

**UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF PROFESSIONAL RESPONSIBILITY
WASHINGTON, D.C.**

**DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY
Complainant**

v.

Complaint No. 2006-19

**GEORGE DIEHL, CPA,
Respondent**

**Lawrence T. Emert, Esq.,
for the Complainant.
Ronald J. Aiello, Esq. (Borah Goldstein
Altshuler & Nahins PC),
for the Respondent.**

DECISION

STEVEN DAVIS, Administrative Law Judge: This matter arises from a complaint issued on September 18, 2006, by the Director, Office of Professional Responsibility, Department of the Treasury, Internal Revenue Service (OPR), pursuant to 31 C.F.R. § 10.60 (also referred to as Section 10.60 of the Treasury Department Circular No. 230).

The complaint seeks to have the Respondent, George Diehl, (Respondent or Diehl), a certified public accountant engaged in practice before the Internal Revenue Service (IRS), disbarred from such practice for having engaged in disreputable conduct in violation of the provisions of 31 C.F. R. § 10.50 (a). Specifically, it is alleged that Diehl threatened to kill IRS agent Maimouna Diakite in violation of 31 C.F.R. §10.51 generally, and §10.51(k) by the use of abusive language.

Section 10.51 (k) states in relevant part that n[d]isreputable [sic] conduct for which a practitioner may be censured, suspended or disbarred from practice includes ... contemptuous conduct in connection with practice before the Internal Revenue Service, including the use of abusive language...."

The Respondent's answer denies that he threatened Diakite, and on May 1 and June 1, 2007, a hearing was held before me in New York, NY at which the parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Closing arguments were made at the

conclusion of the hearing and the parties waived the filing of proposed findings and conclusions of law and supporting reasons.

Upon the entire record, and based on my observation of the demeanor of the witnesses, I made the following:

Findings of Fact

The Government's Evidence

The Respondent, George Diehl, a 69 year old army veteran, is a certified public accountant, having been licensed by New York State in December, 1989.

In 2003, Taxpayer 1's 2001 tax return was audited and she authorized the Respondent to act as her representative in dealing with the IRS. It was determined that Taxpayer 1 owed a total of \$7,576.98.

About five appointments were scheduled whereby Taxpayer 1 or the Respondent could meet with tax compliance officer Rudolph Charles and discuss the amount owed and submit documentation which included bank statements and checks to lower the tax liability. Some of those appointments were made at the request of the Respondent. Neither the Respondent nor Taxpayer 1 appeared at any of those interviews. Diehl testified that he did not appear and he cancelled the meetings because Taxpayer 1 was unable to obtain the requested documentation and he believed that no purpose would be served by attending the meeting without such documentation. As a result the matter was closed in June, 2004 as "unagreed" and "no-show." No challenge was made thereafter in Tax Court to the amount of tax owed.

In November, 2004, the IRS sent a collection notice to Taxpayer 1 advising that if she did not pay the full amount owed it could levy on her assets. Diehl then requested reconsideration, and requested additional time to produce documentation. Accordingly, in January, 2005 the IRS granted a six week hold on Taxpayer 1's account pursuant to which no collection action, such as levies, garnishment or liens against Taxpayer 1's property could be taken. One month later, a fifteen week hold was granted. Thereafter, on July 6, it was noted in Taxpayer 1's account that no more holds would be permitted.

On July 11, 2005, Taxpayer 1 received a letter from the IRS marked "Fourth Urgent Notice" demanding that payment be made. It stated that if payment was not made the IRS would garnish her wages. She phoned the IRS the following day, July 12, and spoke to Maimouna Diakite, a collection or contact representative who was employed by the IRS for about one year and who worked in Detroit, Michigan. Her duties are to attempt to resolve tax matters and collect money.

The following is based on Diakite's testimony which I credit for the reasons set forth below. She stated that Taxpayer 1 was upset and angry, claiming that the IRS

unfairly sent her letters threatening her with collection while failing to review the information that Diehl had previously submitted.

Diakite examined the data on her computer and explained to Taxpayer 1 the history of the matter: certain information was not received, the audit was closed, and the matter was in collection status pursuant to which the full amount was due and owing. Thereafter, certain information was received, the audit was reopened and reconsidered but was then closed with no change in the amount due. Their conversation was ten to fifteen minutes.

Taxpayer 1, [redacted], asked Diakite to speak to him because she gave him the information to send to the IRS. Diakite introduced herself to Diehl, and pursuant to IRS protocol gave her last name and identification number. Diakite asked for his name and verified that he was the registered representative of Taxpayer 1 and noted his address as being in New York.

Diakite told Diehl that Taxpayer 1 said that she gave him information to send to the IRS but that the IRS did not receive that information before the specified deadline, and it closed the matter. Diehl told her that he sent the documents, but later admitted that he sent them in late because he was busy with other matters before the IRS. He asked for Diakite's fax number so that he could send her proof that he was working on other matters. Diakite refused, saying that Taxpayer 1's case was the only one under consideration. Diakite told Diehl that the account was closed and then the audit was reconsidered after receiving Diehl's information but was again closed after a determination that the data received did not warrant any change in the amount due.

Diakite stated that at the start of the conversation, Diehl's demeanor was professional and appropriate. However he became more heated or irate when he asked her to place a 45-day hold on the account which would have the effect of precluding any collection action such as a levy or a federal lien during that period of time. Diakite refused, telling Diehl that the IRS had given him enough time to provide the information requested. In making this statement, Diakite was aware that Taxpayer 1 had been given holds totaling 21 weeks, and only the week before her account noted that no further holds should be granted.¹

Diakite stated that she offered to set up an installment payment plan for the full amount owed and suggested that Taxpayer 1 make a minimum payment of \$25.00 so that she would have more time to provide further information. She also told him that by entering into an installment agreement, the account would be transferred to "agreement status," which would protect it against collection actions such as levies, garnishment and liens against Taxpayer 1's property.

Diakite stated that Diehl refused to enter into an installment agreement. Diakite testified that he became irate and loud, saying that he had obtained holds on

¹ In this regard, Diakite stated that it was within her discretion to have granted Taxpayer 1 another hold but she believed that the Respondent was "procrastinating" in settling the matter simply to "buy more time" and she chose not to grant additional time.

accounts routinely, and asked to speak to Diakite's supervisor. Diakite told him that, pursuant to IRS procedure, her supervisor would call him within 24 hours. He insisted on talking to her supervisor immediately. Diakite then, also pursuant to protocol, told him that the account was then in "collection status" whereby the IRS "will" levy against Taxpayer 1's bank account, garnish her salary and obtain liens on her real and personal property.

Diakite testified that Diehl became very upset and said "do you know what I do to people like you. I kill them." Diakite replied "you don't mean that, sir" and Diehl replied "I do. I do. I'll kill you." Diakite then sat at her desk repeating to herself aloud that Diehl said that he would kill her and he is in New York. She became frightened and then heard a male voice, not Diehl's, saying "what are you doing?" and the phone was then disconnected. The call, in which she spoke with Taxpayer 1 for about 15 minutes and with the Respondent for about 15 minutes, was not recorded.²

Taxpayer 1 credibly denied that she was present with the Respondent during the material part of his conversation with Diakite.

Bernice Reeves, a lead collection representative, sits in an adjoining work-space to Diakite. Her work area and Diakite's share a common wall. Reeves testified that she heard Diakite say in a distressed, nervous, fearful voice "you did not mean that." Reeves, whose job is to assist 12 collection officers including Diakite approached her and asked if she was all right. Diakite told her in a shaky voice that the person she was talking to wanted an additional hold on the account and became abusive when she told him that she could not grant that request. Diakite quoted Diehl as asking if she knew what he did to people like her, he kills them. Reeves stated that Diakite appeared "visibly shaken," noting that she had never seen Diakite in this condition in the one year that she was her lead. Diakite said that she was afraid and asked if their building was secure and whether Diehl can "get to me." Reeves assured her it would be all right since Diehl was not in Detroit.

Reeves directed Diakite to report the threat to her manager and supervisor Chantay Marie Ross. Following protocol which requires that the agent make a contemporaneous report of any conversation with a taxpayer or representative, Diakite then typed in her computer the following note, in relevant part, which was written within minutes of the telephone call:³

He [Diehl] admitted that he sent the documents late and he requested a hold time to re-submit the documents. Told him that I will not input any hold time that he can set up an IA [installment agreement] and send the document after. He requested to talk to my manager. Told him that

² There was much evidence as to the recording-capability of the telephones at the Detroit office, none of which was relevant to the issue here – whether a threat was made by the Respondent.

³ There was some confusion as to whether the note was written immediately after the call or after her meeting with the Inspector General's representative which took place within minutes of the call. Regardless of the precise timing it is clear that it was written shortly after the call and reflected her current, fresh account of the call.

she will contract [sic] him within 24 hours. I gave him the WOE: [warning of enforcement action] lien and levy. He became very irate and asked me if I knew what he does to people like me, and he added that he kills them. Told him that he does not mean what he said. He stated again: "I will kill you" and disconnects the call.

Diakite gave the note to manager Ross who testified that she found Diakite nervous, upset and scared, demeanor which she had never seen in Diakite before or after. Ross asked what happened and Diakite said that a taxpayer's representative had just threatened to kill her. Ross immediately reported the threat to the Inspector General's office. Quickly thereafter, a representative from that office interviewed Diakite and asked her to make a written statement. Diakite stated that during the interview she was shaking. She prepared a separate statement which was virtually identical to the one she wrote, above.

After speaking to the Inspector General's representative, Ross told Diakite to take a break and calm down. She went outside the building for 30 minutes and then remained away from her desk during her regularly scheduled break, taking a total of 60 to 90 minutes away from work.

Thereafter, Diakite took no time off from work and reported to work the following day, as usual. She stated that in all the conversations she has had with taxpayers or their representatives prior to this one, she never felt frightened, upset, nervous or distressed.

Tanya Ferguson, an experienced Special Agent for the Inspector General for Tax Administration interviewed the Respondent on July 19. She testified, and the report of her interview stated that he asked Diakite to put a hold on Taxpayer 1's account because her file would be re-opened but she refused. Ferguson quoted the Respondent as telling her that he "blew up" at Diakite, meaning that he became angry at her, telling her "you are killing me with all of this bullshit." Ferguson stated that the Respondent denied threatening Diakite or telling her that he would kill her. The Respondent admitted that he probably raised his voice and used profanity during their conversation, and offered that Diakite may have felt threatened because he was angry at her. Ferguson stated that when she interviewed Diakite by phone on July 19 she detected that Diakite was upset and very nervous as exhibited by her shaking voice.

Ferguson's opinion was that Diakite's version of the events was credible. She concluded that the Respondent threatened her, although Ferguson did not believe that Diehl would carry out his threat. She referred this matter to the United States Attorney's Office for criminal prosecution, but that office declined to prosecute because it did not meet prosecutorial guidelines. She recommended that the matter be referred to the IRS for administrative action.

Diakite testified that after hearing Diehl's threat she believed that, through the internet, Diehl could use her distinctive name to obtain her home address. She stated

that she was and is concerned about the safety of her family. She did not report the threat to local police authorities because she followed IRS protocol which simply required her to report the matter to her manager.

Diakite testified that in the thousands of calls she has handled, 40 to 60 per day, 40% to 50% of the callers are angry, but she has never gotten angry at a taxpayer. Her reasoning is that they have a dispute with the IRS, not with her and she does not take their anger personally. Ordinarily they do not direct their anger at her.

Diakite denied speaking to the Respondent in a raised voice. She also denied being disciplined for making false statements or for any other conduct-related matters. Although she has been yelled at by taxpayers she had never been threatened. She knew that the Respondent was a professional person, a CPA, but knew nothing of his personal nature or criminal background.

In the one year that Reeves was Diakite's lead and Ross was her manager, they did not discipline her for making a false statement or for any misconduct. Nor did they receive any complaints concerning how she treated taxpayers or their representatives. Both stated that Diakite properly handled the call with the Respondent.

In testimony which bolstered her credibility, Diakite stated that following her conversation with the Respondent, she found herself inappropriately recommending that levies imposed on accounts be released when the taxpayers became upset while talking to her. She did this in an effort to placate angry taxpayers and prevent them from becoming upset or threatening toward her. Ultimately, the levies were not released because her lead, who has final authority over releasing levies, refused to permit such action. In other such actions, she referred the matter to her lead so that the taxpayer would not "blame" or "threaten" her.

The Respondent's Evidence

Diehl has been a CPA for 18 years. His clients include private and business taxpayers for whom he has had hundreds of telephone and in-person interviews with IRS agents. During all of that time, until the present matter, no complaints had been filed against him by the IRS or by any licensing authority. He has not been arrested or convicted of any crime, and denied threatening any IRS agent during his contacts with them. He stated that whenever he speaks to an agent by phone he assumes that the call is recorded and therefore would not make an improper comment. Indeed, Rudolph Charles, the tax compliance officer who audited Taxpayer 1's tax return, stated that he had several phone conversations with the Respondent, during which Diehl was not rude or angry.

In 1990, Diehl [redacted]. He offered to help [redacted], Taxpayer 1, without fee, regarding her 2001 taxes as to which the IRS challenged certain deductions she claimed from her income. As set forth above, the IRS claimed that she owed \$7,576.98.

Taxpayer 1 initiated the call with Diakite. She described their conversation as "heated," in which they may have raised their voices. She testified that Diakite said that she had not presented documentation of the deductions and was "adamant" that Taxpayer 1 had to pay the amount due. Taxpayer 1 denied owing the entire amount claimed and challenged how Diakite could decide that money was owed if she was not given the opportunity to present her documentation.

Taxpayer 1 asked Diehl to speak to the agent and then left the room. Taxpayer 1 denied hearing the alleged threat made by Diehl. Hours later, Taxpayer 1 was told by Diehl that he called the Holtsville, NY office of the IRS and arranged for an installment agreement for the amount due. He did not mention his conversation with Diakite.

Diehl testified that in speaking to Diakite he sought to (a) get the case re-opened and present the evidence that would prove that Taxpayer 1 had valid deductions which would reduce her tax liability (b) have the IRS put a hold on the account so that collection efforts would be held in abeyance and (c) enter into an installment agreement so that during that period he could have the newly obtained evidence reviewed. Diehl claimed that he had been able to reopen the case by writing to the IRS office in Bensalem, Pennsylvania.

Diehl testified that when he picked up the phone Diakite was immediately "aggressive" with him - "fighting mad," repeating twice that Taxpayer 1 had enough time to pay, saying that she would not extend the matter, and repeating twice that she was "not listening to this," concluding that she wanted full payment immediately and if she did not receive it by Friday, she would levy against Taxpayer 1's assets. Diehl claimed that he was "getting annoyed" that Diakite would not listen to him when he said that Taxpayer 1 could prove most of the deductions she claimed and would probably have to pay only a small amount of the sum claimed. Diehl asked for an installment agreement which in his experience should have been automatically granted, but Diakite refused to grant it.

Although Diehl was aware that two holds had already been placed on the account, he denied that Diakite told him that no further holds could be granted because the record did not reflect that the matter was being reopened. Rather, he stated that he told her that he had sent a letter to Bensalem requesting that the matter be reopened and that it had reopened the case. Diehl stated that he offered to fax the letter to Diakite but did not ask for her fax number because she refused to accept anything and would not extend the hold beyond that day.

Conceding that he was becoming frustrated with Diakite because she would not listen to him, he testified that he became angry at her and raised his voice when she said that she would not grant a 45 day hold on the account, telling her that "you are killing me with your stupidity," but then later testified that he said "you are killing me with your bullshit." He accused her of not knowing the law and asked to speak to her supervisor which she denied. Diehl said that he then told her that he would contact another agent in order to obtain an installment agreement and that he would present the evidence required. This contradicts Diakite's testimony that she offered

an installment agreement but that he refused to accept it. The conversation ended. He denied threatening Diakite, and denied hearing her talk to herself or repeat the alleged threat he made. He also denied that anyone else was in the room when he spoke to her.

Diehl stated that in the hundreds of conversations he has had with IRS agents he never became angry at them, lost his temper or raised his voice even where they refused to grant the relief or take the action he requested. Significantly, however, he conceded that in this conversation, alone among the hundreds he has had, he became angry with Diakite, lost his temper with her and raised his voice to her because she "blew up" at him, was "very nasty" to him and "egged him on." However, all that he could cite as misbehavior on her part is that she applied the IRS law and regulations as she believed they should be applied.

Perhaps Diakite did misapply IRS laws and regulations. As she conceded, she had discretion to grant another hold on Taxpayer 1's account but chose to "follow the book." Further, this may have caused Diehl to become angry and lose his temper since it was his experience that holds are routinely granted in these circumstances. However, the fact remains that although Diehl believed that Diakite's actions were improper that did not and cannot justify his threatening her.

Diehl denied threatening Diakite in any way. He stated that he had been successful in reopening cases involving as much as \$400,000 and therefore would not have been motivated to threaten an IRS agent for a case involving only \$7,000. He denied knowing her name or her work location and therefore could not have believably threatened to kill her.

Diehl's explanation for why Diakite might falsely accuse him of threatening her is that perhaps she took offense when he told her that she did not know the law and asked to speak to her supervisor. .

While Diehl claimed that Diakite was "verbally abusive" to him, he did not report her alleged misconduct to anyone in the IRS or to investigating agent Ferguson basically because he did not want her to take adverse action against Taxpayer 1 because of his complaint. However, it appears that, even based on Diehl's testimony, Diakite was not abusive. Rather, she simply denied his request for a hold on Taxpayer 1's account and demanded that payment be made, all matters within her authority and discretion to decide.

Sometime thereafter, an installment agreement was executed and Taxpayer 1 paid the entire amount due. Diehl was unsuccessful in obtaining any reduction in the tax liability owed.

Character Evidence

In addition to Taxpayer 1, the Respondent presented three character witnesses, Witness 1, Diehl's supervisor at the state agency for 12 years and for whom Diehl prepared his federal tax returns; Witness 2, a friend and neighbor for 10

years; and Witness 3, an insurance agent and friend for 10 years for whom Diehl prepares tax returns.

Their testimony may be summarized as follows: Diehl does not have a reputation for being violent. Rather he is a gentleman, calm, peaceable, low-key, avoids controversy, never lost his temper, never threatened anyone, nothing fazes him, and when provoked or antagonized his reaction is to be calm, quiet and leave the area.

Each of the above witnesses stated that they did not know how Diehl would behave or react when speaking to an IRS agent who did not agree with his position, although Witness 2 did recount that perhaps she heard Diehl speak once by phone in a "firm but calm" way to an IRS agent. Of course, none overheard his conversation with Diakite.

Analysis and Discussion

This case presents a sharp credibility issue. Diakite testified that during a telephone conversation Diehl threatened to kill her. Diehl denies making the threat.

In crediting Diakite's testimony and finding that Diehl threatened her I rely on several factors. First, Diakite's testimony was forthright, candid and delivered in a most believable way. Her testimony that she was genuinely frightened by Diehl's remarks and immediately sought assurance from her supervisors that she would be safe supported her testimony that she was threatened. She immediately recorded in her computer at her desk the threat she received and shortly thereafter wrote an identical statement for an investigator. Her testimony at trial as to the threat was identical to what she wrote at the time it occurred. Further, her supervisors observed her obvious distress and nervousness immediately after the call and directed that she calm down and take some time to collect herself. They had never seen her in that condition.

Diakite had no reason to lie about her conversation with Diehl. The Respondent can only offer that she was motivated to lie because he asked to speak to her supervisor and perhaps she would be disciplined for not knowing the law. However, Diakite believably testified that requests to speak to an agent's supervisor were routine and were customarily granted and her supervisors stated that her handling of the call was proper. She therefore had no reason to fear any discipline.

Further bolstering her testimony are her post-threat efforts to placate taxpayers who she believed might threaten her. She credibly testified that following her conversation with Diehl she was inclined to grant taxpayers' requests to release levies against their property even though she believed that she could not properly take such action. Certainly, as an agent who sought to "follow the book" prior to the threat it may be found that this new tendency was caused by something traumatic - the threat to her life by Diehl. The fact that she did not file a complaint with the local police department or seek his arrest does not detract from the fact that the threat occurred. She believably testified that her obligation was to report the threat to her

supervisors and they processed the matter promptly by referring it to the Inspector General's department which itself has powers of arrest and referral for criminal prosecution.

Diehl has an admirable record in that he served in the military, earned bachelors and masters degrees and achieved the professional status of becoming a CPA. I credit his testimony that he believed that he represented his clients in a highly professional way. I also find that the character witnesses in his behalf were all honest, completely believable people.

Unfortunately I find that his professionalism suffered a lapse in his conversation with Diakite. While testifying that he never became angry with other IRS agents, and never lost his temper or raised his voice with them, he stated that he did so with Diakite here. His reasons for doing so were that she became "aggressive" with him and was "fighting mad." Nevertheless, he never reported her allegedly improper conduct to the appropriate authorities. Even assuming she acted in such a manner that did not permit Diehl to threaten her.

First, Diehl acted unprofessionally in losing his temper and raising his voice simply because Diakite applied the Internal Revenue Code and its regulations as she believed they should be applied. Second, the fact that he conceded that this was the only conversation among hundreds he has had where he acted in such an inappropriate manner supports a finding that he went even further by threatening her when she denied the action he sought.

I find that Diehl threatened Diakite. His credibility was shaken by first stating that his words to her was that you are "killing me with your stupidity" and then changing that testimony to state that you are "killing me with your bullshit." It is also odd that if he had a letter from Bensalem which stated that the matter was being reopened why he did not send such a letter to Diakite. His explanation was that Diakite refused to accept it. But he could have sent it nevertheless with a copy to her supervisor or a copy to IRS offices in Bensalem or Holtsville. Further, the fact that he was unable to obtain any reduction in Taxpayer 1's tax liability supports a finding that either the requested documentation was either never provided or that the IRS did not believe that such evidence warranted a change in the tax liability.

As set forth above, the Respondent's character witnesses were sincere, honest people, all friends of Diehl, who could only testify as to their business or social relationship with him during which he acted gentlemanly and professionally. None, of course, was present during his conversation with Diakite and none could with certainty describe how he actually acted during a discussion with an IRS agent.

In conclusion, I find that Diehl threatened to Diakite as alleged.

Sanction

The complaint seeks to have the Respondent disbarred from practice before the IRS because of his threat to Diakite. Although the Director's determination as to

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision was sent by first class mail on this 20th day of June, 2007 to each of the following:

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