

# FIRST SECTION



1515 CLAY STREET, 20<sup>TH</sup> FLOOR  
P.O. BOX 70550  
OAKLAND, CA 94612-0550

Public: (510) 622-2100  
Telephone: (510) 622-2226  
Facsimile: (510) 622-2121  
E-Mail: [jeanne.werner@doj.ca.gov](mailto:jeanne.werner@doj.ca.gov)

May 22, 2006

Robert E. Barnes  
Law Office of Robert G. Bernhoft, S.C.  
207 East Buffalo Street, Suite 600  
Milwaukee, Wisconsin 53202

RE: HEARING DATE REQUESTED and DISCOVERY ENCLOSED  
In the Matter of the Accusation Against: JOSEPH R. BANISTER  
Board of Accountancy Case No. AC-2005-22

Dear Mr. Barnes:

I appreciate your having your colleague telephone me to discuss the hearing dates. He informed me that you will be out of the country for a good part of June, and that hearing dates between Wednesday, July 5, 2006 and Friday, July 14 are acceptable to you. My client has requested that this matter be set as soon as possible, given our previous accommodations to you regarding hearing dates. Thus, **I am requesting that the case be set on July 6**, which will give you and Mr. Banister travel time outside the Fourth of July holiday. I will represent to the Office of Administrative Hearings that I have cleared this date with you and I anticipate no difficulty in having the matter set at that time. I informed your colleague that, because my case in chief is straightforward, I believe a half-day hearing is sufficient for the case. Please let me know immediately if you believe additional time to be necessary. Otherwise, I will revise my request to OAH, changing it from one-half day to one day.

On another subject, I am enclosing the discovery which was inadvertently left out of my last communication to you.

Sincerely,

A handwritten signature in cursive script that reads "Jeanne C. Werner".

JEANNE C. WERNER  
Deputy Attorney General

For BILL LOCKYER  
Attorney General

JCW:prm  
Enclosures

cc: Gregory P. Newington, Board of Accountancy  
90039626.wpd

INVESTIGATIVE REPORT ON

JOSEPH R. BANISTER

CASE NO. A-2004-247

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John E. O'Connor, CPA  
California Board of Accountancy  
2000 Evergreen Street, Suite 250  
Sacramento, CA 95815  
(916) 561-1723

December 3, 2004

State of California  
California Board of Accountancy  
2000 Evergreen Street, Suite 250  
Sacramento, CA 95815-3832

Attention: Gregory P. Newington, Chief  
Enforcement Division

**LICENSEE**

Joseph R. Banister  
License No.: 57875  
Expiration Date: March 1, 2005  
2282 Sunny Vista Drive  
San Jose, CA 95128  
(408) 260-9819

**CASE CONTROL NUMBER:** A-2004-247

**COMPLAINANT**

Internal

**I. SUMMARY OF COMPLAINT**

On January 20, 2004, the California Board of Accountancy received a Reportable Events Licensee Reporting Form (**EXHIBIT 1**) from Mr. Banister. Mr. Banister, pursuant to ***Business and Professions Code 5063***, is reporting that on December 24, 2003, he was barred from practicing before the Internal Revenue Service.

**II. STATUTES AND RULES**

**SUSPENSION OR REVOCATION OF THE RIGHT TO PRACTICE BEFORE ANY GOVERNMENTAL BODY OR AGENCY- *Business and Professions Code Section 5100(h)*.**

### III. SUMMARY OF INVESTIGATION

The CBA obtained an IRS letter (**EXHIBIT 2**) dated December 29, 2003, that was sent to Mr. Robert Bernhoft, Esq, attorney for Mr. Banister notifying him that Mr. Banister was disbarred from practice before the Internal Revenue Service. It also advised Mr. Bernhoft that any appeal of the decision must be filed on or before January 23, 2004.

Included with the letter were:

- The IRS Complaint No. 2003-2 (**EXHIBIT 3**)
- The Amended Complaint No. 2003-2 (**EXHIBIT 4**).
- Decision of the Administrative Law Judge (**EXHIBIT 5**).

The Decision of the Administrative Law Judge (William B. Moran) states:

1. That Mr. Banister gave advise to two clients that according to the 16<sup>th</sup> Amendment of the Constitution they did not have to pay taxes on their earnings, as the 16<sup>th</sup> Amendment was never ratified by the States.
2. That Mr. Banister did not file his own income tax returns for the years 1999-2002.

ALJ Moran stated that Mr. Banister admitted the facts alleged in the Complaint. In addition, ALJ Moran states that the 16<sup>th</sup> Amendment issues and the definition of income had long been settled by the Federal Courts.

With regard to Mr. Banister's non-filing of his 1999-2002 income tax returns, ALJ Moran noted that Mr. Banister did not claim the 16<sup>th</sup> Amendment issue. As such, it was Mr. Banister's responsibility to disprove the IRS allegations by presenting evidence to the contrary, such as providing a copy of his tax returns to the Court, which he did not.

ALJ Moran concluded that "Mr. Banister had an obligation to follow the federal tax laws and to comply with the Circular 230 regulations and that he failed to do so. These violations were willful. The provisions of 31 CFR section 10.50 expressly permit suspension or disbarment of a practitioner who is shown to be incompetent or disreputable or who refuses to comply with any of the regulations in 31 CFR Part 10. The Court also finds that Mr. Banister's actions were detrimental to the effectiveness of the Internal Revenue System.

On January 23, 2004, the Enforcement Division mailed a letter (**EXHIBIT 6**) to Mr. Banister requesting that he provide the status of the appeal action along with a copy of the appeal request and the response from the Secretary of the Treasury of the United States Department of the Treasury and/or the Director of Practice of the Internal Revenue Service.

On February 1, 2004, I received a letter (**EXHIBIT 7**) by facsimile from Mr. Banister in which he states:

"My appeal of the Administrative Law Judge's "Initial Decision" was filed by the January 23<sup>rd</sup>, 2004 deadline. Many of the documents filed in this administrative case, including

**California Board of Accountancy**

**December 3, 2004**

**Page 3**

the 50 page appeal document requested in your agency's January 23<sup>rd</sup> letter, are available at [www.freedomeabovefortune.com](http://www.freedomeabovefortune.com) by clicking on "IRS LOCKOUT UPDATE."

"If you determine that further information or documents are needed in the future, please contact me in writing. You can fax your correspondence to (408) 615-0819 to reduce unnecessary delay. If the nature of your inquiry absolutely must be oral, please contact my legal counsel Robert Barnes at (414) 276-3333. Thank you..."

Mr. Banister also indicated in his letter that he did not receive the handout as described in our January 23<sup>rd</sup> letter. I proceeded to fax him the Board handout entitled "*Licensee Information*."

I tried to obtain a copy of Mr. Banister's appeal from his website; however, I was unsuccessful. I then mailed a letter (**EXHIBIT 8**) dated February 19, 2004, to Mr. Banister requesting that he mail me a copy of his appeal, which I received on February 26, 2004 (**EXHIBIT 9**).

On April 2, 2004, I mailed Mr. Banister a letter (**EXHIBIT 10**) requesting that he provide in writing an answer to the question: "Did you file Federal (Form 1040) and California (Form 540) for the years 1999-2002?"

On May 3, 2004, I received a letter (**EXHIBIT 11**) dated April 30, 2004, from Mr. Banister in which he refers me to his attorney, Donald Kilmer of San Jose, CA.

On May 20, 2004, I telephoned Mr. Kilmer and left a message with his office assistant that he call me. To date Mr. Kilmer has not responded.

I obtained a copy of an IRS news release (**EXHIBIT 12**) dated July 13, 2004, noting that Mr. Banister's appeal of ALJ Moran's December 24, 2003, decision had been denied by Mr. David F.P. O'Connor of the Treasury Department.

On November 4, 2004, Mr. Banister and his attorney, Robert Barnes, appeared at an Investigative Hearing in Los Angeles, California. Mr. Barnes noted that due to what he believed was conflict since Mr. Banister would be appealing the decision rendered by Mr. O'Connor that his client would not answer questions posed by the members of the Investigative Hearing.

As a follow up to the IH, I contacted the Internal Revenue Service and was informed that to date Mr. Banister has not filed an appeal to his disbarment.

**IV. CONCLUSION**

The violation committed by Joseph R. Banister, and the standards of practice, follow.

**CONDUCT**

Joseph R. Banister, CPA was disbarred from practice before the Internal Revenue Service.

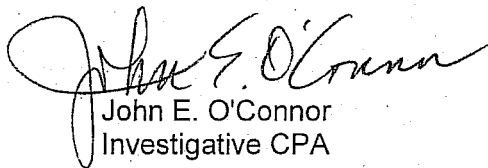
**Standard of Practice**

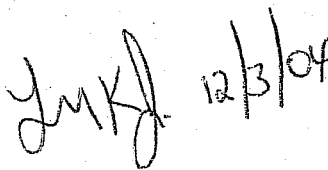
***Business and Professions Code Section 5100 (EXHIBIT 13)*** states that after notice and hearing the board may revoke, suspend or refuse to renew any permit or certificate, or may censure the holder of that permit or certificate for unprofessional conduct which includes, but is not limited to, one or any combination of the following causes:

\*\*\*\*\*

- (h) Suspension or revocation of the right to practice before any governmental body or agency...

Respectfully submitted,

  
John E. O'Connor  
Investigative CPA

  
JMKJ 12/3/04

**WITNESSES**

John E. O'Connor, CPA  
Investigative CPA  
2000 Evergreen Street, Suite 250  
Sacramento, CA 95815-3832  
(916) 263-3976  
CALNET 8-435-3976

**EXHIBITS**

- (1) Reportable Events Licensee Reporting Form dated January 12, 2004, received from Mr. Banister on January 20, 2004.
- (2) Letter dated December 29, 2003, received from Brien T. Downing, Director, Office of Professional Responsibility, Internal Revenue Service.
- (3) IRS Complaint No. 2003-2.
- (4) IRS Amended Complaint No. 2003-2.
- (5) Decision of the Administrative Law Judge (William B. Moran).
- (6) Letter dated January 23, 2004, mailed to Mr. Banister.
- (7) Letter dated February 1, 2004, received from Mr. Banister.
- (8) Letter dated February 19, 2004, mailed to Mr. Banister.
- (9) Letter dated February 25, 2004, received from Mr. Banister.
- (10) Letter dated April 2, 2004, mailed to Mr. Banister.
- (11) Letter dated April 30, 2004, received from Mr. Banister.
- (12) IRS News Release dated July 13, 2004.
- (13) B&P Code & 5100.

**CHRONOLOGY OF INVESTIGATION**

**January 20, 2004**

Pursuant to B&P Code § 5063 "Reportable Events Licensee Reporting Form" was received from Mr. Banister.

**April 2, 2004**

Additional information requested from Mr. Banister.

**November 4, 2004**

Mr. Banister and Mr. Barnes appeared at an Investigative Hearing.

**December 3, 2004**

Date of Investigative CPA report.

EXHIBIT 1



RECEIVED  
04 JAN 20 AM 11:48  
CALIFORNIA BOARD  
OF ACCOUNTANCY

**CALIFORNIA BOARD OF ACCOUNTANCY**  
2000 EVERGREEN STREET, SUITE 250  
SACRAMENTO, CA 95815-3832  
TELEPHONE: (916) 263-3680  
FACSIMILE: (916) 263-3675  
WEB ADDRESS: <http://www.dca.ca.gov/cba>



### REPORTABLE EVENTS Licensee Reporting Form

Pursuant to California Business and Professions Code Section 5063  
(Please read the attached information before completing and submitting this form.)

#### LICENSED ACCOUNTANT AND/OR LICENSED ACCOUNTING FIRM

Licensee Name Joseph R. Banister License Number 57875E  
Company Name \_\_\_\_\_ License Number \_\_\_\_\_  
Address 2282 Sunny Vista Drive  
San Jose, California  
Telephone (408) 260-9819

#### TYPE OF REPORTABLE EVENT

Please check the appropriate box. See Statement 1

- Felony Conviction [Section 5063(a)(1)(A)]
- Criminal Conviction [Section 5063(a)(1)(B)]
- Criminal Conviction [Section 5063(a)(1)(C)]
- Cancellation, revocation, or suspension of a certificate, other authority to practice as a certified public accountant or a public accountant, by any other state or foreign country [Section 5063(a)(2)]
- Cancellation, revocation, or suspension of the right to practice as a certified public accountant or a public accountant before any governmental body or agency [Section 5063(a)(3)]
- Restatement of a financial statement [Section 5063(b)(1)]
- Civil action settlement [Section 5063(b)(2)]
- Civil action arbitration award [Section 5063(b)(2)]
- Any notice of the opening or initiation of an investigation of the licensee by the Securities and Exchange Commission [Section 5063(b)(3)]
- Any notice from the Securities and Exchange Commission requesting a Wells Submission [Section 5063(b)(4)]
- Any notice of the opening or initiation of an investigation by the Public Company Accounting Oversight Board [Section 5063(b)(5)]
- Civil action judgment [Section 5063(c)(1)(2)(3)(4)(5)]

**EXPLANATION FOR REPORTABLE EVENT**

1. Summary (Attach additional sheets if necessary):

*See Statement 1*

2. If the reportable event involves a restatement, please submit copy of the original and restated financial statement or the portions of the original and amended Form 990 or 990PF related to the reissued financial statement.
3. If the reportable event involves a civil action settlement or arbitration award that is \$30,000 or greater, please provide:

\_\_\_\_\_  
Total Amount Paid by Insurer

\_\_\_\_\_  
Date Paid

\_\_\_\_\_  
Total Amount Paid by Licensee

\_\_\_\_\_  
Date Paid

4. If the reportable event involves an administrative agency action or court action, please provide:

*Director, Office of Professional Responsibility v. Joseph R. Banister*

\_\_\_\_\_  
Title of Matter

*Complaint No. 2003-2*

\_\_\_\_\_  
Docket Number

*See Statement 1*

\_\_\_\_\_  
Dates of Occurrence

*U.S. Environmental Protection Agency Office of Administrative Law Judges  
mail code 1900L, Ariel Rios Building, 1200 Pennsylvania Avenue N.W. Washington, D.C. 20460*

\_\_\_\_\_  
Court, Arbitrator, or Agency Name and Address

I certify under penalty of perjury under the laws of the state of California that to the best of my knowledge the information provided within this report and any attachments is true and correct.

Signature: \_\_\_\_\_

*Joseph R. Banister*

Date: \_\_\_\_\_

*11/2/04*

The following are excerpts from the California Business and Professions Code.

**Section 5063(a).** A licensee shall report to the board in writing of the occurrence of any of the following events occurring on or after January 1, 1997, within 30 days of the date the licensee has knowledge of these events:

(1) The conviction of the licensee of any of the following:

- (A) A felony.
- (B) Any crime related to the qualifications, functions, or duties of a public accountant or certified public accountant, or to acts or activities in the course and scope of the practice of public accountancy.
- (C) Any crime involving theft, embezzlement, misappropriation of funds or property, breach of a fiduciary responsibility, or the preparation, publication, or dissemination of false, fraudulent, or materially misleading financial statements, reports, or information.

As used in this section, a conviction includes the initial plea, verdict, or finding of guilt, pleas of no contest, or pronouncement of sentence by a trial court even though that conviction may not be final or sentence actually imposed until appeals are exhausted.

- (2) The cancellation, revocation, or suspension of a certificate, other authority to practice or refusal to renew a certificate or other authority to practice as a certified public accountant or a public accountant, by any other state or foreign country.
- (3) The cancellation, revocation, or suspension of the right to practice as a certified public accountant or a public accountant before any governmental body or agency.

**Section 5063(b).** A licensee shall report to the board in writing the occurrence of any of the following events occurring on or after January 1, 2003, within 30 days of the date the licensee has knowledge of the events:

- (1) Any restatement of a financial statement and related disclosures by a client audited by the licensee.
- (2) Any civil action settlement or arbitration award against the licensee relating to the practice of public accountancy where the amount or value of the settlement or arbitration award is thirty thousand dollars (\$30,000) or greater and where the licensee is not insured for the full amount of the award.
- (3) Any notice of the opening or initiation of a formal investigation of the licensee by the Securities and Exchange Commission or its designee.
- (4) Any notice from the Securities and Exchange Commission to a licensee requesting a Wells Submission.
- (5) Any notice of the opening or initiation of an investigation by the Public Company Accounting Oversight Board or its designee, as defined pursuant to subdivision (g).

**Section 5063(c).** A licensee shall report to the board in writing, within 30 days of the entry of the judgment, any judgment entered on or after January 1, 2003, against the licensee in any civil action alleging any of the following:

- (1) Dishonesty, fraud, gross negligence, or negligence.
- (2) Breach of fiduciary responsibility.
- (3) Preparation, publication, or dissemination of false, fraudulent, or materially misleading financial statements, reports, or information.
- (4) Embezzlement, theft, misappropriation of funds or property, or obtaining money, property, or other valuable consideration by fraudulent means or false pretenses, or other errors or omissions.
- (5) Any actionable conduct by the licensee in the practice of public accountancy, the performance of bookkeeping operations, or other professional practice.

**Section 5063(d).** The report required by subdivisions (a), (b), and (c) shall be signed by the licensee and set forth the facts which constitute the reportable event. If the reportable event involves the action of an administrative agency or court, then the report shall set forth the title of the matter, court or agency name, docket number, and dates of occurrence of the reportable event.

**Section 5063(e).** A licensee shall promptly respond to oral or written inquiries from the board in conjunction with license renewal.

**Section 5063(f).** Nothing in this section shall impose a duty upon any licensee to report to the board the occurrence of any of the events set forth in subdivision (a), (b), or (c) either by or against any other licensee.

**Section 5063(g).** The board may adopt regulations to further define the reporting requirements of this section.

### Statement 1

On or about March 19, 2003, Brien T. Downing, Director of the Internal Revenue Service Office of Professional Responsibility, initiated a disciplinary proceeding against me (Complaint 2003-02). An "Initial Decision" was issued by Administrative Law Judge William B. Moran on December 24, 2003. According to Mr. David Finz, Senior Attorney for the Office of Professional Responsibility, the "Initial Decision" becomes final unless an appeal is timely filed (within 30 days) with the Secretary of the Treasury. I am hereby informing the California Board of Accountancy (CBA) that I will be timely filing an appeal of the Administrative Law Judge's "Initial Decision" with the Secretary of the Treasury and, therefore, the decision is not final.

The plain language of California Business and Professions Code (B&PC) Section 5063(a)(3) instructs a licensee to report knowledge of "cancellation, revocation, or suspension of the right to practice as a certified public accountant or public accountant before any governmental body or agency". Since my status before the Internal Revenue Service has not been cancelled, revoked, or suspended, I do not believe I have a statutory duty to report these events but I am nonetheless informing the CBA of these events as a professional courtesy.

If I am not successful in my appeal and/or a final decision or termination of appeal rights occurs, I will notify the CBA of such an event in compliance with B&PC Section 5063(a)(3).

If you have any questions regarding this matter, you may contact my legal representatives, Robert E. Barnes or Robert G. Bernhoft at (414) 276-3333.



EXHIBIT 2



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

December 29, 2003

VIA UNITED PARCEL SERVICE

Robert G. Bernhoft, Esq.  
207 East Buffalo Street, Suite 600  
Milwaukee, WI 53202

re: Initial Decision  
Joseph R. Banister, CPA  
Complaint No.: 2003-2

Dear Mr. Bernhoft:

An Initial Decision in the above-referenced case, dated December 24, 2003, was issued by Administrative Law Judge William B. Moran. This Initial Decision orders your client to be disbarred from practice before the Internal Revenue Service. This decision will become a final of the agency, unless an appeal is timely filed with the Secretary of the Treasury. Pursuant to 31 C.F.R. section 10.77, "[w]ithin 30 days from the date of the Administrative Law Judge's decision, either party may appeal to the Secretary of the Treasury, or his or her delegate." Any appeal must be filed by **January 23, 2004**. Accordingly, should your client desire to file an appeal, please direct such appeal to the following address:

John. W. Snow, Secretary of the Treasury  
United States Department of the Treasury  
1500 Pennsylvania Avenue, N.W.  
Washington, D.C. 20220

Also under section 10.77, "the respondent must file his or her appeal with the Director of Practice in duplicate and a notice of appeal must include exceptions to the decision of the Administrative Law Judge and supporting reasons for such exceptions." Your client's duplicate copies to the Director should be addressed as follows:

Brien T. Downing, Director  
Office of Professional Responsibility, SE:OPR  
Internal Revenue Service  
1111 Constitution Avenue, N.W., Suite 7238  
Washington, D.C. 20224

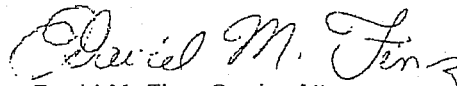
The Office of Professional Responsibility will presume timeliness of any appeal to the Secretary of the Treasury in this matter, so long as the duplicate copies sent to the Director are postmarked no later than January 23, 2004.

Should you have any questions, please contact David M. Finz of my staff at the address and telephone number indicated below.

Regards,

BRIEN T. DOWNING, Director  
Office of Professional Responsibility  
Internal Revenue Service

By:



David M. Finz, Senior Attorney  
Office of Professional Responsibility  
c/o Long Island Appeals – IRS  
50 Clinton Street, Suite 300  
Hempstead, NY 11550-4201  
Tel: (516) 539-6221  
FAX: (516) 539-6241

cc: Joseph R. Banister, CPA  
2282 Sunny Vista Drive  
San Jose, CA 95128

Jay J. Kessler, Esq., CC:GLS:SF  
Office of Chief Counsel – IRS  
General Legal Services  
333 Market Street, Suite 1200  
San Francisco, CA 94105

EXHIBIT 3

1 THE DEPARTMENT OF THE TREASURY  
2 OFFICE OF PROFESSIONAL RESPONSIBILITY  
3 INTERNAL REVENUE SERVICE  
4 WASHINGTON, D.C.

5 DIRECTOR,  
6 OFFICE OF PROFESSIONAL RESPONSIBILITY,

7 Complainant,

8 v.

9 JOSEPH R. BANISTER,

10 Respondent.

COMPLAINT NO. 2003-2

11  
12 COMES NOW the Complainant, Brien T. Downing, who in his official capacity as  
13 Director of the Office of Professional Responsibility (formerly the Office of the Director of  
14 Practice), Internal Revenue Service, files this complaint pursuant to 31 C.F.R. §§ 10.60  
15 and 10.91, issued under authority of 31 U.S.C. §330, and makes the following allegations  
16 of fact and charges of misconduct against the above-named Respondent. All citations to  
17 31 C.F.R. §§10.0 et seq. are also found in corresponding sections of Treasury Department  
18 Circular No. 230.

19 I.

20 (A) At all times material hereto, Respondent was a Certified Public Accountant  
21 (CPA). See Complainant's Exhibits 1-9, 12 and 14. Respondent has engaged in practice  
22 before the Internal Revenue Service. See Complainant's Exhibits 5, 6, 7, 12 and 14.  
23 Respondent's last address of record with the Internal Revenue Service is 2282 Sunny  
24 Vista Drive, San Jose, California 95128.

25 (B) As a Certified Public Accountant (CPA) who has engaged in federal tax practice  
26 before the Internal Revenue Service, Respondent is bound by 31 C.F.R. §§10.0 et seq.  
27 and the rules and regulations contained therein.  
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B.

Respondent is a former Internal Revenue Service Criminal Investigation Special Agent. He was a Special Agent for approximately five (5) years. See Complainant's Exhibits 4, 5, 10, and 14.

III.

Respondent is subject to disbarment or suspension from practice before the Internal Revenue Service by virtue of 31 C.F.R. §10.50 for his violation of the rules and regulations in 31 C.F.R. Part 10; specifically, Respondent engaged in disreputable conduct in violation of 31 C.F.R. §§ 10.34, 10.51, 10.51(d), 10.51(j), 10.22(b), and 10.22(c) as set forth below.

(A) Respondent engaged in disreputable conduct in violation of 31 C.F.R. §§ 10.51, 10.51(d), 10.51(j), 10.22(b), and 10.22(c) in that:

(1) Respondent advised taxpayer Frank W. Coleman that he was not liable for income taxes for the years 1989 through 1998 because the Sixteenth Amendment to the Constitution was "not ratified." See Complainant's Exhibits 13 and 14.

(2) Respondent advised taxpayer Frank W. Coleman that he was not liable for income taxes for the years 1989 through 1998 because Internal Revenue Code (I.R.C.) § 861 and the regulations thereunder defined "source" of income in such a way as to exclude Mr. Coleman's income from taxation. See Complainant's Exhibits 11, 12, 13, and 14.

(3) Respondent advised taxpayer Walter A. Thompson that he was not liable for income taxes for 1996 and 1998 because his income for the stated tax years was not taxable income per I.R.C. §§ 861-865 because I.R.C. § 861 and the regulations thereunder defined "source" of income in such a way as to exclude Mr. Thompson's income from taxation. See Complainant's Exhibits 8 and 9.

(B) Respondent engaged in disreputable conduct in violation of 31 C.F.R. § 10.34 in that:

1 On February 29, 2000, and on January 31, 2000, Respondent signed as the  
2 preparer for taxpayer Walter A. Thompson's Amended U.S. Tax Returns  
3 (Forms 1040X) for calendar years 1996 and 1998, respectively. The  
4 aforementioned amended returns stated that Mr. Thompson's income for the  
5 stated tax years was not taxable income per I.R.C. §§ 861-865. Said returns  
6 were filed with the Internal Revenue Service. See Complainant's Exhibits  
7 8 and 9.

#### 8 IV.

9 (A) By his conduct as specified in paragraphs III(A)(1), III(A)(2), III(A)(3) and III(B)  
10 above, Respondent failed to exercise due diligence in violation of 31 C.F.R. § 10.22 (b) and  
11 (c) and engaged in disreputable conduct in violation of 31 C.F.R. § 10.51. Specifically,  
12 Respondent gave advice to taxpayer Frank Coleman and to taxpayer Walter A. Thompson  
13 that had no basis in law or fact; and while representing taxpayer Coleman and taxpayer  
14 Thompson before the Internal Revenue Service, Respondent took a position that had no  
15 substantive basis in law or fact.

16 (B) By his conduct as specified in paragraphs III(A)(1), III(A)(2) and III(A)(3) above,  
17 Respondent knowingly counseled taxpayer Frank Coleman and taxpayer Walter A.  
18 Thompson of an illegal plan to evade Federal taxes or the payment thereof in violation of  
19 31 C.F.R. § 10.51(d).

20 (C) By his conduct as specified in paragraphs III(A)(1)(2) and (3) above, Respondent  
21 violated 31 C.F.R. § 10.51(j) by providing false opinions, either knowingly, recklessly, or  
22 through gross incompetence, to taxpayer Frank Coleman and to taxpayer Walter  
23 A. Thompson.

24 (D) By his conduct as specified in paragraphs III(A)(1), III(A)(2), III(A)(3) and III(B)  
25 above, Respondent violated 31 C.F.R. §§ 10.22(b) and (c) by failing to exercise due  
26 diligence in determining the correctness of oral and/or written representations he made to  
27 taxpayer Frank Coleman, to taxpayer Walter A. Thompson, and to the Internal Revenue  
28 Service.

1 (E) By his conduct as specified in paragraph III(B) above, Respondent violated  
2 31 C.F.R. § 10.34 by signing as the preparer of federal income tax returns that did not have  
3 a realistic possibility of being sustained on their merits and were clearly frivolous.

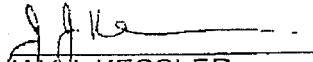
4 Respondent's actions in paragraphs III(A)(1), III(A)(2), III(A)(3) and III(B), evidence  
5 disreputable conduct that warrants his disbarment from practice before the Internal  
6 Revenue Service. WHEREFORE, Complainant prays that Respondent be disbarred from  
7 practice before the Internal Revenue Service pursuant to the provisions of 31 C.F.R.  
8 §§10.50 and 10.70, issued under the authority of 31 U.S.C. § 330.

9 //

10 BRIEN T. DOWNING  
11 Office of Professional Responsibility  
Internal Revenue Service

12 //

13 By:

  
14 JAY V. KESSLER  
Senior Counsel  
(General Legal Services)

15 //

16 Dated: MAR 15 2003

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EXHIBIT 4

THE DEPARTMENT OF THE TREASURY  
OFFICE OF PROFESSIONAL RESPONSIBILITY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C.

DIRECTOR,  
OFFICE OF PROFESSIONAL RESPONSIBILITY )  
Complainant, )

v. )

JOSEPH R. BANISTER, )  
Respondent )

AMENDED COMPLAINT  
NO. 2003-2

**COMES NOW** the Complainant, BRIEN T. DOWNING, who in his official capacity as Director, Office of Professional Responsibility (formerly the office of the Director of Practice), Internal Revenue Service, files this amended complaint incorporating all charges set forth in the original complaint filed March 19, 2003, pursuant to 31 C.F.R. § 10.63 [also published as section 10.63 of Treasury Department Circular No. 230 (Revised 2002); all of the following citations to 31 C.F.R. § 10.0 et seq. can also be found in corresponding sections of Treasury Department Circular 230], issued under the authority of 31 U.S.C. § 330, and makes the following additional allegations of fact and charges of misconduct against the above-named Respondent.

I.

That at all times material hereto, Respondent has been eligible to practice before the Internal Revenue Service as a Certified Public Accountant by virtue of 31 C.F.R. § 10.3(b), and that Respondent's last address of record with the Internal Revenue Service is 2282 Sunny Vista Drive, San Jose, California 95128.

II.

That Respondent is subject to disbarment or suspension from practice before the Internal Revenue Service under 31 C.F.R. § 10.50, by reason that Respondent has engaged in disreputable conduct punishable by disbarment or suspension under 31 C.F.R. § 10.51(f), the circumstances of Respondent's offenses being more particularly set forth hereinafter:

- A. Respondent was required by 26 USC §§ 1, 6011(a), 6012(a) et seq., 6013, and/or 6072(a) to file an individual Federal income tax return (Form 1040) for the 1999 tax year no later than April 15, 2000, but failed to do so. See Agency Attachment 1.
- B. Respondent was required by 26 USC §§ 1, 6011(a), 6012(a) et seq., 6013, and/or 6072(a) to file an individual Federal income tax return (Form 1040) for the 2000 tax year no later than April 15, 2001, but failed to do so. See Agency Attachment 2.
- C. Respondent was required by 26 USC §§ 1, 6011(a), 6012(a) et seq., 6013, and/or 6072(a) to file an individual Federal income tax return (Form 1040) for

the 2001 tax year no later than April 15, 2002, but failed to do so. See Agency Attachment 3.

D. Respondent was required by 26 USC §§ 1, 6011(a), 6012(a) et seq., 6013, and/or 6072(a) to file an individual Federal income tax return (Form 1040) for the 2002 tax year no later than April 15, 2003, but failed to do so. See Agency Attachment 4.

**WHEREFORE** the Complainant prays that Respondent be disbarred from further practice before the Internal Revenue Service, pursuant to the provisions of 31 C.F.R. §§ 10.50 and 10.70 issued under the authority of 31 U.S.C. §330.

Dated: San Francisco, California  
October 21, 2003

BRIEN T. DOWNING  
Director, Office of Professional Responsibility  
Internal Revenue Service

By:

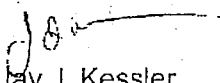
  
Jay J. Kessler  
Senior Counsel  
(General Legal Services)  
Attorney for the Director, Office of Professional  
Responsibility, Internal Revenue Service

EXHIBIT 5

UNITED STATES OF AMERICA  
THE DEPARTMENT OF THE TREASURY

DIRECTOR,<sup>1</sup> OFFICE OF )  
PROFESSIONAL RESPONSIBILITY, )

Complainant, )

v. )

JOSEPH R. BANISTER, )

Respondent. )

Complaint No. 2003-2

DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. Introduction

This is an action brought pursuant to 31 C.F.R. §§ 10.60<sup>2</sup> and 10.91<sup>3</sup> and under the authority of 31 U.S.C. § 330.<sup>4</sup> The Complainant, The Director, Office of Professional Responsibility seeks to have Joseph R. Banister, Respondent, disbarred because, in the course of

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<sup>1</sup>The Director, Office of Professional Responsibility, Internal Revenue Service, Department of the Treasury was formerly known as The Director of Practice. For convenience and as a practical frame of reference, the Court will refer to the Complainant as the "IRS."

<sup>2</sup>This section authorizes the Director to institute a proceeding seeking censure, suspension, or disbarment of a practitioner before the IRS when the Director determines that such practitioner has violated any of the laws governing practice before the IRS.

<sup>3</sup>The IRS Regulations, governing practice before it, were revised, effective July 26, 2002. Under the revised rules, these proceedings apply the revised rules' Subparts D and E, which are procedural in nature, for proceedings instituted as of July 26, 2002 but, substantively, where the *conduct* occurred prior to that date, such conduct is measured under the prior rules. Accordingly, as applied in this case, all of the charges, except for Banister's failure to file his 2002 tax return, were evaluated, substantively, under the prior rules.

<sup>4</sup>31 U.S.C. § 330 provides that the Secretary of the Treasury may regulate the practice of representatives before that Department and may suspend or disbar such representatives who, among other things, are incompetent, or act disreputably, or violate the prescribed regulations.

his representation of taxpayers "T" and "C,"<sup>5</sup> he advised them that they were not required to file federal income tax returns on the grounds that the Sixteenth Amendment to the United States Constitution was not properly ratified and because Sections 861 through 865 of the Internal Revenue Code defines "income" in a manner which excluded their earnings. Subsequently, the IRS amended the Complaint, adding as grounds for disbarment Banister's failure to file his own federal income tax returns for the years 1999 through 2002.

On November 24, 2003, the Court issued its Order on the Complainant's Motion for Summary Judgment. That Order concluded that the IRS "demonstrated through clear and convincing evidence, that ... Joseph R. Banister committed the violations set forth in the original Complaint, as well as those charges added by the Amended Complaint." Order at 10. Because the public has shown interest in this proceeding, the Court will explain the effect of that Order.

A fundamental purpose of conducting a hearing or a trial is to determine whether the allegations of fact, as set forth in a Complaint, occurred. But where there is no dispute as to the underlying facts, obviously there is no need for a court to resolve whether one party's version of the facts is more believable than the other side's version. That is what happened in this case. In fact, in Mr. Banister's Answer to the original Complaint *he admitted* that the facts alleged in the Complaint occurred. Thus, Mr. Banister *admitted* that he so advised his client "C" that the Sixteenth Amendment to the United States Constitution was not ratified and he *admitted* that he advised client "C" that Internal Revenue Code sections 861 through 865 defined "source of income" so as to exclude C's earnings. Similarly, Banister *admitted* that he also advised client "T" that Internal Revenue Code sections 861 through 865 defined "source of income" so as to exclude T's earnings. The very significant problem with Banister's advice to his clients is that it is absolutely wrong. Both of Banister's assertions have been long resolved by the Federal Courts as completely without merit. Thus, Banister was not presenting some new theory in support of the dream entertained by some United States citizens that somehow they don't have to pay federal income taxes.<sup>6</sup> In fact, Banister's assertions have been addressed by so many federal

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<sup>5</sup>Because Banister insisted, albeit at the last moment, through his counsel, that the hearing in this proceeding be held in public, pursuant to 31 C.F.R. § 10.71, this decision should also be made available to the public. To protect the identity of the taxpayers Banister advised, as set forth in the Complaint, they are identified only as "T" and "C."

<sup>6</sup>Were the effect of this advice, misleading taxpayers about their federal tax obligations, not so serious, Banister's worn out theories would be in the laughable category. As noted by the Tax Court: "Some people believe with great fervor preposterous things that just happen to coincide with their self-interest. "Tax protesters" have convinced themselves that wages are not income, that only gold is money, that the Sixteenth Amendment is unconstitutional, and so on. These beliefs all lead - - so tax protesters think - - to the elimination of their obligation to pay taxes. *United States v. Bell*, 238 F.Supp.2d 696, 700 (M.D. Pa. 2003), quoting *Christopher v. C.I.R.*, 2002 WL 71029 \*3 (U.S. Tax Ct. 2002), which in turn quoted from *Coleman v.*

courts that they are no longer afforded the dignity of repeating the explanations as to why the claims are meritless. Accordingly, with no factual dispute as to the allegations in the original Complaint, and having determined as a matter of law that such advice to clients "T" and "C" constituted misconduct and disreputable conduct under the regulatory sections cited in the Complaint, the Court directed summary judgment in favor of the IRS.

With a slightly different twist, the same conclusion was reached with regard to the new claims of Banister's misconduct, as set forth in the Amended Complaint. The Amended Complaint, as noted above, reflected that Banister was apparently following the same advice he was selling to his clients because it charged that Banister himself failed to file his own federal income tax returns for the tax years 1999 through 2002. The twist was that, unlike the original Complaint where Banister admitted to the facts alleged, for the Amended Complaint he *denied* those factual allegations. Thus, although it would seem to appear that the Court would have to resolve, as a factual dispute at a hearing, whether Banister did or did not file his federal returns for those years, the matter is not quite that simple. This is because one does not get a right to a hearing to resolve facts simply by denying the allegations. Once the Complainant has put on some credible evidence to support its claim, a Respondent has a duty to either challenge that evidence itself or to bring forth some conflicting evidence to challenge it.

Here, the IRS did indeed put forward such credible evidence, by submitting official copies of its business records, which records showed that no federal returns had ever been received from Banister for the years in question. At that point, it was Banister's responsibility to come forward with contradicting evidence. In such a circumstance, if one had contradictory facts, they would not be hard to produce. For example, Banister could have produced copies of the tax returns, and sworn that they had been filed. Such evidence would have suggested that the allegations in the Amended Complaint were all a huge mistake, the result perhaps of some misfiling of documents by the IRS. Or, Banister could have offered evidence to show that his earnings were so minimal during the years in question that he fell below the income threshold for the requirement to file returns for those years. Under either example such conflicting facts would have required the Court to determine, through the evidence produced at the hearing, which version of the facts occurred. The problem for Banister was that *he never offered any contradictory facts* to rebut the official IRS records which showed that Banister never filed returns for the years alleged. Under such circumstances, that is there being no genuine factual dispute, the Court then determined that Banister's failure to file his federal tax returns for those years also constituted misconduct under the practice regulations. With summary judgment also fully warranted as to the allegations in the Amended Complaint, the Court acted accordingly.

Having found that the IRS had established that Banister committed the acts alleged in the Complaint and the Amended Complaint and that those acts constituted disreputable conduct, it

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*Commissioner*, 791 F.2d 68, 69 (7<sup>th</sup> Cir. 1986).

remained for the Court to determine the appropriate sanction to be imposed, in light of those acts. Under 31 C.F.R. §10.70, the Court is authorized to order disbarment, suspension, or a reprimand when a practitioner has been shown to be incompetent or disreputable. In order to determine the appropriate sanction to be applied here, a hearing was held to afford the IRS and Banister to present their respective views on that subject. A brief summary<sup>7</sup> of that hearing on the penalty phase along with comments from the Court follows.

#### **The December 1, 2003 Penalty Phase Hearing.**

Mr. David M. Finz, senior attorney for the IRS Office of Professional Responsibility, ("OPR") testified for the Complainant, expressing the views of that office regarding the appropriate sanction to be imposed. Finz serves as the liaison between OPR and the Office of Chief Counsel for General Legal Services ("GLS"). Tr. 13. In that role, upon consultation with the OPR Director, Finz recommends that Office's view of the appropriate penalty to be imposed.

Finz testified that the sanction sought by the Complainant is based upon the nature and severity of the offense, along with any repetitiveness of the offense and, if applicable, whether a Respondent had any prior disciplinary history as a practitioner before the IRS. Tr. 25. Also considered are any aggravating or mitigating factors, and the signal that could be sent to the practitioner community if the IRS failed to discipline or insufficiently disciplined, those who violate the rules of practice. *Id.* Applying those factors, Finz expressed the IRS view that Banister's actions regarding taxpayers "T" and "C" were egregious, because the contentions Banister raised have been consistently rejected by the courts. That being the case, it viewed the assertion of those contentions as frivolous. Finz noted that repetitiveness was also present, as Banister advanced these long rejected views for more than one taxpayer client.<sup>8</sup> Tr. 26. On top of that, as noted in the Amended Complaint, Banister had failed to file his own federal tax returns for several consecutive years. Tr. 27

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<sup>7</sup>The Court read and considered the entire transcript. To the extent that some aspects of that hearing transcript are not discussed, such absence reflects the Court's view that it was unnecessary to note them in this decision. The Court has determined that much of the cross-examination of Mr. Finz does not warrant discussion in this decision.

<sup>8</sup>Finz distinguished that aspect of repetitiveness from the situation where a practitioner has been the subject of an earlier disciplinary action. The IRS acknowledged that this latter sense of repetitiveness was not present in this case.

Finz also expressed that Respondent's experience, as a former IRS employee<sup>9</sup> and his educational background, which includes being a certified public accountant ("CPA"), were aggravating factors. In short, Banister should have known better than to advance these long-rejected arguments. *Id.* In advocating disbarment,<sup>10</sup> as opposed to some lesser sanction, Finz noted that Banister had shown no remorse for his transgressions nor had he repudiated the underlying, discredited, views.

By agreement between the parties, Mr. Banister elected only to make a statement to the Court. This statement was not made under oath, nor was it subject to cross-examination. Tr. 66. Banister began by objecting to the Court's Order regarding admissible evidence at the sanction phase of proceeding.<sup>11</sup> Banister then reviewed his working life, beginning with a newspaper delivery route at age twelve, and his acquiescence to the idea that one had to pay federal taxes on income, an acquiescence that continued through adulthood. When referring to the time he was employed by the IRS, he asserted that he was wrongly accused that he owed thousands of dollars in back taxes. The upshot of this story, was that, not only was the allegation incorrect, but also that he was entitled to a refund for the questioned taxes.<sup>12</sup>

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<sup>9</sup>Banister was an IRS Special Agent with the criminal investigation division. Banister touted this background in promoting his IRS practice. *There was certainly ample evidence of this from Banister himself.* For example the website "Joseph Banister.com" refers to his experience as an IRS special agent with the criminal investigation division. IRS exhibit 2, Tr. 56. So too, Banister's book, *Investigating the Federal Income Tax*, also refers to his former IRS employment. IRS exhibit 8, Tr. 57. These were not the only exhibits where Banister used his background with the IRS in promoting himself. Tr. 59 - 61. Finz believed this promotion of his background operated to give weight to his views before clients. Tr. 28. Finz also expressed that, even if the touting of his work experience with IRS had not occurred, IRS would still be seeking disbarment for the transgressions identified in the Complaint. Tr. 62.

<sup>10</sup>When the case was originally referred, the Director of Practice concurred that disbarment was appropriate. When renamed as the Office of Professional Responsibility, the new Director also agreed with that recommendation.

<sup>11</sup>That Order, issued November 26, 2003, limited the sanction phase to the issue of the appropriate sanction to be applied, in light of the Court's earlier Order granting summary judgment for the IRS. The Court made it clear that the sanction phase would not be a vehicle for Mr. Banister to reargue the violations found to have occurred in the summary judgment order.

<sup>12</sup>Every sentence from Banister's statement must be considered in the context it was given. Hence, it must be remembered his story was not under oath, nor was it subject to cross-examination. And these observations do not take into account that his stories, such as the asserted wrongful claim of back taxes, are not relevant at all to the violations which have been found or to the appropriate sanction to be applied for those violations.

Banister's statement then continued with a recounting of awards he received while an IRS employee. Along the way he "encountered and accumulated information and evidence about the inception and administration of the federal income tax system and the practices of the Internal Revenue Service that deeply disturbed [him] and contributed to a change in [his] perspective." Tr. 73. Answering what he perceived to be a higher calling, he attempted to get answers to his doubts about the federal income tax system, but was ignored in this endeavor. Banister continues to have strong convictions that the IRS does not have the authority to collect income taxes from most United States citizens. He has pursued these convictions without success: "For reasons I do not understand, I have been unable to impress upon my IRS supervisors, IRS collection personnel, IRS appeals personnel, IRS management, the IRS Assistant Commissioner, the IRS Commissioner, the Treasury Inspector General's office, the Treasury Department, the US House of Representatives, the US Senate, the Supreme Court, the Clinton administration, the Bush administration and even an Administrative Law Judge from the Environmental Protection Agency that the IRS as an agency is engaged in serious wrongdoing." Tr. 75. He also ties these views to his religious beliefs: "I believe my perspective about the federal income tax and the IRS, as a certified public accountant assisting clients with IRS matters, is consistent with the teachings of my Christian faith and the ethics of my profession."

Banister also asserted in his unsworn statement that he has "been forbidden from confronting my IRS accusers to evaluate what, if any, evidence they have accumulated to prove that my conduct was willful, knowing, conscious disregard, intentional or reckless. I have been forbidden from introducing my own evidence proving that my conduct was not in any way willful, knowing, conscious disregard, intentional or reckless."<sup>13</sup> This assertion is inaccurate. Banister was permitted to offer any evidence he could muster to rebut the charges set forth in the Complaint and the Amended Complaint. As this decision reflects, he was also given the opportunity to offer any factors for the Court to consider, in mitigation of the violations, in determining the appropriate sanction. Despite the opportunity to do so, Banister offered nothing that the Court could consider as mitigation. Instead, he continued to assert his ardent belief that the IRS acts fraudulently and without authority to impose a federal income tax: "Once I resigned from the Internal Revenue Service, my detailed knowledge of the IRS's wrongdoing increased at a seemingly exponential rate ... I believe that the IRS purposely and fraudulently manipulates its individual master file computer system to achieve desired results against the unsuspecting public, because I have witnessed it." Banister is entitled to whatever beliefs he chooses, but the question

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<sup>13</sup>Banister also claimed to have "been forbidden from presenting evidence of the number of time [he has] petitioned government officials in good faith for a redress of grievances in connection with the income tax and IRS injustices that [he has] encountered." It must be noted that this claim is not relevant to the charges in the Complaint, charges which, as described above, were either admitted by Banister regarding the original complaint or effectively admitted with regard to the amended complaint, by virtue of Banister's failure to come forward with any evidence to rebut the prima facie showing that he failed to file his federal income tax returns for the tax years 1999 through 2002.

here is his fitness to continue practice before the IRS. Espousing his long discredited views regarding the validity of the ratification of the Sixteenth Amendment, his equally discredited view that Section 861 of the Internal Revenue Code accomplished a result which was exactly opposite to the intent to tax the income of United States citizens, and his personal failure to file his own income tax returns for several consecutive years, are all completely inconsistent with such fitness.

The Court does agree with one assertion made by Banister in his unsworn statement. In the context of referring to the reactivation of his CPA certificate, he stated that the preparation materials for his ethics examination noted that: “[e]very person is an independent moral agent capable of making choices and accountable for the consequences of those choices.” Tr. 78. In this case Mr. Banister is being held accountable for the consequences of his choices upon his fitness to continue practice before the IRS.

Mr. Robert G. Bernhoft,<sup>14</sup> one of Banister’s counsel, made the closing argument on Banister’s behalf.<sup>15</sup> Mr. Bernhoft asserted that disbarment would be “draconian.” Tr. 90. Mr. Bernhoft echoed the claims made by Banister in his statement, asserting that “many times the IRS agenda directly conflicts with important Constitutional rights and the concerns of ordinary Americans” and that the historical record of this reflects “a fairly longstanding history of fraud, waste and mismanagement.” Tr. 90-91. Mr. Bernhoft claimed that this disciplinary hearing was “not in public interest at all” and that attempting to stop Banister from his “zealous advoca[cy]” interferes with Americans “paramount right to petition the government for redress of grievance,

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<sup>14</sup>The Court notes that Mr. Bernhoft does not exactly come to this proceeding as purely a detached advocate for the Respondent. In *United States v. Robert R. Raymond and Robert G. Bernhoft*, the United States Court of Appeals for the Seventh Circuit upheld the federal district court’s granting of a permanent injunction “preventing [Raymond and Bernhoft] from engaging in ... activities related to the sale of ... materials known as the ‘De-Taxing America Program’ ... and the incitement to violate federal tax laws.” 228 F.3d.804, 806, 816. (7<sup>th</sup> Cir. 2000). (emphasis added). Like Banister, the Court of Appeals noted that Bernhoft “expressed no remorse concerning [his] participation in the unlawful activities at issue here.” Further, like Banister, Bernhoft “refused to acknowledge that [his] conduct in [the] matter was anything other than perfectly lawful.” *Id.* at 814. Not unlike Banister, in the Respondents’ advertising for their “De-Taxing” Program, they represented that “payment of income tax is a voluntary activity and that individuals cannot be legally compelled to file tax returns or submit to tax investigations or penalties.” *Id.* at 812. As this Court also has observed, the Seventh Circuit has quoted with approval that “the argument that an individual is a sovereign citizen of a state who is not subject to the jurisdiction of the United States and not subject to federal taxing authority is ‘shop worn’ and frivolous.” *Id.* at 812 (emphasis added).

<sup>15</sup>Banister’s other counsel in this proceeding was Mr. Robert Barnes, who also is a member of the Wisconsin State Bar.

including tax grievances." Tr. 91-92.

The balance of Mr. Bernhoft's closing attempted to cloak Banister's actions as an expression of the "fundamental right to unfettered exchange of information and ideas" and that the imposition of a sanction "would chill effective advocacy before the IRS." Tr. 92. According to Mr. Bernhoft, the foundation of this disbarment proceeding arose from Banister's "assert[ing] a legal position that some obscure Tax Court memo apparently hadn't approved of."<sup>16</sup> Tr. 93-94. Likening his client to Thomas Payne, Mr. Bernhoft argued that this proceeding was an attempt by the government to stifle enlightenment and "the liberty of opinion." Tr. 95-96.

In his closing statement, Mr. Kessler, as counsel for the IRS<sup>17</sup>, brought the proceeding back to real world of facts, noting that Banister actions were about his "blatant disregard for the regulations which govern his practice before the IRS that was the cause of the action." The IRS noted that: "[A]s a certified public accountant who is authorized to practice before the IRS, and as a former IRS special agent, Respondent clearly has a more heightened awareness of the legal requirements related to the filing of returns and the payment of taxes [and that] as a practitioner before the IRS, Respondent has a duty to exercise due diligence and further viable arguments in representing clients before the IRS. Instead, the Respondent has shown an utter disregard for the rule of law he must comply with as a tax practitioner before the IRS. This utter disregard is evidenced by his failure to file his own income tax returns for a number of years and his reliance on arguments that have been consistently rejected by the courts to the point where sanctions are ordered and injunctions obtained against individuals making the very same claims as the Respondent." Tr. 83-84.

Mr. Kessler noted, as has this Court, that "a number of courts have clearly rejected the positions taken by Respondent" and that "not a single court has ruled in Respondent's favor on these issues." Tr. 84. He correctly observed that it is "hard to believe that despite his stated extensive research into the subject of federal taxation, the Respondent, a certified public accountant, who also received extensive training to become a special agent for the IRS's criminal investigative division, and then served in that capacity honorably for five years, approximately, failed to be aware of or discover the numerous cases that have refuted the frivolous positions he has taken." Tr. 85. In fact, the Court finds that it is not believable at all and that, if accepted that Banister did not know of all the cases rejecting his views, such unawareness would itself "clearly evidence incompetence on the Respondent's part." *Id.*

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<sup>16</sup>This is a gross misstatement of the basis for this proceeding, as the numerous orders issued by the Court in this case have pointed out.

<sup>17</sup>Ms. Bridgette M. Gibson, Esq., also appeared as co-counsel for the IRS. Ms. Gibson conducted the direct and redirect examination of IRS witness Mr. Finz.

The Court notes that, contrary to the assertions of Banister and his counsel, this case is not about restricting Mr. Banister's beliefs. As expressed by the IRS, "Respondent can have the belief he wants to have. He can advocate that the Internal Revenue Code be changed. He can advocate that there be a flat tax in this country to make it simple. But if he wants to practice before the IRS, he must comply with the regulations which govern such practice based on the laws as they are today, whether he personally disagrees with those laws or not." Tr. 86. The Court agrees with the IRS that Mr. Banister's actions are "about a tax practitioner who demands that the government follow his interpretation of the law when so many courts have already taken the time to consider these arguments and shown him and others the error of their ways."<sup>18</sup> Tr. 87.

Having considered the arguments, statement, and testimony presented at the hearing for the sanctions phase of this proceeding, the Court concludes that nothing less than disbarment is appropriate for Mr. Banister. As reflected in the Orders previously issued, this Court has found that the Respondent committed a number of violations of 31 CFR Part 10, and that these violations demonstrate incompetent and/or disreputable conduct. These violations amply warrant Mr. Banister's disbarment. In the Court's view, either the violations found to have been committed in the original Complaint or the additional violations, which were also found to have occurred, independently warrant nothing short of disbarment.<sup>19</sup> It should be obvious that the combination of both of these grounds for disbarment only serve to make matters worse.

It is clear that Mr. Banister had an obligation to follow the federal tax laws and to comply with the Circular 230 regulations and that he failed to do so. These violations were willful. The provisions of 31 CFR section 10.50 expressly permit suspension or disbarment of a practitioner who is shown to be incompetent or disreputable or who refuses to comply with any of the regulations in 31 CFR Part 10. The Court also finds that Mr. Banister's actions were detrimental to the effectiveness of the Internal Revenue system. No mitigating factors were presented at the hearing. Indeed, Banister was anything but contrite or remorseful for his actions, and thus the Court agrees with the IRS that there is "no reason to believe that he would engage in any different conduct in his future dealings with clients and with the IRS." Tr. 89.

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<sup>18</sup>Appropriately, the IRS notes this case is also "about a tax practitioner who quickly alleges that this action is being taken in retaliation for his having been a former IRS criminal special agent when he uses that very fact in his advertisements and in his letters to the IRS on behalf of his clients [and that Banister traded upon] his former position well when it suit[ed] him, [by] attempt[ing] to rely on his former position to bolster his credibility with gullible members of the public and in his communication with IRS employees. Tr. 87-88. Although the established violations in the Complaint by themselves amply warrant disbarment, the Court notes that this is certainly an aggravating factor.

<sup>19</sup>While this Court entertains no doubt that its findings of the violations in the Complaint and the Amended Complaint will be upheld, it wants to make it expressly clear that, *either* of the demonstrated violations in the Complaint warrant disbarment.

**ORDER**

For the reasons set forth in this decision, the Respondent, JOSEPH R. BANISTER, is hereby ORDERED DISBARRED from practice before the Internal Revenue Service.

William B. Moran  
William B. Moran  
United States Administrative Law Judge

Dated: December 24, 2003  
Washington, D.C.

EXHIBIT 6

**CALIFORNIA BOARD OF ACCOUNTANCY**

2000 EVERGREEN STREET, SUITE 250  
SACRAMENTO, CA 95815-3832  
TELEPHONE: (916) 263-3680  
FACSIMILE: (916) 263-3675  
WEB ADDRESS: <http://www.dca.ca.gov/cba>



January 23, 2004

Mr. Joseph Banister  
2282 Sunny Vista Dr.  
San Jose, CA 95128

**Re: Case No. A-2004-247**

Dear Mr. Banister:

The California Board of Accountancy ("Board") has received the information provided by you regarding your suspension from practice before the Internal Revenue Service. As you have noted, you may file an appeal by today, January 23, 2004. This matter has been assigned to John O'Connor, Investigative CPA. All future correspondence regarding the matter should be directed to the attention of Mr. O'Connor. His telephone number is (916) 263-3976.

The Board is requesting that you provide the status of the appeal action along with a copy of the appeal request and the response from the Secretary of the Treasury of the United States Department of the Treasury and/or the Director of Practice of the Internal Revenue Service.

Please include with your response any information that you would like the Board to consider in this matter.

**Please provide your written response and documentation by February 24, 2004.**

Our request for this information is based on our preliminary review. Additional information may be required by the assigned Investigative CPA, who will contact you directly.

Enclosed for your information is a copy of the Board's handout describing the investigative process.

Sincerely,

A handwritten signature in black ink, appearing to be 'Enj'.

Enforcement Division

EXHIBIT 7

Joseph R. Banister  
Certified Public Accountant

VIA FACSIMILE

February 1, 2004

Mr. John O'Connor  
Investigative CPA  
California Board of Accountancy  
2000 Evergreen Street, Suite 250  
Sacramento, California 95815-3832

Re: Case No. A-2004-247

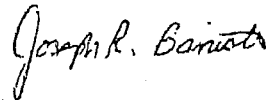
Dear Mr. O'Connor:

Pursuant to the request for status and copy of the appeal request contained in the January 23, 2004 letter sent by the California Board of Accountancy (CBA) Enforcement Division, I am providing the following information.

My appeal of the Administrative Law Judge's "Initial Decision" was filed by the January 23<sup>rd</sup>, 2004 deadline. Many of the documents filed in this administrative case, including the 50 page appeal document requested in your agency's January 23<sup>rd</sup> letter, are available at [www.freedomabovefortune.com](http://www.freedomabovefortune.com) by clicking on "IRS LOCKOUT UPDATE".

If you determine that further information or documents are needed in the future, please contact me in writing. You can fax your correspondence to (408) 615-0819 to reduce unnecessary delay. If the nature of your inquiry absolutely must be oral, please contact my legal counsel Robert Barnes at (414) 276-3333. Thank you.

Sincerely,



Joseph R. Banister, C.P.A.

P.S. Your agency's January 23<sup>rd</sup> letter indicated that a handout describing the investigative process was enclosed but no such handout was enclosed.

cc: Robert Barnes, Attorney at Law

c/o Box 90239  
San Jose, California [95109-4239]  
Office (408) 260-9819 Facsimile (408) 615-0819  
[www.josephbanister.com](http://www.josephbanister.com)

EXHIBIT 8



## CALIFORNIA BOARD OF ACCOUNTANCY

2000 EVERGREEN STREET, SUITE 250  
SACRAMENTO, CA 95815-3832  
TELEPHONE: (916) 263-3680  
FACSIMILE: (916) 263-3675  
WEB ADDRESS: <http://www.dca.ca.gov/cba>



February 19, 2004

Joseph R. Banister  
2282 Sunny Vista Dr.  
San Jose, CA 95128

**Re: Case No A-2004-247**

Dear Mr. Banister:

I have tried to obtain a copy of your appeal from your website; however, I cannot access it. Please mail me a copy by **February 29, 2004**.

Thank you for your cooperation.

Sincerely,

A handwritten signature in cursive script that reads 'John E. O'Connor'.

John E. O'Connor  
Investigative CPA



**Joseph R. Banister  
Certified Public Accountant**

---

**February 25, 2004**

Mr. John O'Connor  
Investigative CPA  
California Board of Accountancy  
2000 Evergreen Street, Suite 250  
Sacramento, California 95815-3832

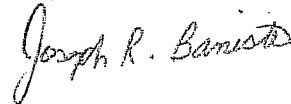
**RECEIVED  
FEB 26 2004  
CALIFORNIA BOARD  
OF ACCOUNTANCY**

Re: **Case No. A-2004-247**

Dear Mr. O'Connor:

Pursuant to your request, I am enclosing a photocopy of the appeal recently filed. The enclosure consists of a 50 page appeal and 2 page certificate of service. It would be appreciated if you would confirm via facsimile or mail that your request has been satisfied. Thank you very much.

Sincerely,



Joseph R. Banister, C.P.A.

cc: Robert Barnes, Attorney at Law

**UNITED STATES OF AMERICA  
THE DEPARTMENT OF THE TREASURY**

DIRECTOR OF PROFESSIONAL RESPONSIBILITY,	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	Complaint No. <u>2003-2</u>
	)	
JOSEPH R. BANISTER,	)	
	)	
Respondent.	)	
_____	)	

**RESPONDENT'S NOTICE OF APPEAL AND APPEAL  
TO THE SECRETARY OF THE TREASURY**

The respondent, Joseph R. Banister ("Banister"), by and through his attorneys, the Law Office of Robert G. Bernhoft, S.C., hereby appeals the judgment of the Administrative Law Judge. *See Decision of the Administrative Law Judge*, December 29, 2003.

The Secretary must reject the recommendation of the Administrative Law Judge (hereinafter "ALJ"), and dismiss the complaint against Banister. The decision of the ALJ merits no deference from the Secretary of the Treasury, due to its evident defects in matters of law. The actions of the agency warrant dismissal of the complaint, due to the agency's egregious misconduct, including retaliatory action against their former agency whistleblower, conducting illicit secret audits and conferences with grand jury prosecutors, secret surveillance of Banister's political appearances, relying on Banister's political publications for initiating this action and recommending disbarment, and failure to follow their own rules and procedures at each stage of this inquisition into Banister, from the investigation to the recommendation for prosecution to their perjured testimony in the proceeding.

Banister files the following exceptions to the IRS' action: the IRS' failure to provide meaningful notice of the allegations prior to commencement of the complaint; the secret parallel criminal proceeding by the IRS; the IRS' retaliatory motives for Banister's free speech and former whistle-blowing activities; the IRS' failure to follow its own rules and attempt to punish Banister for conduct outside the scope of practice before the IRS. In short, the First Amendment and Fifth Amendment, as well as the Administrative Procedure Act and the rules governing the Director of Practice, all require dismissal of the complaint, not disbarment.

Separately, Banister also takes exception to the decisions of the ALJ, in his administration of this case. The ALJ erred in all of the following respects:

- denying Banister any discovery of any documents or any witnesses;
- denying Banister his right to testify on his own behalf as to the merits;
- denying Banister his right to cross examine any of his accusers;
- denying Banister any right to any hearing on the merits;
- applying the wrong standard for summary judgment;
- excluding the exculpatory testimony of IRS witnesses from the entire case;
- relying on the perjured testimony of an IRS official.

Indeed, this case is unprecedented in the history of administrative law. This political prosecution makes a mockery of any semblance of justice in the administrative process. Upholding the ALJ decision and IRS action seals the coffin on cherished ideals of American justice –the right to meaningful notice, the right to a hearing, the right to cross examine accusers in open court, the right to discover exculpatory evidence, the

right against self-incrimination, the right to freedom of expression, the right to petition, and the right to due process of law. Reversal is necessary.

### **I. Standard of Review**

Any respondent has an automatic right to an independent review of the recommendation of an Administrative Law judge. *See* 31 C.F.R. § 10.71. Any error of law by the Administrative Law Judge (hereinafter “ALJ”) must be reviewed de novo. *See* 31 C.F.R. § 10.78. Thus, the legal errors by the ALJ merit no deference.

The ALJ abdicated his role of independence and merely served as a rubber stamp for the government. His extraordinary errors – exceptional only in their infidelity to the rule of law -- require vacating his recommendation and dismissing the case.

### **II. The Law Governing Licensing Practice Before the IRS**

The Constitution protects a person’s right to practice before the IRS. *See Bell v. Burson*, 402 U.S. 535 (1971). The license to practice is a protected property interest. *See id.* The IRS can only take away this license by due process of law. *See id.* Practice before the IRS only involves “representing clients before the IRS” and even that is limited to “matters connected with a presentation to the IRS” concerning a client’s “rights, privileges or liabilities” relating to only those “laws or regulations administered by the IRS.” *See* 31 C.F.R. § 10.0, 10.2. In fact, the regulations governing practitioners admits at the outset that the authority of those regulations is limited only to the practitioner’s conduct in actually “representing clients before the IRS.” *See* 31 C.F.R. § 10.0. Therefore, the regulations do not vest unfettered discretion in the IRS to disbar or suspend those authorized by Congress, rather than the IRS, to practice before the agency. Otherwise, the agency could use its disbarment authority to limit aggressive advocacy,

punish the exercise of free speech, and penalize those successful on behalf of clients against government misconduct. Yet, that is exactly what the IRS did here.

First, the rules impose strict limits on what substantive conduct the Director of Practice can regulate when that conduct involves a Congressionally licensed practitioner. The conduct must involve “representation” of a “client” of the practitioner in practice “before the IRS.” Mere client representation cannot permit the invasive desires of the IRS. Instead, the practitioner’s conduct must be conduct “before the IRS” which refers only to “presentations to the IRS” about a client’s liabilities. Even there, the presentations to the IRS must concern the laws and regulations administered by the IRS; those laws outside the scope of the IRS cannot be the basis for punitive action by the IRS. Similarly, citizens can freely disagree with the opinions of the government, including the opinions of the IRS or the lower courts. In fact, the regulations only prohibit “frivolous” arguments if those arguments are made on tax returns. *See* 31 C.F.R. § 10.34. Even a tax return argument is not frivolous if it has any “reasonable possibility of success” which is measured by the practitioner’s knowledge of internal IRS procedure. *See* 31 C.F.R. § 10.34. The IRS Manual itself so advises practitioners, permitting the IRS to adapt any position it desires as long as there is no U.S. Supreme Court case law against the IRS. *See* IRM § 4.10.7.2.9.8.

Still, the regulations permit advocacy of controversial positions, as the drafters did not want to muzzle practitioners. Thus, the practitioner enjoys a safe harbor from sanction as long as the tax return position was adequately disclosed to the IRS, was not the result of gross incompetence, and the client was informed of possible penalties. *See* 31 C.F.R. § 10.34. These safe harbors for practitioners reflect Congressional concern that

sincere practitioners not lose their licenses over mere disagreement with the government agency or innocent mistakes.

The regulations impose a further substantive limit on the power of the Director to “disbar” a practitioner, which merely means the Director’s ability to refuse recognition of a representative chosen by a citizen to be their representative. The regulations permit “disbarment” only for willful violations of the rules themselves. *See* 31 C.F.R. § 10.52. The definition of willfulness is familiar to tax practitioners. As the Director acknowledged, willfulness is the “voluntary, intentional violation of a known legal duty.” *See IRS Motion for Summary Judgment*, at 32.

This willfulness requirement protects innocent practitioners from unintentional violation of the rules. By definition, the conduct itself may be intentional, but that allegation does not suffice. The rules require willful violation of the rules themselves, not mere willfulness in the underlying act. The rationale is quite simple – Congress did not want people to lose their licenses for conduct they did not know could jeopardize their licenses. Hence, Congress required a nexus between the definition of willfulness and the rules themselves.

The Supreme Court has recently clarified the required elements of such “willfulness.”

Willfulness...requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.

*United States v. Cheek*, 498 U.S. 192, 201 (1991).

A volitional act does not suffice. An intentional act does not suffice. A volitional intentional act does not suffice. The act of volition and intentionality must involve notice

and knowledge of the law itself -- in this instance, the law governing practice before the IRS. This comports with Congressional intent and Constitutional due process.

Correlating to this definition of willfulness and concern for due process, Congress imposed a special "opportunity to comply" requirement as a precondition to disbarment when the IRS cannot allege willful violation of the regulation itself. As the regulations codify:

A proceeding will not be instituted under this section until...the proposed respondent...has been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

31 C.F.R. § 10.54 (2000).

This follows from the directive of the Administrative Procedures Act, codified in Section 558. The "opportunity to comply" provision insures everyone a "second chance" before government sanctions can issue. As the Ninth Circuit recently observed:

**The statute requires written notice and an opportunity to demonstrate or achieve compliance, all 'before the institution of agency proceedings.' In this instance, the government did not follow the statutorily-mandated procedures.** The show cause letter stated that "permit action is warranted" and proposed 100 percent cancellation of the permit, requesting a response as to 'why this proposed permit action should not be taken.' Anchustegui was **entitled to written notice that would afford him the opportunity to correct deficiencies in his performance** under this permit. *See Air North America v. Dep't of Transp.*, 937 F.2d 1427, 1438 (9<sup>th</sup> Cir. 1991) ('the purpose of section 558 c is to provide individuals with an **opportunity to correct their transgressions before the termination or suspension of their licenses**').

*See Anchustegui v. Dep't of Agriculture*, 257 F.3d 1124, 1129 (9<sup>th</sup> Cir. 2001) (some citations omitted) (emphasis added).

Separate from these substantive limits, the rules also impose a host of procedural protections for all practitioners. These provisions ensure a fair and accurate adjudication before stripping a duly authorized practitioner of their right to practice before the agency. At each step, written referrals must be made, documentation of the allegation provided,

an opportunity to comply offered, and, only then, a proceeding into an administrative adjudication.

The administrative adjudication involves detailed notice of the facts alleged, opportunities to answer and employ counsel, a hearing on the merits, a clear order finding facts and conclusions of law, and an appeal directly to an independent official. All along, the premier concern reflects the due process interest of the practitioner.

To enforce the due process mandates of the Constitution, the code utilizes the following process. First, as soon as any IRS employee receives any information or has any reason to believe a practitioner's conduct may violate the regulations, they must "promptly make a written report" of the conduct. *See* 31 C.F.R. § 10.53. This insures that those closest to the allegations are the ones making the report and documenting their findings.

The IRS employee with direct knowledge of the supposed violation must forward their written report to the Director of Practice. *See id.* The code requires the Director of Practice make an independent review of any report of alleged misconduct. The Director can issue a mere reprimand if the Director chooses. Unless the Director's own independent review uncovers serious misconduct, the case must be dismissed.

The Director of Practice must make a finding that conduct warrants suspension or disbarment before proceeding further. Even at this later stage of the proceeding, the process provided by the regulations protect against unfair or inaccurate findings. An independent referral making written findings and a Director finding misconduct are not enough to initiate a complaint against the practitioner.

If the Director of Practice chooses to pursue either suspension or disbarment, the Director must, in writing, inform the practitioner of the facts that warrant disbarment.