In re Steven Messner
Attorney-Respondent

Commission No. 2021PR00094

Synopsis of Hearing Board Report and Recommendation
(March 2024)

The Administrator filed a three-count Complaint against Respondent alleging he participated in a scheme that had the dual purpose of concealing financial information from a client's estranged wife and helping the client and his business evade taxes. Count I charged that he assisted a client in conduct he knew to be criminal or fraudulent and made false statements of fact to a third party. Count II charged that he failed to disclose material information in a document he prepared for the client's dissolution matter. Count III charged that he unlawfully obstructed another party's access to evidence by providing a tax return containing false information in the client's dissolution matter. Each count also charged Respondent with engaging in dishonest conduct. The Hearing Board found that the Administrator proved the charges of misconduct by clear and convincing evidence. After considering the egregious nature of the misconduct and the factors in aggravation and mitigation, the Hearing Board recommended that Respondent be disbarred.

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of: **STEVEN MESSNER**, Attorney-Respondent, No. 3122711.	Commission No. 2021PR00094

REPORT AND RECOMMENDATION OF THE HEARING BOARD

SUMMARY OF THE REPORT

The Hearing Panel found that Respondent assisted his client in conduct he knew was criminal or fraudulent and made false statements to a third party by preparing and filing state and federal tax returns containing false information on behalf of the client and his business. The Hearing Panel further found that Respondent engaged in misconduct related to the client's dissolution proceeding by failing to disclose certain information and providing a tax return that Respondent knew contained false information. Respondent was also found to have engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. The Hearing Panel recommended that Respondent be disbarred.

INTRODUCTION

The hearing in this matter was held remotely by video conference on June 7, June 8, and June 26, 2023, before a Panel of the Hearing Board consisting of Henry T. Kelly, Chair, John P. Moynihan, and James W. Kiley. Richard C. Gleason, II and Rory P. Quinn represented the Administrator. Respondent was present and was represented by Samuel J. Manella.

PLEADINGS AND ALLEGED MISCONDUCT

On November 22, 2021, the Administrator filed a three-count Complaint against Respondent, charging him with assisting a client in conduct the lawyer knows to be criminal or fraudulent (Count I), making false statements of fact to a third party (Count I), engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (Counts I-III), failing to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client (Count II); and unlawfully obstructing another party's access to evidence (Count III), in violation of Rules 1.2(d), 3.4(a), 4.1(a), 4.1(b) and 8.4(c) of the Illinois Rules of Professional Conduct (2010).[1] In his Answer, Respondent admitted some of the factual allegations but denied all allegations of misconduct.

EVIDENCE

The Administrator presented testimony from Respondent as an adverse witness and five additional witnesses. The Administrator's Exhibits 1, 3-13, 16-30, 33-40, and 43-47 were admitted. Respondent testified on his own behalf and presented testimony from four additional witnesses, including two-character witnesses. Respondent's Exhibits 2-13 and 15-29 were admitted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Administrator bears the burden of proving the charges of misconduct by clear and convincing evidence. In re Thomas, 2012 IL 113035, ¶ 56. Clear and convincing evidence constitutes a high level of certainty, which is greater than a preponderance of the evidence but less stringent than proof beyond a reasonable doubt. People v. Williams, 143 Ill. 2d 477, 577 N.E.2d 762 (1991). The Hearing Board assesses witness credibility, resolves conflicting testimony, makes factual findings and determines whether the Administrator met the burden of proof. In re

Winthrop, 219 Ill. 2d 526, 542-43, 848 N.E.2d 961 (2006). As the trier of fact, we may consider circumstantial evidence and draw reasonable inferences from the evidence presented. In re Green, 07 SH 109, M.R. 23617 (March 16, 2010).

I. In Count I, Respondent is charged with assisting a client in conduct the lawyer knows to be criminal or fraudulent, making false statements of fact to the Illinois Department of Revenue and the Internal Revenue Service, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rules 1.2(d), 4.1(a), and 8.4(c).

A. Summary

Respondent engaged in a series of acts intended to help a client conceal payments of his personal expenses with corporate funds and claim improper tax deductions for the client's business by mischaracterizing payments of the client's personal expenses as business expenses in corporate books and documents and on state and federal tax returns. Respondent's conduct included providing the client with a credit card linked to Respondent's credit card account to be used for personal expenses; facilitating the payment of $421,306.98 for the client's personal credit card expenditures and legal fees through Respondent's IOLTA account with funds deposited by the client's business; knowingly mischaracterizing those payments as business expenses in the corporate books and in state and federal tax returns; falsely claiming tax deductions for the client's business based on the mischaracterized expenses; and underreporting the client's income on his personal tax returns. The Administrator proved the charged misconduct by clear and convincing evidence.

B. Evidence Considered

Respondent has an undergraduate degree in accounting and a master's degree in estate tax planning. (Tr. 436). He has been a certified public accountant (CPA) since 1977 and a licensed attorney since 1978. (Tr. 474). He is the sole owner of a law firm and accounting firm, Steven

Messner & Associates. In addition to his Illinois law license, he has an inactive law license in Florida. (Tr. 436).

The allegations before us pertain to Respondent's conduct involving his friend and client, Luis Downes, between 2011 and 2018. Respondent has performed legal and accounting work for Luis, personally, and Luis's business, Downes Swimming Pool Company, Inc. (DSPC), from approximately 2000 through the time of the hearing. (Tr. 372-73). That work includes maintaining the books and ledgers for DSPC, preparing and filing state and federal tax returns for Luis and DSPC, and representing Luis and his family members in various matters. (Tr. 160, 162).

During the time relevant to this matter, DSPC was a C corporation. As such, it was a separate legal entity from Luis. DSPC's income, expenses, and deductions remained with the corporation and did not flow through to Luis. Luis received a salary from DSPC and filed personal Form 1040 tax returns. (Tr. 299).

Providing Credit Card to Client

In or around December 2011, Luis asked Respondent to allow him to use a credit card linked to Respondent's American Express account. (Ans. at par. 7). Respondent agreed to do so because Luis is his friend, and he was aware that Luis was experiencing difficulties in his marriage. Respondent testified he did not want to know why Luis wanted the credit card, but he acknowledged giving prior testimony that Luis said he was tired of being under a microscope and had personal expenses he wanted to pay using Respondent's credit card. (Tr. 147, 149-50). Luis testified he was distraught by circumstances involving his wife. He knew she would be able to obtain his credit card records through an impending dissolution proceeding, and he did not want her to know what he was doing and where he was going. (Tr. 378). He acknowledged that he told Respondent that he wanted the credit card for personal expenses. (Tr. 403). Luis's wife, Christine, filed dissolution of marriage proceedings in Lake County on September 28, 2012. (Adm. Ex. 2).

Between January 2012 and November 2017, Luis made charges totaling $219,308.48 to Respondent's American Express account. (Ans. at par. 10). Luis and Respondent testified they did not expect for the dissolution proceedings and Luis's use of the credit card to go on for so long. (Tr. 178).

Between January 18, 2012, and August 14, 2017, DSPC provided funds totaling $1,013,500 to Respondent, which Respondent deposited in his IOLTA account at ByLine Bank. (Ans. at par. 8). Respondent testified that during that period he earned over $500,000 in fees from DSPC, which came out of the deposited funds. (Tr. 447). DSPC provided funds every one to three months, in lump sums ranging from $5,000 to $40,000. (Adm. Ex. 1). When Respondent received his monthly American Express statement, he paid Luis's portion of the charges with a check drawn on his IOLTA account against the DSPC funds in that account. (Ans. at par. 10). Respondent testified that he perused his portion of the American Express statements, but not Luis's portion. (Tr. 153).

Luis testified it was his decision to bill his credit card charges to DSPC, and he instructed Respondent to do so because he did not want Christine to see what he was doing. Respondent cautioned Luis that they knew they would have to "straighten it out eventually." (Tr. 377-79). Luis testified it was his intention to do so after the divorce proceedings concluded. (Tr. 404). Luis and Respondent testified that some of the credit card charges were corporate expenses for travel and entertainment. (Tr. 388). Luis acknowledged, however, charges that were not reasonable business expenses. (Tr. 403).

Personal Legal Expenses

Between 2012 and 2017, Respondent paid fees totaling $161,143.50 to Luis's dissolution attorneys and valuation expert by drawing checks on his IOLTA account against funds that DSPC provided for deposit in that account. (Ans. at 11; Tr. 135-39; Adm. Ex. 6). In the same manner,

Respondent paid himself attorney fees totaling $40,855 for legal services he provided to Luis, personally. Those services included preparing a prenuptial agreement for Luis and helping Luis's son buy a property in Connecticut. Respondent testified that Luis directed him to charge these legal fees to DSPC, and he followed Luis's direction. (Tr. 184-85).

Luis testified he charged his fees for the dissolution matter to DSPC because he did not have enough funds to pay them personally. He "was using the company with the understanding this was going to be short-term, and I would square everything up." (Tr. 381). At the time, Luis thought he was justified in charging the dissolution fees to DSPC in the interest of preserving the company. He knows now that was not correct. (Tr. 382).

Classification of Expenses

Between 2012 and 2017, Respondent maintained the books and ledgers for DSPC, prepared quarterly financial statements, and reviewed and reclassified expenses. (Tr. 160-161). Respondent made sure to allocate Luis's American Express charges as a DSPC expense. (Tr.162). In preparing DSPC's state and federal tax returns, Respondent included Luis's American Express charges and legal fees as business expense deductions and categorized them as "professional fees," "legal and professional fees," or "travel and entertainment." (Tr. 162). When Respondent did so, he knew the claimed deductions included the amounts DSPC paid for Luis's personal credit card charges and legal and professional fees related to Luis's dissolution and other personal matters. (Ans. at par. 15; Tr. 167-68). Respondent always advised Luis that, if he pursued an avenue that might create an audit question, he did so at his own risk. (Tr. 468).

Respondent testified that Luis directed him to classify the payments of personal expenses and legal fees as DSPC business expenses. With respect to the credit card expenses, Respondent categorized those expenses as professional fees or business travel and entertainment. (Tr. 142, 145, 163). He testified, "I know on the Amex card, there's a lot of business there. There's a lot

of personal there, too, but my client wants to maximize his tax results. He may say take it all and deal with it later, and that's what my client did." (Tr. 446).

With respect to the legal fees, Respondent testified that Luis directed him to classify the fees pertaining to the prenuptial agreement as a business expense. Respondent would argue that was appropriate because the purpose of the prenuptial agreement was to prevent adverse claims against DSPC from Luis's new wife. (Tr. 184). Luis instructed Respondent to classify the fees pertaining to his son's real estate purchase as a DSPC business expense because the amount of those fees was immaterial. (Tr. 185).

By signing Luis's and DSPC's tax returns, Respondent declared under penalty of perjury that they were true, correct, and complete to the best of his knowledge and belief. (Tr. 168). He does not believe he committed fraud or perjury because he is retained to pursue aggressive postures with the IRS. (Tr. 439).

Dissolution Proceeding

The Downes dissolution matter was bifurcated, with the parties' marriage being dissolved in 2014 and issues of support and the allocation of certain assets, including DSPC, being reserved and ultimately finalized in 2018. (Adm. Ex. 2; Resp. Ex. 13). Luis and Respondent knew that Christine had a right to some percentage of DSPC and that the valuation of DSPC would be an issue in the divorce proceeding. (Tr. 133-34, 408).

Attorney Peter Wifler, who is also a CPA, represented Christine in the dissolution proceeding. (Tr. 28). As an accountant, he is familiar with financial statements and tax returns. (Tr. 30). In March 2016, Wifler subpoenaed the financial records of DSPC, including all expense reports and credit card statements for which Luis had signing authority, to ascertain whether Luis was using DSPC to pay personal expenses and for the purposes of business valuation. (Tr. 38-40; Adm. Ex. 4 at 1069-70). If DSPC was paying Luis's personal expenses, Wifler would consider

that to be a source of additional income to him, which could have impacted his ability to pay maintenance. It also could have impacted the business valuation if DSPC deducted those expenses. (Tr. 41). Wifler testified that Christine was a shareholder in DSPC and, as such, was entitled to the corporate records. Respondent, on behalf of DSPC, moved to quash Christine's subpoena. (Tr. 42; Adm. Ex. 4 at 1066).

In the spring of 2018, Wifler received Respondent's billing records and then learned of the credit card Respondent provided to Luis. (Tr. 43-44). Wifler later obtained Respondent's credit card statements and saw that Luis charged golf, travel, entertainment, and dining expenses. (Tr. 45). Wifler took Respondent's deposition in the dissolution proceeding after learning of this arrangement. He asked Respondent how he came to provide the credit card. Respondent answered that Luis asked for it because he was tired of being scrutinized, and Respondent complied. When Wifler asked Respondent about legal fees related to Luis's divorce, Respondent characterized them as business expenses but acknowledged that some were personal. (Tr. 46-47). In Wifler's view, the paid expenses should have been included in Luis's income for purposes of ascertaining maintenance. (Tr. 49).

Attorney James M. Quigley represented Luis for a period of time in the dissolution matter. (Tr. 74). During that representation, he did not know that Respondent had given Luis a credit card, that DSPC was depositing funds into Respondent's IOLTA account to pay Luis's personal expenses, or that Respondent was characterizing those payments as professional fees and claiming them as business deductions on DSPC tax returns. (Tr. 81-82).

Attorney Rickey Ament began representing Luis in the dissolution matter in 2017. (Tr. 97, 100). Respondent sought out Ament's representation. When Respondent came to Ament's office, he said there was an issue with respect to Luis taking some personal expenses through the business.

Respondent wanted Ament to come into the case "to get it settled." (Tr. 101). Ament testified that Luis said his ex-wife found out about the credit card. (Tr. 115-16). In Ament's view, the purpose of the credit card was to hide expenses and income from Christine, "and the effect was that it was a fraud upon the court." (Tr. 110).

Wifler and Ament reported Respondent's conduct to the ARDC. (Tr. 51, 107-08). Luis later sued Ament for malpractice, which resulted in Ament's insurer settling with Luis. (Tr. 123).

Respondent testified that anyone reviewing DSPC's books could have reviewed the source documents that were the basis for the professional fees entries. (Tr. 156). He acknowledged that one would have had to obtain copies of checks written on Respondent's IOLTA account in order to learn what the payments for professional fees included. (Tr. 146). He also acknowledged that there were no accounts receivable on the DSPC books for Luis's personal legal fees and credit card expenses until 2018. (Tr. 483-84).

Amended Tax Returns

In March 2018, Respondent filed amended tax returns for DSPC for 2014 through 2017. Respondent testified he did so of his own volition because the court decided to allow another valuation of DSPC in the dissolution matter. (Tr. 180). Respondent testified that "as for the valuation, there really is no leeway. You must give the evaluator every piece of information that might have an effect on his final figure." (Tr. 181). Respondent did not want the integrity of the valuation to be suspect, so, with Luis's agreement, he prepared journal entries in the DSPC books reclassifying Luis's credit card charges and personal attorney fees as a corporate asset being due from Luis.

The amended tax returns reduced DSPC's business expense deductions by the amounts of Luis's personal expenses, which increased DSPC's taxable income. (Tr. 483-84). As a result, DSPC paid $33,000 in additional taxes over a six-year period. (Tr. 181). The IRS accepted the

amended returns. (Tr. 384). Luis withdrew $200,000 from his profit sharing plan to partially repay the approximately $400,000 he owed to DSPC. The funds he repaid went into DSPC's retained earnings. (Tr. 452).

Respondent testified that the adjustments did not affect Luis's personal tax returns because DSPC was taxed separately from Luis. (Tr. 452). Luis acknowledged that if he had not reimbursed DSPC he would have had to report the expenses paid on his behalf as income. (Tr. 410).

Certified public accountant Joseph Modica performed valuations of DSPC in 2014 and 2018 as part of the dissolution proceedings. (Resp. Exs. 5, 6). In doing so, he relied in part on the DSPC tax returns. (Tr. 189-90). The amended returns did not change Modica's 2018 valuation because he had already normalized or reduced DSPC's "huge" legal fees when he performed his valuation. (Tr. 192, 195). Modica defined "normalizing" as adjusting abnormal increases or decreases in revenues or expenses to reflect the cash flow a hypothetical buyer would expect to receive. He reduced DSPC's legal fees to what would be normal for a similar business based on industry standards. (Tr. 197).

Opinion Evidence

Forensic CPA and attorney Larry Goldsmith presented opinion testimony on behalf of the Administrator. (Tr. 203). He has testified as an expert more than 50 times. (Tr. 205). Goldsmith opined to a reasonable degree of accounting certainty that Respondent's conduct qualifies as fraud according to the definition set forth in the Internal Revenue Code, 26 U.S.C. § 7201. (Tr. 209). Intentionally seeking not to report income or knowingly reporting excessive deductions that are not legitimate constitutes evading taxes. (Tr. 210). In forming this opinion, Goldsmith relied on DSPC's amended tax returns showing $427,000 in payments that were hidden and misclassified as legal expenses, which should have been classified as nondeductible personal expenses. In addition, Goldsmith opined that DSPC's payment of Luis's personal expenses were a fringe benefit

or constructive dividend to Luis that should have been reported as income on his personal tax returns pursuant to Section 61 of the Internal Revenue Code. (Tr. 211, 218).

Goldsmith calculated that DSPC owed an additional $100,000 in taxes over a 5-year period due to the improper deductions and Luis owed approximately $200,000 over that same period due to unreported income. Goldsmith considered those amounts to be material. (Tr. 219).

Goldsmith opined that Respondent received a financial benefit from his fraudulent conduct because he received the value of the American Express points for the $219,000 Luis charged to Respondent's credit card and he maintained Luis as a client for many years. (Tr. 230).

Respondent presented Russell Macejak as an expert in accounting and tax matters. (Tr. 282). His experience includes working as an IRS agent for 18 years and an IRS appeals officer for 5 years. (Tr. 283-84). Macejak met Respondent approximately 30 years ago, when Respondent represented a taxpayer in an IRS audit examination. They have maintained a professional relationship since that time and have discussed different tax issues that have arisen in their practices. (Tr. 286-87).

Macejak does not believe there was any disguising of Luis's personal income under Section 61 because there has been no allegation of unreported income, other than Goldsmith's opinion. (Tr. 292). When asked what the DSPC payments were, from Luis's perspective, Macejak testified as follows:

> A. Those payments were advances from the corporation based on 2018 returns. Prior to 2018, they had no effect on Mr. Downes' personal returns.
>
> Q. So they were nothing to Mr. Downes?
>
> A. Correct.

(Tr. 365-66).

Macejak testified that the Internal Revenue Manual identifies badges of fraud to guide IRS agents when examining evidence of fraud. They include deceitfulness, false statements, and claiming a deduction when no monies were actually paid for an expense. Macejak distinguished between a false deduction where no monies were paid and a business expense deduction that was paid but the item did not fall within the definition of a trade or business expense. Macejak opined that the latter is an issue of classification and is not fraud or an inflated business expense. (Tr. 300, 302-03).

Macejak believes Respondent had a reasonable basis for DSPC's business expense deductions because the DSPC books show items where monies were paid, and the expense seemed reasonable in Macejak's experience. (Tr. 310). Macejak testified that in his opinion Respondent's job was not to audit his client's books and records. He did not have a duty to inquire into the nature of Luis's expenses beyond making sure that monies were paid, there was a payee, and he had an explanation from Luis as to the nature of the payment. (Tr. 311). Prior to reaching his opinions, Macejak had not reviewed the DSPC corporate books and records and had relied on Respondent's contention that the purported business expenses were accurate. (Tr. 331-32). He had not read Respondent's testimony in which he said he gave Luis the credit card for personal expenses. (Tr. 333).

In Macejak's opinion, Respondent took an aggressive approach with the DSPC deductions, but an aggressive approach does not constitute fraud. (Tr. 312). Macejak testified that the IRS is the only entity that can determine whether a tax preparer committed a crime with respect to the filing of tax returns. (Tr. 324-25).

Respondent also submitted a written opinion from CPA David S. Levinson, who was unable to testify in person. The letter, dated January 6, 2023, states as follows in its entirety:

> I have sat with Mr. Messner and reviewed with him the facts of the allegations against him, along with the answer to the ARDC complaint and the ARDC expert's report.
>
> It is my belief that Mr. Messner acted responsibly in 2014 when learning of the nature of the expenses, as told to him by his client. In 2018, once he learned that the evaluation date had changed, he re-classified the expenses by filing amended income tax returns so that the returns reflected only those expenses that were business in fact.
>
> In my view, as a CPA, this was the correct method to report the nature of the expense. Both Mr. Messner and his client received no benefit, after the amended income tax returns were filed. It is my opinion, that no act of fraud was committed.

(Resp. Ex. 26).

C. Analysis and Conclusions

Rule 1.2(d)

The Administrator alleges that Respondent engaged in misconduct by assisting Luis and DSPC in violating state and federal tax laws. Rule 1.2(d) provides that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. Ill. Rs. Prof'l. Conduct R. 1.2(d). "Knows" denotes actual knowledge of the fact in question, which may be inferred from the circumstances. Ill. Rs. Prof'l. Conduct R. 1.0(f). "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. Ill. Rs. Prof'l. Conduct R. 1.0(d). Conduct may be fraudulent regardless of whether the deception is successful. In re Segall, 117 Ill. 2d 1, 7, 509 N.E.2d 988 (1987).

A tax evasion offense may be civil or criminal in nature, or both. Internal Revenue Manual 25.1.1.3.2 (04-22-2021). Section 7201 of the Internal Revenue Code provides that it is a felony offense for anyone to willfully attempt in any manner to evade or defeat the payment of federal

income tax. 26 U.S.C. 7201. We take judicial notice of Section 5/1301 of the Illinois Income Tax Act[2], which states in relevant part:

> Any person who is subject to the provisions of this act and who willfully fails to file a return, or who files a fraudulent return, or who willfully attempts in any other manner to evade or defeat any tax imposed by this Act or the payment thereof, or any accountant or other agent who knowingly enters false information on the return of any taxpayer under this Act, shall, in addition to other penalties, be guilty of a Class 4 felony for the first offense and a Class 3 felony for each subsequent offense.

35 ILCS 5/1301 (2006).

The IRS defines tax fraud as "intentional wrongdoing on the part of a taxpayer, with the specific purpose of evading a tax known or believed to be owing." Internal Revenue Manual 25.1.1.3 (01-23-2014). The IRS considers concealing bank accounts, claiming fictitious or substantially overstated deductions, and claiming substantial business expense deductions for personal expenditures to be indicators of fraud. Internal Revenue Manual 25.1.6.4, Fraud Handbook (06-10-2021).

False Business Expense Deductions

We find that the Administrator proved by clear and convincing evidence that Respondent assisted Luis in conduct he knew was criminal or fraudulent by filing tax returns on behalf of DSPC that claimed substantial amounts of business expense deductions that were in fact Luis's personal expenses. Section 162(a) of the Internal Revenue Code allows, generally, for deductions of all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. 26 U.S.C. §162(a). Section 262 of the Internal Revenue Code provides that no deduction is allowed for personal, living, or family expenses. 26 U.S.C. § 262. The Illinois Department of Revenue generally follows IRS guidelines regarding business expenses. See tax.illinois.gov/taxprofessionals/business-income-and-expense-questions-and-answers.html.

The evidence established that Respondent knew that the $219,208.48 in credit card charges he characterized as "service fees," "professional fees," or "travel and entertainment" and deducted as DSPC business expenses on state and federal tax returns were in fact Luis's personal expenses. Luis freely admitted that he told Respondent he wanted to use Respondent's American Express account for his own personal expenses because he did not want Christine to know what he was doing and where he was going. Respondent knew DSPC was paying Luis's American Express charges because Respondent received the American Express statements, received DSPC's deposits into his IOLTA account, and withdrew funds from that account for Luis's charges with a check payable to Respondent. We do not find credible Respondent's and Luis's testimony that some of the charges constituted business entertainment or travel expenses. Neither Respondent nor Luis identified a single charge that was a legitimate business expense, nor would there be a reason for Luis to conceal legitimate business expenses from Christine by charging them to Respondent's American Express account.

Similarly, Respondent knew that at least $161,143.50 in legal fees that he characterized as DSPC business expenses were not for a valid DPSC business purpose. Respondent knew these fees were for Luis's dissolution matter and other personal matters because Respondent made the payments to Luis's dissolution lawyers and to himself from his client trust account. Respondent had no legal basis to believe that the entirety of Luis's divorce attorneys' fees constituted business expenses, as the United States Supreme Court clearly held, in United States v. Gilmore, 372 U.S. 39 (1963), that a taxpayer's legal expenses in contesting divorce proceedings were not deductible business expenses even if the taxpayer was seeking to protect business assets against a spouse's claims. See also Northwestern Ind. Tel. Co. v. C.I.R., 127 F.3d 643 (7th Cir. 1997).

Respondent makes several arguments as to why the Administrator failed to prove that he assisted Luis in conduct that was criminal or fraudulent, none of which is convincing. Respondent relies on the opinions of his expert, Russell Macejak, that the reclassification of expenses is not fraudulent. We do not agree that this is an issue of classification of expenses. We find it to be an issue of knowingly taking deductions to which DSPC was not entitled. There was no gray area that could have allowed Respondent to reasonably believe the expenses were legitimate business expenses. Respondent had actual knowledge of the personal nature of the expenses when he claimed the deductions on behalf of DSPC.

Respondent also relies on Macejak's opinion that his conduct did not fall within the IRS badges of fraud. We find this opinion at odds with the Internal Revenue Fraud Handbook, which clearly states that claiming substantially overstated deductions and claiming substantial business expenses for personal expenditures are indicators of fraud. IRM 25.1.2.3, Fraud Handbook, Recognizing and Developing Fraud, Indicators of Fraud-Expenses or Deductions (11-03-2023). Macejak ignored or was unaware of the evidence that Respondent did both of these things. Prior to the time Macejak expressed his opinions, he had not reviewed the corporate books and records, and had only relied on Respondent's contention that the purported business expenses were accurate. Macejak was also not aware that Respondent testified in his deposition that he gave Luis the American Express card for personal expenses. We find more persuasive Goldsmith's testimony that intentionally seeking not to report income or knowingly reporting excessive deductions that are not legitimate constitutes tax evasion. We further note that we give no weight to David Levinson's written opinions, including his opinion that no act of fraud was committed. Levinson's opinions are overly general, unsupported, and provide no assistance to us in evaluating the issues in this case.

We also reject Respondent's contention that he was merely acting in accordance with Luis's instructions. Even if we accepted this testimony as true, longstanding precedent makes clear that an attorney cannot hide behind the excuse that he was following his client's instructions when he engaged in misconduct. In re Doss, 367 Ill. 570, 572, 12 N.E.2d 659 (1937); In re Himmel, 125 Ill. 2d 531, 542-43, 533 N.E.2d 790 (1988). Moreover, Respondent had actual knowledge of the nature of the expenses charged to DSPC. Given this actual knowledge, he had no justification for overstating DSPC's deductions.

Next, we reject Respondent's contention that only the IRS may determine whether Respondent or Luis committed tax fraud. Respondent has not pointed to any legal authority for this proposition, and we are aware of none. While the responsibility for determining whether to pursue criminal charges or civil penalties for federal tax fraud lies with the IRS and the U.S. Attorney's office, that is not the purpose of this proceeding. The Hearing Board may evaluate conduct and make findings as to whether conduct was criminal or fraudulent in nature for purposes of determining whether a violation of Rule 1.2(d) occurred. The absence of criminal charges, a criminal conviction, or a finding of wrongdoing by another body does not preclude us from making such findings. See In re Johnson, 2013PR00034, M.R. 27988 (May 18, 2016) (Johnson violated Rule 1.2(d) by assisting his client in committing criminal trespass and theft, and neither Johnson nor his client was criminally charged).

We also reject Respondent's argument that the deductions at issue were not fraudulent because they were not material in comparison to DSPC's revenue. We consider the improper deductions in their totality, not individually. In the aggregate, DSPC overstated its deductions by at least $421,306.48, which caused it to owe an additional $33,000 to the IRS. We find these amounts to be material. The fact that Respondent felt the need to file amended returns for DSPC

indicates to us that he too viewed the improper deductions as material, despite his testimony to the contrary. Respondent acknowledges that changes to the tax returns and DSPC records in 2018 were material to the valuation, in that all information that might have affected the valuation had to be provided.

Accordingly, we find that the Administrator proved by clear and convincing evidence that, between 2012 and 2017, Respondent assisted Luis in conduct that was criminal or fraudulent by knowingly mischaracterizing personal expenses as business expenses and claiming deductions to which DSPC was not entitled in order to reduce DPSC's taxable income. This conduct constituted willful attempts to evade or defeat the payment of federal and state income tax, in violation of Section 7201 of the Internal Revenue Code and Section 5/1301 of the Illinois Income Tax Act.

Misstatement of Luis's Income

We further find that Respondent knowingly underreported Luis's income between 2012 and 2017 in Luis's personal tax returns. Respondent emphasizes that the increase in DSPC's taxable income that resulted from amending its tax returns did not cause Luis's taxable income to increase, because DSPC and Luis were separate legal entities and DSPC's income did not flow through to Luis. We understand Respondent's position. Our finding that Luis's income was underreported is not based on a flow-through analysis, though, but on the evidence that DSPC made distributions of at least $421,306.48 for Luis's personal benefit, which were not deductible as valid business expenses and which Luis had no obligation to repay when his returns for 2012 through 2017 were filed. Whether the distributions constituted advances, constructive dividends, or fringe benefits, we find they were income to Luis that Respondent helped to conceal. In making this finding, we rely on the opinions of Larry Goldsmith, the definitions of income in the Internal Revenue Code, and our own research.

Goldsmith opined that Luis's personal expenses paid by DSPC constituted a fringe benefit or constructive dividend that should have been acknowledged in his personal tax returns. Goldsmith's opinion is consistent with the IRS definition of gross income as all income from whatever source derived, including dividends and fringe benefits (26 U.S.C. §61(a)), and the IRS definition of a dividend as any distribution of property made by a corporation to its shareholders from its earnings and profits from the taxable year (26 U.S.C. §316).

A federal appeals court has held that, "when a corporation confers an economic benefit upon a shareholder, in his capacity as such, without an expectation of reimbursement, that economic benefit becomes a constructive dividend, taxable to the respective shareholder. This benefit is taxable to the shareholder whether or not the corporation intended to confer a benefit upon him." Loftin & Woodard, Inc. v. United States 577 F.2d 1206 (5th Cir. 1978). See also Santos v. Comm'r, T.C. Memo 2019-148. DSPC clearly conferred a benefit upon Luis by paying more than $400,000 of his personal expenses. There was no expectation of reimbursement at the time Respondent prepared Luis's tax returns for 2012 through 2017. Consequently, we agree with Goldsmith's opinion that the DSPC distributions were taxable to Luis. We do not agree with Macejak's opinion that the payments were not constructive dividends because they were clarified in 2018 as a "due to due from." Nor do we find credible his assertion that the payments were "nothing" with respect to Luis's personal tax returns prior to 2018. Our focus is Respondent's conduct and knowledge when he filed Luis's tax returns between 2012 through 2017. The amended returns may have resolved the tax consequences of the distributions for the IRS's purposes, but for our purposes they did not retroactively undo the underreporting of income prior to 2018, with the intent to hide DSPC payments of Luis's known personal expenses.

Based on Respondent's extensive accounting experience, we view the failure to report this income in Luis's tax returns as an intentional effort to conceal the DSPC distributions made for Luis's personal benefit, provide Luis the benefit of those distributions without any tax consequences, and assist Luis in underreporting his income. Accordingly, we find that Respondent assisted Luis in conduct he knew was criminal or fraudulent, in violation of Rule 1.2(d).

Rule 4.1(a)

Rule 4.1(a) provides that in the course of representing a client a lawyer shall not make a false statement of material fact or law to a third person. Ill. Rs. Prof'l. Conduct R. 4.1(a). The Administrator charged Respondent with making false statements of material fact to the Illinois Department of Revenue (IDOR) and the Internal Revenue Service (IRS) by certifying that the DSPC tax returns he prepared and filed from 2012 through 2017 were true and accurate, when he knew those returns claimed deductions that were not business expenses. Respondent contends that his reclassification of expenses was permissible and was not the equivalent of making false statements.

We find clear and convincing proof that Respondent made false statements to the IDOR and IRS and did so in the course of representing Luis and DSPC. Luis and DSPC were Respondent's clients when Respondent filed the tax returns at issue. Respondent's provision of legal and accounting services were intertwined such that it is not possible to say that certain services were purely accounting or purely legal. Respondent used his IOLTA account as a repository from which he paid himself for all of his services, including preparing DSPC's tax returns. Accordingly, we find that the statements at issue were made in the course of representing DSPC and Luis.

We further find that Respondent made false statements to the IRS and IDOR when he certified that DSPC's state and federal returns were true and correct to the best of his knowledge.

For the reasons detailed above, Respondent knew that at least $421,306.48 of business expense deductions taken on behalf of DSPC were in fact Luis's non-deductible personal expenses. He falsely certified that the information in DSPC's returns was true and accurate when he knew it was not. Respondent's approach was more than aggressive; it was untruthful. Accordingly, we find the Administrator proved by clear and convincing evidence that Respondent violated Rule 4.1(a).

Rule 8.4(c)

Rule of Professional Conduct 8.4(c) provides that engaging in conduct involving dishonesty, fraud, deceit or misrepresentation constitutes misconduct. Ill. Rs. Prof'l. Conduct R. 8.4(c). Dishonesty includes any conduct, statement, or omission that is calculated to deceive, including the suppression of truth and the suggestion of what is false. In re Gerard, 132 Ill. 2d 508, 528, 548 N.E.2d 1051 (1989). Respondent's duty to conduct himself honestly applied at all times, whether he was performing accounting services or legal services.

Respondent argues that the Administrator failed to prove his conduct was dishonest because the DSPC payments for Luis's expenses were accurately logged in the corporate books and records and anyone could have viewed the source documents for those entries. This argument is disingenuous. It is undisputed that the payments at issue were characterized as service fees and professional fees in DSPC's books and records, and one would have had to obtain Respondent's American Express statements, billing statements, and IOLTA statements to ascertain the true nature and amount of DSPC's payments for Luis's personal expenses. Recording that payments were made but disguising what they actually were is not honest.

Respondent further asserts that his filing of amended returns for DSPC shows that he was not trying to hide anything. We are dubious of Respondent's and Luis's testimony that the 2018 valuation was the reason behind the amended returns. Respondent testified to the importance of giving the evaluator every piece of information that might affect the valuation, yet he did not see

fit to amend DSPC's returns in 2014, when the first valuation took place. We find his change in attitude in 2018 difficult to believe, especially in the context of his six-year pattern of deceptive behavior. It is more likely that he filed the amended returns because Christine and attorney Wifler were close to discovering the scheme. Moreover, even if the valuation was the actual triggering event, it does not undo the prior intentional misrepresentations. For these reasons we find Respondent's professed concern for the legitimacy of the 2018 valuation both improbable and self-serving and do not consider the filing of amended tax returns to be indicative of an honest motive.

In addition to falsely attesting to the accuracy of DSPC's tax returns for six consecutive years, Respondent actively participated in and facilitated the scheme that resulted in DSPC and Luis evading taxes. He gave Luis an American Express card, controlled the payments of Luis's personal expenses through his IOLTA account, ensured that the DSPC payments were characterized as professional fees in its corporate books and records, and prepared and filed fraudulent tax returns. Respondent's conduct was intentional and was calculated to deceive tax authorities. Accordingly, we find that the Administrator proved by clear and convincing evidence that Respondent violated Rule 8.4(c).

II. In Count II, Respondent is charged with engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and failing to disclose that a financial affidavit he prepared understated Luis's income, in violation of Rules 4.1(b) and 8.4(c).

A. Summary

In a financial affidavit Respondent prepared on Luis's behalf for the Downes dissolution proceeding, Respondent did not disclose information about DSPC's payments for Luis's personal expenses. By omitting that information, we find that Respondent knowingly misstated Luis's income and failed to disclose the material misstatement to Luis's dissolution attorney.

B. Evidence Considered

During the time relevant to this matter, Lake County Court Local Rule 11.02 required parties in a dissolution proceeding to exchange comprehensive financial affidavits listing their income, expenses, and liabilities. (Ans. at par. 20). Four financial affidavits were provided on Luis's behalf, on December 31, 2012, October 15, 2013, May 31, 2014, and December 1, 2017. (Resp. Exs. 16-19). Each financial affidavit contained a section entitled "Gross Monthly Income," which asked for the amount of income the party received from a number of possible sources including salary, dividend income, and "other income." The charges of misconduct in Count II relate only to the 2013 financial affidavit.

While there was conflicting testimony from Luis and Respondent as to who prepared certain parts of the financial affidavit, Respondent admitted in his Answer that, at the request of attorney Quigley, he prepared a financial affidavit on behalf of Luis in 2013. (Ans. par. 21). Quigley testified that Respondent said he would prepare the financial affidavit because he had all of Luis's financial information. It is Quigley's recollection that Respondent managed the drafting and completion of the financial affidavit. (Tr. 80).

In the financial affidavit, Respondent provided Luis's monthly salary income, interest income, dividend income, and rental income. Luis's personal expenses charged to and paid by DSPC were not disclosed. (Adm. Exs. 43, 44; Tr. 401). Quigley provided the completed financial affidavit he received from Respondent to Christine's lawyers. (Tr. 80-81).

Attorneys Quigley, Wifler and Ament testified that lawyers rely on the accuracy of the financial affidavits in evaluating maintenance and asset allocation and determining their discovery plans. (Tr. 34, 78-79, 80-81, 99). Quigley testified that, had he known about Respondent's conduct with respect to the American Express card and DSPC's payment of Luis's personal

expenses, he would have taken steps to verify the numbers in the financial affidavit before tendering it to opposing counsel. (Tr. 82).

Respondent agreed that the purpose of the financial affidavits was to provide accurate financial information for each party, and he knew that Quigley would provide the financial affidavit at issue to Christine's attorney. (Tr. 154, 159). However, Respondent denies that DSPC's payment of Luis's personal expenses constituted income to Luis that was required to be disclosed. (Tr. 158).

Opinion Testimony

Larry Goldsmith opined that Luis's financial affidavits were incorrect because DSPC's payments of his personal expenses constituted constructive dividends or fringe benefits that should have been listed as business income. (Tr. 232). Russell Macejak did not review Luis's financial affidavits, so he was not permitted to offer opinions pertaining to them. (Tr. 292).

C. Analysis and Conclusions

Rule 4.1(b)

Rule 4.1(b) provides that in the course of representing a client a lawyer shall not knowingly fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. Ill. Rs. Prof'l. Conduct R. 4.1(b). The Administrator alleges that Respondent violated Rule 4.1(b) by failing to disclose to Quigley that the October 2013 financial affidavit understated Luis's income as a consequence of DSPC having paid Luis's credit card expenses and attorney fees for personal matters. The Administrator further alleges that Respondent knew the attorneys in the dissolution matter would rely on the accuracy of the financial affidavit.

Although Respondent did not represent Luis in the dissolution matter, he was Luis's attorney and took on the preparation of the financial affidavit knowing it would be provided to

Christine's attorney and the dissolution attorneys would rely on its accuracy. Based on these circumstances, we find that Respondent prepared and submitted the financial affidavit to Quigley in the course of representing Luis.

Consistent with our findings in Section I, we find that the Administrator proved by clear and convincing evidence that the personal expenses DSPC paid on Luis's behalf constituted income to Luis that Respondent should have disclosed when he prepared the 2013 financial affidavit. As Respondent acknowledges, the purpose of the financial affidavit was to provide accurate information about the parties' finances. Luis's stated income was not accurate because it omitted large sums that DSPC was paying on his behalf. Based on the credible testimony of attorneys Wifler, Quigley, and Ament that a party's financial disclosures and income are important for discovery purposes and determining support, we find that Luis's actual income was a material fact that Respondent failed to disclose. We do not agree with Respondent that the DSPC payments were immaterial because Christine's support remained the same before and after they were disclosed. A fact does not have to be outcome-determinative to be material. Respondent's conduct frustrated the primary purpose of the financial affidavit.

We further find that the underreporting of Luis's income was undertaken for the fraudulent purpose of concealing from Christine the fact that DSPC was paying Luis's personal expenses. Luis and Respondent concocted a scheme to hide information from Christine before the dissolution matter was filed, and the omission of the DSPC payments from Luis's financial affidavits was a continuation of that scheme. Accordingly, we find that Respondent's knowing underreporting of Luis's income on the financial affidavit violated Rule 4.1(b).

Rule 8.4(c)

The Administrator alleges that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation by preparing the 2013 financial affidavit with information he

knew to be false and failing to disclose to attorney Quigley that it was false. Consistent with our finding above that Respondent knowingly underreported Luis's income in the 2013 financial affidavit in order to conceal DSPC's payment of Luis's expenses from Christine, we also find that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent's conduct was not a mistake or a misunderstanding regarding the information that should have been disclosed. He intentionally omitted information that he and Luis wanted to conceal from Christine and her counsel.

III. In Count III, Respondent is charged with unlawfully obstructing another party's access to evidence and engaging in dishonest conduct by knowingly providing a false tax return to Christine's attorney, in violation of Rules 3.4(a) and 8.4(c).

A. Summary

When Respondent provided Luis's 2014 tax return to attorney Wifler, Respondent knew the tax return did not accurately report Luis's income. In doing so, Respondent unlawfully obstructed Christine's access to evidence and engaged in dishonest conduct.

B. Evidence Considered

On December 22, 2015, attorney Wifler filed a Petition for Rule to Show Cause on Christine's behalf, seeking that Luis be required to show cause why he should not be held in contempt for failing to produce his 2014 tax returns. In response, Respondent wrote Wifler a letter, dated January 5, 2016, enclosing Luis's 2014 tax return. Wifler relied on the accuracy of the tax return that Respondent provided. (Tr. 36).

The 2014 tax return did not include as income the DSPC payments made on Luis's behalf. Respondent denies that the tax return was false because the DSPC payments did not constitute income to Luis.

C. Analysis and Conclusions

Rule 3.4(a)

Rule 3.4(a) provides in relevant part that a lawyer shall not unlawfully obstruct another party's access to evidence. Ill. Rs. Prof'l. Conduct R. 3.4(a). For the same reasons set forth in our analysis of Count I, we find that the 2014 tax return that Respondent provided to attorney Wifler was not filed in good faith, misstated Luis's income, and therefore obstructed Christine's access to evidence. As a person with a financial interest in DSPC and the recipient of spousal support/maintenance from Luis, Christine was entitled to accurate information about Luis's income and DSPC's payment of Luis's expenses. Respondent participated in concealing that information, and thereby violated Rule 3.4(a).

Rule 8.4(c)

The Administrator alleges that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation when he knowingly provided the 2014 tax return containing false information to attorney Wifler. As with the conduct in Counts I and II that we found to be dishonest, we find Respondent's conduct of providing a tax return that misstated Luis's income to attorney Wifler to be dishonest as well. This conduct was part of Luis's and Respondent's efforts to conceal information from both Christine and taxing authorities. It was done intentionally, for a deceptive purpose, and was a violation of Rule 8.4(c).

EVIDENCE IN AGGRAVATION AND MITIGATION

Mitigation

Respondent testified that he served in an Army special forces unit from 1977 until 1982 and was honorably discharged. (Tr. 437). He provided *pro bono* representation for four years to a woman going through a difficult divorce. (Tr. 476).

Character Testimony

Richard Hammer, a retired deputy police chief for the Rolling Meadows Police Department, has known Respondent since the early 1970s. Respondent and Hammer's brother served together in the armed forces. Respondent represented Hammer in an employment matter and a dissolution matter, and Hammer has referred coworkers and relatives to Respondent. Hammer finds Respondent to be trustworthy, dependable, and honest. (Tr. 415-17).

Patrick Reardon, an attorney and former Catholic priest, has been a friend of Respondent's since 1981. He and Respondent have occasionally been co-counsel and have referred cases to each other. Respondent has prepared Reardon's taxes for the past several years and represented him in a dissolution matter. Reardon described Respondent as honest, generous, and conscientious. His opinion would not change if the charges in this matter were proven. (Tr. 422-31).

Aggravation

Respondent gave the following testimony when asked about making inaccurate statements on a tax return:

> Q: Okay. So it's okay in your opinion to state things that are inaccurate on a tax return as long as it's not, quote, material; is that right?
>
> A: I would say that I take my instructions from my client, and if I could get it by Internal Revenue, I'll do my best to do it.***
>
> If they come back and audit, we'll adjust it and figure it out. For the time being, if you would like to deduct it, I won't object to it.
>
> Q: So it's not a problem as long as you don't get called in by the IRS, right?
>
> A: It's not a problem unless during an audit of some sort the IRS comes in and says let me look at professional fees. Let me look at these. Give me a detail of what it's for, and you can argue your position then whether you can take it as a deduction or not.
>
> Q. So unless you're audited, it's okay to make that claim that the expenses were business-related when in fact they weren't?

A: When you say it's okay, I have to weigh the Internal Revenue Code, the parameters of the Internal Revenue Code, what my client says, what his knowledge will be in case we're audited. That is my role. My role is not Internal Revenue. I don't work for the Treasury Department. I don't interpret their rules. I try to abide by them with a certain degree of flexibility.

(Tr. 185-86).

RECOMMENDATION

A. Summary

The Hearing Panel recommends that Respondent be disbarred based on his lengthy pattern of dishonest conduct, use of his position as an attorney for fraudulent purposes, lack of remorse, and unwillingness or inability to recognize his wrongdoing.

B. Analysis and Conclusions

In recommending a sanction, we bear in mind that the purpose of these proceedings is not to punish, but to safeguard the public, maintain the integrity of the profession and protect the administration of justice from reproach. In re Edmonds, 2014 IL 117696, ¶ 90. We strive for consistency in our recommendations but must consider the unique circumstances of each case. In re Mulroe, 2011 IL 111378, ¶ 25. In doing so, we consider the nature of the misconduct and any factors in mitigation and aggravation. In re Gorecki, 208 Ill. 2d 350, 360-361, 802 N.E.2d 1194 (2003).

The Administrator requests that Respondent be disbarred. Respondent contends that this matter should be dismissed because no misconduct was proven. Having found that the Administrator proved all of the charged misconduct, we disagree with Respondent's position and must consider the appropriate measure of discipline to recommend.

Respondent committed egregious misconduct. He facilitated a years-long scheme, involving more than $400,000, to claim false tax deductions for DSPC and understate Luis's personal income. He had actual knowledge that the tax returns he filed were not true or accurate,

yet he certified them. Although it was Luis and DSPC who directly benefited from this wrongdoing, Respondent benefited by maintaining Luis and DSPC as clients who paid him over $500,000 in fees during the time period at issue. The deception carried over into Luis's dissolution matter when Respondent provided information that he knew misstated Luis's income.

In mitigation, we consider Respondent's military service, *pro bono* work, and the testimony of his two character witnesses. We also consider his cooperation in this proceeding and lack of prior discipline in over 40 years of practice. While this mitigating evidence is favorable to Respondent, we find it is outweighed by the following evidence in aggravation.

Respondent's misconduct was not an isolated instance, but a deliberate, calculated series of individual acts, over a period of at least five years. See In re Fumo, 52 Ill. 2d 307, 310, 288 N.E.2d 9 (1972). We are especially troubled that Respondent used his client trust account and his position as an attorney to conceal DSPC's payment of Luis's expenses. Respondent's control over his American Express account, his IOLTA account, the DSPC corporate books, and Luis's and DSPC's tax returns were essential for the scheme to succeed. Contrary to Respondent's testimony, we do not believe it was Luis's idea to funnel monies through Respondent's IOLTA account and mischaracterize the payments for his personal expenses. Respondent is an experienced accountant and attorney who knew his IOLTA account statements and billing statements would not be easily discoverable. We find that he bears substantial responsibility for concocting and facilitating the fraudulent scheme and demonstrated exceedingly poor judgment in allowing his client trust account to be used for deceptive purposes.

In further aggravation, Respondent's testimony showed that his practice is to try to slip things by the IRS and file tax returns without regard to whether he has complied with his duty to conduct himself honestly. He repeatedly stated that he will do what a client asks him to do and try

to justify it later, if there is an audit. We do not believe it is consistent with the Illinois Rules of Professional Conduct for an attorney to present information that is known to be inaccurate on a client's tax return, and then certify the accuracy of that return. Respondent's disregard for this principle is an aggravating factor in our decision. Respondent has shown no intention to change his practices, nor has he shown remorse or recognition that his "aggressive approach" cannot include dishonesty. For these reasons, we conclude that Respondent does not fully understand his ethical obligations, is unwilling or unable to conform his conduct to ethical rules and poses a risk of committing similar misconduct in the future.

In support of a recommendation of disbarment, the Administrator cites In re Nasser, 1998 DC 1007, M.R. 14990 (Sept. 25, 1998); In re Elston, 04 CH 34, M.R. 19736 (Nov. 17, 2004); and In re Minneman, 98 SH 38, M.R. 17352 (March 22, 2001). Nasser and Elston were disbarred on consent following criminal convictions. Nasser failed to turn over foreign bank records related to his client's activities to a grand jury and filed a false tax return that omitted interest the client earned from the foreign bank accounts. He was convicted of obstructing justice and assisting a client in filing a false individual tax return. Nasser, 1998 DC 1007. Elston pleaded guilty to engaging in bankruptcy fraud by knowingly filing a bankruptcy petition for himself using a false social security number and engaging in tax fraud by misrepresenting his gross income on tax returns he filed from 1992 through 1997.

Minneman was disbarred after he was convicted of conspiring with a client to commit tax fraud. He allowed the client to deposit about $700,000 of income into his client trust account, which the client did not report on his tax returns. Minneman provided cash to the client and bought the client equipment and real estate using funds from his client trust account. Despite his conviction, Minneman insisted he did not engage in any wrongdoing, expressed no remorse, and

displayed a lack of understanding of his ethical obligations. In recommending disbarment, the Hearing Board noted that Minneman acted in a knowing, willful and deceitful manner to hide a large portion of his client's income, for the purpose of evading taxes. In addition, his misconduct was a deliberate, calculated series of events over a long period of time. Notably, he used his special skills as a lawyer to facilitate a crime even though he had a clear duty to dissuade his client from participating in criminal conduct. Minneman, 98 SH 38 (Hearing Bd. at 19-21).

We find Respondent's misconduct and factors in aggravation particularly comparable to Minneman. Even though Minneman was criminally convicted and Respondent was not, it is the conduct, not the fact of a conviction, that is relevant in determining an appropriate sanction. In re Ciardelli, 118 Ill. 2d 233, 239, 514 N.E.2d 1006 (1987). Both Respondent and Minneman used their client trust accounts and positions as attorneys to help their clients commit tax fraud for multiple years. Both lacked remorse, did not understand their ethical obligations, and failed to take responsibility for their actions.

Other attorneys who have used their client trust account and/or their position and skills as attorneys to commit criminal or fraudulent acts or assist clients in such acts have also been disbarred. See In re Powell, 126 Ill. 2d 15, 533 N.E.2d 831 (1988) (attorney arranged for his client to post a certificate of deposit as collateral for a $10,000 bank loan to a judge presiding over a case involving the client); In re Hook, 98 CH 50, M.R. 21025 (Sept. 21, 2006) (attorney conspired with the owner of a business he represented to illegally transfer $989,000 from an employee retirement plan to the business, by laundering the funds through his firm's client trust account and into a shell account); In re Porter, 2016PR00130, M.R. 030289 (Sept. 21, 2020) (attorney assisted clients in a scheme to defraud investors in a deal to purchase fast-food franchises by performing legal work for the deal and planning to use his client trust account for the transaction). While these cases are

not as factually similar to this case as Minneman, they support the conclusion that a lawyer who knowingly takes part in or orchestrates a fraudulent scheme and uses his or her skills as a lawyer to do so is subject to the most significant sanction of disbarment.

We determine that disbarment is the appropriate recommendation here due to Respondent's level of culpability, his intentionally dishonest acts, the calculated nature of the years-long scheme involving his client, his insistence that he did nothing wrong, and discipline imposed in comparable cases. We do not make this recommendation lightly but determine it is necessary to protect the public, maintain the integrity of the profession, and protect the administration of justice from reproach. While we have considered that Respondent has no prior discipline in his long career, that does not cause us to change our recommendation. Accordingly, we recommend that Respondent, Steven Messner, be disbarred.

Respectfully submitted,

Henry T. Kelly
John P. Moynihan
James W. Kiley

CERTIFICATION

I, Michelle M. Thome, Clerk of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois and keeper of the records, hereby certifies that the foregoing is a true copy of the Report and Recommendation of the Hearing Board, approved by each Panel member, entered in the above entitled cause of record filed in my office on March 5, 2024.

/s/ Michelle M. Thome
Michelle M. Thome, Clerk of the
Attorney Registration and Disciplinary
Commission of the Supreme Court of Illinois

[1] Before the hearing commenced, the Administrator voluntarily dismissed the charge of knowingly offering false evidence in violation of Rule 3.3(a)(3) from Count II of the Complaint.

[2] The Administrator did not submit evidence of the relevant Illinois statute. However, we may take judicial notice of the contents of a statute, whether or not a party asks us to do so. 735 ILCS 5/8-1003 (2020); Ill. R. Evid. 201.