

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE:

Complaint Against:

CASE No. 2013-0223

Robert F. Alsfelder, Jr. (#0014829)
RESPONDENT

RELATOR'S OBJECTIONS AND BRIEF
IN SUPPORT

CINCINNATI BAR ASSOCIATION,
RELATOR

RELATOR'S OBJECTION TO THE FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE
BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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IN THE SUPREME COURT OF OHIO

IN RE:	:	
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Complaint Against:	:	Case No. 2013-0223
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Robert F. Alsfelder, Jr. (#0014829)	:	
	:	
RESPONDENT	:	RELATOR'S OBJECTIONS
	:	
CINCINNATI BAR ASSOCIATION,	:	
	:	
RELATOR	:	

RELATOR'S OBJECTIONS TO THE FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE
BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

Relator hereby objects to the following findings by the Board:

1. The dismissal of Count One, the Witschger Matter, and the finding that Respondent did not violate Prof. Cond. R. 1.15(d) in this count.
2. The dismissal of Count Three, Income Tax Returns, and the finding that Respondent did not violate Prof. Cond. R. 8.4(b), and 8.4(c) in this count.

Relator hereby waves its objections to the following findings by the Board:

1. The finding that Respondent did not violate Prof. Cond. R. 1.15(a) and 8.4(c) in Count One.
2. The dismissal of Count Two, Colonial Dry Cleaners, and the finding that Respondent did not violate Prof. Cond. R. 1.8(a), 1.8(b) and 8.4(c) in this count.

Relator submits the following brief in support of these objections.

STATEMENT OF FACTS

Respondent, Robert F. Alsfelder, Jr., was admitted to the practice of law in 1981. He has previously been suspended for one year, stayed on the condition that he paid restitution in the amount of \$30,000. *Cincinnati Bar Association v. Alsfelder*, 103 Ohio St.3d 375, 2004-Ohio-5216.

Respondent represented one Joseph Witschger, first in 2000 and subsequently between 2004 and 2008. Respondent's services between 2004 and 2008 consisted of legal and business services related to the operation of Mr. Witschger's dry cleaning business, Eastern Hills Dry Cleaners. Respondent's hourly rate for business services was \$65. His hourly rate for legal services was \$225. Mr. Witschger's understanding was that Respondent and his wife, Deborah Alsfelder, would prepare Eastern Hills Dry Cleaners' profit and loss statements, taxes, and payment plans for creditors, and pay its bills. (Tr. Part 1, 117-118, 120). Deborah Alsfelder is a licensed attorney and licensed certified public accountant.

Mr. Witschger testified that Respondent did not prepare profit and loss statements or complete the tax and accounting work that was promised. (*Id.* at 128-29, 212-13). He testified that he "was in trust and faith that everything Bob said he was doing got done. That is where I put Bob, that high on a pedestal, that his word was good." (*Id.* at 222). When Judge Street questioned Mr. Witschger as to why he did not realize earlier that Eastern Hills Dry Cleaners had not filed any tax documents between 2004 and 2008, he replied, "[i]t was not in my mainstream mind. I had the confidence that Bob was doing that." (*Id.* at 225).

Mr. Witschger testified that Respondent regularly brought checks to Eastern Hills Dry Cleaners for him to sign, and that he would often stack them so that only the signature line was visible. (*Id.* at 122). Respondent wrote, and Mr. Witschger signed, a total of 311 checks on the

Eastern Hills Dry Cleaners account that were payable to Respondent. These checks totaled \$141,862.84. Respondent presented virtually all of them for cash at various banking institutions, rather than depositing them in any account. (Tr. Part 2, 281).

Mr. Witschger testified that although Respondent did not wholly prevent him from looking at the checks, he did not look at them carefully because he “had the confidence that everything was aboveboard.” (Tr. Part 1, 227). When he asked Respondent why checks were being made payable to Respondent, his answer was that they were for services rendered. (*Id.* at 122). However, Mr. Witschger testified that he never received an itemized bill for any of the work that Respondent performed, and Respondent admitted that he never submitted an itemized bill to Mr. Witschger after 2004. (*Id.* at 118, 123; Tr. Part 2, 471, 476). When Judge Street asked Respondent whether he kept written track of how much time he spent on his work for Mr. Witschger, his response was: “I was spot checking to make sure that I wasn’t spending anything less than an hour a day.” (Tr. Part 2, 482). When Judge Street asked Respondent how he accounted for the 311 checks, he stated, “[W]e would put it down as money received...from a client for services rendered.” (*Id.* at 479). Ultimately, Respondent admitted that the majority of the checks were income to him. (*Id.* at 457-58).

Towards the end of Respondent’s representation, Mr. Witschger requested tax documents and profit and loss statement from Respondent in order to refinance a loan. (Tr. Part 1, 213-16, 218-20). Respondent failed to provide these documents. (*Id.* at 195, 213-14, 219-21).

After Mr. Witschger terminated Respondent, he made repeated requests to Respondent for his records, including bookkeeping and/or accounting, profit and loss statements, bank statements, a list of all the dry cleaner’s creditors, and accounts receivable and payable. (*Id.* at 195, 197, 250). These were necessary to pursue a bankruptcy proceeding with a different

attorney. (*Id.* at 178, 250). Respondent failed to produce these documents. (*Id.* at 194-95, 198, 250). Mrs. Witschger testified that as a result of not having Eastern Hills Dry Cleaners' business records, she and Mr. Witschger were not able to keep their home. (Tr. Part 2, 353). She stated, "[h]ad we had the business records...I think we would have been able to make a wiser financial decision about our future and our family's future and what we were looking at." (*Id.* at 354).

On July 24, 2012, on the basis of Relator's Motion for Requests for Admission to be Deemed Admitted, the Panel Chair deemed the allegations of Count III admitted and conclusively established. Respondent filed Federal and State of Ohio income tax returns between the years 2004 and 2008. He received checks from Joseph Witschger and/or Eastern Hills Dry Cleaners made payable to Robert F. Alsfelder and/or Robert Alsfelder for legal and business services. He cashed these checks but did not report the money as gross income on his Federal and/or State of Ohio income tax returns between the years 2004 and 2009.

Relator requested a sanction of permanent disbarment, but the Board recommended that Respondent be indefinitely suspended based on his failure to cooperate.

ARGUMENT

PROPOSITION OF LAW I

Respondent's admissions regarding his income taxes, both pursuant to Civ. R. 36 and in his testimony at hearing, were sufficient to prove, by clear and convincing evidence, violations of the Code of Professional Conduct as charged. The Board's findings to the contrary were in error.

In November, 2010, Respondent was personally served with a *subpoena duces tecum* issued by the Board of Commissioners on Grievances and Discipline of this Court. Respondent was thereby required to turn over certain documents to Relator by December 1, 2010, including "Copies of your Federal Tax Returns for the years 2004 through 2009." Respondent has failed and refused to comply with that subpoena, with the result that Relator attempted to compel discovery through motions filed with the Chairman of the Board and, subsequently, with the hearing panel chairman. Ultimately, Relator initiated an original action against Respondent in this Court, being Case No. 11-0625. On May 19, 2011, this Court found Respondent to be in contempt and ordered him "to comply with the *subpoena duces tecum* and orders issued by the Board of Commissioners on Grievances and Discipline." Thereafter, Respondent failed to comply with that order, with the result that, on September 22, 2011, this Court suspended Respondent from the practice of law in Ohio. That is his status today.

In November, 2011, Relator served Respondent with a Request for Admissions pursuant to Ohio Civ. R. 36. Thereafter, Respondent failed to answer or to object to the Request for

Admissions, and has never done so. In an entry dated July 24, 2012, the hearing panel chair ruled that “The following matters are deemed admitted and shall be conclusively established:

1. Respondent filed Federal and State of Ohio Income Tax Returns in 2004.
2. Respondent filed Federal and State of Ohio Income Tax Returns in 2005.
3. Respondent filed Federal and State of Ohio Income Tax Returns in 2006.
4. Respondent filed Federal and State of Ohio Income Tax Returns in 2007.
5. Respondent filed Federal and State of Ohio Income Tax Returns in 2008.
6. Respondent received checks from Joseph Witschger and/or Eastern Hills Dry Cleaners made payable to Robert F. Alsfelder and/or Robert Alsfelder for legal and business services.
7. Checks were made payable to Robert Alsfelder from Eastern Hills Dry Cleaners and/or Joseph Witschger which were cashed but the money was not reported as gross income either on Respondent’s Ohio and/or Federal Income Tax Returns from the years 2004 through 2009.”

On the basis of the foregoing facts which were deemed admitted and conclusively established, Relator’s Amended Complaint, in Count 3, charged that Respondent had violated Prof. Cond. R. 8.4 (b), by committing tax evasion, an illegal act that reflects reversely on Respondent’s honesty or trustworthiness, and Prof. Cond. R. 8.4 (c), by engaging in conduct involving dishonesty and fraud. However, the board concluded that “The deemed admissions, by themselves, are not sufficient to established by clear and convincing evidence of a violation of either Prof. Cond. R. 8.4 (b) or Prof. Cond. R. 8.4 (c).” (Findings, ¶ 36) The board said: “The admissions, however, do not prove tax evasion.” (Findings, ¶ 37).

At hearing, a member of the panel asked what the elements of tax evasion are. (Tr. Part 2, 401). Counsel for Relator responded, in part, that “[T]he crime of tax evasion is failure to report income with intent to evade tax. . . .” (*Id.* at 402). He then expounded on tax evasion from a civil perspective.¹

The federal statute on tax evasion is set forth at 26 U.S.C. §7201: “Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.”

The United States Supreme Court has stated that 26 U.S.C. §7201 “includes the offense of willfully attempting to evade or defeat the assessment of a tax as well as the offense of willfully attempting to evade or defeat the payment of a tax. (*Sansone v. United States*, 380 U.S. 343, 354 (1965)). Thus, the crime of tax evasion can be committed either by attempting to evade assessment or by attempting to evade payment. The Court has held that the following elements must be proved to establish a violation of §7201: (1) An affirmative act constituting an evasion or attempted evasion of the tax, (2) The existence of a tax deficiency, and (3) Willfulness.

¹ Relator notes that a criminal conviction is not a prerequisite to finding a violation of Prof. Cond. R. 8.4 (b). The American Bar Association’s *Annotated Model Rules of Professional Conduct* states: “Because subsection (b) is concerned with a lawyer’s conduct rather than procedural matters, it is not necessary for a lawyer to be convicted of, or even charged with, a crime to violate the Rule.” (5th edition, 2003, p. 604) The ABA cited *People v. Odom* 941 P. 2d 919 (Colo, 1997), *In re Riddle* 700 N.E. 2d 788 (Ind. 1998), and *In re Hassenstab* 934 P. 2d 1110 (Or. 1997) in support of that statement. Ohio’s Rule 8.4 (b) is identical to ABA Model Rule 8.4 (b). Comment [2] to Ohio’s rule states: “Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. . . .”

The comparable provision in the former Ohio Code of Professional Responsibility was Disciplinary Rule 1-102 (A) (3), which stated that “A lawyer shall not engage in illegal conduct involving moral turpitude.” Obviously and unfortunately, there are many reported Ohio attorney disciplinary cases, based in whole or in part on criminal convictions, where a violation of that rule was found. However, there are also Ohio cases in which DR 1-102 (A) (3) was found to have been violated in the absence of a criminal conviction. See, for example, *Cincinnati Bar Ass’n. v. Lawson*, 2008-Ohio-3340, 119 Ohio St. 3d 58 at ¶ 61, *Cincinnati Bar Ass’n. v. Farrell*, 2008-Ohio-4540, 119 Ohio St. 3d 529, at ¶ 13, and *Toledo Bar Ass’n. v. Baker*, 2009-Ohio-2371, 122 Ohio St. 3d 45, at ¶ 26.

Sansone, 380 U.S. at 351. A conviction for tax evasion under 26 U.S.C §7201 does not require as a prerequisite that the government has made a tax assessment and a demand for payment. *United States v. Daniel*, 956 F. 2d 540, 542 (6th Cir. 1992).

Filing a false tax return that omits income is an affirmative act constituting an attempt to evade or defeat the payment of a tax. In *Sansone*, the Court said: "In this case, however, it is undisputed that petitioner filed a tax return, and that the petitioner's filing of a false tax return constituted a sufficient affirmative commission to satisfy the requirement of §7201." *Sansone*, 380 U.S. at 351-352. In the case at hand, it was deemed admitted and conclusively established that "Checks were made payable to Robert Alsfelder from Eastern Hills Dry Cleaners and/or Joseph Witschger which were cashed but the money was not reported as gross income either on Respondent's Ohio and/or Federal Income Tax Returns from the years 2004 through 2009." (Findings, ¶ 32).

A second element to be proven in establishing a violation of 26 U.S.C. §7201 is that an additional tax is due and owing. It has been said that "In a tax evasion prosecution it is necessary to show that an individual received more income than he reported. In order to do this, the government must establish potential sources from which this unreported income was derived." *United States v. Vannelli*, 595 F. 2d 402, 405-406 (8th Cir. 1979). The defendant in *United States v. Fogg*, 652 F.2d 551 (5th Cir. 1981), was convicted of tax evasion under 26 U.S.C. §7201 for skimming off approximately \$80,000 per year on the wholesale price that his company paid for orange juice and putting it, tax-free, into his own pocket. The Court said: "The government met its burden under the statute by demonstrating Fogg's receipt of unreported income and the existence of its taxable source." (*Id.* at 555). That court noted that the burden of proving tax deductions was on the defendant: "If Fogg contends that he used the money from FOJC for

FOJC for legitimate purposes, he must prove it.” (*Id.*). However, unlike Respondent herein, Defendant Fogg refused to characterize the money he received as income. That Court said: “When the government in the instant case presented evidence indicating that the money received by Fogg was income to him, the court below properly submitted that question to the jury.” (*Id.*).

In the case at bar, Relator’s expert witness, Kent E. Marcum, a former IRS criminal agent, testified that he “was given some records and checks and asked to go through them to try and identify what may have taken place with the checks and to make a schedule.” (Tr. Part 2, 278). Mr. Marcum said he looked at two boxes of checks that appeared to be written on the Eastern Hills Dry Cleaning account for business purposes. Further, that he reviewed additional checks that were made payable only to Respondent. These checks, written between January 7, 2005 and January 21, 2009, and over 200 in number, were summarized by Mr. Marcum in a document which Relator introduced as Exhibit 12. Mr. Marcum calculated the total value of those checks to be \$141,862.84. Mr. Marcum testified that with the exception of four checks drawn on Huntington Bank, all of the others were presented at PNC bank for currency, rather than being deposited. He said that the checks were made payable to Respondent and were endorsed by Respondent with the exception of one check endorsed over to Respondent’s wife, Deborah Alsfelder. (*Id.* at 279-280).

The third and final element to establish a violation of 26 U.S.C. §7201 is willfulness. “Statutory willfulness, which protects the average citizen from prosecution for innocent mistakes made due to the complexity of the tax laws, is a voluntary, intentional violation of a known legal duty.” *Cheek v. United States*, 498 U.S. 192 (1991) [citations omitted]. In the absence of an admission or a confession, “proof of willfulness usually must be accomplished by the means of

circumstantial evidence.” *United States v. Collorafi*, 876 F.2d 303, 305 (2nd Cir. 1989). In the case of bar, however, the following exchange took place during Respondent’s testimony:

Q. Now, with respect to the checks – and I asked you this question yesterday in detail – but you agree that the majority of the checks that were made payable to you were for business services?

A. Are you referring to over 50 percent, the majority?

Q. The majority.

A. Over 50 percent?

Q. Over 50 percent.

A. I would – without having had the opportunity to review the checks that you are referring to, I would have to guess that that is a correct statement.

Q. Okay.

A. But I haven’t had the opportunity to inspect and do a calculation – an exact calculation.

Q. And business services are not expenses. That is actually a service and you are obtaining a fee for your services, correct?

A. It is an expense.

Q. Not to you.

A. Not to me.

Q. It's a fee to you?

A. That's correct.

Q. It's income to you?

A. That's correct.

(Tr. Part 2, 457-458).

It is deemed admitted and conclusively established that "Respondent received checks from Joseph Witschger and/or Eastern Hills Dry Cleaners made payable to Robert F. Alsfielder and/or Robert Alsfielder for legal and business services." (Findings, ¶32).

The Board erred in failing to find violations of Prof. Cond. R. 8.4 (b) and 8.4 (c).

PROPOSITION OF LAW II

The Board's conclusion that Relator never requested an accounting by Respondent of the funds paid to Respondent from Joseph Witschger's business account is in error. Respondent's failure to produce an accounting of "charges for services rendered to Mr. Witschger and monies paid by Mr. Witschger," as directed by the Board's subpoena, constitutes professional misconduct for which Respondent should be sanctioned.

This Court usually defers to the "hearing panel's better perspective in terms of assessing witness credibility." *Disciplinary Counsel v. Kelly*, 2009-Ohio-317, 901 N.E. 2d 798, ¶10. However, the Court is the "ultimate arbiter of misconduct and sanctions in disciplinary cases," and "is not bound by factual and legal conclusions drawn by either the panel or the board." (*Id.* at ¶11.) In attorney disciplinary cases, this Court "renders the final determination of the facts and conclusions of law. . . ." *Disciplinary Counsel v. Vogtsberger*, 2008-Ohio-4571, 895 N.E. 2d 158, ¶8.

In the case at hand, there was conflicting testimony between Respondent and his former client, Joseph Witschger, regarding whether Respondent had kept business records belonging to Mr. Witschger. The hearing panel found Respondent's testimony to be more credible than Mr. Witschger's on this point. (Findings, ¶26). Nevertheless, the Board also found as follows:

"From 2005 to 2008, Respondent or his wife [attorney Deborah T. Alsfelder] wrote a total of 311 checks on the Eastern Hills Dry Cleaners Account to himself. These checks totaled over \$152,000. Two hundred

and seventy-two of the checks, totaling over \$141,000, contained no notation on the memo line and no description as to the reason for the check. Most of these checks were cashed by Respondent, not deposited, at various banking institutions in Cincinnati.

Respondent did not keep a record of his billings for services to Witschger nor did he keep any record of payments received. . . .”

(Findings, ¶19-20).

The Board said: “Although the panel is troubled by the large number of checks written to Respondent and the lack of accounting for them, it does not appear that Respondent was ever asked to account for them. . . . Relator never requested an accounting of the funds. The panel, therefore, cannot find that Respondent violated Prof. Cond. R. 1.15(d).” (Findings, ¶28).

The conclusion that “Relator never requested an accounting of the funds” is incredible. In fact, on November 3, 2010, pursuant to a praecipe filed by Relator, The Board of Commissioners on Grievances and Discipline of this Court issued a subpoena duces tecum which directed Respondent to produce the following documents:

- A. A copy of your Account Balance document, showing a running account of charges for services rendered to Mr. Witschger and monies paid by Mr. Witschger.
- B. A copy of the document which was provided to Matrix as a “check ledger”.
- C. A copy of your business and personal calendars for the years 2004 through 2009.
- D. Copies of your Federal Tax Returns for the years 2004 through 2009.

This subpoena was personally served on Respondent November 17, 2010, and Relator filed a Return of Service with the Board under cover of November 18, 2010. Respondent has

never complied with this subpoena duces tecum, and, as recited above, he has been suspended from the practice of law in Ohio by this Court for contempt since September 22, 2011.

Certainly, Respondent's client, Joseph Witschger, had a lawful interest, per the meaning of Prof. Cond. R. 1.15(d), in the funds in his business account for Eastern Hills Dry Cleaners. As the Board found, from 2005 to 2008 Respondent or his wife wrote a total of 311 checks on that account which were payable to Respondent. During that time, Respondent had possession of a blank checkbook belonging to Eastern Hills Dry Cleaners. (Tr. Part 2, 485-486).

During the hearing, Mr. Witschger was asked by a panel member: "It appears from the complaint that's been filed you also must think he has stolen money from you. Is that right?" Mr. Witschger replied: "I can't say that he stole money from me. I just have the blank checks with no receipt coming to verify what those checks were for that I signed. I have checks that were recorded in the memo section it tells you what the check was for. But the 140-or-so-thousand dollars of the checks that are there I have no receipt of those checks." (Tr. Part 1, 226).

Mr. Witschger admitted, and the hearing panel found, that when Respondent presented checks to him, "He would then simply sign his name when Respondent asked him to do so." (Findings, ¶20).

Relator submits that Mr. Witschger's naivety and lack of sophistication as a business man should not be held against him in the context of an attorney disciplinary proceeding. To the contrary, those factors evidence the trust which Mr. Witschger placed in Respondent, and should cause Respondent to be held to a high standard of care in fulfilling his fiduciary duties. All of that aside, the fact remains that Relator did request, by way of subpoena, that Respondent "shall promptly render a full accounting regarding such funds or other property," as required by Prof. Cond. R. 1.15(d).

CONCLUSION

The Board found, by clear and convincing evidence, that Respondent failed to cooperate in Relator's investigation and in these disciplinary proceedings. (Findings, ¶ 45) The Board found the following aggravating factors: a prior disciplinary offense, a pattern of misconduct, a lack of cooperation in the disciplinary process, and the submission of false evidence, false statements, or other deceptive practices during the disciplinary process. (Findings, ¶ 46). No factors in favor of mitigation were found. (Findings, ¶ 47)

The Board recommended the imposition of an indefinite suspension, with the further condition that there be no consideration of reinstatement unless Respondent files proof that he has obeyed the May 19, 2011 order of this Court and complied with the subpoena duces tecum issued by the Board.

This Court has repeatedly held that failure to cooperate in a disciplinary proceeding, coupled with prior disciplinary violations, warrants disbarment. Respondent's additional violations of 1.15(d), 8.4 (b), and 8.4 (c) further indicate that a disbarment should be imposed.

In *Cuyahoga County Bar Assn v. Wagner*, 117 Ohio St.3d 456, 2008-Ohio-1200 (2008), a previously suspended attorney failed to respond to orders to show cause, an order finding him in contempt, and an order to return client fees. He also failed to cooperate with disciplinary proceedings. In its decision to permanently disbar the attorney, the Court stated, "[his] conduct in this matter – and in his previous disciplinary case – reflects a lack of regard for the ethical and professional standards required of members of the bar." (*Id.* at ¶ 15).

In *Disciplinary Counsel v. Marshall*, 74 Ohio St.3d 615, 1996-Ohio-241 (1996), an attorney was served with a *subpoena duces tecum* commanding his appearance and the

production of documents in relation to a disciplinary investigation. The attorney failed to comply with this subpoena, as well as a second subpoena later issued. In the meantime, he received a six-month suspension for other misconduct. He was later found in contempt for failing to comply with the board's two subpoenas, and received an indefinite suspension. On Relator's motion for default, the attorney was permanently disbarred for his "demonstrated disdain for the disciplinary process." (*Id.* at 616).

In *Akron Bar Assn v. Bodnar*, 90 Ohio St.3d 399, 2000-Ohio-97 (2000), a previously suspended attorney participated in illegal conduct involving moral turpitude, conduct involving dishonesty, fraud, deceit, or misrepresentation, conduct prejudicial to administration of justice, and conduct adversely reflecting on his fitness to practice law when he falsely secured a loan and then failed to repay it. He failed to cooperate with the disciplinary investigation that ensued, and was permanently disbarred.

Respondent herein has previously been suspended for one year, stayed on the condition that he pay \$30,000 plus interest in restitution to an aggrieved client. In the instant case, the Board found that Respondent, like the attorneys discussed above, failed to comply with Court and Panel orders, failed to attend a deposition, failed to provide tax returns, and was "very guarded in his testimony." (Findings ¶ 46).

If additional violations of Rules 8.4(b), 8.4(c), and 1.15(d) are found, as discussed above in Propositions of Law I and II, then the case for disbarment becomes even stronger. In *Disciplinary Counsel v. Crosby*, 132 Ohio St.3d 387, 2012-Ohio-2872, an attorney was previously suspended three times. He was disbarred following his income-tax evasion, among other misconduct.

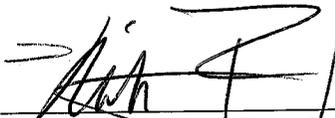
In *Cleveland Metropolitan Bar Association v. Mishler*, 127 Ohio St.3d 336, 2010-Ohio-5987, an attorney was previously suspended three times. He was unable to account for the fees he charged and the assets he handled, he did not provide client funds from a settlement until four months after they were received, he engaged in a check-exchanging scheme with a client's pension checks, and he charged \$5,500 for services he did not render. His handling of his clients' cases resulted in years of delay, unnecessary work and fees, and client confusion. Because he did not provide any final accounting of his services or fees, his clients were often left wondering where their money was going and what the hefty fees were accomplishing. The attorney also failed to cooperate in the disciplinary process, and during his hearing, he was argumentative and gave contradictory testimony. He was permanently disbarred for his misconduct.

Like the attorney in *Crosby*, Respondent committed an illegal act by failing to report gross income on his tax returns. Respondent also engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation by writing checks totaling over \$141,000 from Eastern Hills Dry Cleaners to himself without accounting for the money. Like the attorney in *Mishler*, Respondent's inability to account for the fees he charged left his client confused as to what services Respondent was actually performing for him.

The appropriate sanction for Respondent's misconduct is permanent disbarment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing Respondent's Relator's Objections to the Findings of Fact, Conclusions of Law, And Recommendation of the Board of Commissioners on Grievances and Discipline and Brief in Support Thereof was mailed by regular U.S. Mail, postage prepaid, this 26th day of March, 2013 to:

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**BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO**

In re:	:	
Complaint against	:	Case No. 10-076
Robert F. Alsfelder, Jr. Attorney Reg. No. 0014829	:	Findings of Fact, Conclusions of Law, and Recommendation of the
Respondent	:	Board of Commissioners on Grievances and Discipline of
Cincinnati Bar Association	:	the Supreme Court of Ohio
Relator	:	

OVERVIEW

{¶1} Relator accused Respondent of two counts of misconduct related to his representation of the owner of a dry cleaning business, one count related to filing his federal tax return, and one count for failing to cooperate. The evidence presented at the hearing did not establish by clear and convincing evidence that Respondent had violated the specific rules of professional conduct alleged in the complaint, except for the allegations in Count Four concerning his failure to cooperate in Relator's investigation. Because of his failure to cooperate, the panel recommends that Respondent be indefinitely suspended from the practice of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prehearing Proceedings

{¶2} On August 16, 2010, a probable cause panel found probable cause for the filing of a complaint against Respondent, and the original complaint was accepted for filing. The original

complaint contained two counts against Respondent. The first count concerned Eastern Hills Dry Cleaners, and the second count concerned Colonial Dry Cleaners. Both counts were based on Respondent's representation of Joseph Witschger, the owner of Eastern Hills Dry Cleaner.

{¶3} Notice was sent to Respondent of the filing of the complaint on August 16, 2010.

{¶4} The Board was not able to secure service of the complaint on Respondent, and on October 6, 2010, filed the complaint with the Clerk of Court of the Supreme Court of Ohio pursuant to Gov. Bar R. V, Section 11(B). On October 19, 2010, the Board advised Relator that Respondent was in default for not filing an answer.

{¶5} In the meantime, Relator was attempting to take the deposition of Respondent. Respondent attended two depositions, but failed to attend a third scheduled on December 1, 2010. Respondent also failed to produce certain documents at that deposition pursuant to a subpoena duces tecum.

{¶6} On December 21, 2010, Relator filed a motion to compel discovery and hold Respondent in contempt for not attending the deposition and for not producing documents. On January 19, 2011, the Board's chair ordered Respondent to produce the documents forthwith.

{¶7} On January 19, 2011, Respondent filed an answer to the complaint, and on January 24, 2011, a hearing panel was assigned.

{¶8} On March 15, 2011, Relator filed a motion to hold Respondent in contempt for failing to produce the documents requested in the earlier subpoena duces tecum. On March 22, 2011, the panel ordered Respondent to provide the requested documents.

{¶9} On April 18, 2011, based on Respondent's failure to comply with the discovery orders, Relator filed a motion to hold Respondent in contempt in the Supreme Court of Ohio. Supreme Court Case No. 2011-0625. This contempt proceeding was handled by the Court

outside of the proceedings before the Board. On May 19, 2011, the Court found Respondent in contempt and ordered him to comply with the subpoena duces tecum. On September 22, 2011, the Court suspended Respondent from the practice of law for not complying with its order. On March 30, 2012, the Court found Respondent in contempt for failing to immediately file an affidavit of compliance and ordered him to pay a fine of \$500.

{¶10} In the disciplinary case before the Board, at a telephone conference on June 3, 2011, and memorialized by journal entry dated June 7, 2011, Respondent was ordered to review, sign, and return a standard IRS waiver form to Relator. The waiver form would allow Relator to obtain copies of Respondent's tax returns. Respondent did not complete the form and, on June 16, 2011, Relator filed a motion for Respondent to be held in contempt. By entry dated June 17, 2011, Respondent was given until June 27, 2011 to complete and return the form.

{¶11} On July 8, 2011, the panel recommended that Respondent be found in contempt for not complying with the previous order of the panel.

{¶12} While the contempt matter was pending before the Court, Relator filed a request for admissions in the Court case. Respondent failed to respond to the request for admissions. Consequently, in the disciplinary case, Relator filed a motion to deem the admissions to be admitted. On July 24, 2012, the panel ordered that the request for admissions would be deemed admitted.

{¶13} On July 30, 2012, Relator filed an amended complaint that included the two original counts and two additional counts. The two additional counts alleged misconduct on the part of Respondent for tax evasion and for noncooperation in the disciplinary proceeding.

{¶14} Respondent filed an answer to the amended complaint on August 28, 2012.

{¶15} The matter was heard on October 29 and 30, 2012 in Cincinnati before a panel consisting of Sharon Harwood, Alvin Bell, and Judge John Street, chair. None of the panel members is from the district in which the complaint arose, and none was a member of the probable cause panel that certified the matter to the Board. Michael P. Foley and Stephen M. Nechemias appeared as counsel for Relator. Respondent was present for the hearing and represented himself.

Count One—Witschger Matter

{¶16} In 2000, Respondent had performed legal work for Joseph Witschger. Witschger owned Eastern Hills Dry Cleaners. During and after his representation in 2000, Respondent became a regular customer of the dry cleaning business. By 2004, Witschger's business was struggling, and he needed help in managing it. On or about November 1, 2004, Respondent and Witschger entered into an agreement for Respondent and his wife, an attorney and certified public accountant, to "take over the business aspect of the cleaners." Exhibit 7. The agreement called for Respondent to bill for legal services at the hourly rate of \$225 and for his wife to charge \$65 per hour for her business related services.

{¶17} Typically each day, Respondent would visit Witschger at his business early in the morning to discuss business problems. Respondent would obtain the mail that Witschger had received and would take documents to his wife who would organize them and prepare checks to pay bills. Later that afternoon or the next day, Respondent would return to the business to have Witschger sign the checks and make payments. Respondent would also return the documents for Witschger to keep.

{¶18} Witschger was responsible for signing the checks.

{¶19} From 2005 to 2008, Respondent or his wife wrote a total of 311 checks on the Eastern Hills Dry Cleaners account to himself. These checks totaled over \$152,000. Two hundred and seventy-two of the checks, totaling over \$141,000, contained no notation on the memo line and no description as to the reason for the check. Most of these checks were cashed by Respondent, not deposited, at various banking institutions in Cincinnati.

{¶20} Respondent did not keep a record of his billings for services to Witschger nor did he keep any record of payments received. Respondent testified that the 311 checks were for services rendered and for reimbursement of costs and expenses, and that they were fully explained to Witschger. Witschger testified that Respondent brought him the checks stacked one on top of the other so that he could not see the payee line. He would then simply sign his name when Respondent asked him to do so. Respondent testified that he spent a minimum of six or seven hours a week working on Witschger's business and that his wife performed a minimum of 17 to 18 hours per week working on the business. Respondent claimed that he was not nearly paid in full for the time he spent working on the business.

{¶21} Witschger testified that he asked Respondent to return records for the business, but that Respondent has not returned them. Respondent testified that he did not keep the business records. Instead his practice was to take documents home, give them to his wife, and then return them as soon as she was through with them. In addition, Witschger testified that he expected Respondent to prepare profit and loss statements, do the tax returns, and other items. Respondent testified that he had never prepared those documents and was not retained to do so. In fact, there was another entity that had prepared some tax returns and another entity that did the payroll accounting for the business.

{¶22} Witschger at no time asked Respondent to give him an accounting for the time or money performed by or paid to Respondent.

{¶23} As a result of his representation, in Count One of the amended complaint, Relator accused Respondent of violating the following: Prof. Cond. R. 1.15(a) by failing to maintain records of a client's funds and property; Prof. Cond. R. 1.15(b) for failing to promptly render a full accounting of a client's funds and property; and Prof. Cond. R. 8.4(c) for converting Witschger's funds for his own use and for misleading Witschger as to the payees of the checks.

{¶24} The panel does not find by clear and convincing evidence that Respondent has violated Prof. Cond. R. 1.15(a), Prof. Cond. R. 1.15(d), or Prof. Cond. R. 8.4(c).

{¶25} Prof. Cond. R. 1.15(a) states in part:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. Other property shall be identified as such and appropriately safeguarded. Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. For other property, the lawyer shall maintain a record that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution.

{¶26} Although Witschger claimed that Respondent kept property belonging to Witschger, the panel is not convinced that Respondent did. The panel finds Respondent's testimony more believable than Witschger's on this point. Respondent testified that he returned the property to Witschger soon after he and/or his wife had recorded or made use of it, and that Witschger was responsible for maintaining it. There was no testimony that Respondent had ever held any funds belonging to Witschger.

{¶27} Prof. Cond. R. 1.15(d) states:

Upon receiving funds or other property in which a client or a third person has a lawful interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third's person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, confirmed in writing, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.

{¶28} Although the panel is troubled by the large number of checks written to Respondent and the lack of accounting for them, it does not appear that Respondent was ever asked to account for them. At the hearing, Witschger was asked if he had ever asked for an accounting or a billing by Respondent, and Witschger said he had not. None of the written communication on behalf of Witschger to Respondent requested an accounting. Relator never requested an accounting of the funds. The panel, therefore, cannot find that Respondent violated Prof. Cond. R. 1.15(d).

{¶29} Prof. Cond. R. 8.4(c) prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Although Witschger claimed that Respondent stacked the checks so that he could not see who the payee was when he signed the checks, the panel does not find his testimony to be credible. Respondent testified that he explained everything to Witschger and that Witschger signed the checks. Witschger received the mail and had access to the cancelled checks and bank account records. The panel is not convinced there has been sufficient evidence to prove a violation of Prof. Cond. R. 8.4(c).

{¶30} Therefore, the panel recommends that the allegations in Count One of the complaint be dismissed.

Count Two—Colonial Dry Cleaners

{¶31} The allegations in Count Two concerned a second dry cleaning business, the Colonial Dry Cleaners. The owners of Colonial Dry Cleaners were looking to sell the business. Ultimately, Respondent became the owner of Colonial Dry Cleaners. Relator alleged that Respondent had taken advantage of Witschger in order to purchase the Colonial Dry Cleaners and charged Respondent with violations of Prof. Cond. R. 1.8(a), 1.8(b), and 8.4(c). The panel found that these allegations had not been proven by clear and convincing evidence. At the conclusion of Relator's case, the panel dismissed Count Two in its entirety.

Count Three—Income Tax Returns

{¶32} The allegations in Count Three revolved around the request for admissions filed in the contempt action before the Supreme Court of Ohio. Respondent did not respond to the request, and the following facts were deemed admitted and conclusively established:

- Respondent filed federal and State of Ohio income tax returns in 2004;
- Respondent filed federal and State of Ohio income tax returns in 2005;
- Respondent filed federal and State of Ohio income tax returns in 2006;
- Respondent filed federal and State of Ohio income tax returns in 2007;
- Respondent filed federal and State of Ohio income tax returns in 2008;
- Respondent received checks from Joseph Witschger and/or Eastern Hills Dry Cleaners made payable to Robert F. Alsfelder and/or Robert Alsfelder for legal and business services; and
- Checks were made payable to Robert Alsfelder from Eastern Hills Dry Cleaners and/or Joseph Witschger which were cashed but the money was not reported as gross income either on Respondent's Ohio and/or federal income tax returns from the years 2004 through 2009.

{¶33} At the hearing, Relator offered no additional evidence beyond these admissions. Respondent identified at least one check that was written to him that was a reimbursement from the dry cleaning business for damage to his clothing.

{¶34} Relator alleged that Respondent had violated the following: Prof. Cond. R. 8.4(b) by committing tax evasion, an illegal act that reflects adversely on Respondent's honesty or

trustworthiness; and Prof. Cond. R. 8.4(c) by engaging in conduct involving dishonesty and fraud.

{¶35} The allegations contained in Count Three concern the matters deemed to be admitted by Respondent as a result of his not responding to the request for admissions.

{¶36} The deemed admissions, by themselves, are not sufficient to establish by clear and convincing evidence of a violation of either Prof. Cond. R. 8.4(b) or Prof. Cond. R. 8.4(c).

{¶37} Prof. Cond. R. 8.4(b) prohibits an attorney from committing an illegal act that reflects adversely on the lawyer's honesty or trustworthiness. Relator argues that Respondent has committed tax evasion based on the admissions. The admissions, however, do not prove tax evasion. Through the admissions, Relator established that Respondent received checks for legal and business services and that Respondent received checks that were cashed but not reported as gross income. The admissions do not establish that the checks received for legal and business services were the same checks that were cashed and not reported as gross income. In fact, Respondent identified at least one check that was cashed but that was not payment for legal or business services and that would not necessarily be included in gross income.

{¶38} Prof. Cond. R. 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The deemed admissions do not prove, by clear and convincing evidence, that Respondent violated this rule.

{¶39} The panel, therefore, recommends that the allegations in Count Three be dismissed.

Count Four—Failure to Cooperate

{¶40} Respondent failed to respond to a November 18, 2010, subpoena for a deposition and production of documents. On January 19, 2011, the Board's chair ordered Respondent to produce the documents in compliance with the subpoena. Respondent failed to do so.

{¶41} On May 19, 2011, the Court found the Respondent in contempt and ordered him to comply with the subpoena duces tecum.

{¶42} Respondent failed to comply with the Court's May 19, 2011 order and on September 22, 2011 the Court suspended Respondent from the practice of law until proof was filed that he had obeyed the May 19, 2011 order and had complied with the subpoena duces tecum.

{¶43} On July 8, 2011, the panel recommended that Respondent be found in contempt for not complying with an order of the panel to review and sign a standard IRS waiver to allow Relator to obtain Respondent's tax returns. On March 30, 2012, the Court found Respondent in contempt for failing to immediately file an affidavit of compliance and ordered him to pay a fine of \$500.

{¶44} Relator alleged Respondent had violated Gov. Bar R. V, Section 4(G) by failing to cooperate in the disciplinary process.

{¶45} The panel finds, by clear and convincing evidence, that Respondent has failed to cooperate in Relator's investigation and in the disciplinary proceedings.

AGGRAVATION, MITIGATION, AND SANCTION

{¶46} The panel finds that the following aggravating factors are present:

- *Prior disciplinary offense.* Respondent was previously suspended for one year, stayed on the condition that he pay restitution in the amount of \$30,000. See *Cincinnati Bar Assn. v. Alsfelder*, 103 Ohio St.3d 375, 2004-Ohio-5216. The

defendant has also been suspended by the Court for being in contempt of the Court's order to comply with a subpoena duces tecum in this case.

- *Pattern of misconduct.* Respondent has failed to comply with the Court's order to turn over certain documents pursuant to a subpoena duces tecum. Respondent has failed to comply with the panel's order to sign a standard IRS waiver form. Respondent failed to attend a deposition.
- *Lack of cooperation in the disciplinary process.* Respondent refused and still refuses to provide his tax returns. On occasions, Respondent agreed to provide tax returns and other documents, but never did so.
- *Submission of false evidence, false statements, or other deceptive practices during the disciplinary process.* At the hearing, Respondent was very guarded in his testimony. Respondent has not been forthcoming.

{¶47} None of the factors to be considered in favor of mitigation has been shown.

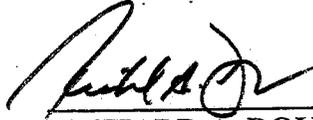
{¶48} Relator recommends that Respondent be permanently disbarred. Respondent asks that there be no finding of misconduct and that the matter be dismissed. Respondent argues that the failure to cooperate has already been dealt with by the Court in the contempt proceeding.

{¶49} The panel recommends that Respondent be indefinitely suspended from the practice of law. The panel further recommends that no reinstatement be considered unless proof is filed that Respondent has obeyed the May 19, 2011 order of the Court and that he has complied with the subpoena duces tecum issued by the Board.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on February 1, 2013. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Robert F. Alsfelder, Jr., be indefinitely suspended from the practice of law in Ohio with reinstatement subject to the conditions set forth in ¶49 of this report. The Board further recommends that the costs of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on
Grievances and Discipline of the Supreme Court of Ohio,
I hereby certify the foregoing Findings of Fact, Conclusions
of Law, and Recommendation as those of the Board.**



RICHARD A. DOVE, Secretary

ABA Model Rules

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

RULE 36. Requests for Admission

(A) Availability; procedures for use. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Civ.R. 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. A party serving a request for admission shall serve the party with an electronic copy of the request for admission. The electronic copy shall be reasonably useable for word processing and provided on computer disk, by electronic mail, or by other means agreed to by the parties. A party who is unable to provide an electronic copy of a request for admission may seek leave of court to be relieved of this requirement.

(1) Each matter of which an admission is requested shall be separately set forth. The party to whom the requests for admissions have been directed shall quote each request for admission immediately preceding the corresponding answer or objection. The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service of a printed copy of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

(2) If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer, or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Civ.R. 37(C), deny the matter or set forth reasons why the party cannot admit or deny it.

(3) The party who has requested the admissions may move for an order with respect to the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Civ.R. 37(A)(4) apply to the award of expenses incurred in relation to the motion.

(B) Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Civ. R. 16 governing modification of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subverted thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by the party for any other purpose nor may it be used against the party in any other proceeding.

(C) Document containing request for admission. If a party includes a request for admission in a document containing any other form of discovery, the party shall include a caption on the document that indicates the document contains a request for admission. A party is not required to respond to requests for admission that are not made in compliance with this division.

[Effective: July 1, 1970; amended effective July 1, 1972; July 1, 1976; July 1, 2004; July 1, 2005; amended effective July 1, 2008; July 1, 2009; July 1, 2012.]

26 U.S.C.

United States Code, 2011 Edition
Title 26 - INTERNAL REVENUE CODE
Subtitle F - Procedure and Administration
CHAPTER 75 - CRIMES, OTHER OFFENSES, AND FORFEITURES
Subchapter A - Crimes
PART I - GENERAL PROVISIONS
Sec. 7201 - Attempt to evade or defeat tax
From the U.S. Government Printing Office, www.gpo.gov

§7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(Aug. 16, 1954, ch. 736, 68A Stat. 851; Pub. L. 97-248, title III, §329(a), Sept. 3, 1982, 96 Stat. 618.)

AMENDMENTS

1982—Pub. L. 97-248 substituted “\$100,000 (\$500,000 in the case of a corporation)” for “\$10,000”.

EFFECTIVE DATE OF 1982 AMENDMENT

Section 329(e) of Pub. L. 97-248 provided that: “The amendments made by this section [amending this section and sections 7203, 7206, and 7207 of this title] shall apply to offenses committed after the date of the enactment of this Act [Sept. 3, 1982].”