



UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

April 24, 2015

PRESS RELEASE

The Chief Judge of the United States Tax Court announced today that the following practitioner has been disciplined by the United States Tax Court for reasons explained in an order and memorandum sur order issued in the case of the practitioner.

A copy of the order and memorandum sur order are attached.

1. Charles E. Hammond, III

Attachments

UNITED STATES TAX COURT

WASHINGTON, DC 20217

In re: Charles E. Hammond, III

ORDER OF SUSPENSION

The record of this Court in the case of Richard Ohendalski & Kay Ohendalski v. Commissioner, Docket No. 19021-12, reflects that Mr. Hammond intentionally failed to appear and to take action in response to orders of this Court causing interference with a legal proceeding.

The Court issued an Order to Show Cause on August 12, 2014, affording Mr. Hammond the opportunity to show cause, if any, why he should not be suspended or disbarred from practice before this Court, or otherwise disciplined. The Order to Show Cause instructed Mr. Hammond to (1) submit a written response to the order on or before September 15, 2014, and (2) notify the Court in writing on or before September 15, 2014, of his intention to appear, in person or by counsel, at a hearing concerning his proposed discipline scheduled before the United States Tax Court, 400 Second Street, N.W., Washington, D.C. 20217, on October 9, 2014, at 10:00 a.m.

Mr. Hammond responded to the Order to Show Cause, first by letter received on September 15, 2014, and then by supplement to the order to show cause, received on September 22, 2014. Mr. Hammond notified the Court of his intention not to appear for hearing and waived his right to so appear.

Upon due consideration of Mr. Hammond's submissions and for reasons set forth in the attached Memorandum Sur Order, it is

ORDERED that the Court's Order to Show Cause, issued August 12, 2014, is hereby made absolute in that under the provisions of Rule 202, Tax Court Rules of Practice and Procedure, Mr. Hammond is forthwith suspended from further practice before the United States Tax Court, until further order of the Court. A practitioner who has been suspended may apply for reinstatement. See Rule 202(f), Tax Court Rules of Practice and Procedure, for reinstatement procedures. It is further

SERVED APR 24 2015

ORDERED that Mr. Hammond's practitioner access to case files maintained by the Court in electronic form, if any such access was given to him, is hereby revoked. It is further

ORDERED that, until reinstated, Mr. Hammond is prohibited from holding himself out as a member of the Bar of the United States Tax Court. It is further

ORDERED that the Court will file orders to withdraw Mr. Hammond as counsel in all pending cases in which he appears as counsel of record. It is further

ORDERED that Mr. Hammond shall, within 20 days of service of this order upon him, surrender to this Court his certificate of admission to practice before this Court.

By the Court:

(Signed) Michael B. Thornton

Michael B. Thornton
Chief Judge

Dated: Washington, D.C.
April 24, 2015

In re: Charles E. Hammond, III

MEMORANDUM SUR ORDER

On August 12, 2014, the Court issued an Order to Show Cause to Charles E. Hammond, III, a member of the Bar of this Court, affording him the opportunity to show cause, if any, why he should not be suspended or disbarred from practice before this Court, or otherwise disciplined. The Order to Show Cause is predicated on Mr. Hammond's conduct in Richard Ohendalski & Kay Ohendalski v. Commissioner, Docket No. 19021-12, in response to which the order states as follows:

The record of this Court in the case of Richard Ohendalski & Kay Ohendalski v. Commissioner, Docket No. 19021-12, reflects that you failed to appear and to take action in response to orders of this Court. See Standing Pretrial Order, dated August 12, 2013; Transcript, Vol. 1, dated January 13, 2014, pp. 4, 13-16; and Transcript, Vol. 2, dated January 14, 2014, pp. 255-257. Your conduct in Richard Ohendalski & Kay Ohendalski v. Commissioner, Docket No. 19021-12, appears to have violated Rules 202(a)(3) and (4) of the Tax Court Rules of Practice and Procedure, as well as orders and other instructions of the Court. Furthermore your conduct in that case may have violated the following Model Rules of Professional Conduct of the American Bar Association: Rule 1.1 (Competence); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.16 (Declining or Terminating Representation); Rule 3.2 (Expediting Litigation); Rule 3.3 (Candor Toward the Tribunal); Rule 3.4 (Fairness to Opposing Party and Counsel); Rule 3.5(d) (Impartiality and Decorum of the Tribunal – engaging in conduct intended to disrupt a tribunal); Rule 8.4(a) (Misconduct – violating the Rules of

Professional Conduct); and Rule 8.4(d) (Misconduct – engaging in conduct that is prejudicial to the administration of justice).

Mr. Hammond submitted Response to Order to Show Cause on September 15, 2014, (herein referred to as response) and Supplement to Response to Order to Show Cause on September 22, 2014. In his supplement to response, Mr. Hammond waived his right to appear at the hearing on the Order to Show Cause that had been scheduled by the Court.

Background

Mr. Hammond entered his appearance on behalf of petitioners in Ohendalski v. Commissioner, Docket No. 19021-12, by signing the petition filed on July 27, 2012. See Rule 24(a), Tax Court Rules of Practice and Procedure. The petition sought redetermination of the tax deficiencies, additions to tax, and penalties for taxable years 2002, 2003, and 2004 determined in notices of deficiency issued by the Internal Revenue Service to Mr. and Mrs. Ohendalski on April 24, 2012.

The principal adjustments in the notices of deficiency were increases in the amount of income reported by each petitioner to reflect the unreported gross income computed by respondent in a bank deposits analysis for each of the taxable

years in issue. Respondent also determined that Mr. Ohendalski was liable for the fraud penalty under section 6663 for each of the years in issue.

The amount of the tax deficiencies, penalties, and additions to tax determined in the notices is substantial. For the three years in issue, respondent determined aggregate tax deficiencies in Mr. Ohendalski's notice of deficiency of approximately \$934,000, together with aggregate penalties and additions to tax of approximately \$677,000. For the same years, respondent determined aggregate tax deficiencies in Mrs. Ohendalski's notice of deficiency of approximately \$855,000, together with aggregate penalties and additions to tax of approximately \$431,000. Thus, tax deficiencies, penalties, and additions of approximately \$2,897,000 were at issue in the case.

On August 12, 2013, the Court issued a notice setting the case for trial during the two-week trial session scheduled to begin in Houston, Texas, on Monday, January 6, 2014, at 10:00 a.m. The notice stated, among other things, "The calendar for that session will be called at that date and time, and the parties are expected to be present and to be prepared to try the case." On the same day, the Court issued its Standing Pretrial Order in which the Court ordered the parties to stipulate all facts to the maximum extent possible, exchange trial exhibits, and

file a pretrial memorandum not less than 14 days before the beginning of the trial session.

By Order dated December 13, 2013, the Court granted the informal request of the parties for a time and date certain for trial, and ordered the case calendared for trial at 9:00 a.m. on January 13, 2014. Thus, the Court set the case for trial on the second Monday of the two-week trial session. The Court also relieved the parties of their obligation to appear on January 6, 2014.

On January 13, 2014, when the case was called for trial, Mr. Hammond did not appear as ordered by the Court. See Ohendalski v. Commissioner, Docket No. 19021-12, Transcript, Vol. 1, p. 4. In this Memorandum Sur Order, all transcript references are to the Transcript in Ohendalski v. Commissioner, Docket No. 19021-12. Petitioner, Mr. Ohendalski, appeared and stated, that he had not dismissed Mr. Hammond, and he was unaware of the “exact reason” why Mr. Hammond had failed to appear. Id. In response to questions from the Court, Mr. Ohendalski stated that he did not know that Mr. Hammond was not going to appear, and Mr. Hammond had not told him that he was not going to appear. Transcript, Vol. 1, pp. 13-15. Under further questioning by the Court, petitioner explained Mr. Hammond’s absence as follows:

THE COURT: * * *. You didn't seem surprised that Mr. Hammond wasn't here this morning. Why weren't you surprised?

MR. OHENDALSKI: Emails.

THE COURT: What did he [Mr. Hammond] tell you in these emails? What was the nature of your communication in the emails?

MR. OHENDALSKI: That there was a better strategy.

THE COURT: So he is not here, as part of a strategy? Is that correct?

MR. OHENDALSKI: In my own words, I would say that he is not here because he felt like putting me on the stand as a witness would be bad for our case, because of the criminal investigation at the same time.

* * * * *

THE COURT: All right. So as part of the strategy, your counsel is not here this morning. That is a fair statement? That's correct?

MR. OHENDALSKI: (No verbal response.)

Transcript, Vol. 1, pp. 15-16.

As mentioned by Mr. Ohendalski in the above passage, his tax returns for the taxable years in issue and for later years had been the subject of a criminal tax investigation. During a telephone conference with the Court on January 8 or 9, 2014, shortly before the start of trial, the attorneys for the parties discussed the case with the Court, and Mr. Hammond orally asked the Court to continue the case

based upon the ongoing criminal tax investigation of Mr. Ohendalski's tax returns. Transcript, Vol. 1, pp. 5-6, 8. During that telephone conference, respondent's attorney represented to the Court that, in fact, there was no ongoing criminal tax investigation of petitioners' returns. See paragraph 3 of Petitioners' Opposed Motion of Reconsideration for Continuance, filed January 13, 2014, as Petitioners' Support as to Petitioners' Oral Motion for Continuance.

After the telephone conference, the Court received, by facsimile transmission, a written motion for continuance. Transcript, Vol. 1, pp. 5-6. In that document, Mr. Hammond repeated petitioners' motion to continue the case based upon the ongoing criminal tax investigation of Mr. Ohendalski's tax returns.

At some point, Mr. Hammond drafted, but did not file, Petitioners' Opposed Motion for Reconsideration for Continuance for the purpose of asking the Court to review its denial of petitioners' request for a continuance. See Petitioners' Support as to Petitioners' Oral Motion for Continuance. In that motion, Mr. Hammond set forth the factual basis for petitioners' assertion that Mr. Ohendalski "is the subject of a criminal referral to the Department of Justice." Id.

When the case was called for trial on January 13, 2014, and Mr. Hammond failed to appear, Mr. Ohendalski undertook his own representation. He told the Court that he had been advised not to testify because of respondent's continuing

criminal investigation of his tax returns, and he made an oral motion for continuance. Transcript, Vol. 1, pp. 6-7. Mr. Ohendalski also told the Court that he had been advised that petitioner's first motion for continuance had been denied during the telephone conference based solely upon the oral statement of respondent's attorney that there was no longer an ongoing criminal investigation. Transcript, Vol. 1, p. 8. Mr. Ohendalski said, "We just believe that there should be better evidence of that, than a verbal anticipation [sic] from Respondent's attorney." Id.

The Court explained to Mr. Ohendalski that his understanding of the discussion during the Court's telephone conference with the attorneys was incorrect. Id. The Court stated that, in fact, petitioners' motion for continuance, submitted by facsimile transmission, had not been filed, and the Court had not yet acted upon the motion. Id.

Respondent's counsel then reassured the Court that the criminal investigation of Mr. Ohendalski's returns had been closed and there was no ongoing criminal tax investigation of those returns. Transcript, Vol. 1, pp. 9-11. Respondent's counsel submitted two documents to substantiate her statement, including a letter from the Special Agent in Charge of the Houston Field Office, Criminal Investigation Division of the Internal Revenue Service, to the Assistant

Attorney General for the Tax Division, United States Department of Justice, dated September 27, 2013, stating, in part, as follows:

Please be advised that the grand jury investigation of the above-referenced individual [Richard Stephen Ohendalski] has been discontinued based on our discussions with DOJ Tax Division attorneys concerning the limitations of the existing evidence obtained during the investigation * * *.

As no further investigation is warranted, the above-named grand jury matter has been closed. There are no other related cases in this investigation. Since the investigation has been concluded, this letter will constitute termination of the referral and, as such, we will now seek appropriate civil action.

See id. Respondent's documents, including the above letter, were filed January 13, 2014, in the record of the case as Opposition to Petitioners' Oral Motion to Continue.

In support of petitioners' oral motion for continuance, Mr. Ohendalski submitted Petitioners' Opposed Motion for Reconsideration for Continuance, the motion mentioned above that had been prepared by Mr. Hammond. See Petitioners' Support as to Petitioners' Oral Motion for Continuance. Transcript, Vol. 1, pp. 11-12, 18.

After considering petitioners' oral motion for continuance, and the documents submitted by each party, the Court found that the Government had discontinued its Grand Jury investigation, and there was, in fact, no ongoing

criminal investigation of Mr. Ohendalski's returns by the Government as of September 27, 2013. Transcript, Vol. 1, pp. 19-20, 22. Accordingly, the Court concluded that there was no basis for a continuance. Id. See generally, Rule 133.

The Court expressed frustration about the fact that petitioners' attorney had not raised this issue earlier, and about the fact that respondent had not notified petitioners in September of 2013 that the criminal tax investigation had ended. The Court directed respondent to proceed with its civil fraud evidence, without calling Mr. Ohendalski as a witness, so that Mr. Ohendalski could have an opportunity, overnight, to review the documents submitted by respondent and to consult with Mr. Hammond about whether Mr. Ohendalski would testify. Transcript, Vol. 1, pp. 20-22, 27-28, 31.

Mr. Ohendalski then proceeded to file a motion to stay proceedings in the case and a motion to certify interlocutory appeal. Both of those motions had been prepared by Mr. Hammond and, if granted, they would have, in effect, continued the proceedings. Mr. Ohendalski filed other motions that had been prepared by Mr. Hammond, including motions in limine, a motion to suppress evidence, a motion for leave to file amendment to petition, a motion to conform notice of deficiency to statute. In all, Mr. Ohendalski filed nine motions and other documents that had been prepared by Mr. Hammond.

The Court considered and acted on most of petitioners' motions but, in view of Mr. Hammond's absence, the Court was not able to rule on aspects of petitioners' motion in limine that sought to obtain certain criminal investigation division files. Transcript, Vol. 1, pp. 41-50, 56. The Court felt it necessary to allow Mr. Ohendalski to consult with Mr. Hammond about whether a prior written request for certain information had been made. Id. Similarly, the Court deferred ruling on petitioners' motion to suppress evidence in order to give Mr. Ohendalski an opportunity to consult with Mr. Hammond. Transcript, Vol. 1, pp. 52, 54-56. Thereafter, respondent's counsel began respondent's case.

When the case was recalled on the following day, Mr. Hammond again failed to appear, although it is not clear that he had received notice that the case would be recalled on that date. Transcript Vol. 4, pp. 256-257. Another attorney, Richard Kuniansky, Esquire, entered his appearance on behalf of petitioners.

Mr. Kuniansky announced that petitioners did not intend to contest respondent's bank deposits analysis. Transcript, Vol. 4, p. 258. After a recess, to allow the parties to discuss the effect of that concession, the parties announced that they had reached agreement on a number of issues. Transcript, Vol. 4, p. 264. After a further recess, respondent's counsel read a basis for settlement into the record. Transcript, Vol. 4, pp. 266-268. The Court then gave the parties 120 days

in which to file a decision or a status report as to their efforts to finalize decision documents. Transcript, Vol. 4, p. 269.

Approximately four months later, on May 12, 2014, respondent filed Motion for Entry of Decision in which respondent reported that petitioners' counsel, Mr. Kuniansky, had not executed a proposed decision document. According to respondent's motion, Mr. Kuniansky had advised respondent's counsel that petitioners had delayed responding to Mr. Kuniansky for approximately three months. Petitioners then "instructed Mr. Kuniansky to withdraw, stating attorney Charles Hammond would be handling the case."

By Order dated May 19, 2014, the Court directed petitioners to file a response to respondent's motion for entry of decision. In response to that order, Mr. Kuniansky filed Response to Motion for Entry for Decision in which he stated that he had not been able to communicate with his clients, and, for that reason, he could not agree to entry of the decision. Mr. Kuniansky also filed Motion to Withdraw as Counsel in which he stated that, originally, he had been retained only to represent Mr. Ohendalski in the criminal tax investigation, and he had not been retained to represent petitioners in the Tax Court case. Nevertheless, he said, he "very reluctantly stepped in" as Mr. Ohendalski's attorney following Mr. Hammond's failure to appear. He did so, he said, after first warning Mr.

Ohendalski that he was not familiar with the civil tax case, and was not prepared for trial. After sending the proposed decision to Mr. Ohendalski, Mr. Kuniansky stated that he had received a memo from Mr. Ohendalski asking him to withdraw as counsel and asking that Mr. Hammond be on the decision document. The Court denied Mr. Kuniansky's Motion to Withdraw as Counsel.

In response to respondent's motion for entry of decision, Mr. Hammond also filed Motion to Withdraw as Counsel on May 30, 2014, in which he stated,

* * * abject and visceral differences in trial strategy, potential abuse of legal process and wholesale lack of cooperation in preparation, made it impossible for the undersigned counsel to continue to effectively represent Richard and Kay Ohendalski in this action.

Further, * * * it is/was impossible for undersigned counsel to effectively represent the interests of Richard and Kay Ohendalski due to a parallel criminal investigation related to the above litigation, without patently compromising Petitioner's [sic] interests in that criminal investigation. To be clear, in the clear, researched opinion of Counsel, any attempt to litigate the above-mentioned civil tax matter or discuss the issues involved would compromise Richard and Kay Ohendalski in the ongoing criminal investigation for those and other tax years.

According to Mr. Hammond's motion, he had notified his clients on January 12, 2014, the day before the start of trial, "of his immediate withdrawal and refusal to represent petitioners" in the subject case and he "made it clear * * * "that he would not show up at that hearing [sic]." Motion to Withdraw as Counsel, par. 3.

Mr. Hammond said that he took such action “knowing, understanding and accepting the full risk of reprimand”. Id. The Court denied Mr. Hammond’s Motion to Withdraw as Counsel.

Finally, Mr. Ohendalski filed Notice of Objection to Motion for Entry of Decision. In his objection, Mr. Ohendalski said nothing to suggest that he had been notified on January 12, 2014, of Mr. Hammond’s “immediate withdrawal and refusal to represent petitioners”, or of Mr. Hammond’s decision that he “would not show up at that hearing [sic].” To the contrary, Mr. Ohendalski made it clear in the section entitled “Notice of Clarification of Counsel” that, notwithstanding Mr. Hammond’s failure to appear at trial, Mr. Hammond remained petitioners’ counsel. Mr. Ohendalski pointed out, “there was no motion before the Court to replace original counsel of record Attorney Hammond; nor has Hammond yet been replaced.” Mr. Ohendalski also stated that “Attorney Kuniansky’s service has been terminated by Petitioner.”

In his objection, Mr. Ohendalski also argued that the action of the Court, denying his motion for a continuance after Mr. Hammond had failed to appear at trial, caused petitioners to be prejudiced “by being denied effective representation during critical cross-examination of Government witnesses and during settlement discussions.”

The Court granted respondent's Motion for Entry of Decision, over petitioners' objection, and on June 12, 2014, entered an order and decision in accordance with the settlement that had been read into the record of the case.

Mr. Hammond's Response to Order to Show Cause

In his response, Mr. Hammond acknowledges that he had failed to appear for trial, and he had failed to take action in response to orders issued by the Court in the case of Ohendalski v. Commissioner, Docket No. 19021-12. As the basis for his defense to the Order to Show Cause, Mr. Hammond repeats the two assertions he had made in his Motion to Withdraw as Counsel. First, he claims that there was a “[c]omplete and abject failure in the Attorney/Client relationship” which was caused by: (1) his clients' instructions to “intend to lose” at trial, which amounted to an attempt to manipulate the legal process; (2) his clients' dealing with him and with government counsel in bad faith by, for example, showing up for a settlement conference with six boxes of new evidence; (3) his clients' refusal to follow his trial preparation instructions; and, (4) the discovery of evidence that his client is a tax protestor who refused to recognize the authority of government employees and who insisted on making tax protestor arguments.

The four items cited by Mr. Hammond as causing the failure of his attorney-client relationship with the Ohendalskis appear to have taken place weeks and

months prior to trial. Mr. Ohendalski allegedly issued the “intent to lose” instructions on November 19, 2013, approximately two months before trial. See Exhibit A to response. The last instance of Mr. Ohendalski’s dealing in bad faith took place “several weeks prior to trial” when Mr. Ohendalski appeared for the last settlement conference “with 6 full white boxes” of evidence. Response, p. 2. Mr. Ohendalski’s refusal to follow trial instructions took place “in the weeks prior to trial”. Response, p. 3. Finally, the alleged evidence of Mr. Ohendalski’s status as a “tax protestor”, consisting of a “No trespass” warning, was “discovered in late produced records”, presumably the 6 full white boxes of evidence produced several weeks prior to trial. Id.

Mr. Hammond’s second assertion is that “an ongoing corresponding criminal tax investigation of Client, on which Client was represented by separate counsel * * * for the identical years [before the Court in the civil tax matter] rendered effective representation at the civil tax trial impossible”. Id. Mr. Hammond states that “the federal government was well aware of Client’s tax protestor status and intended to punish Clients accordingly.” Id. at 4. Mr. Hammond claims that the ongoing criminal proceeding rendered it impossible for him to effectively represent the clients.

Mr. Hammond asserts in his response, as he did in his Motion to Withdraw as Counsel, that he decided to immediately withdraw as counsel in the Ohendalskis' case and to refuse to represent petitioners for the two reasons mentioned above. He also decided that he would not appear before the Court "to explain why or otherwise withdraw from the case." Id. at 5. He came to this decision because he did not want to "poison" his clients' position before the Court.

Id. Mr. Hammond stated it this way in his response:

Further, and most importantly, to formally appear at trial and outline the aforementioned as either a basis for motion for withdrawal and/or refusal to proceed on examination of my Clients at trial and otherwise poison my Clients [sic] position before the trying Court, by announcing their intended manipulation of the Court through their 'intent to lose' strategy and recently identified tax protester position, inter alia, would ultimately doom whatever semblance of credibility remained with the Clients with respect to the Government.

Response, p. 5.

According to Mr. Hammond, on the day before trial, January 12, 2014, he notified the Ohendalskis that he "would no longer represent them, at trial or on any other matter", and that he "would not appear before the trial Court to explain why or otherwise withdraw from the case".

Discussion

It is fundamental to the attorney-client relationship that by agreeing to undertake the representation of a client, the attorney generally assumes the obligation to see the work through to completion of the representation. See, e.g., Laster v. District of Columbia, 460 F. Supp. 2d 111, 113 (D.D.C. 2006); Streetman v. Lynaugh, 674 F. Supp. 229, 234 (E.D. Tex. 1987). This obligation, to carry each matter through to conclusion, persists until the matter is concluded or until the attorney-client relationship is terminated as provided in Model Rule 1.16. See ABA Model Rules of Professional Conduct, Rule 1.3, Comment 4.

ABA Model Rule 1.16(a) sets forth the circumstances that require a lawyer to withdraw from a representation, so-called mandatory withdrawal, and ABA Model Rule 1.16(b) sets forth the circumstances in which a lawyer may withdraw from the representation, so-called optional withdrawal. In either situation, withdrawal of the attorney is subject to ABA Model Rule 1.16(c) which provides as follows:

A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

See Fry v. Commissioner, 92 T.C. 368, 373 (1989).

In this Court, the applicable law governing withdrawal of the appearance of a counsel of record is set forth in Rule 24(c) of the Tax Court Rules of Practice and Procedure. That rule provides as follows:

(c) Withdrawal of Counsel. Counsel of record desiring to withdraw such counsel's appearance, or any party desiring to withdraw the appearance of counsel of record for such party, must file a motion with the Court requesting leave therefor, showing that prior notice of the motion has been given by such counsel, and stating whether there is any objection to the motion. A motion to withdraw as counsel and a motion to withdraw counsel shall each also state the then-current mailing address and telephone number of the party in respect of whom or by whom the motion is filed. The Court may, in its discretion, deny such motion.

Thus, under Tax Court Rule 24(c), a lawyer seeking to withdraw his or her appearance as counsel of record must file a motion requesting leave from the Court, and, in such motion, the attorney must show that prior notice of the motion had been given to the client and to the other parties or their counsel. As we said in Fry v. Commissioner, 92 T.C. at 375, in considering a motion to withdraw under Tax Court Rule 24(c), we must balance the interests of petitioner, respondent, the attorney seeking withdrawal, and the Court. Tax Court Rule 24(c) makes it clear that the Court may deny a motion to withdraw as counsel of record. In that case, ABA Model Rule 1.16(c) requires the lawyer to continue the representation notwithstanding good cause for terminating the representation.

In filing a motion to withdraw as counsel of record under Tax Court Rule 24(c), the lawyer has an obligation of candor toward the Court. See ABA Model Rule 3.3. The lawyer also has an obligation to protect the confidences of the client, and the lawyer may not reveal information relating to the representation, unless the client gives informed consent. See ABA Model Rule 1.6. There is often tension between these obligations, especially when the lawyer's reasons for seeking withdrawal involve the client's misconduct. Comment 3 to ABA Model Rule 1.16, deals with that tension as follows:

court approval or notice to the court is often required by applicable * * * law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Furthermore, ABA Model Rule 3.3, Candor Toward the Tribunal, permits a lawyer seeking permission to withdraw due to a client's misconduct, to reveal information relating to the representation to the extent reasonably necessary to comply with ABA Model Rule 3.3 or as otherwise permitted by ABA Model Rule 1.6. See Comment 15, ABA Model Rule 3.3.

Thus, as noted in Comment 3, supra, a lawyer's statement to the presiding judge that "professional considerations require termination of the representation" should ordinarily be a sufficient explanation in support of a motion to withdraw. The lawyer could also request a conference *in camera* to ensure that he or she does not violate confidences or duties owed to the client. Finally, the lawyer could ask the client to consent to the disclosure. The thing that the lawyer is not permitted to do is to simply walk away from the representation.

Mr. Hammond entered his appearance as counsel of record in the Ohendalski case, and he was obligated to see that case to completion or to seek withdrawal as counsel under Tax Court Rule 24(c). E.g., Laster v. District of Columbia, 460 F. Supp. 2d at 113. He did neither. Instead, he deliberately failed to appear for trial without giving notice to opposing counsel, to the Court, and, if we accept his explanation of events, without giving reasonable notice to his clients. In so doing, it is clear that he intended to disrupt the trial of an important case in which substantial deficiencies, penalties, and additions to tax were at issue. As Mr. Hammond stated in his Motion to Withdraw as Counsel, he took such action "knowing, understanding and accepting the full risk" of discipline by the Court.

Neither of the reasons, offered by Mr. Hammond, the alleged failure of his attorney-client relationship with his clients, or the existence of an ongoing criminal tax investigation of his clients, either alone or together, is legally sufficient to justify his conduct. We discuss each of those reasons below.

Failure of Attorney-Client Privilege: We reject, out of hand, Mr. Hammond's assertion that the alleged failure of his attorney-client relationship with the Ohendalskis justified his failure to appear for trial. If Mr. Hammond felt that the attorney-client relationship had ended, then he was obligated by ABA Model Rule 1.16 to seek leave to withdraw as counsel of record pursuant to Tax Court Rule 24(c). We find nothing in Mr. Hammond's response that justifies his failure to do so.

We also find nothing in Mr. Hammond's response that explains why he waited until the day before trial to terminate his relationship with the Ohendalskis when, as discussed above, the events on which he now relies as the cause of the alleged failure of his attorney-client relationship took place months or weeks prior to trial.

We also note that the trial date, on which Mr. Hammond failed to appear was Monday, January 13, 2014. The Court had set that date after the parties had informally requested a time and date certain during the two-week trial session.

Mr. Hammond's strategy was to force the Court to continue the case by failing to appear. In effect, Mr. Hammond's strategy would also severely disrupt the Court's trial schedule.

Furthermore, we have more than a little difficulty reconciling the unsworn statements made by Mr. Hammond, in his response and in his Motion to Withdraw as Counsel, with Mr. Ohendalski's statements and actions in these proceedings. If Mr. Hammond had summarily terminated his representation of the Ohendalskis on the night before the trial of their multi-million dollar deficiency action, as Mr. Hammond claims, then, surprisingly, Mr. Ohendalski gave no indication of it at the start of trial on the following day, or at any time thereafter. Contrary to Mr. Hammond's statements, Mr. Ohendalski told the Court that he did not know that Mr. Hammond was not going to appear, and that Mr. Hammond had not told him that he was not going to appear. Transcript, Vol. 1, pp. 13-14. Mr. Ohendalski gave the Court every impression that Mr. Hammond remained petitioners' counsel of record despite his failure to appear for trial. Mr. Ohendalski suggested to the Court that Mr. Hammond had not appeared as part of a "strategy", to prevent Mr. Ohendalski from being compelled to testify while there was an ongoing criminal investigation of his tax returns. As evidence of such a strategy, Mr. Ohendalski then proceeded to make a series of procedural motions, that had been prepared in

advance by Mr. Hammond, with the obvious objective of forcing the Court to continue or otherwise delay the trial of the case.

Several months later, respondent's Motion for Entry of Decision reported that petitioners had instructed their attorney Mr. Kuniansky to withdraw, and had further instructed him that Mr. Hammond would be handling the case. Mr. Kuniansky's Motion to Withdraw as Counsel confirmed those instructions from Mr. Ohendalski.

Furthermore, petitioners' Notice of Objection to Motion for Entry of Decision, states that Mr. Hammond remained petitioners' attorney. It also states that petitioners were denied effective representation during the cross-examination of Government witnesses, and during settlement discussions, because the Court had denied their motions to continue the case after Mr. Hammond failed to appear. Significantly, petitioners do not complain about Mr. Hammond's failure to appear; they complain about the Court's denial of their motions to continue, following Mr. Hammond's failure to appear.

"Ongoing" Tax Investigation: We also reject the assertion that an ongoing criminal tax investigation of Mr. Ohendalski's returns justified Mr. Hammond's conduct. As the Court found at trial, there was no "ongoing" criminal tax investigation of Mr. Ohendalski's returns. The investigation had concluded on or

about September 27, 2013, when the Special Agent in Charge of the Houston Field Office, Criminal Investigation Division of the Internal Revenue Service, notified the Assistant Attorney General of the Tax Division and the Chief of the Southern Criminal Enforcement Division that the criminal investigation of Mr. Ohendalski had been closed.

Significantly, Mr. Hammond was put on notice, before trial, that the criminal investigation of Mr. Ohendalski's returns had terminated. This took place during the telephone conference with the Court on January 8 or 9, 2014, when Government counsel advised the Court and Mr. Hammond that the criminal tax investigation of Mr. Ohendalski's returns had terminated. Nevertheless, Mr. Hammond persisted in his plan to disrupt the trial by failing to appear. In his response, Mr. Hammond does not address the finding of the Court that the criminal tax investigation of Mr. Ohendalski's tax returns had terminated in September of 2013, well before the trial of Mr. Ohendalski's civil case, as Government counsel had represented during the telephone conference with the Court.

Mr. Hammond asserts that he believed that he would "poison" his clients before the Court or damage their "credibility" if he appeared to make a motion for withdrawal as counsel or to explain his refusal to proceed with an examination of

his clients. Mr. Hammond cites no authority to justify his decision not to appear before the Court.

Summary and Findings: Mr. Hammond failed to appear for the trial of a substantial case, involving approximately \$2.9 million of tax deficiencies, penalties, and additions to tax, without giving advance notice to the Court, or to the other party or its counsel. We find that he did so intentionally to disrupt the proceedings and to force the Court to continue or otherwise delay the case as part of a “strategy” which, according to his client, was designed to preclude the client from being called to testify while there was an ongoing criminal tax investigation of his tax returns. The difficulty is that there was no “ongoing” criminal tax investigation of the client’s returns, as the Government’s attorney had advised the Court and Mr. Hammond during a telephone conference before trial.

Nevertheless, Mr. Hammond pursued his strategy and he failed to appear for trial thereby intentionally causing interference with the proceeding.

Furthermore, we are concerned by the discrepancies discussed above, between the statements made by Mr. Hammond in his response and his Motion to Withdraw as Counsel, and the statements and actions of Mr. Ohendalski. These discrepancies raise serious questions about whether Mr. Hammond violated his duty of candor toward the Court required by ABA Model Rule 3.3. Nevertheless,

without an evidentiary hearing, the record in this proceeding does not permit us to find, by clear and convincing evidence, the facts necessary to conclude that Mr. Hammond violated ABA Model Rule 3.3.

In sum, considering the facts of the case in Ohendalski v. Commissioner, Docket No. 19021-12, and Mr. Hammond's Response to the Court's Order to Show Cause, we find that Mr. Hammond's conduct violated the following ABA Model Rules: 1.16 (Declining or Terminating Representation); 3.2 (Expediting Litigation); 3.4(c) (Fairness to Opposing Party and Counsel - knowingly disobey an obligation under the rules of a tribunal); 3.5(d) (Impartiality and Decorum of the Tribunal - engaging in conduct intended to disrupt a tribunal; 8.4(a) (Misconduct - violating the Rules of Professional Conduct); and 8.4(d) (Misconduct - engaging in conduct that is prejudicial to the administration of justice). We also find that Mr. Hammond's conduct violated Tax Court Rules 202(a)(3) and (4).

Consideration of the Appropriate Sanction

The American Bar Association has published a theoretical framework to guide courts in imposing sanctions for ethical violations in order to make sanctions more consistent within a jurisdiction and among jurisdictions. ABA Standards for Lawyer Sanctions, 2012. Under that framework, in order to

determine the sanction to be imposed, the court should generally consider: (a) the duty violated (i.e., whether the lawyer violate a duty to a client, the public, the legal system, or the profession); (b) the lawyer's mental state (i.e., whether the lawyer act intentionally, knowingly, or negligently); (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. See ABA Standards for Imposing Lawyer Sanctions, sec. 3.0.

The Tax Court Rules of Practice and Procedure require practitioners to carry on their practices in accordance with the letter and spirit of the ABA Model Rules of Professional Conduct. See Rule 201(a), Tax Court Rules of Practice and Procedure. Accordingly, after having determined by clear and convincing evidence that Mr. Hammond violated provisions of the ABA Model Rules, it is appropriate for the Court to consider the ABA Standards for Imposing Lawyer Sanctions (ABA Standards) when imposing sanctions for such violations.

The Duty Violated: Under the facts of this case, the duty violated by Mr. Hammond is his duty to the legal system. As discussed above, Mr. Hammond failed to appear at the trial and to satisfy his responsibilities under orders of this Court. As stated above, we find that his conduct violated ABA Model Rules: 1.16 (Declining or Terminating Representation); 3.2 (Expediting Litigation); 3.4(c) (Fairness to Opposing Party and Counsel - knowingly disobey an obligation

under the rules of a tribunal); 3.5(d) (Impartiality and Decorum of the Tribunal - engaging in conduct intended to disrupt a tribunal; 8.4(a) (Misconduct - violating the Rules of Professional Conduct); and 8.4(d) (Misconduct - engaging in conduct that is prejudicial to the administration of justice). ABA Standards, section 6.2, states as follows:

6.2 - ABUSE OF THE LEGAL PROCESS

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

- 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.
- 6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
- 6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

- 6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

Under the above Standards, disbarment is appropriate when a lawyer knowingly violates a court order or rule with the intent to benefit himself or another, and causes injury to a party, or causes serious or potentially serious interference with a legal proceeding. Id. at sec. 6.21. Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury to a client or party, or causes interference or potential interference with a legal proceeding. Id. at sec. 6.22. Lesser sanctions are appropriate when the lawyer acts negligently. Id. at secs. 6.23, 6.24.

In this case, Mr. Hammond knowingly violated his obligation to appear for trial. Thus, the appropriate sanction is found in section 6.21 or section 6.22. We do not believe that disbarment, the sanction recommended by section 6.21, is appropriate because there is nothing in this case to suggest that Mr. Hammond intended to obtain a benefit for himself or another. On the other hand, suspension, the sanction recommended by section 6.22, applies when the lawyer's knowing

conduct “causes interference or potential interference with a legal proceeding.”

Id. That is what happened in this case.

The Lawyer’s Mental State: As discussed, Mr. Hammond deliberately failed to appear for trial, and he did so “knowing, understanding and accepting the full risk of” discipline. Neither of the reasons offered by Mr. Hammond, the alleged failure of his attorney-client relationship or the “ongoing” criminal tax investigation of his client, justify his conduct.

The Actual or Potential Injury: By failing to appear for trial Mr. Hammond caused actual interference with the trial proceeding. The Court was forced to assume that Mr. Hammond continued to represent the Ohendalskis. This complicated the Court’s job of ruling on the procedural motions, drafted by Mr. Hammond, that were made by Mr. Ohendalski at trial. For example, the Court was not able to dispose of one or more motions in limine and motions to suppress until Mr. Ohendalski had had an opportunity to discuss the motions with Mr. Hammond. Furthermore, the Court directed that respondent not call Mr. Ohendalski to testify until Mr. Ohendalski had had an opportunity, overnight, to discuss the case with Mr. Hammond. Obviously, this caused a major revision of the Government’s order of proof.

The potential interference from Mr. Hammond's failure to appear would have been greater. Mr. Hammond's actions were intended to cause the trial proceeding to be postponed entirely even though, as the Court found, there was no justification for such a postponement.

The Existence of Aggravating and Mitigating Factors: An aggravating circumstance in this case is the fact that Mr. Hammond's failure to appear took place on January 13, 2014, the second Monday of the two-week trial session. This was the date certain that the parties had informally requested. Mr. Hammond's failure to appear for trial on that date could be expected, not only to disrupt the proceedings in the Ohendalski case, but also to severely disrupt the Court's trial schedule. Mitigating circumstances include the absence of a prior disciplinary record, the absence of a dishonest or selfish motive, and a cooperative attitude toward this proceeding.

Recommendation

Based upon the foregoing, it is the recommendation of the Committee on Admissions, Ethics, and Discipline that Mr. Charles E. Hammond, III be

suspended for his conduct in Ohendalski v. Commissioner, Docket No. 19021-12.

See ABA Standard, sec. 6.22.

Committee on Admissions,
Ethics, and Discipline

Dated: Washington, D.C.
April 24, 2015