Factors

a. Aggravating Factors

Section 9.22 of the *ABA Standards* sets forth a list of aggravating factors that should be considered when determining an appropriate sanction. The parties stipulated to a single

⁴ The Hearing Panel considered § 5.11, which applies to “serious criminal conduct” and “intentional conduct,” and § 5.14, which applies to “other conduct that reflects on the lawyer’s fitness to practice law,” but concluded Respondent’s mental state did not fit the criteria of these Sections.

aggravating factor, being Respondent's substantial experience in the practice of law. See *ABA Standards* § 9.22(i). Respondent has practiced law in Vermont for twenty-seven years. The Hearing Panel concurs and finds only one aggravating factor in Respondent's case, her substantial experience in the practice of law.

b. Mitigating Factors

Section 9.32 of the ABA Standards sets forth a list of mitigating factors that should be considered when determining an appropriate sanction. The parties have stipulated to the several mitigating factors.

Respondent's failure to file her tax returns coincided with a horrific personal tragedy, involving the murder/suicide of her parents and stepbrother in the family home. The tragedy occurred in January 2012, a few months before Respondent's 2011 tax return was due. The Hearing Panel finds that Respondent's family tragedy, and its consequences, caused Respondent to suffer personal and emotional issues that affected Respondent's ability to attend to her personal legal obligations. In 2014, Respondent's husband left the marriage and filed for divorce. The parties stipulated, and the Hearing Panel finds, that the divorce has been contentious, making it difficult for Respondent and her husband to communicate and complete their joint tax returns. These events qualify as personal and emotional issues pursuant to *ABA Standard* § 9.32(c).

Respondent has no prior record of discipline. *ABA Standard* § 9.32(a). The Hearing Panel finds it noteworthy that Respondent has practiced law in Vermont for twenty-seven years without a disciplinary issue.

Respondent fully cooperated with Disciplinary Counsel and the Hearing Panel during these proceedings. *ABA Standards* § 9.32(e) ("full and free disclosure to disciplinary board or

cooperative attitude toward proceedings.”)

Respondent has expressed remorse for her failure to meet her legal obligation. *ABA Standard* § 9.32(l).

In addition to the mitigating factors the parties stipulated to, the Hearing Panel notes the absence of selfish motive. See *ABA Standard* § 9.32(b). At the time each of Respondent’s tax returns were due, Respondent believed she did not owe any tax to the State of Vermont. The Hearing Panel has no evidence that taxes were, or are, due for tax years 2011 through 2014. Accordingly, the Hearing Panel gives some weight to the fact that Respondent’s conduct did not involve a selfish motive. The Hearing Panel also notes that Respondent may be required to pay a penalty to the Vermont Tax Department for each year she failed to file a tax return. 32 V.S.A. § 3202(b)(1) (“If the return is not filed within 60 days after the date prescribed therefor, there shall be assessed a minimum penalty of \$ 50.00 regardless of whether there is a tax liability.”). The *ABA Standards* permit the Hearing Panel to consider such penalties a mitigating factor. *ABA Standard* § 9.32(k).

c. Mitigating Factors Outweigh Aggravating Factors

The Hearing Panel finds that the mitigating factors far outweigh the aggravating factors in this case. Respondent’s personal tragedy and subsequent contentious divorce explain, in part, why Respondent was not able to meet her personal legal responsibilities. Prior to the 2011 family tragedy, Respondent practiced law for over two decades without a disciplinary infraction. The Hearing Panel concurs with the parties that Respondent’s contentious divorce hindered her and her husband’s ability to file their joint tax returns. Respondent has taken action to address her failing and expressed remorse. In addition to any sanction the Hearing Panel imposes, Respondent may be subject to a financial penalty imposed by the Vermont Tax Department.

Under these circumstances, a public reprimand, rather than suspension, is the appropriate sanction. To assure that Respondent meets her legal obligation to file income tax returns for 2011, 2012, 2013 and 2014, a period of probation is appropriate.

Precedent supports public reprimand as the appropriate sanction in this case. In *In re Obregon*, the respondent failed to file her income tax returns for four years. 2016 VT 32. The Vermont Supreme Court found the presumptive sanction was suspension, but concluded the mitigating factors made public reprimand the appropriate sanction. The Court noted the mitigating factors included a health issue resulting from a minor car accident and a series of computer problems that limited respondent's access to her financial records. *Id.* § 26.

In some earlier Vermont cases, a number of respondents were suspended from the practice of law for failure to file their income tax returns. In each of these cases, the respondent was convicted of a crime, being the failure to file one or more tax returns. In *In re Taft*, the respondent was suspended for four months after pleading *nolo contendere* to two criminal counts of failing to file his Vermont income tax returns. 159 Vt. 618 (1992). In *In re Free*, the respondent pled guilty to three counts of failing to file his Vermont income tax returns and was suspended for six months. 159 Vt. 625 (1992). In *In re Massucco*, the respondent was convicted of two counts of failing to file his Vermont income tax returns and was suspended for four months. 159 Vt. 617 (1992).

Not every case involving a criminal conviction for failure to file tax returns resulted in a suspension from the practice of law. In *In re McShane*, the respondent was publicly reprimanded after pleading *nolo contendere* to failing to file federal income tax returns for three years. 122 Vt. 442 (1961). The *McShane* Court noted that the respondent had some personal problems and incomplete financial records for the years he failed to file his returns. The Court found “no bad

faith or evil intent on the part of the respondent,” stating respondent’s conduct was the result of “carelessness.” *Id.* at 442. The Court concluded a public reprimand was the appropriate sanction. *Id.*

In the present case, Respondent knowingly failed to file her Vermont income tax returns for four years. Respondent’s circumstances, however, more closely resemble those found in *Obregon* or *McShane*, than those found in *Taft, Free* and *Massucco*. In Respondent’s case there are significant mitigating factors, like those found in *Obregon*. Accordingly, public reprimand is the appropriate sanction.

III. ORDER

BASED UPON the foregoing findings of fact and conclusions of law, Respondent is reprimanded for violation of Rule 8.4(c) of the Vermont Rules of Professional Conduct, and shall serve a period of probation of six (6) months. The only conditions of probation are that Respondent timely file her 2015 tax return and file her 2011, 2012, 2013 and 2014 tax returns with the Vermont Tax Department. Disciplinary Counsel has agreed to serve as the probation monitor in light of the limited scope of the probation requirements. Once the aforesaid tax returns are completed and filed with the Tax Department, the purposes of probation shall have been satisfied.

Dated: July 18, 2016.
FILED 7/18/2016

Hearing Panel No: 8

/s/

Elizabeth Novotny, Esq., Chair

/s/

Andrew D. Manitsky, Esq.

/s/

Jeanne Collins