FOURTH SECTION

to exclude T's earnings. The very significant problem with Banister's advice 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 their federal income taxes. In fact, Banister's assertions have been addressed by so many federal courts that they are no longer accorded 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."

While Judge Moran found it appropriate to decide the question of whether Respondent committed the acts alleged in the Initial Complaint, and the question of whether those acts constituted disreputable conduct, on the basis of Complaint's Motion for Summary Judgment, and found that such violations and their status as disreputable conduct had each been proved by clear and convincing evidence, the court held a hearing under §10.70 of Treasury Circular 230 to determine which of three potentially applicable sanctions – disbarment, suspension or censure – to impose against Respondent. In his Decision of the Administrative Law Judge, Judge Moran summarized what he took to be the testimony from that hearing most relevant to the sanctions determination.

From the testimony of Mr. Frinz, he discerned that the Director of the Office of Professional Responsibility made a determination of which sanction to seek against a practitioner based on the severity of the offense, whether it was repetitive, the nature of the signal that would be sent to the practitioner community if the IRS failed to discipline, or insufficiently

disciplined, a practitioner in light of the conduct charged, and other aggravating and mitigating factors. Mr. Frinz indicated that the Director considered the conduct: egregious because the contentions advanced by Respondent had consistently been rejected by the courts; and repetitive because the views had been advanced on behalf of more than one client. Mr. Frinz also indicated that Respondent's experience, including but not limited to that as a former IRS employee, his educational background, and the fact that he was a certified public accountant were aggravating factors in that a practitioner of his experience should have known better than to advance these long-rejected arguments. Judge Moran noted that there was also ample evidence to this effect in the administrative record "from [Respondent] himself." Judge Moran also noted that Mr. Frinz had indicated that the Director of the Office of Professional Responsibility has also determined that a sanction less than disbarment was inappropriate since Respondent had neither shown remorse nor repudiated the underlying, discredited views.

Judge Moran then went on to discuss at length various statements made by Respondent in the unsworn statement Respondent read during the hearing on sanctions held on December 1, 2003. The most salient portions of those materials (from page 6 of the Decision of the Administrative Law Judge) appear below:

> **"Along the way, he [Respondent] '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. [Respondent] continues to have strong convictions that the IRS does not have 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, the 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 is engaged in serious wrongdoing.' Tr. 75. He 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.'"

Again, at pages 6-7 of the Decision of the Administrative Law Judge, Judge Moran noted:

"[Respondent] 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.' This assertion is inaccurate. [Respondent] was permitted to offer any evidence he could muster to rebut the charges set forth in the [Initial] 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, [Respondent] offered nothing that the Court could consider in mitigation. Instead, he continued to assert his ardent belief that the IRS acts fraudulently and without authority to impose a federal tax: 'Once I resigned from the Internal Revenue Service, my

detailed knowledge of the IRS's wrongdoing increased at an exponential rate. . . . I believe that the IRS purposelessly and fraudulently manipulates its individual master file computer system to achieve desired results against an unsuspecting public, because I have witnessed it.' [Respondent] is entitled to whatever beliefs he chooses, but the question here is his fitness to continue to 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, . . . are all completely inconsistent with such fitness."

Finally, Judge Moran noted with apparent approval and agreement the following statements from the closing argument of Complainant's counsel, Mr. Kessler:

"In his closing statement, Mr. Kessler, as counsel for the IRS, brought the proceedings back to the real world of facts, noting that [Respondent's] actions were about his 'blatant disregard for the regulations which govern his practice before the IRS that was the cause of this action.' The IRS noted that: '[A]s a certified public account[ant] 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. This utter disregard is evidenced by . . . his reliance on arguments that have been consistently rejected by the courts to the point where sanctions have been ordered and injunctions obtained against individuals making the same claims as the Respondent."

"Mr. Kessler noted, as has this court, that 'a number of courts have clearly rejected the position 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 investigation 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 Respondent's part."

Decision of the Administrative Law Judge, p. 8.

From the above, I conclude that there was clear and convincing evidence in the record to support Judge Moran's determination that Respondent willfully and knowingly committed each of the violations with which he was charged in the Initial Complaint. It follows that it is even clearer than Judge Moran's determination in this regard was not "clearly erroneous." Judge Moran's quotation of Respondent's unsworn statement clearly evidences his awareness of the "willfulness" requirement of §10.52(a) of Treasury Circular 230 and his findings with respect to Respondent's beliefs and his express holding that Respondent's actions were willful are clearly consistent with the Supreme Court's holding in Cheek as to the appropriate consideration of "objective unreasonableness" – determining the credibility of the party asserting a good faith but mistaken belief defense, and the nature of that belief. Judge Moran clearly found that credibility lacking. I agree. In addition, I find that Respondent's own unsworn statement, to which Judge Moran referred at length, reflects that Respondent's beliefs are not a good faith misunderstanding of a known legal duty but rather a

"'studied conclusion . . . that [the law is] invalid and unenforceable.'" United States v. Willie, supra, at p.1392 (citing the Supreme Court's decision in Cheek v. United States, at 205-206). See also the decision of the United States Court of the Appeals for the 7th Circuit on remand from the Supreme Court, United States v. Cheek, 931 F.2d 1206, 1208-1209 (7th Cir. 1991). Such a belief does not indicate a lack of willfulness. Further, as noted above, I also would have found Respondent's omission of any reference to and discussion of the adverse precedents relating to Respondent's §861 "source of income" argument in the amended income tax returns (Forms 1040X) Respondent prepared for Taxpayer T for the 1996 and 1998 tax years to be further evidence of Respondent's lack of good faith.

3. Allegations Raised in the Amended Complaint

The charges made for the first time in the Amended Complaint relate to Respondent's purported failures to file individual income tax returns for the years 1999, 2000, 2001 and 2002, which Complainant charged constituted disreputable conduct punishable by disbarment or suspension under § 10.51(f) of Treasury Circular 230. As noted above, the provisions of Treasury Circular 230 in effect on the date of the alleged conduct govern whether a violation of Circular 230 occurred. See § 10.91 of Treasury Circular 230. The due dates for individual income tax returns for the years 1999, 2000, 2001 and 2002 were April 15, 2000, April 15, 2001, April 15, 2002 and April 15, 2003, respectively. While the first three of these dates preceded July 26, 2002, there was a provision contained in Treasury Circular 230 as amended and in effect on each of the dates in issue (§ 10.51(d)) identical in all material respects to §10.51(f) of Treasury Circular 230 as amended and in effect on and after July 26, 2002. In each instance, the relevant provision of Treasury Circular 230 provided that the following conduct constituted disreputable conduct for which an attorney, certified public accountant, enrolled agent or enrolled actuary could be disbarred or suspended from practice:

"Willfully failing . . . to make a Federal income tax return in violation of the revenue laws of the United States . . .."[2]

Due to the clarity of the allegations contained in the Amended Complaint and the absence of any substantive difference between the provisions of Treasury Circular 230 in effect at the time of the alleged acts or omissions and the provision referred to in the Amended Complaint, I find no prejudice to Respondent in addressing the substance of each of the four charges raised in Complainant's Amended Complaint.

The language of § 10.51(f) (formerly § 10.51(d)) of Treasury Circular 230, insofar as it relates to a failure to file a return, is similar to the language contained in Section 7203 of the Internal Revenue Code of 1986, as amended and in effect on each of the years and dates in issue:

"Any person . . . required by this title or regulations made under authority thereof to make a return . . . who willfully fails to . . . make such return . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor . . .."

While the degree of proof required of the Government in a Section 7203 prosecution (proof beyond a reasonable doubt) and that required of the Complainant in a Treasury Circular 230 proceeding (proof by a preponderance of the evidence or by clear and convincing evidence, depending on the sanction sought) differ in degree, in each instance the burden is on the charging

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[2] As in effect prior to July 26, 2002, § 10.51(d) of Treasury Circular 230 provided "Willfully failing: to make a Federal tax return in violation of the revenue laws of the United States, or evading, attempting to evade, or participating in any way in attempting to evade any Federal tax or payment thereof, knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof, or concealing assets of himself or another to evade taxes or the payment thereof . . .." From and after July 26, 2002, §10.51(f) of Treasury Circular 230 provides: "Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, willfully evading or attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal income taxes or the payment thereof."

party to sustain its burden of proof with respect to each of three elements of the alleged violation. First, did Respondent have a legal duty to file an individual tax return for each of the four years in issue? Second, did Respondent fail to timely file an individual tax return for each of the four years in issue? Third, were Respondent's failures "willful?" Cf., e.g., United States v. Ostendorff, 371 F.2d 729, 730 (4th Cir.), cert. denied, 386 U.S. 982 (1967); United States v. Quimby, 636 F.2d 86, 90 (5th Cir. 1981); United States v. Buckley, 586 F.2d 498, 503-504 (5th Cir. 1978), cert. denied, 440 U.S. 982 (1979); United States v. Brodie, 858 F.2d 492, 497 (9th Cir. 1988); United States v. Poschwatta, 829 F.2d 1477, 1481 (9th Cir. 1987), cert. denied, 484 U.S. 1064 (1988); United States v. Buras, 633 F.2d 1356, 1359-1360 (9th Cir. 1980); United States v. Harting, 879 F.2d 765, 766-767 (10th Cir. 1989).

For the reasons set forth below and under the standards of review discussed in Section 1 above, I find that Complainant has failed to meet his burden with respect to the first element of his three elements of proof. While I would normally remand this case to Judge Moran to allow Complainant to introduce evidence to meet his burden with respect to this element of proof, as noted in Section 2 above, I agree with Judge Moran that the violations contained in the Initial Complaint, discussed in Section 2 of this Decision, alone provide ample support for Judge Moran's determination to disbar Respondent from practice before the Internal Revenue Service. Accordingly, I will not remand this case to allow the development of a more complete record on the first element of required proof on four allegations relating to Respondent's alleged failures to file individual tax returns for the years 1999 through 2002, inclusive.

Under §6012 of the Internal Revenue Code of 1986, as amended and in effect for each of the years in issue, the determination of whether an individual has an obligation to file a Federal income tax return for a taxable year can be made only after a determination is made that an individual had gross income for the taxable year which equaled or exceeded the sum of an amount equal to an "exemption amount" plus the amount of

the standard deduction to which the individual was entitled. Under §6012, both the "exemption amount" and the amount of the standard deduction to which a taxpayer is entitled differ depending on the taxpayer's filing status [as either (i) an unmarried individual not filing as a surviving spouse or head of household, (ii) a head of household, (iii) a surviving spouse, or (iv) an individual entitled to file a joint return unless the taxpayer's spouse filed a separate return for the year or the spouse was entitled to be claimed as an exemption on another taxpayer's return].

The courts have held that the Government is not required to prove that a taxpayer had a tax liability for the taxable year in order to sustain a conviction for a willful failure to file a tax return under Section 7203. See, e.g., United States v. Hairston, 819 F.2d 971 (10th Cir. 1987). The same was found to be true with respect to a disbarment proceeding under Treasury Circular 230. Owrutsky v. Brady, 925 F.2d 1457 (4th Cir. 1991) (the fact that a tax practitioner owed no tax was irrelevant when the record showed the practitioner's awareness of an obligation to file a return notwithstanding the absence of a tax liability). However, to support a conviction under Section 7203 for a willful failure to file a tax return, the Government must introduce evidence that the taxpayer had gross income for the taxable year sufficient in amount to require the taxpayer to file a tax return, and proof of gross receipts alone may not suffice. See, e.g., United States v. Brewer, 486 F.2d 507 (10th Cir. 1973), cert. denied, 415 U.S. 913 (1974); Clark v. United States, 211 F.2d 100, 102 (8th Cir. 1954), cert. denied, 348 U.S. 911 (1955). See also Comisky, Feld & Harris, Tax Fraud and Evasion, ¶ 2.09[1][a], p. 2-78, footnote 328 and accompanying text.

The record in these proceedings contains no evidence that supports a finding that Respondent had a sufficient amount of gross income for any of the four years in issue to require him to file a federal income tax return for any of the four years. While the Complainant's pleadings in these proceedings and the referral to the Director of the Office of Professional

Responsibility indicate that Internal Revenue Service personnel heard Respondent indicate on a radio show that he did not file because of his beliefs respecting the Sixteenth Amendment and the §§861-865 "source of income" rules, there is no actual evidence in the record to that effect. Moreover, the record in these proceedings contains no indication that Respondent ever admitted that he had the requisite gross income in any of the four years (nor, for that matter, does the record reflect that Respondent was ever asked to admit that he had the requisite gross income for any of the four years, through focused and specific allegations in the Amended Complaint or otherwise).

Judge Moran, noting that the Complainant had introduced business records of the Internal Revenue Service to prove that Respondent had not filed individual income tax returns for any of the four years in issue, and surmising that the reason Respondent may have failed to file was that he followed the same advice he gave to Taxpayer C and Taxpayer T in determining his obligations for the years in issue, found that sufficient to satisfy Complainant's burden of proof with respect to both the first and second element of Complainant's burden of proof (though Judge Moran's Decision blends these two elements). However, the record of the proceedings contains no evidence indicating why Respondent failed to file individual tax returns for these years. Judge Moran found Respondent's general denial of the charges with respect to Respondent's alleged failures to file individual tax returns for the years in issue insufficient to impose any further burden of proof on Complainant, given that the facts necessary to disprove these charges, if such facts existed, were uniquely within the possession of Respondent.

Judge Moran may have been influenced in his holding by the cases cited by Complainant indicating that a party to a proceeding could not defeat a motion for summary judgment by relying on a general denial rather than introducing some proof of a material fact in dispute. See, e.g., Strong v. H.G. France, 474 F.2d 747, 749 (9th Cir. 1973). But relying on that line of reasoning

begs the question. The fact remains that Complainant failed to introduce any evidence of gross income in any of the four years in issue for Respondent to deny or controvert, and Respondent never admitted that he had the requisite income in any of the four years. In effect, Judge Moran's decision would require Respondent to raise his lack of a legal obligation to file an individual tax return for the years in issue by affirmative defense, and would find Respondent's general denial of an obligation to file unavailing for that purpose.

Under the provisions of Treasury Circular 230 in effect on the dates of Respondent's conduct relating to these charges, I find it inappropriate to remove from Complainant one of the key elements of his burden of proof. Even without Respondent's cooperation, Complainant could have used indirect methods of proof (such as an examination of bank accounts and other financial records, or net worth audits) to produce some evidence that proved Respondent had sufficient gross income during each of the taxable years in issue to require Respondent to file a tax return. Complainant has not done so and accordingly has not met his burden of proof on the first of his three elements of proof on these four charges.

With respect to the second element of proof, I find that Complainant has met his burden of proving that Respondent failed to timely file an individual income tax return for each of the years in issue, if such a return was required to be filed, through the introduction certified records of accounts relating to Respondent for each of the years in issue. Courts have long recognized that such business records of the Internal Revenue Service are sufficient to support the Government's burden on the second element of its proof in prosecutions under Section 7203. See, e.g., United States v. Farris, 517 F.2d 226, 227-229 (7th Cir.), cert. denied, 423 U.S. 892 (1975); and United States v. Neff, 615 F.2d 1235, 1241-1242 (9th Cir.), cert. denied, 447 U.S. 925 (1980). It follows that the same is true of the lesser burden of proof Complainant must satisfy in these proceedings. I also note that

reliance on such records is clearly countenanced by §10.72(c) of Treasury Circular 230.

The third element Complainant must prove is that Respondent's failures to file tax returns were "willful." As noted in Section 2 above, in the context of criminal prosecutions under Section 7203, the courts have found that "willfulness" requires proof of a willful violation of a known legal duty (the duty to timely file a return). United States v. Pomponio, supra. The record in these proceedings clearly reflects that: (1) Respondent has a bachelor's degree in accounting and is a certified public accountant licensed to practice by the State of California; (2) before entering Federal Government service, Respondent was employed for several years doing tax work as a manager in a national accounting firm; (3) Respondent was employed for several years as a Special Agent by the Criminal Investigation Division of the Internal Revenue Service; and (4) Respondent for many years following his Federal government service has made his living representing taxpayers before the Internal Revenue Service and by providing tax advice. Moreover, as noted in Section 1 above, in United States v. Boyle, supra, the duty of timely filing federal tax returns is one that the courts have long recognized as one so easy to comprehend that it is normally a non-delegable duty placed upon every citizen. It follows a fortiori that the same duty to timely file an income tax return would be a known legal duty for an experienced tax practitioner if that person had the requisite gross income to require a return to be filed. In fact, in Owrutsky v. Brady, 925 F.2d 1457 (4th Cir. 1991), the United States Court of Appeals for the Fourth Circuit reversed a holding of the Unites States District Court for the District of Maryland at Baltimore, and upheld the Secretary of the Treasury's disbarment of Owrutsky for disreputable conduct under §10.51 (d) of Treasury Circular 230 (specifically, "willfully failing to make Federal tax return[s] in violation of the revenue laws of the United States"). In so holding, the Fourth Circuit applied the standard of "willfulness" set forth in United States v. Pomponio, supra (discussed at length in Section 2, above), finding that Owrutsky had engaged in a "voluntary, intentional

violation of a known legal duty," and that willfulness may be found when "the obligation to act is fully known and consciously disregarded." The District Court below had found that Owrutsky's eligibility for refunds and his lack of tax liability precluded the finding of a willful motive. Reversing, the Fourth Circuit noted:

> **"The [District] [C]ourt held that Owrutsky's eligibility for refunds and his lack of tax liability precluded a willful motive. The court overlooked the important finding by the ALJ that Owrutsky, an experienced practicing attorney, was fully aware that he had a legal duty to timely file returns regardless of his tax liability. See, Spies v. United States, 317 U.S. 492 (1943). Under the *Pomponio* standard, willfulness does not require proof of any motive other than an intentional violation of a known legal duty."**

That established, had Complainant met his burden with respect to the first element of his proof, the only question that would have remained would have been whether Respondent had a good faith but mistaken belief that he had no obligation to file a tax return for any of the four years in issue. For the reasons stated in Section 2, above, if Respondent had asserted that his reasons for failing to file his individual income tax returns were his belief that the Sixteenth Amendment to the United States Constitution had not been ratified, and/or his belief that §§ 861-865 of the Internal Revenue Code of 1986, as amended and in effect during the years in issue, established that his income was not subject to tax, I would agree with the Administrative Law Judge that Respondent had failed to establish a good faith but mistaken belief defense with respect to those failures for the same reasons I affirmed Judge Moran's decision with respect to the charges contained in the Initial Complaint. See discussion in Section 2, above. I would also note that Respondent's failures to file for the year 2000 also occurred after the decision of the Tax Court in Williams v. Commissioner, supra, and that his failures to file for the years 2001 and 2002 occurred after the Tax Court's decisions in both Williams v. Commissioner, supra and Furniss v. Commissioner, supra.

Had Complainant met his burden with respect to the first element of his proof, there is an additional reason why I would have found that Complainant had met his burden with respect to "willfulness." Unlike the burden of proof concerning whether Respondent in fact had sufficient gross income in each of the four years in issue to impose upon Respondent a duty to file a tax return for each of those years, it is Respondent who must establish his "good faith misunderstanding" of a known legal obligation through an affirmative defense. The record in these proceedings is devoid of any explanation of Respondent's failures to file individual income tax returns for the four years in issue. Accordingly, Respondent failed to meet his burden of proof with respect to the availability of any affirmative defense of a good faith but mistaken belief that he did not have an obligation to file tax returns for the years in issue.

4. Respondent's Constitutional and Procedural Objections

In his Appeal, Respondent raises a number of constitutional and/or procedural objections with respect to the actions of the Director of the Office of Professional Responsibility and/or the Administrative Law Judge in these proceedings. Each objection is discussed below.

First, Respondent claims that Judge Moran erred in allowing these proceedings to go forward in light of what Respondent characterized as "egregious agency misconduct." The conduct alleged includes: (i) the existence of what Respondent characterized as a "secret" parallel criminal investigation and the alleged use of these proceedings to develop evidence for that proceeding and alleged Fifth Amendment violations arising from the parallel proceedings; (ii) alleged retaliation against Respondent for exercise by Respondent of his free speech and free assembly rights guaranteed by the First Amendment and for Respondent's actions as a "whistleblower;" (iii) alleged retaliation against Respondent because he is a former employee of the Internal Revenue

Service; and (iv) the alleged "publication" of a ruling in these proceedings before the issuance of final agency action in these proceedings.

With regard to the existence of an allegedly "secret" parallel criminal proceeding, this claim was the subject of Judge Moran's November 19, 2003 Order Regarding Respondent's Motion to Abate the Case. In his Motion, Respondent alleged (1) that "the government is conducting a criminal investigation into the Respondent" and (2) "upon information and belief of the Respondent, Complainant will utilize these proceedings as a tool of a pending criminal investigation. . .," which Respondent asserted involved "related or the same allegations" (Respondent's Motion to Abate the Case, p.2). At p. 1 of his Motion to Abate the Case, Respondent alleged that in United States v. Kordel, 397 U.S. 1 (1970), the Court "circumscribed the ability of the government to conduct criminal investigations under the cloak of administrative process" and noted that "civil process should not be utilized to obtain evidence for a criminal process." From this Respondent concluded that "the proper process is to abate the[se] proceedings" (Respondent's Motion to Abate the Case, p.1) since doing otherwise would force the Respondent "to choose between the assertion of his Fifth Amendment rights against self incrimination and his livelihood in representing clients . . .[,] the very kind of 'unfair injury' the [C]ourt [in Kordel] intended to protect against." (Respondent's Motion to Abate the Case, p. 3).

In his Opposition to Respondent's Motion to Abate the Case, Complainant admitted that there was a pending criminal case involving Respondent, but indicated:

> **"The sole purpose of the Director of Professional Responsibility's issuance of a complaint and amended complaint seeking the disbarment of the Respondent is to take action against a tax practitioner who practices before the Internal Revenue Service who has engaged in disreputable conduct, incompetent representation of**

clients, and who has failed to comply with the regulations set forth in Circular 230. In addition, the instant proceedings before the Administrative Law Judge are being conducted for the sole purpose of providing the Respondent with an opportunity to defend against the disbarment action before an impartial presiding official. Neither the Director of Professional Responsibility's issuance of a complaint or amended complaint or the instant administrative proceedings has the purpose of obtaining evidence for a criminal proceeding."

"Although there are grand jury proceedings concerning the Respondent, those proceedings are separate and apart from this administrative action. . . ."

Complainant's Opposition to Respondent's Motion to Abate the Case, p. 5. Judge Moran agreed, noting at p. 4 of his Order on Respondent's Motion to Abate the Case:

"This case is about whether the matters raised in the Complaint and the Amendments to it, constitute incompetent or disreputable conduct. Clearly, on this record, this administrative proceeding is not a subterfuge to acquire information for use in any potential criminal action. This administrative proceeding has independent legitimacy in carrying out the IRS's important responsibility to protect the public from practitioners who engage in disreputable or incompetent behavior. Where a legitimate disbarment proceeding is in process, it would be [an] odd situation to allow alleged offenders to continue to practice before the IRS where a grand jury is also conducting an investigation, while no such delay would be faced for those practitioners who were only dealing with disbarment. The public would be ill served by such a result. Further, it would appear that *if* any problems of admissibility of evidence developed in this administrative proceeding, the question of the use of such evidence should properly be resolved at the time such a matter ever comes before a criminal tribunal."

I agree with Judge Moran.

With regard to Respondent's Fifth Amendment claim, Complainant correctly noted at p. 6 of his Opposition to Respondent's Motion to Abate the Case the Constitution does not always require a stay of a civil proceeding pending the outcome of a criminal proceeding. Keating v. Office of Thrift Supervision, 45 F.3d 322 (9th Cir.), cert. denied, 516 U.S. 827 (1995); Federal Savings & Loan Insurance Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989); Securities & Exchange Commission v. Dresser Industries, 628 F.2d 1368 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980). Rather, the decision of whether or not to stay the civil proceedings should be made "in light of the particular circumstances and competing interests involved in the case." Federal Savings & Loan Insurance Corp. v. Molinaro, supra at 902. In the context of these proceedings, the five factors weighed by the 9th Circuit in Molinaro were: (1) the interests of the Complainant in proceeding expeditiously with these proceedings or any aspect of it, and the potential prejudice to Complainant of any delays; (2) the burden which any particular aspect of the proceedings places upon Respondent; (3) the convenience of the Court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not party to these proceedings; and (5) the interests of the public in the pending civil and criminal proceedings.

Judge Moran assessed each of the Molinaro factors in determining that, in light of all the circumstances and the competing interests of the parties, these proceedings should continue notwithstanding the existence of the separate criminal proceedings. First, Judge Moran noted that Complainant has a substantial interest in stopping those who make frivolous contentions in representing clients before the Internal Revenue Service. I concur in Judge Moran's finding in this respect. There are several reasons why the Internal Revenue Service has an interest in preventing practitioners from asserting frivolous and meritless arguments on behalf of taxpayers. The first is fairness

to the represented taxpayers themselves. If taxpayers assert these positions, they will likely be subject to civil and/or criminal tax penalties, as well as interest on both the tax deficiencies and penalties. The cumulative effect of these liabilities, particularly if resolution of the issue is prolonged, can be ruinous. Second, if taxpayers take frivolous positions that are not detected on audit, the Federal government is deprived of needed tax revenues lawfully owed. This results in one of several forms of unfair burden being placed upon other taxpayers, and upon citizens as a whole. Depending on the public policy choices made, the burden to others may take the form of increased taxes, growing deficits (and with them growing costs of Federal government borrowings), increased interest rates for both governmental and private sector borrowing, a decrease in the availability of funds available for private sector borrowing, inflation and the overall drag on economic performance that can result from one or a combination of the above. Complainant also has an interest in avoiding delays in dealing with practitioners urging taxpayers to take unreasonable positions because of the extreme administrative burdens such practitioners place on our tax system. Each of these factors was recognized by the Supreme Court in United States v. Boyle, supra.

With regard to the burdens placed on Respondent, I agree with Judge Moran that whatever harm may exist with regard to Respondent's Fifth Amendment rights has been ameliorated by the fact that Respondent has admitted the facts that form the basis of the charges contained in the Initial Complaint. I agree with Judge Moran on this point, at least insofar as it relates to the charges contained in the Initial Complaint.

In his Opposition to Respondent's Motion to Abate the Case, Complainant had argued that any such harm could be further ameliorated by Respondent selecting invoking his Fifth Amendment privileges with respect to specific troublesome areas of possible testimony as to both the charges contained in the Initial Complaint and those raised for the first time in the Amended Complaint, and that in any event, with respect to the

charges raised for the first time in the Amended Complaint regarding his failure to file tax returns for 1999, 2000, 2001 and 2002, there would seem to be no need to protect a privilege since Respondent had denied each of the charges, a fact Complainant equated with a statement that Respondent denied all facts associated with those charges.

I disagree with both these assertions. The Fifth Amendment privilege is a subject matter privilege. It cannot be selectively invoked. Accordingly, once any testimony is given with respect to a given subject matter, no privilege exists with respect to other testimony within the subject matter area. Further, I do not view Respondent's general denial of the charges first raised in the Amended Complaint to be an indication that Respondent denies each fact alleged in these charges. Rather, I see Respondent's general denial as an attempt to leave Complainant with his burden of proof with respect to each element of these charges.

Having said that there is some merit in Respondent's position that these proceedings leave him with a Hobson's choice with respect to the assertion herein of his Fifth Amendment rights does not mean that he is entitled to prevail on this issue. I see no substantial prejudice to Respondent's Fifth Amendment rights as to the charges contained in the Initial Complaint given that Respondent has *admitted* the facts underlying the charges. Given my conclusions with respect to the charges first made in the Amended Complain (see Section 3, supra), I see no need to address in these those charges in these proceedings, other than to note that, if Respondent's reason for failing to file his tax returns for the four years in issue was an asserted good faith belief that he had no legal obligation to file those returns because the Sixteenth Amendment was not duly "ratified" or because the §§861-865 "source of income" rules excluded his income from tax, Respondent in any event would have been required to take the stand to asserted his good faith but mistaken beliefs through an affirmative defense to the charges brought, whether in these proceedings or in any criminal

proceedings involving an alleged criminal failure to file under §7203 of the Internal Revenue Code of 1986, as amended. I also note, as to all the charges against Respondent, that Judge Moran showed extraordinary sensitivity to Respondent's Fifth Amendment concerns, in effect taking "judicial notice" of Respondent's unsworn statement, thereby allowing Respondent to avoid a testimonial act as well as protecting him from cross-examination with respect to both his statement and any other aspect of these proceedings.

With regard to the third factor in Molinaro, Complainant noted that the hearing in these proceedings had already been scheduled at the time Respondent filed his Motion to Abate the Case, and that therefore judicial economy weighed in favor of denying Respondent's Motion to Abate the Case. While I do not believe this factor weighs as heavily in the balance as the other factors mentioned, I agree that this factor weighs in favor of allowing these proceedings to continue.

With regard to the fourth factor in Molinaro,Complainant indicated that there were no persons who were not parties to the case whose interests would be affected by abating these proceedings or letter them go forward. Judge Moran likewise did not consider this factor "pertinent" to these proceeding. With the exception of the interests identified in the discussion of the first and fifth Molinaro factors, I agree.

With regard to the fifth Molinaro factor, Complainant argued that the public had a strong interest in protecting the public from practitioners who assert frivolous and non-meritorious theories in tax matters. Judge Moran agreed. See p. 4 of Order Regarding Respondent's Motion to Abate the Case. For the reasons stated in my discussion of the first Molinaro factor (see pp. 70-71, supra), I agree.

Considering all of the above in the manner required by Molinaro, I find that Judge Moran was correct in denying

Respondent's Motion to Abate the Case, and further find that Respondent's Fifth Amendment claim is without merit.

With respect to Respondent's claims that these proceedings constitute retaliation for Respondent's exercise of free speech rights, Respondent makes two distinct claims. First, Respondent claims that the conduct forming the basis for the charges contained in the Initial Complaint constituted protected speech under the First Amendment. Second, Respondent claims that both the Initial Complaint and the Amended Complaint violate the First Amendment because they constitute "selective enforcement" predicated on Respondent's exercise of "free speech" and "free association" rights guaranteed by the First Amendment. Respondent also asserts that these proceedings are retaliation for his actions as a "whistleblower" while he was a Special Agent employed by the Criminal Investigation Division of the Internal Revenue Service. Each of these claims is discussed in turn below.

Respondent's first First Amendment claim is based on Brandenburg v. Ohio, 395 U.S. 444 (1969), a United States Supreme Court decision involving Ohio's criminal syndicalism statute and its application to the Ku Klux Klan. The case dealt with the Klan's right to assemble and show certain films at its meetings. Respondent cites Brandenburg for the proposition that speech constituting mere advocacy cannot be constrained through governmental action unless the speech in question will, under the circumstance of its utterance, cause "imminent lawless action." Id. at 449. Respondent claims that the conduct forming the basis of the charges contained in the Initial Complaint constituted "mere advocacy" and that the circumstances of his utterances did not cause or incite "imminent lawless action."

In response, Complainant first argues that these proceedings are not about Respondent's public expressions about his political views but rather are about statements made orally or in writing to Taxpayer C, Taxpayer T, or employees of

the Internal Revenue Service in the course of his representation of Taxpayer C and Taxpayer T before the Internal Revenue Service or in the course of providing tax advice to the same clients. As a consequence, Complainant argues that Respondent's written and oral statements constitute commercial speech that, if used in furtherance of an illegal activity, is not constitutionally protected speech (citing United States v. Kaun, 827 F.2d 1144, 1152 (7th Cir. 1987). Complainant further argues that commercial speech is protected only if it concerns lawful activities and is not misleading, citing Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) and Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980). In the alternative, Complainant argues that, even if Respondent's speech is not commercial speech, it is not constitutionally protected speech because the speech has as its objective advocating frivolous schemes to avoid the tax laws, which courts have likewise held not to constitute protected speech. United States v. Rowlee, 899 F.2d 1275, 1279 (2d Cir.), cert denied, 498 U.S. 828 (1990); United States v. May, 555 F. Supp. 1008 (E.D. Mich. 1983).

Judge Moran reached the conclusion that Complainant's conduct involved "commercial speech." Order on Complainant's Motion for Summary Judgment, p. 8. Judge Moran also indicated that, even if the conduct had been determined to be non-commercial speech, it would still not be constitutionally protected. Id. Judge Moran so found because Respondent's "admitted actions, in connection with . . . [Taxpayer C] and [Taxpayer T], constitutes "speech brigaded with action." Id. pp. 8-9, footnote 16.

I generally agree with Judge Moran's holding on these points, and would add that, given the content, timing and circumstances of Respondent's utterances (i.e., statements made to taxpayers in the course of Respondent providing representational or tax advisory services to those taxpayers, and particularly that statements contained in the Amended U.S. Individual Income Tax Returns for 1996 and 1998 prepared for

Taxpayer T by Respondent), Respondent's utterances could well be viewed as having caused or incited "imminent lawless action." At a minimum, Respondent's conduct has caused the Government to unnecessarily assume the burden of making unnecessary ad hoc determinations with respect to these taxpayers. See quoted language from United States v. Boyle, supra, at pp. 15-16, supra.

Those who seek to practice before administrative agencies and the courts are subject to certain constraints on the nature and extent of their discourse within the scope of their practitioner functions that might constitute protected speech in other contexts. For example, attorneys who learn facts from their clients in the course of an attorney-client relationship are prohibited by bar disciplinary rules from divulging those confidences and can be disbarred by state bars, including so-called "unified state bars" acting under color of law, for such disclosures. Likewise, in the case of tax practitioners subject to Treasury Circular 230, tax practitioners are subject to certain constraints on their free speech rights appropriate to and within the confines of the functions they perform as tax practitioners.

Respondent's other First Amendment claim is that he is the victim of impermissible "selective enforcement" based on his exercise of free speech and free association rights protected under the First Amendment. In support of this assertion, Respondent claims that his attendance at certain "political meetings" at which he espoused his views concerning the Federal income tax became the subject of "unauthorized surveillance" by Mr. Canfield, and that his appearances on "talk radio" and "Sixty Minutes II" preceded and caused Mr. Canfield's referral to the Director.

In his Reply Brief to Respondent's Appeal in these proceedings, Complainant notes, as the United States Court of Appeals did in Teague v. Alexander, 662 F.2d 79, 83 (D.C. Cir. 1981), that in Oyler v. Boles, 368 U.S. 448, 456 (1962), the Supreme Court indicated that some the exercise of some

selectivity in enforcement of the laws is not, in and of itself, always a constitutional violation. Only when the selection is based on an arbitrary and impermissible selection on the basis of a protected class does the classification raise concerns of a constitutional dimension. In Teague, the United States Court of Appeals for the District of Columbia found that Teague's failure to file, and not any suspect classification, was the cause of the enforcement action against him. To borrow a term from tort law, when an event intervenes and becomes the "proximate cause" of an enforcement action, the fact that a suspect classification may have been involved at some point in the decision to focus examination or investigative resources on a person does not make a subsequent enforcement against the individual constitutionally suspect when the acts that form the basis of the enforcement action are not themselves constitutionally suspect. In these proceedings, for the reasons mentioned above, neither the charges relating to Respondent's representational and advisory conduct (contained in the Initial Complaint) nor the charges relating to Respondent's alleged failures to file (raised for the first time in the Amended Complaint) are constitutionally suspect. Accordingly, I find Respondent's second First Amendment argument to be without merit.

Respondent also claims the actions brought against him have been brought in retaliation for his actions as a "whistleblower." Judge Moran found, and I agree, that Respondent has shown neither that he was a "whistleblower" nor that the charges brought against him were brought in retaliation for actions he took as a "whistleblower." Respondent merely seeks to cloak his frivolous arguments with a veneer of respectability by suggesting that he was acting as a "whistleblower" by making these assertions. Saying it does not make it so. I find Respondent's "whistleblower retaliation" claim without merit.

In addition to his "whistleblower" claim, Respondent claims that he is being discriminated against because he is a former Internal Revenue Service employee. I find no merit to this claim.

The fact that Respondent is an experienced tax practitioner is a factor that was appropriately considered by Judge Moran in determining to disbar Respondent. However, Respondent has failed to show that a practitioner with similar experience gained solely in private practice would have been treated any differently. Mr. Finz did indicate that the fact that Respondent advertised his prior Government service in statements he made to his clients, prospective clients, and Internal Revenue Service personnel was considered an aggravating factor for purpose of determining the appropriate sanction to impose with respect to his conduct given the fact that Respondent referred to that prior service in a way that could have given an aura of credibility to the frivolous positions he espoused, but Mr. Finz also stated that the Director would have sought the same sanction against a practitioner espousing such positions even absent this aggravating factor. For these reasons, I find Respondent's claim with respect to his "former employee" status without merit.

With regard to Respondent's claim that Complainant somehow "published" a ruling in these proceedings prior to the final agency action in these proceedings, I find no merit to this claim. Presumably, this claim is an indirect way of challenging Judge Moran's determination to resolve the liability issues in these proceedings on the basis of Complainant's Motion for Summary Judgment. My response to Respondent's direct claim on this subject appears elsewhere in Section 4 of this Decision on Appeal (see pp. 81-82, infra). Judge Moran in no sense "published" his Order on Complainant's Motion for Summary Judgment. Whatever publications occurred with respect to these proceedings occurred at the instance of Respondent, and as required by §10.71(b) of Treasury Circular 230, only by agreement of the parties. Further, as noted elsewhere, orders on motions in Treasury Circular 230 proceedings are respectively contemplated and countenanced by §§10.71(a) and 10.70(b)(9) of Treasury Circular 230.

Second, Respondent claims that he was not given adequate or meaningful notice of these proceedings. Judge

Moran found this claim to be without merit. I agree. The allegations contained in the Initial Complaint and in the Amended Complaint were more than adequately specific to provide Respondent fair notice of the charges against him and the opportunity to prepare a defense. As the specificity of Respondent's Answer reflects, Respondent had an adequate opportunity to prepare his defense to the charges contained in the Initial Complaint. Moreover, I agree with Judge Moran that, given the nature of the charges added in the Amended Complaint, Respondent was also accorded both adequate notice and the time necessary to prepare a defense to the charges first raised in the Amended Complaint. Cf., §10.65 of Treasury Circular 230.

Third, Respondent claims that his rights of discovery with respect to documents and witnesses have been abridged. Respondent has not indicated all that he seeks to include within this sweeping claim, other than the specific claims that are addressed elsewhere in Section 4 of this Decision on Appeal. However, to the extent that Respondent seeks to resurrect his claims that became the subject of Judge Moran's Orders on Respondent's Motion for Discovery and Complainant's Motion in Limine, I concur in Judge Moran's holdings as expressed in his Orders. Respondent's requests to present witness testimony, introduce documents, or gain discovery were often untimely (prejudicially so with respect to both Complainant and Judge Moran's efforts to conduct orderly proceedings) and often made on the basis of not even the most minimal showings of relevance or materiality, let alone with the type of particularity required by the court in United States v. Willie, supra. Further, Respondent made requests for discovery not allowed at all in disciplinary proceedings under Treasury Circular 230, or only available at the discretion of the Trial Judge for good cause shown. §10.73(a) of Treasury Circular 230. Judge Moran frequently found Respondent's requests to be irrelevant and/or immaterial to the central issues in these proceedings, at least on the basis of the record before him at the time he made his determinations. I see no error in Judge Moran's determinations, let alone the clear error I would have to find to reverse his determinations under the

authority granted me by §10.78 of Treasury Circular 230. I find Respondent's claims on these questions to be without merit.

Fourth, Respondent claims that he was denied his right to testify. Judge Moran, in no uncertain terms, at p. 6 of the Decision of the Administrative Law Judge, has flatly denied this claim:

> **"[Respondent 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."**

While Respondent has again failed to provide any specifics in support of another broad claim, it would seem that his assertion is premised on what he believes to be the unfairness embodied in his possible loss of the Fifth Amendment privilege against self incrimination if he testifies in these proceedings and in certain of the evidentiary exclusions arising from Judge Moran's determinations of irrelevance and immateriality. The former complaint is addressed elsewhere (see pp. 70-73, supra). I would also note that Judge Moran did everything he could to address even these concerns by allowing Respondent to submit his unsworn statement at the December 1, 2003 hearing and refusing to allow Complainant's counsel to cross-examine him with respect to that statement or any other matters relevant to these proceedings. As to Judge Moran's evidentiary rulings, as I have stated above, I find Judge Moran's rulings with respect to the evidentiary issues in these proceedings appropriate. Again, Respondent's claim is without merit.

Fifth, Respondent claims that he was denied his right to cross-examine his "accusers." Presumably, Respondent refers to the fact that he was not allowed to call Patrick McDonough, the former Director of Practice, and Kenneth Canfield, the Revenue Officer who made the referral respecting Respondent to the

Office of the Director of Practice. These claims are addressed elsewhere in Section 4 of this Decision on Appeal (see pp. 80--86 and 89--90, infra).

Sixth, Respondent claims that he was denied his right to a hearing on the merits with regard to the charges made against him in the Initial Complaint and the Amended Complaint. It is unclear all that Respondent intends to include within this sweeping claim. As stated elsewhere in Section 4 of this decision (see pp. 99-100, infra), Treasury Circular 230 accords Respondent no absolute right to an evidentiary hearing on the merits in these proceedings. Moreover, no constitutional right to procedural due process precluded the resolution of the liability issues in these proceedings through motion for summary judgment if the charges before Judge Moran did not involve disagreements with respect to relevant and material facts. The propriety of resolving the liability matters in these proceedings by motion for summary judgment is addressed elsewhere in Section 4 of this Decision (see pp. 81-82, infra).

Seventh, Respondent claims that Judge Moran erred by applying the wrong standards in allowing the liability issues in these proceedings, respecting both the charges contained in the Initial Complaint and the charges first raised in the Amended Complaint, to be resolved through Complainant's Motion for Summary Judgment. For the reasons set forth below, I find that the charges raised in the Initial Complaint were appropriately resolved through Complainant's Motion for Summary Judgment. For the reasons already described in Section 3 of this Decision on Appeal, I find that the charges raised for the first time in the Amended Complaint were not appropriately resolved on the basis of Complainant's Motion for Summary Judgment, or on the basis of the record in these proceedings developed to date.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate where there are no genuine issues as to any material fact and when the moving party is entitled to judgment as a matter of law. Similar standards apply

in the context of disciplinary proceedings under Treasury Circular 230. Washburn v. Shapiro, supra. These standards are in accord with decisions such as Puerto Rico Aqueduct and Sewer Authority v. United States Environmental Protection Agency, 35 F.3d 600, 606 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (1995), which find that there is no constitutional due process right to an evidentiary hearing absent an actual dispute as to a material fact.

As to the fundamental underlying facts pertaining to the charges contained in the Initial Complaint, Judge Moran has found that Respondent has admitted the underlying facts with respect to liability and has been accorded a hearing on all matters pertaining to the sanction to be imposed with respect to that conduct. I agree. Accordingly, I find Respondent's claim, insofar as it relates to the charges contained in the Initial Complaint, to be without merit.

Eighth, Respondent claims that Judge Moran erred by excluding exculpatory testimony from IRS witnesses from consideration in the proceedings. Specifically, Respondent claims that Judge Moran erred by excluding the testimony of Kenneth Canfield, Priscilla Ousley, Sue Erwin, Patrick McDonough and Charles Rossotti. Each of these claims is considered separately below. As a preliminary matter, however, I note that Complainant's counsel has alleged (at p. 77, footnote 56 of Complainant's Response to Respondent's Appeal) that the excluded witnesses would not have provided supportive testimony if they were allowed to testify. While that may have been true, this case was decided by Judge Moran on the basis of Complainant's Motion for Summary Judgment. When matters are before a tribunal on a motion for summary judgment, all relevant and material matters as to which there is a factual disagreement between the parties are, for purposes of considering that motion, considered in the light most favorable to the non-moving party (here, Respondent). Thus, without regard to the actual truth, the version of the truth alleged by the non-moving party is accepted for purposes of the motion. That does not mean that the

inferences and conclusions Respondent seeks to draw from the facts are accepted. Only the facts themselves are accepted as true for purpose of the motion for the summary judgment.

The issues remaining for the tribunal are whether the facts alleged are relevant and probative of a material fact relating to the issues being considered. If the facts are irrelevant or immaterial to the tribunal's determination, the exclusion of the witness' testimony is either not error at all or constitutes harmless error. It is appropriate for an appellate authority to consider the same matters, as well as the issue of whether the testimony was ever requested, whether any request for testimony was timely made and whether the proffers made with respect to the testimony were sufficiently specific to allow the tribunal to determine whether the testimony requested would provide relevant and credible evidence with respect to a material fact. With that framework, I consider each of the purported erroneous exclusions.

Kenneth Canfield is employed by the Internal Revenue Service as a Revenue Officer. In his Appeal, Respondent notes his reasons for believing that it was inappropriate to "exclude" Canfield's testimony. First, Respondent alleges that Canfield was the only person to make a written referral respecting Respondent to the Director of the Office of Professional Responsibility. Second, without specifying the nature of the testimony he alleges Canfield would supply, Respondent broadly alleges that Canfield would testify as to the "impermissible" and "illicit" motives of the Internal Revenue Service in bringing these proceedings. Again without specificity, Respondent alleges that Canfield would provide "exculpatory" and "mitigating" information with respect to Respondent's conduct. Respondent also alleged that Canfield would testify that: (1) Canfield commenced his "investigation" of Respondent before Respondent spoke to Canfield about his client and his desires to be accorded a collection due process hearing; (2) Canfield "surveilled" Respondent's "political appearances" and decided to start an "investigation" based on those appearances; (3) Canfield spoke

to the Office of Professional Responsibility about investigating Respondent "based on" his political speech on talk radio; (4) Canfield contacted Respondent's former supervisors from the Criminal Investigation Division of the Internal Revenue Service who informed him that Respondent had an entirely honorable work record while an employee of the Internal Revenue Service under their supervision; (5) Canfield knew that Respondent was not challenging the constitutionality of the tax system in his representation of clients before the Internal Revenue Service but merely informing his clients of Respondent's "political opinions;" (6) Canfield had no knowledge of what Respondent would argue before the Internal Revenue Service because he never granted Respondent a collection due process hearing; (7) the Internal Revenue Service personnel had granted taxpayers reduced tax liabilities on the basis of those being asserted by Respondent (while unspecified, this is presumably a reference to Respondent's reliance on the §§861-865 "source" rules) and that Respondent was aware of these facts; and (8) Canfield was conducting a "private investigation" of Respondent and "attempting to entrap" Respondent "after the fact," which would have been reflected both in Canfield's written notes and in Canfield's written referral to the Office of Professional Responsibility.

There are several problems with Respondent's assertions with respect to the purported "exclusion" of Mr. Canfield's testimony. First, as noted at p. 76 of Complainant's Response to Respondent's Notice of Appeal, Mr. Canfield's testimony was never excluded for the simple reason that Respondent never requested his testimony, at least until Respondent filed his Offer of Proffers of Proof on November 25, 2003, in response to a request Respondent made of Judge Moran during a telephone conference with the parties on November 24, 2003. As noted at pp. 4-5, supra, Judge Moran issued his Prehearing Order in these proceedings on June 9, 2003, requiring, inter alia, that the parties exchange the names of their witnesses in these proceedings. After granting Respondent's request for an extension of the date for complying with the Prehearing Order, to

and including July 31, 2003, Respondent provided Complainant and Judge Moran with a copy of his Prehearing Exchange on July 31, 2003. Those materials did not list Mr. Canfield as a witness.

As noted by Complainant at p. 76 of his Response to Respondent's Appeal, Respondent may have been confusing his requests for witness testimony, which Judge Moran required to be filed by July 31, 2003, with either the list of persons to which he wished to propound interrogatories under his October 29, 2003 Motion for Discovery, and/or with Respondent's Proffer of Offers of Proof submitted on November 25, 2003. In his June 9, 2003 Prehearing Order, Judge Moran indicated: "The parties are hereby advised that testimony of witnesses which have not been identified . . . as required above may not be introduced into evidence at the hearing." Thus the deadline for identifying witnesses who could present evidence at the hearing had long passed when Respondent filed his Motion for Discovery, and had even longer passed when Respondent filed his Proffer of Offers of Proof. Moreover, because Mr. Canfield was not included on Respondent's list of witnesses in his Prehearing Exchange, Complainant and Judge Moran were not allowed to consider whether Mr. Canfield could provide any relevant testimony and the proper scope of any such testimony when Complainant filed (on October 30, 2003) and Judge Moran acted upon (on November 21, 2003) Complainant's Motion in Limine.

Moreover, an examination of Respondent's Motion for Discovery shows that Respondent failed to provide specifics that would have permitted Judge Moran to determine whether and in what respect the testimony of Mr. Canfield would have been relevant to the evidence Respondent wanted to introduce in these proceedings. Indeed, Respondent's Motion for Discovery did not indicate that Respondent intended to call Respondent as a witness. It merely noted that Respondent sought unspecified discovery from Mr. Canfield which would be relevant because Mr. Canfield, one of the persons listed as a witness by Complainant in his Prehearing Exchange, "had information concerning [Respondent's] representation of [Taxpayer C], and made the

referral to the Director of [OPR], which precipitated this complaint."

Mr. Canfield's name did appear on Complainant's initial witness list provided to Judge Moran and Respondent pursuant to the Pretrial Order. When Judge Moran denied Respondent's request for discovery with respect to Mr. Canfield, he indicated, inter alia, that the discovery was not necessary because Respondent's counsel could cross examine Mr. Canfield when he appeared as one of Complainant's witnesses at trial. On November 24, 2003, Judge Moran granted Complainant's Motion for Summary Judgment with respect to the liability issues in this case. On November 25, 2003, Complainant filed an Amended Witness list, indicating that in view of Judge Moran's Order granting Complainant's Motion for Summary Judgment, Complainant intend to call only Mr. Finz as a witness at the hearing.

Not until Respondent filed his Proffer of Offers of Proof on November 25, 2003, a scant week before the December 1, 2003 hearing and a day after Judge Moran's November 24, 2003 Order on Complainant's Motion for Summary Judgment (which granted Complainant's Motion as to all issues of liability) did Respondent either indicate that he intended to call Mr. Canfield as a witness or provide anything even remotely approaching the specificity of his Notice of Appeal as to the reasons Respondent sought Mr. Canfield testimony. Previously, Judge Moran knew only that Respondent sought discovery with respect to an individual that Complainant had indicated he might call in support of his proof. In these circumstances, the propriety of Judge Moran's actions should be judged on the basis of the record before him on the dates of those actions. So viewed, I find no basis for finding error on the part of Judge Moran.

In addition, for the reasons stated elsewhere in Section 4 of this Decision on Appeal, the testimony of Mr. Canfield with respect to the matters as to which Respondent sought to have him testify (and specifically, as to Respondent's "good faith" and

"reliance" defenses) either (1) are not relevant to either the liability and sanction determinations, or (2) even if specificity concerning the need for Mr. Canfield's testimony had been timely asserted, would have constituted, if error at all, harmless error. As noted elsewhere, even if the facts Respondent sought to introduce through Mr. Canfield's testimony were accepted as true, they would not alter any of the conclusions reached by Judge Moran.

According to page 77, footnote 55 of Complainant's Response to Respondent's Appeal, Priscilla Ously "appears to be" a Tax Examining Assistant employed by the Internal Revenue Service in the Chamblee, Georgia post of duty. As was the case with Mr. Canfield, Ms. Ously was not among the individuals included on Respondent's witness list submitted as part of Respondent's Prehearing Exchange on July 31, 2003. Nor was Ms. Ously among the individuals listed by Complainant as a witness on the witness list submitted by Complainant in response to Judge Moran's Pretrial Order.

Ms Ously was among the individuals listed by Respondent in the Motion for Discovery filed on October 29, 2003, where the relevance of information sought to have been obtained from Ms. Ously was stated to be "information related to the IRS treatment of the respondent's opinions and advice, including the acceptance by the IRS of these positions in reducing the tax liability of other similarly situated individuals."

In Respondent's Proffer of Offers of Proof dated November 25, 2003, Respondent described the relevance of Ms. Ously's testimony as follows: "Priscilla Ously, another IRS employee, would testify that the IRS reduced the tax debts of taxpayers who made identical arguments to the ones [Respondent] allegedly made around the time [Respondent] made them involving similar taxpayers to [Respondent's] clients. In Complainant's Response to Respondent's Motion for Discovery, at p.3, Complainant objected to the taking of Ms. Ously's deposition, inter alia, on vagueness grounds, indicating that

Respondent had not indicated Ms. Ously's individual authority and/or role in the IRS's alleged acceptance of Respondent's position on the merits in other cases, whether it concerned the exact positions taken by Taxpayer C and Taxpayer T, and whether Ms. Ously was authorized to speak for the IRS on these matters generally. Nor had Respondent submitted exhibits as part of his Prehearing Exchange relevant to his assertions regarding Ms. Ously and the information she allegedly possessed. While Complainant acknowledged that some low-level employees of the Internal Revenue Service may have accepted these frivolous arguments, Complainant argued that this was irrelevant to the issues in these proceedings. Judge Moran agreed, as I do. This testimony is irrelevant to the issues presented in these proceedings. Further, the other reasons cited for not finding error with respect to the claimed "exclusion" of Mr. Canfield's testimony apply to Ms. Ously's testimony as well.

As was the case with Mr. Canfield and Ms. Ously, Sue Erwin was not included on the witness list submitted to Judge Moran and Complainant as part of Respondent's Prehearing Exchange on July 31, 2003. However, Ms. Erwin was among the potential witnesses listed by Complainant in his witness list submitted as part of his Prehearing Exchange in response to Judge Moran's Prehearing Order. Respondent included Ms. Erwin among the individuals from whom he sought discovery in his Motion for Discovery filed on October 29, 2003, indicating the following as to the relevance of the discovery sought: "[Ms. Erwin] has information related to the [R]espondent's representation of Respondent's clients, including [Taxpayer T] and [Taxpayer C]."

Again, Respondent's Motion for Discovery provided no indication that the discovery sought was for any purpose other than to prepare for the cross examination of one of Complainant's witnesses. As with Mr. Canfield, Judge Moran denied the requested discovery, noting that Respondent could cross examine Ms. Erwin when she testified at the hearing. Again as with Mr. Canfield, after Judge Moran entered his Order on Complainant's Motion for Summary Judgment granting the Motion

as to the liability issues in these proceedings, Complainant on November 25, 2003 filed his Amended Witness List, indicating that Complainant intended to call only Mr. Finz as a witness at the hearing.

In Respondent's Offer of Proffers of Proof filed on November 25, 2003, Respondent indicated for the first time what he would seek to prove through the testimony of Ms. Erwin and that of Patrick McDonough. With respect to Ms. Erwin, Respondent alleged:

> **"These two witnesses all [sic] know one critical fact – that the IRS chose to bring this complaint against [Respondent] after he appeared on Sixty Minutes II. In fact, their own written notes will reflect that Sue Erwin, an IRS employee, contacted the Director's office and inform[ed] them that her contacts told her [Respondent] would be appearing on Sixty Minutes II. The private notes also reflect that the Director of Practice decided to bring charges if and after [Respondent] appeared on the show. . . ."**

If it is assumed for purposes of Complainant's Motion for Summary Judgment that it is true that (1) Ms. Erwin contacted the Office of Professional Responsibility and informed OPR personnel that Respondent would be appearing on Sixty Minutes II, and (2) Complainant chose to bring this complaint against Respondent after Respondent appeared on Sixty Minutes II, those facts would not constitute relevant and probative evidence of material facts relating to the determinations of liability in these proceedings. The same would be true if it is assumed that Ms. Erwin's testimony would have shown that Respondent's Sixty Minutes II appearance was among the factors OPR personnel considered in determining to devote resources to the investigation of Mr. Canfield's referral. Given the fact that the proximate causes of the liability determinations against Respondent in these proceedings are the conduct alleged in the Initial Complaint and the Amended Complaint, the facts alleged

by Respondent in seeking the testimony of Ms. Erwin are irrelevant and immaterial to the issues in these proceedings.

A statement made by Judge Moran in the context of Respondent's request for discovery with respect to another IRS employee has equal application to Respondent's request with respect to Ms. Erwin:

> "The Court reminds Respondent that this case is not about a broad inquiry into the IRS practices regarding the referral and investigation into [Respondent]. Rather . . . the case is about the consequences of that referral and investigation, which translated into the Complaint brought against [Respondent]. It is those alleged actions in the Complaint which are at issue and whether, if proven, those actions constitute disreputable conduct. Should those determinations be made in favor of the IRS [sic], it is then up to the Court to determine an appropriate sanction, after hearing the [parties'] arguments and considering any post-hearing briefs on the issue."

Order on Respondent's Motion for Discovery (filed November 17, 2003), p. 4. See also discussion at pp. 74--77, supra, regarding Respondent's First Amendment assertions regarding impermissible "selective enforcement." For these reasons, I find that Judge Moran did not commit error with respect to any testimony Respondent may have wanted Ms. Erwin to present at an evidentiary hearing in these proceedings.

With respect to the testimony of Patrick McDonough, the former Director of the Office of Professional Responsibility, Respondent had included Mr. McDonough among the individuals on his witness list in submitting his Pretrial Submission to Judge Moran and Complainant on July 31, 2003. Respondent sought Mr. McDonough's testimony with respect to an asserted "policy" of not filing or pursuing complaints in Treasury Circular 230 disciplinary proceedings against practitioners that were the subject of on-going grand jury proceedings involving similar

matters. In his Motion in Limine, Complainant asserted that Mr. McDonough's testimony on this subject was not needed because the issue could be fully addressed in the testimony of Mr. Frinz, who served as the legal adviser to Mr. McDonough at the time the Complaint against Respondent was filed and pursued. In his Order Regarding Complainant's Motion in Limine (filed November 21, 2003), at p. 9, Judge Moran noted his agreement with Complainant. Judge Moran noted, "Further, independently of this ruling, the Court has reservations whether testimony regarding such asserted policy would be admissible in any event." In his testimony at the December 1, 2003 hearing, neither Complainant's counsel nor Respondent's counsel asked Mr. Finz anything about this alleged policy. Given the fact that Respondent failed to avail himself of this opportunity, he cannot now be heard to complain about the "exclusion" of Mr. McDonough's testimony.

At various points in these proceedings, Respondent has suggested two reasons for seeking to introduce the testimony of Charles Rossotti, the former Commissioner of the Internal Revenue Service. First, Respondent indicated that Mr. Rossotti could testify to Respondent's history of honorable service while employed by the Criminal Investigative Division of the Internal Revenue Service. Judge Moran found such testimony irrelevant to the liability determinations in these proceedings. While Mr. Finz testified that Respondent's mention of his prior employ in communications with both Internal Revenue Service personnel and his client was viewed as an aggravating circumstance because the Director of the Office of Professional Responsibility believed his reference to his prior employ made him appear more credible in asserting frivolous arguments, Mr. Frinz indicated that the absence of that aggravating factor would not have changed the Office of Professional Responsibility's determination concerning the sanction to be sought in these proceedings. Further, Mr. Frinz noted that the absence of any prior complaints against Respondent had been considered a mitigating factor. Further, Respondent spoke at length on the honorable nature of his Federal service in presenting his unsworn statement during

the December 1, 2003 hearing. Given these facts, I find no prejudice to Respondent arising from any "exclusion" of Mr. Rossotti's testimony for these purposes.

Respondent also sought Mr. Rossotti's testimony to prove that (1) Respondent had written to Mr. Rossotti asserting his general §861 "source of income" argument inviting the then Commissioner to write him a letter refuting the argument, and (2) Mr. Rossotti had never responded. In his Motion in Limine, Complainant objected to Respondent's attempted inclusion of Respondent's Exhibit 18, purporting to be a copy of the letter sent Mr. Rossotti. Complainant objected on two grounds, the second relevant to the issue of Mr. Rossotti's testimony. First, Complainant objected because the letter did not contain a date and is an incomplete version. Second, Complainant objected on the grounds that the letter was irrelevant. Judge Moran found that the letter was "not material to the issue of whether the Respondent's conduct violated the cited sections of the Code of Federal Regulations for IRS practitioners or for any other purpose of these proceedings." Order Regarding Complainant's Motion in Limine, p.8.

Presumably, Respondent would seek to use Mr. Rossotti's testimony to bolster his reliance and good faith defenses. I find this area irrelevant to the former and immaterial to the latter. As noted in the discussion of the Internal Revenue Service's guidance programs in Section 2 of this Decision, the fact that that at any point in time the Service has not provided guidance on an issue provides neither taxpayers nor tax practitioners with any basis for "reliance." As to Respondent's "good faith" defense, I take "judicial notice" of that any experienced tax practitioner knows that the appropriate way to determine the answer to any non-frivolous question under the tax laws is to submit a request for a private letter ruling on behalf of the taxpayer. If the Service is unwilling to rule on the question, the taxpayer's "user fee" is refunded and a general letter of explanation as to the Service's unwillingness to rule generally is sent to the taxpayer, or at least discussed orally with the practitioner. Respondent saw fit not to

follow this normal and well known procedure. Under these circumstances, Judge Moran's decision to deny Respondent's request for Mr. Rossotti's testimony for these purposes was not error.

Ninth, Respondent claims that Judge Moran erred by predicating his decision on the "perjured testimony" of Mr. Finz. The alleged "perjury" relates solely to the question of whether Mr. Finz was himself the official who make the final determination of the Office of the Director of Practice as to whether Respondent had committed the various violations of Circular 230 outlined in the Initial Complaint and the Amended Complaint, and was the person who personally decided to request the sanction of disbarment, or whether he was the person who acted as the Director's principal adviser in making those determinations and then worked with the IRS Chief Counsel's General Legal Services Division in pursuing those matters. These facts were fully disclosed to Judge Moran during the December 1, 2003 hearing and had absolutely no effect on Judge Moran's determinations, nor should they have. Judge Moran's reliance on Mr. Finz' testimony was not misplaced and did not constitute error.

Tenth, Respondent claims that he was denied a property interest without being provided due process of law. Again, it is unclear all that Respondent attempts to sweep in through this assertion. Elsewhere in Section 4 of this Decision on Appeal, I have addressed specific aspects of Respondent's claims regarding the shortcomings of these proceedings, such as his claim that he had an unqualified right to a full evidentiary hearing with respect to the liability issues in these proceedings and his claim that he was denied various procedural rights during the proceedings, including the right to present witness testimony (including his own), the right to introduce various pieces of documentary evidence, and the right to cross-examine certain witnesses included on Complainant's initial witness list.

Respondent also argues that his authorization to practice before the Internal Revenue Service is a right akin to a license right accorded by a state or federal agency. He asserts that he is a "Congressionally licensed" tax practitioner, and as such has rights akin to those of the driver licensed by the State of Georgia whose license suspension was the subject of the United States Supreme Court's decision in Bell v. Burson, 402 U.S. 535 (1971).

Bell v. Burson, supra, did not establish the right to an evidentiary hearing as a broad constitutional right. The statutory scheme in Georgia did not automatically terminate drivers' licenses for a failure to keep in force liability insurance. Rather, the Georgia statute provided that, if a Georgia driver was uninsured at the time of any reported accident and it was discovered that he or she was uninsured at the time of the accident, the driver was required to post a $5,000 bond or present a notarized release from liability, together with proof of future responsibility, or suffer the suspension of his driver's license and vehicle registration. Bell sought to introduce evidence at an administrative hearing that he was not at fault in the accident (his car had been hit on the side by a child riding a bicycle). Finding that he had no insurance at the time of the accident, and finding that he had not met the other requirements of the statute, the motor vehicle administration suspended his driver's license.

As was his right, Bell appealed this determination to the Georgia Superior Court, which ordered that Bell's license not be suspended until suit was filed against Bell for the injuries sustained by the child. The Georgia Court of Appeals reversed this order, reinstating Bell's license suspension.

Before the Supreme Court, Bell claimed that the Georgia statutory scheme violated his rights to procedural due process under the Fourteenth Amendment to the United States Constitution. The Supreme Court noted that, had the Georgia statute provided for the automatic suspension of a Georgia driver's license for failing to carry insurance, or for a failure to

post a bond, in neither instance would Bell have a constitutional claim. Id. at 539. However, the Court indicated that it did not follow that in a statutory scheme where not all motorists, but only motorists who had been involved in accidents, were required to post security, that a driver could lose his license without being accorded due process. Id. Indeed, the Court went on to note that relevant constitutional constraints limit state power to terminate an "entitlement whether the entitlement is denominated a 'right' or a 'privilege'". Id.

Claimant notes that Respondent is not "licensed" by Congress or the Department of Treasury. Rather, he is licensed as a certified public accountant by the State of California, a status that will not change on the basis of any action taken in these proceedings. Any action taken as a result of these proceedings at most will act as a restriction upon the scope of Respondent's practice, not a revocation of the right to practice accorded him by the State of California. Cf. Lopez v. United States, 129 F. Supp. 2d 1284 (S.D. Tex. 2000). 31 U.S.C. §330 does not license practitioners, nor does it authorize the Department of the Treasury to do so. Rather, it authorizes the Secretary of the Treasury to regulate the practice of representatives, require certain demonstrations of representatives before admitting them to practice, and to suspend or disbar representatives from practice who, on the basis of their conduct, prove themselves to be incompetent or disreputable, violate regulations prescribed under the statutory grant, or with intent to defraud, willfully and knowingly mislead or threaten the person being represented or a prospective person to be represented. Accordingly, neither 31 U.S.C. §330 nor Treasury Circular 230 creates a Federal "entitlement" akin to a property interest.

Moreover, as the Supreme Court noted in Bell v. Burson, supra:

> **"A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process**

in every case. Thus, procedures adequate to determine a welfare claim may not suffice to try a felony charge. . . . Clearly, however, the inquiry into fault or liability requisite to afford the licensee due process need not take the form of a full adjudication of the question of liability. . . ."

"The hearing required by the Due Process Clause must be 'meaningful,' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, [339 U.S. 306, 313 (1963)]."

Courts have examined the question of what rights to procedural due process must be accorded in disciplinary proceedings under Treasury Circular 230. See, e.g., Washburn v. Shapiro, supra (finding that neither §§556 and 557 of the Administrative Procedure Act, 5 U.S.C. §§556 and 557, nor the Fifth Amendment's procedural due process requirement entitled respondents to "full-blown" hearings, and that the procedural protections accorded by Treasury Circular 230 were not constitutionally infirmed). I find that these proceedings have accorded Respondent the due notice, fundamental fairness and opportunity to be heard to which he was entitled. With the exception noted in Section 3 of this Decision respecting Complainant's first element of proof on the four charges relating to Respondent's alleged failures to file individual income tax returns for the years 1999, 2000, 2001 and 2002, Respondent's claims to the contrary are without merit.

Eleventh, Respondent claims that Judge Moran erred by considering matters that had nothing to do with Respondent's actual conduct in representing clients before the Internal Revenue Service (specifically, Respondent's advice to his clients and Respondent's own failures to file tax returns). The merits of this claim have been fully addressed in Section 1 of this Decision on Appeal. Respondent misconstrues both the scope and purpose of Treasury Circular 230 and the reach of its provisions.

After a threshold determination is made that a practitioner both has the right to practice before the Internal Revenue Service and in fact has practiced before the Internal Revenue Service, Treasury Circular 230 sets forth rules and regulations governing not only a practitioner's activities as a representative of taxpayers before the Internal Revenue Service but also rules respecting his or her functions as an adviser to taxpayers and relating to the practitioner's conduct in his own tax and other relevant business and professional affairs. The courts that have reviewed these rules and regulations have consistently approved the appropriateness of their scope and purpose.

Twelfth, Respondent claims that Complainant failed to accord Respondent the "right to comply" with Treasury Circular 230, as required by "§10.54" of Treasury Circular 230 and by Section 558 of the Administrative Procedure Act, 5 U.S.C. §558. Treasury Circular 230 does not now and did not at any time relevant to these proceedings contain a §10.54. §558(c) of the Administrative Procedure Act, 5 U.S.C. §558(c), provides:

> **"When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawl, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given –**
>
> > **"(1) notice by the agency in writing of the facts or conduct which may warrant the action; and**
> > **(2)opportunity to demonstrate or achieve compliance with all lawful requirements. . . ."**

Respondent's claim is that these proceedings were unlawful because the Director failed to provide Respondent with the opportunity to demonstrate or achieve compliance with all lawful requirements. In support of this proposition Respondent cites Anchustegui v. Department of Agriculture, 257 F.3d 1124, 1129 (9th Cir. 2001) (involving the revocation of sheep grazing permits) and Air North America v. Department of Transportation, 937 F.2d 1427, 1428 (9th Cir. 1991) (involving the revocation of airline certificates of authority). §558(c) of the Administrative Procedure Act involves not only Federal license rights but Federal license rights initially obtained following adjudicatory proceedings before the agency that later seeks to withdraw, suspend, revoke or annul that grant. For reasons noted elsewhere in Section 4 of this Decision on Appeal (see p. 95, supra), disciplinary proceedings against attorneys and certified public accountants under Treasury Circular 230 are not such proceedings and hence are not subject to the requirements of §558(c) of the Administrative Procedure Act. Moreover, even if I had found that §558(c) of the APA applied to disciplinary proceedings, I would have found that the Director was in substantial compliance with each of §558(c)'s requirements.

Respondent was sent a letter by the Director of Practice (now the Director of the Office of Professional Responsibility) outlining the allegations concerning the conduct which formed the basis of the Initial Complaint. I find that this letter met the "written notice" requirement of §558(c)(1). Moreover, Respondent was accorded a conference with respect to those allegations. Under §10.61(a) of Treasury Circular 230, such conferences are permitted in the discretion of the Director, not mandatory. When such conferences occur, practitioners may offer to accept their proposed punishment or suggest that he or she would accept a sanction accepting a sanction containing revised terms, which the Director can either accept or reject. The pleadings reflect that such discussions occurred during the conference accorded Respondent by the Director, but that the parties could not reach agreement. The proceedings were initiated and the hearing was held on December 1, 2003. During

his testimony at the hearing, the following exchange occurred between Respondent's counsel and Mr. Finz:

> "A [Mr. Finz] . . .[T]he [D]irector signed the allegation letter that originally went out to your client in April of 2001. That letter expressly states that our office was considering seeking disbarment, and that letter predated my involvement in the case."
>
> "Q [Mr. Bernhoft] In that letter, was any opportunity to achieve compliance expressly given to Respondent?"
>
> "A [Mr. Finz] During the 30-day period that was extended to the Respondent to make a response to the allegation letter, the Respondent could have repudiated or disavowed any positions . . ."
>
> "[Mr. Bernhoft] Move to strike as unresponsive, Your Honor."
>
> "[Judge Moran] No, overruled." (Tr. 34-35)

In his closing argument, Complainant's counsel noted that Respondent had refused to abandon arguments long since declared both incorrect and frivolous by numerous Federal courts. Respondent has clearly been given repeated opportunities to "demonstrate compliance," both before and after the commencement of these proceedings with the filing of the Initial Complaint, and he has repeatedly failed to avail himself of every opportunity to do so. Accordingly, if §558(c) of the Administrative Procedure Act had any application to these proceedings, I would find that Complainant had met its requirements in his dealings with Respondent. Respondent's claim to the contrary is without merit.

Thirteenth, Respondent claims that Judge Moran failed to accord him a hearing on the merits as required by §10.70 of Treasury Circular 230. Complainant appropriately notes that

§10.70 of Treasury Circular 230 should not be so construed given that §10.71(a) of Treasury Circular 230, in pertinent part, expressly provides that:

> "An evidentiary hearing must be held in all proceedings prior to the issuance of a decision by the Administrative Law Judge unless: . . . the Administrative Law Judge issues a decision on a motion that disposes of the case prior to the hearing."

Also, §10.70(b)(9) of Treasury Circular 230, in discussing the powers of the Administrative Law Judge, provides general authority to the Administrative Law Judge to "[p]erform such acts and take such measures as are necessary or appropriate to the efficient conduct of any proceedings." Accordingly, Treasury Circular 230 accords no absolute right to an evidentiary hearing prior to the issuance of an Administrative Law Judge's decision in a Treasury Circular 230 disciplinary proceeding. The propriety of entertaining a motion for summary judgment in these proceedings is discussed elsewhere. See pp. 81-82, supra.

Fourteenth, Respondent claims that Complainant erred by allowing the Complaint in these proceedings to be initiated without having received a written report allegedly required by §10.53 of Treasury Circular 230, which provides:

> "If an officer or employee of the Internal Revenue Service has reason to believe that an attorney, certified public accountant, enrolled agent, or enrolled actuary has violated any provision of this part, or if any such officer or employee receives information to that effect, he shall promptly make a written report thereof, which report or a copy thereof shall be forwarded to the Director of Practice. If any other person has information of such violations, he may make a report thereof to the Director of Practice or to any officer or employee of the Internal Revenue Service."

Respondent seeks to construe the "written report" statement contained in the first sentence of §10.53 as a procedural right of the Respondent, any violation of which would call into question the validity of the proceedings to follow. Such an interpretation ignores the fact that no such "written report" language appears in the second sentence of §10.53, dealing with information obtained from other sources (including the public). A contrary interpretation of the "written report" language with respect to information provided to the Director of Practice by other Service personnel is that the language allocates administrative burdens between other offices of the IRS and the staff of the Director of the Office of Professional Liability, requiring the former and not the latter to take the time to create the written record of the information. This interpretation is far more plausible, given the absence of similar language in the second sentence. I find no violation of Respondent's rights under Treasury Circular 230 arising from any alleged deficiencies in the referral to the Director of the Office of Professional Responsibility.

Fifteenth, Respondent claims that the Initial Complaint and Amended Complaint in these proceedings did not fairly inform Respondent of the charges against him, which prevented him from preparing an adequate defense. I agree with Judge Moran that the Initial Complaint and Amended Complaint fairly and timely informed Respondent of the charges against him and provided Respondent with an adequate basis for preparing an adequate defense to the charges against him. The charges were quite specific, and Judge Moran is correct that Respondent's Answer and Amended Answer in these proceedings are the best evidence of that fact. Respondent has suffered no impairment of his rights as a consequence of any such alleged deficiencies in the Initial Complaint or Amended Complaint, and was given ample time to prepare a defense with respect to the charges raised for the first time in the Amended Complaint.

Sixteenth, Respondent claimed that Judge Moran erred by allowing Complainant to amend the Initial Complaint, allegedly in violation of §10.59 of Treasury Circular 230. In his Response to

Respondent's Notice of Appeal, Complainant notes that the provision to which Respondent refers now appears in §10.65 of Treasury Circular 230, which provides:

> **"Supplemental charges.**
>
> **If it appears that the respondent, in his or her answer, falsely and in bad faith, denies a material allegation of fact in the complaint or states that the respondent has insufficient knowledge to form a belief, when in fact the respondent in fact possesses such information, or if it appears that the respondent has knowingly introduced false testimony during proceedings for his or her censure, suspension, disbarment, or disqualification, the Director of Practice may file supplemental charges against the respondent. The supplemental charges may be heard with other charges in the case, provided the respondent is given due notice of the charges and is afforded an opportunity to prepare a defense to such charges."**

Respondent argues that the grant of authority contained in §10.65 should also be read as an indication that the addition of supplemental charges in the same disciplinary proceeding is precluded in any other circumstance. In essence, Respondent suggests *inclusio unius est exclusio alterius.*

Whatever the persuasiveness such a rule of construction might have in other contexts, it merits no consideration here. It stands unquestioned that the Director of the Office of Professional Responsibility would not have been precluded from initiating another proceeding against Respondent for conduct not charged in the Initial Complaint, whether that conduct occurred before, contemporaneously with or after the conduct charged in the Initial Complaint, and that such a separate proceeding would not in any way implicate §10.65 of Treasury Circular 230. Further, it also seems evident that, absent prejudice to Respondent of the type identified in the closing sentence of §10.65 (absence of due notice and interference with a right to defend), Judge Moran

could have exercised his authority under §10.70(b)(9) of Treasury Circular 230 to join the two proceedings. Judge Moran has found, and I agree, that no such prejudice occurred in these proceedings. In light of these facts, I see no basis for adopting the rule of construction urged by Respondent. I should also note that this issue is rendered moot in the instant proceedings by the conclusions reached with respect to the charges first raised by the Amended Complaint in Section 3, above.

Seventeenth, Respondent claims that Judge Moran erred by sustaining the charges first introduced in the Amended Complaint relating to Respondent's failures to file tax returns for the years 1999, 2000, 2001 and 2002 by failing to distinguish between "making" and "filing" a return. This claim is wholly without merit. There is no distinction between the "making" and "filing" of a return for these purposes. Spies v. United States, supra; Owrutsky v. Brady, supra.

Eighteenth, Respondent claims that Judge Moran erred by determining that Respondent had failed to file tax returns for the years 1999, 2000, 2001, and 2002 because such conduct would constitute a violation of Treasury Circular 230 only once Respondent had been convicted of such failures to file in a criminal proceeding.

Respondent is incorrect. The fact that §10.51(a) of Treasury Circular 230 makes it disreputable conduct to be convicted on any criminal offense under the revenue laws of the United States, or of any offense involving dishonesty, or breach of trust, does not preclude the Director of the Office of Professional Responsibility from charging a practitioner with respect to acts of disreputable conduct such as willful failures and knowing conduct under §10.51(d) for failing to file a tax return or counseling or suggesting to a client a plan to evade Federal taxes or the payment thereof as a consequence of taking that action, without regard to if and when the practitioner is charged and convicted criminally with respect to the same conduct.

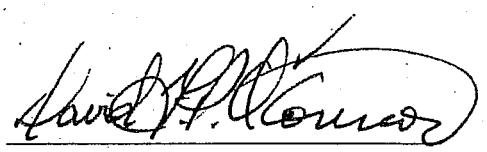
5. Final Agency Action

For the reasons set forth above, I:

AFFIRM Judge Moran's findings with respect to the charges made in the Initial Complaint;

VACATE, WITHOUT REMAND AND WITHOUT PREJUDICE, Judge Moran's findings with respect to the charges first made in the Amended Complaint; and

AFFIRM, on the basis of charges contained in the Initial Complaint, and ADOPT as FINAL AGENCY ACTION Judge Moran's Decision DISBARRING Respondent from practice before the Internal Revenue Service.



David F. P. O'Connor
Special Counsel to the
Senior Counsel
Office of Chief Counsel
Internal Revenue Service
(As Authorized Delegate
of John W. Snow,
Secretary of the Treasury)

June 25, 2004
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that the Decision on Appeal, dated June 25, 2004, was sent this day in the following manner to the addresses listed below:

Copy by Facsimile and Regular Mail to:

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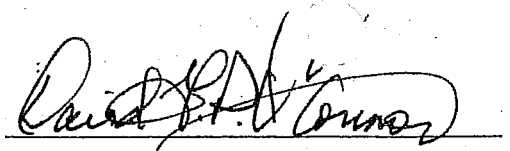
(Certification Signature on Following Page)



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(As Authorized Delegate
of John W. Snow,
Secretary of the Treasury)