The Law Office of
Robert G. Bernhoft, S.C.

207 East Buffalo Street, Suite 600 • Milwaukee, Wisconsin 53202
(414) 276-3333 telephone • (414) 276-2822 facsimile • rgbernhoft@bernhoftlaw.com
www.bernhoftlaw.com

Office of Administrative Hearings
1515 Clay Street
Suite 206
Oakland, California 94612

September 11, 2006

Re: In the matter of Joseph R. Banister, Case No. AC-2005-22

To whom it may concern:

Please find enclosed with this letter an original and two copies of a Memorandum filed pursuant to the Judge's Order of July 6, 2006. Please return the extra copies in the self-addressed stamped envelope provided.

Sincerely,

Daniel Treuden
Paralegal

Robert E. Barnes
The Law Office of Robert G. Bernhoft, S.C.
207 E. Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333 telephone
(414) 276-2822 facsimile

Appearing for Respondent

BEFORE THE
CALIFORNIA BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the matter of the Accusation Against:	
JOSEPH R. BANISTER 2282 Sunny Vista Drive San Jose, California 95128-1258 Certified Public Accountant No. CPA 57875 Respondent.	**Case Nos. AC-2005-22** **MEMORANDUM**

The respondent, Joseph R. Banister ("Banister"), by and through counsel of record, Robert E. Barnes, hereby respectfully files this memorandum pursuant to the Order made at the hearing of July 6, 2006.

ARGUMENT

This case poses three questions: first, did the Board meet its burden that the IRS action against the defendant fits within the meaning of a suspension of the "right to practice" within subsection (h) of section 5100 when the IRS itself claimed their action would have no impact on the defendant because they do not recognize a "right to practice" before their body within the meaning of that section nor within the common meaning of the due process clause, cognizable in California under both the state and Federal constitutions, and representation before the IRS is not a property right, which is

what California requires to fall within the definition of the "right to practice"; secondly, did the Board meet its burden that the IRS action against the defendant fits within the meaning of a suspension when no independent judicial review has yet taken place and comparable provisions of the code prohibit even a conviction as grounds of discipline pending appeal; and third, should any sanction, even if appropriate, be proper in this case when the IRS itself chose not to refer the defendant to this board, no other complaint against the defendant has ever been made in an otherwise stellar record of accountancy service, and the grounds for the IRS action related to advocacy not accounting rules, as no such independent violations have been alleged here.

This case arises under subsection (h) of section 5100 of the Business and Professions Code of California:

> (d) Cancellation, revocation, or suspension of a certificate or other *authority to practice as a certified public accountant* or a public accountant, refusal to renew the certificate or other authority to practice as a certified public accountant or a public accountant, or any other discipline by any other state or foreign country....
> (h) Suspension or revocation of *the right* to practice before any governmental body or agency.

Section 5100, California Business and Professions Code.

The state legislature noticeably distinguished between suspensions of an "authority to practice" *as an accountant* by a state or foreign country compared to a suspension of the "*right* to practice" anything before any governmental body or agency. As important, the state legislature chose not to authorize discipline merely for a governmental body prohibiting someone from practicing before them unless that governmental body was either an accounting licensing entity (such as a state or foreign nation) or, if neither, then suspension only constituted grounds for discipline if the

governmental agency provided a "right to practice" to the person disciplined. The "right to practice" has always been defined in California as when a governmental agency gives someone a *property interest* in practicing a particular profession.

I. Subsection (h) Requires The Governmental Agency Treat Practice Before it as a Right to Practice, Vesting a Property Interest in the Individual and Due Process Standards in its Discipline Prior to Being the Sole Grounds for State Discipline.

There is a simple reason the California legislature chose a term as impregnated with meaning as the *right* to practice. The California and United States Supreme Court articulated it well:

> The right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection.

Bixby v. Pierno, 4 Cal.3d 130, 93 Cal. Rptr. 234, 481 P.2d 242, n. 12 (Cal. 1971).

The United States Supreme Court articulated the same precept: the right to "engage in any of the common occupations of life" is a "fundamental" liberty. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The California Supreme court repeatedly concurs. *Frink v. Prod*, 31 Cal.3d 166, 174-175, 181 Cal. Rptr. 893, 643 P.2d 476 (1982).

This fundamental right enjoys special protection under the due process clauses of the United States and California constitutions. Likewise, the Fourteenth Amendment's guarantee of due process and the California Constitution's protection of due process (Cal. Const., art. 1, § 7, subd. (a)) can be analyzed in a similar fashion. The California legislature's choice of the phrase "right to practice" was a Constitutionally conforming choice, protecting the due process rights of individuals and the public interest in access to professionals of their choice without undue limitation on who can practice.

The state legislature clearly could have authorized discipline merely for any governmental agency suspending someone from "practice before the agency" but instead

only authorized discipline when what was suspended was the "right to practice." There is a reason for their choice of words: the state legislature wanted to conform their disciplinary methods to due process and to their own sense of what constituted fair grounds for disciplinary action for the citizens of California. Any other definition opens up a Pandora's box of due process problems the legislature carefully avoided with its selective language.

The respondent originally argued that the practice before the IRS is a "right akin to a license accorded by a state or federal agency" with the due process protections required by the Supreme Court. The IRS argued just the opposite, and the designate of the Department of Treasury agreed with the IRS:

> Claimant notes that Respondent is not licensed by Congress of 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** . . . 31 U.S.C. 330 does not license practitioners, nor does it authorize the Department of the Treasury to do so . . . . Accordingly, neither 31 U.S. 330 nor Treasury Circular 230 (the authorization to limit representation) creates a Federal entitlement akin to a property interest."

Director v. Banister, Complaint No. 2003-02, page 96.

By contrast, California has always used the phrase right to practice to be when such a practice invests a property right in the individual. As this court has held, the holder of a professional license has a **property** interest in the **right** to **practice** his profession that cannot be taken from him without due process. *Zuckerman v. State Board of Chiropractic Examiners*, 29 Cal.4th 32, 43, 53 P.3d 119, 126 (Cal. 2002).

California's choice borrowed from the analogous standards of full faith and credit, collateral estoppel and res judicata – all circumstances where California requires certain due process minimums before treating any foreign action as a "judgment" within the

meaning of California law. Equally so, here, California used the phrase "right to practice" to limit discipline to those cases where a governmental body invests a property interest in the individual in practicing before that agency, and follow the requisite due process standards required whenever such a fundamental property interest is at stake.

Aside from its common use and specific choice by the legislature, the interpretation of the phrase right to practice must conform the statute to Constitutional standards. It is hornbook law and an axiom of the canon of statutory construction that everyone interpreting a statute should assume the legislature intended a Constitutionally conforming definition, not a definition that would risk a Constitutional; violation, as this one would if applied to the respondent who has never had his "day in court" anywhere in the underlying IRS proceedings, because the IRS concluded no such process was due when no property interest, such as a right to practice, was at stake.

By contrast, anyone, even someone with no accounting proficiency, legal skill, or character fitness, can represent people before the IRS. For that reason, the IRS considers practice before it not equivalent to the right to practice as understood by the California courts and California legislature, as practice before the IRS is neither a common occupation nor a licensed profession. This was critical in this case, where the IRS determined their own procedural rules are purely discretionary, and not binding, such that all of their failures to follow the rules in this case – such as the failure to provide notice of any alleged rule violation and allowing remedial action by the defendant prior to discipline, as required, the failure to allow any discovery, subpoenas, testimony, cross-examination, or evidentiary hearing, apparent ex parte meetings between the IRS hearing adjudicator and the IRS advocacy division, and the refusal to stay proceeding pending a

parralel criminal inquiry (the criminal inquiry ultimately resulted in a complete acquittal of the defendant, a former whistleblower of the IRS) – were inconsequential. Put simply, practice before the IRS was like a privilege of advocating before the city council on behalf of citizens: a discretionary privilege, not a licensed profession impacting a common occupation of life.

Lastly, public policy compels this conclusion: if any limitation by any agency constitutes a "revocation" of a "*right* to practice" then professionals in California will refuse to engage in such representation, since engendering their licenses would not be worth the risk, a real risk when the agency can deny them representation for any grounds, including grounds unrelated to their profession and without adjudicatory standards which could insure minimal risk of error in the truth or fairness of the agency action. Becoming an accountant should not come at such a high cost: loss of the incentive to represent anyone in an advocate capacity, a loss felt most intently by the citizenry with fewer choices of representation merely because their chosen representative has more qualifications.

II. Section (h) Requires Exhaustion of Appeals and Independent Judicial Review to Meet the Definition of Revocation or Suspension.

At a minimum, the state legislature only intended disciplinary action based *solely* on the action of another body of government not subject to California's rules and authority when that action was a final action. Indeed, the necessity of independent judicial review recurs throughout California case law for its own disciplinary actions and California does not even allow a conviction to be grounds for discipline until all appeals have been exhausted. As always, if the underlying conduct independently violated rules, then the Board can take action on those grounds, but cannot short-circuit the process by

piggy-backing on some other agency's actions when those actions have not even been subject to judicial review. Here again, the common practice of requiring exhaustion of appeals fits with the well-developed rules of full faith and credit, *res judicata*, and *collateral estoppel*, long adopted and applied in comparable circumstances, and manifestly well known to the legislature at the time they chose the word "suspended or revoked." For example, under 5106, a conviction cannot constitute grounds for loss of a license until the exhaustion of appeals.

The Board failed to meet its burden that the IRS action against the defendant fits within the meaning of a suspension when no independent judicial review has yet taken place and comparable provisions of the code prohibit even a conviction as grounds of discipline pending appeal.

III. When the IRS Itself Anticipated No Adverse Licensing Action Against the Respondent and Refused to Refer Him For a Sanction, Where the Respondent Has a Clean Record, then No Severe Sanction is Warranted As Is.

Assuming arguendo, that the IRS limitation of who can be a representative constitutes a "revocation" of the "right to practice," certain mitigating factors should be noted. The IRS did not anticipate any hostile action toward the respondent from their action, and relied upon the same in denying the respondent his normal due process protections and administrative procedural remedies for the revocation of a property interest. Indeed, the IRS said as much, and followed up its words with its choice to make no referral of the respondent to this body for any adverse action. The respondent voluntarily self-reported out of an abundance of duty and caution, a character trait reflected in the fact that no client or employer has ever accused him of any malpractice of any kind. Given the respondent's well-founded belief the IRS action was rooted in his

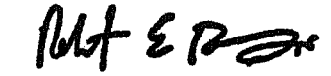
whistle-blowing activities from his former employment with the IRS, vindicated by his complete acquittal at a real trial on the facts, discipline, even if appropriate at all, should not be severe.

Conclusion

The IRS said it best: the respondent never revoked any right to practice because there is no such thing as a right to practice representational advocacy before the IRS. California has always used the phrase right to practice in this field as synonymous with a recognized property interest vested in an individual; when no such interest exists, then there is no *right* to practice to be revoked within the meaning of the Code. Regardless, with an appeal yet to be taken, the "suspension" of "representation" by the IRS should not be considered a revocation or suspension of a right to practice within the meaning of the Code. Finally, under any circumstance, severe sanction is not warranted when the respondent elf-reported, the IRS refused to report, and no client or employer has ever voiced any complaint with the accounting proficiency or ethical conduct of the respondent.

Signed this 11th day of September, 2006.

THE LAW OFFICE OF ROBERT G. BERNHOFT
Attorneys for the Respondent

By: 

Robert E. Barnes
Cal. State Bar No. 70638

207 East Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333 telephone
(414) 276-2822 facsimile
rebarnes@bernhoftlaw.com

CERTIFICATE OF SERVICE

I, Daniel J. Treuden, hereby declare that:

I am competent to serve papers and further certify that I caused a copy of the foregoing "**MEMORANDUM**" to be served this date by placing an envelope with postage pre-paid into the custody of the Federal Express, a national courier, addressed as follows:

Jeanne C. Werner
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, California 94612-0550

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on September 11, 2006 at Milwaukee, Wisconsin.

Daniel J. Treuden