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

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

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

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

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

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

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

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

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

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

## I. Standard of Review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31 C.F.R. § 10.54 (2000).

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

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

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

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

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

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

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

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

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

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

This notice must provide the practitioner with notice that the practitioner may prevent the complaint by exercising his right "to demonstrate or achieve compliance with all lawful requirements." *See* 31 C.F.R. § 10.54.

If the practitioner fails to comply or demonstrate compliance *after notice*, then the IRS may initiate a complaint requesting disbarment. Again, however, the rules impose strict requirements on the complaint process to protect the due process rights of the practitioner against an abusive, over-reaching government agency.

The administrative adjudication anticipates a contested trial, mirroring the hallmark principles of American justice – notice of the exact facts of the allegation; the right to legal representation in defense against the allegations; opportunities to conduct depositions and admit documents; an evidentiary hearing to challenge accusers and present exculpatory evidence; and a clear judgment making findings of fact and law in support of any decision. Wary of the judgments of administrative law judges, often employees of the government without the political limits imposed on real judges, the rules permit an appeal to another independent official, with a right to review of the record *de novo* as to any issues of law.

The first part of the administrative process involves the complaint. The regulations governing this proceeding require that a "complaint shall give a plain and concise description of the allegations which constitute the basis for the proceeding." *See* 31 C.F.R. § 10.56. In assessing whether the allegations contained in the complaint are sufficiently descriptive, the facts within the complaint must be of such specificity that the complaint "fairly informs the respondent of the charges against him so that he is able to prepare his defense." *See id*.

Throughout the proceedings, the rules expressly authorize the administrative law judge to conduct discovery, order depositions, subpoena witnesses, schedule an open hearing, hear testimony, admit evidence, and invite argument on the legal issues. *See* 31 C.F.R. § 10.64. The rules do not permit judgment on the pleadings. *See* 31 C.F.R. § 10.70 (requiring the ALJ issue an opinion only upon "the conclusion of a hearing.")

The hearing itself must be conducted according to federal administrative law. *See* 5 U.S.C. § 556. Thus, the agency always has the burden of proof. *See* 5 U.S.C. § 556. The ALJ cannot order disbarment unless "reliable, probative and substantial evidence" supports the judgment. *See id*. To insure the evidence is in fact "reliable" and trustworthy, the law relies on those hallmarks of American justice to determine the truthfulness of an allegation – the right to testify, the right to present evidence, the right to submit rebuttal evidence, and the right to conduct cross examination, all in open court. *See id*. As the statute states:

> A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

5 U.S.C. § 556.

Neither party must rely on the preliminary recommendation of the ALJ for the final agency decision. Thus, the rules permit appeal to a higher-ranking Treasury Department official to review the case, with no deference to the ALJ on any matters of law. *See* 31 C.F.R. § 10.71. The recommendation of the ALJ is not a final order until the Secretary approves it or both parties accept it. *See* 31 C.F.R. § 10.73. The IRS cannot publish notice of the ruling until "issuance of the final order." *See* 31 C.F.R. § 10.74.

Of note, in their repeated pattern of rule violations, the IRS published notice of the ruling before the issuance of a final order. Apparently, the IRS assumed the Secretary would just rubber stamp the judgment.

## III. The Administrative Law Judge Erred As a Matter of Law in Disbarring Banister.

The Administrative Law Judge erred as a matter of law in disbarring Banister. The IRS never afforded Banister any opportunity to achieve compliance and never alleged willful violation of the rules, as required. *See* 31 C.F.R. § 10.52; *see also* 5 U.S.C. § 558. Moreover, the IRS complaint failed to allege the requisite facts and attempts to punish Banister for conduct outside the scope of the authority of the Director of Practice. Furthermore, this disbarment violates Banister's First and Fifth Amendment rights, including his rights to freedom of expression, freedom of association, right to petition the government, right against self-incrimination, and his right to due process of law. Finally, the complete denial of discovery, the wholesale exclusion of Banister's evidence, the denial of any cross-examination, and the prohibition of any hearing on the merits require vacating the recommendation of the ALJ.

### 1. The IRS Never Gave Banister Meaningful Notice of the Allegations

The Secretary must reverse the recommendation of the ALJ to disbar Banister for allegations in the first complaint because the IRS failed to afford Banister an opportunity to achieve compliance, never alleged willful violation of any of the practitioner rules, and the never fairly informed Banister of all the facts. *See* 31 CFR 10.56. The Secretary must reverse the recommendation of the ALJ to disbar Banister for allegations in the amended complaint because the IRS never notified Banister of the charges prior to commencing the complaint, the IRS failed to afford Banister an opportunity to achieve

compliance, the IRS failed to allege willful violation of the rules, and the conduct could not be punished by the Director of Practice because the conduct did not constitute "practice before the IRS."

Neither complaint ever alleges that Banister's conduct took place during his representation of any taxpayer before the IRS or that his conduct constituted practice before the IRS. Neither complaint ever alleges that Banister willfully ignored the rules of practice before the IRS. Hence, both complaints must be dismissed.

Moreover, the precepts of Constitutional due process, the prerequisites of Administrative Procedures Act, and the provisions mandated by the regulations themselves require an allegation and proof of willfulness before the government can disbar any Congressionally licensed practitioner. The IRS never alleged, nor proved, any willful violation of any IRS practitioner regulation. Given the absence of any allegation of willful violation of a regulation, the IRS never provided the mandatory notice of an opportunity to comply with the rules, which is a condition precedent to any complaint or action for disbarment.

Finally, the entire proceeding negated any due process protection inherent in the rules detailed regulatory methodology.

For example, the first complaint originated from a deficient and suspect report. The report filed by the agent was untimely, relied on information outside the permissible scope of the regulations, and made allegations based on political conduct, not practitioner conduct. The IRS agent who made the report engaged in a private investigation of Banister, including surreptious monitoring of his disclosure of whistle-blowing activities and political statements, unauthorized investigation of Banister's private employment

records with the agency, unauthorized interrogation of Banister's prior employer, and attempt to entrap Banister during Banister's representation of a taxpayer.

Similarly, the second complaint originated from the political monitoring of Banister's free speech on a radio show and the secret, illicit audit by an IRS official.

In the same vein, both complaints exemplify inadequate notice. Both complaints fail to plead sufficient facts to fairly inform Banister of what facts he must disprove to protect his right to practice before the agency.

To begin with the evident errors in the first complaint, the first complaint never avers what allegedly false factual representations were made by Banister. The first complaint plays a shell game with the facts. The first complaint never alleges any factual statements Banister made "during his representation of clients" and in his presentation to the IRS. Statements outside that context are simply free speech and outside the jurisdiction of the Director's authority to sanction.

Indeed, the first complaint is analogous to a complaint alleging fraud as follows: "John told someone the car was green. That someone is a taxpayer. John is a practitioner." Then, from those facts alleging that John committed fraud and disputable conduct, without ever alleging the statement was made during representation before the IRS, to a client whose liabilities were being disputed before the IRS, and the statement came in a presentation to the IRS intended to reduce the tax liabilities of the client represented. Worse yet, the IRS never even alleged the obvious requirement for fraud itself -- alleging the car was not green.

The same kind of defect pervades the IRS' first complaint. For example, the first complaint alleges Banister "took a position" that had "no substantive basis in the law or fact." Yet, the complaint fails to allege which position had "no substantive basis in the

law or fact." The complaint alleges that certain advice Banister supposedly gave to people constituted "false" opinions procured through "gross incompetence." Yet, again, the complaint fails to allege what about the opinion rendered it false or what was "grossly incompetent" about any opinion.

Indeed, in both its allegations of incompetence and the failure to conduct due diligence, the complaint exhibits another deficiency – the complaint fails to state what standard of care measured the degree of competence or diligence Banister was obligated to meet.

Comparably, the first complaint alleges that Banister filed a "frivolous" return for a client. Yet, following the same pattern in its other allegations, fails to state which fact about the return was frivolous. That portion of the complaint must also be dismissed.

Finally, the first complaint alleges that Banister "knowingly counseled" a client to "evade" a tax. Yet, the first complaint fails to allege what about Banister's advise constituted evasion. This requires that Banister know of a legal duty to pay a tax and advise a client to ignore that duty. Once again, the complainant fails to even allege Banister knew his client had any particular legal duty to pay a tax or that Banister advised his client to disobey a known legal duty.

The allegation that public advocacy could ever constitute private evasion is particularly disturbing, and requires reversal of the ALJ decision. A practitioner's duty is to aid a client in reducing their tax liability when the law warrants. Merely stating that a client is not liable for a tax cannot, as a matter of law, constitute evasion, or every accountant and tax lawyer in America can be disbarred for "counseling evasion." Instead, the complainant must show what about the advice was "evasion" and must also show that Banister knew the advice constituted evasion. Evasion, of course, requires

knowledge of a known legal duty. No allegation, and no proof, ever supported anything as absurd as alleging tax evasion from public comments about provisions of the code or historical issues regarding the proper adoption of provisions of the code.

The amended complaint suffers even more egregious defects. The amended complaint alleges that Banister "was required to file a return," but fails to state any facts that support such a contention. Indeed, the amended complaint does not state a single fact that could form the basis for such a legal claim.

Alleging mere legal conclusions fails to put Banister on notice of what facts he will need to prepare his defense. The complainant must plead individual facts that give rise to the claim. Instead, the complainant merely asserts a legal conclusion. As such, the amended complaint fails to fairly inform Banister of what facts he will need to prove or disprove to prepare a defense is inadequate under the rules. *See* 31 C.F.R. § 10.56.

With no factual claims to defend against, the amended complaint gives the respondent no opportunity to prepare a defense. The regulations clearly require such facts to be plead into the complaint for that very purpose. Without such facts, the respondent cannot prepare his defense. Indeed, without such facts, the amended complaint fails to state a claim sufficient to proceed.

The rules specify what kind of supplemental charges can be amended in a complaint.

> 31 C.F.R. Sec. 10.59 Supplemental charges.
> If it appears that the respondent in his answer, falsely and in bad faith, denies a material allegation of fact in the complaint or states that the respondent has no knowledge sufficient to form a belief, when he in fact possesses such information, or if it appears that the respondent has knowingly introduced false testimony during proceedings for his disbarment or suspension, the Director of Practice may thereupon file supplemental charges against the respondent. Such supplemental charges may be tried with other charges in the case, provided the respondent is

> given due notice thereof and is afforded an opportunity to prepare a defense thereto.

As the rules codify, the complainant can only amend a complaint and supplement charges when those charges reflect conduct within the pending proceedings, such as false testimony. This reflects the detailed procedural provisions outlined in the regulations. These detailed procedural prerequisites protect a practitioner's right to due process.

As outlined earlier, these administrative procedures require a slow, step-by-step evaluation before a complaint can ever be filed against a practitioner. This is why these supplemental charges provision is limited to conduct that takes place within the proceedings.

In this case, the allegations in the amended complaint skipped every part of the process. There is no record of any written referral by an IRS employee. There is no written report from the director. There is no notice to the respondent of the alleged problem. The Director gave the respondent no opportunity to either achieve compliance. The Director never even provided a conference for the respondent to discuss the issue with the Director.

The amended complaint alleges no facts that permit this deviation from the required process. In addition, this failure to follow the required process violates Banister's right to due process, as guaranteed by the Fifth Amendment. The amended complaint fails to state a claim upon which relief can be granted and should be dismissed due to the numerous deficiencies in the amended complaint and the secretive process that brought it about.

The amended complaint alleges Banister willfully failed to file a return, but the rules only proscribe the willful failure to make a return. Thus, the complaint alleges no

facts that form the permissible basis of any action. As is, the amended complaint alleges mere legal conclusions, without stating a single fact, depriving Banister of any notice sufficient to "fairly inform" him of the facts he needs to disprove in his defense. Finally, the extraordinary deviation from the required procedure of the code – no notice of the charges through employee and director written referrals and no opportunity to comply or conference on the charges – invalidates this complaint and violates Banister's right to due process.

The regulations codify what allegations can constitute "the basis for the proceeding." *See* 31 C.F.R. § 10.56. The alleged basis for this proceeding is Banister's alleged "disreputable" conduct pursuant to 31 C.F.R. § 10.51 (f). The amended complaint alleges that Banister willfully failed to "file" a return and references the criminal provisions related thereto. However, the regulation only references the willful failure to "make" a return, not "file" a return. *See id.* This distinction would make sense, given that the rules only cover "representation of clients." *See* 31 C.F.R. § 10.00.

In contrast, the willful failure to file only constitutes disreputable conduct if Banister had been convicted of the crime of willful failure to file. *See* 31 C.F.R. § 10.51 (a). Again, the amended complaint nowhere alleges that Banister has been criminally convicted of willful failure to file. Hence, the amended complaint fails to allege any fact that can form the basis for this proceeding, and should be dismissed.

The amended complaint makes no allegation of misconduct within the proceedings. The amended complaint gave Banister no notice of the allegations before commencing the complaint, nor provided Banister any opportunity to demonstrate compliance or achieve compliance prior to the commencement of the amended complaint. The amended complaint alleges facts outside the scope of Banister's

representation of clients. Thus, Banister cannot be disbarred for these allegations, as a matter of law. Instead, the amended complaint must be dismissed.

**2. Disbarment Violates Banister's First Amendment Right to Free Speech.**

As a seminal case cited even by the IRS, states, "[i]t is not the purpose of the law to penalize frank difference of opinion." *Spies v. United States*, 317 U.S. 492, 496 (1943). Yet, that is exactly that the IRS seeks to do here.

The rules also reflected the concern for free speech and the right to petition the government. Thus, the rules exempt political advocacy or conduct – such as public statements, political texts, or personal political beliefs – from the jurisdiction of the Director, as such comments cannot constitute "representation of a client before the IRS."

In short, the Director cannot punish speech. To punish a practitioner for an opinion held by the practitioner, the Director must show all of the following:

1) the statement was made on behalf of a client during the course of representation of a client;
2) the statement was made on a tax return;
3) the statement contradicted Supreme Court law;
4) and the statement was not disclosed to the IRS, produced by gross incompetence, or the client was never informed of any possible penalty.

Even then, further Constitutional constraints require that the speech invite "imminent lawless action" as the fifth element to any such claim. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

A practitioner risks malpractice if he fails to raise an issue never directly litigated by the Supreme Court. However, if the practitioner offends the political sensibilities of

the IRS, the practitioner risks disbarment. The IRS wants to chill advocacy it dislikes and punish speech it disfavors.

Banister contended by affirmative defense that the IRS is attempting to impermissibly punish him for exercising First Amendment rights to free speech. (*See* Answer, ¶ 26(c); Answer to Am. Compl., ¶ 8(c).) Banister's prior history – including his agency record of achievement and leadership, his concerns over agency procedures he believed unconstitutional, and the agency's sudden decision to demand Banister's resignation after he requested answers to his legitimate concerns – directly relate to the issues of a First Amendment violation and impermissible retaliation defense Banister has a right to present.

The IRS itself does not hide its effort to prosecute Banister for purely political beliefs and private conduct. The IRS, in its own pleadings and exhibits, references Banister's political publications to form the basis of their complaint. Indeed, the IRS concedes it surveillances Banister's talk radio appearances and started its investigation of Banister's purely private conduct based on these political appearances. (*See* Complainant's Opp'n to Resp't Mot. for Discovery, p. 6.) The IRS offers no explanation why one of their lead trial attorneys monitors the political appearances of a former Criminal Investigation Division special agent.

Furthermore, the IRS, through its pre-hearing exchange materials, wishes to introduce evidence of Banister's political commentary in this proceeding to disbar him, including his political texts, statements on talk radio and Sixty Minutes. Finally, Banister's prior employment with the IRS and status as a whistleblower triggered this proceeding to disbar him, and alleged the defense of impermissible retaliation for First Amendment speech in his Answer.

Therefore, this case implicates powerful First Amendment rights and the public interest in protecting political speech. Banister exercised this right to unimpeded political speech, and is targeted for punishment because of the political context and implications of that speech. The IRS's attempt to bar Banister from practicing before the agency is subject to special scrutiny by the judiciary. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Banister's private life and political positions is wholly separate from his mere advocacy before the agency, and his actions did not, as admitted by the Agency, constitute incitement to imminent lawless action as admitted by the Complainant. (*See* Complainant's Opp'n to Resp't Mot. to Dismiss, p. 12.)

It is startling that the Complainant would bring an action of the instant type and cite cases such as *Brandenburg v. Ohio*, 395 U.S. 444 (1969) to support their position. There, the Court overturned its improvident holding of *Whitney v. California*, 274 U.S. 357 (1927), observing in the process that the *Whitney* court had simply permitted the sanction of "ideas which the majority of the Court deemed unsound and dangerous." *Brandenburg*, 395 U.S. at 447. Overturning decades of already thoroughly discredited law, the Court articulated a new standard for measuring protected speech and conduct, striking down the Ohio Criminal Syndicalism Act on grounds it was facially unconstitutional under the First Amendment:

> "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

*Id*., at 447.

The Act criminalized advocating, among others things, teaching the duty of violence to accomplish political reform. *Id*., at 448. A Ku Klux Klan leader was convicted under the

Act for telling a crowd, in so many words, that they must kill "Niggers" and "Jews" to restore the country. *Id*., at 445-47.

Examining the instant case in *Brandenburg's* light, Banister's private life and political positions are clearly protected speech. All the statements on talk radio, on Sixty Minutes, and in the political writings provided by IRS in its pre-hearing exchange materials, constitute political speech. On behalf of his clients, Banister followed the proper process and petitioned the Internal Revenue Service to settle certain tax matters on behalf of his clients. He requested a Collection Due Process Hearing, a hearing the IRS never let happen. (*See* IRS Pre-Hearing Exchange Materials.)

Moreover, other circuits also reject government attempts at abridging protected speech, particularly in the tax area, as evidenced by a thoughtful Ninth Circuit decision. In *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), the defendants were charged criminally under 26 U.S.C. § 7206 for promoting a tax avoidance trust scheme, and were convicted in the district court below. See *id*. The appeals court, however, overturned their convictions on First Amendment grounds:

> Nothing in the record indicates that the advocacy practiced by these defendants contemplated imminent lawless action. Not even national security can justify criminalizing speech unless it fits within this narrow category; certainly concern with protecting the public fisc, however laudable, can justify no more.

*Id*. at 1428.

Significantly, the *Brandenburg* test does not rise and fall on the actions of listeners, but on the actual conduct of the speaker:

> Even if the defendants knew that a taxpayer who actually performed the actions they advocated would be acting illegally, the first amendment would require a further inquiry before a criminal penalty could be enforced. With the exception of Durst, no defendant actually assisted in

> the preparation of any individual tax return. Rather, they merely instructed an audience on how to set up a particular tax shelter.

Id. at 1428 (citing *Brandenburg*, 395 U.S. at 444).

If the First Amendment protected Dahlstrom and his co-defendants, who actually advocated aggressive participation in a tax avoidance scheme which they knew could result in criminal and civil penalties against investors, then Banister's mere advocacy of several client asking nothing more than a hearing must be protected from government attempts to silence his political speech. As Justice Douglas eloquently expressed in his *Brandenburg* concurrence:

> The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts. The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded movie theatre. This is, however, a classic case where speech is brigaded with action . . . . Apart from [those types of] rare instances **speech is, I think, immune from prosecution.** Certainly there is no constitutional line between advocacy of abstract ideas as in Yates and advocacy of political action as in Scales. **The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.**

*Brandenburg*, 395 U.S. at 456 (citations omitted) (emphasis added).

As the IRS admits, Banister's actions did not intend to incite imminent lawless action. (*See* Complainant's Opp'n to Resp't Mot. to Dismiss, p. 12.) Indeed, if the government cannot proscribe the publication of books that teach how to build bombs or recommend racist death threats against whole groups of people, then Banister's whistle-blowing activities and his public reports on those activities must warrant protection from Government intrusion. In the same vein, Banister's mere petitioning the IRS for an administrative tax collection hearing on behalf of a client with a tax problem must be equally protected speech.

Finally, public statements are not prohibited by the rules, nor could they be, despite the misjudgments of the ALJ. In one of his many errors, the ALJ claimed that "a practitioner may not advise clients to take a position which is frivolous" in any manner involving the IRS. He later construed this to mean that no citizen can "espouse views" contrary to the positions of the IRS. If they did, and they merely happened to be a practitioner, then they could be disbarred from practice and have their reputation branded with a badge of infamy. Needless to say, such rules would be unconstitutional. In fact, the rules support no such interpretation as the one employed by the IRS and the ALJ.

While the IRS made liberal use of the word "frivolous" throughout its summary judgment motion as to all of the regulation violations alleged, the word "frivolous" is used in only one section of the entire body of practice regulations; e.g., Section 10.34 regarding "frivolous" tax returns. The IRS never alleged that Banister ignored the safe harbor provisions. Instead, the IRS and the ALJ repeatedly referred to irrelevant caselaw, caselaw that was not and could not be binding on the IRS. In one of his many decisions evidencing incompetence of the law and the facts, the ALJ appeared unaware of this. Indeed, the primary prosecutor with the Director of Practice appeared unaware of this. As such, the first complaint fails to fairly inform Banister of what facts he will need to prove or disprove to prepare a defense, requiring dismissal of the complaint. *See* 31 C.F.R. § 10.56.

Despite the multiple misinterpretations by the ALJ and misapplication of the law by the IRS, these rules can be read to comport with Constitutional freedom of expression and the right to petition one's government. That Constitutionally correct construction of the rules requires reversal of the ALJ recommendation and dismissal of the complaint against Banister.

Despite IRS desires, the rules did not overturn the First Amendment. Protecting the First Amendment requires overturning the ALJ judgment.

### 3. Proceeding With The Case Pending the Parallel Secret Criminal Grand Jury Violated Banister's Right Against Self-Incrimination and Right to Due Process.

No administrative agency can constitutionally force a person to choose between self-incrimination and serious economic reprisal. *Baxter v. Palmigiano*, 425 U.S. 308 (1976). Yet, that is what the Administrative Law Judge and the IRS did in this case. The IRS admitted they were conducting a criminal investigation of Banister from before the commencement and throughout these proceedings. The IRS hid this fact until the eve of disposition. The IRS conceded they conducted secret conferences with the Department of Justice concerning this matter. The IRS also admitted their policy was to initiate these proceedings at the will of the criminal arm of the government. The IRS acknowledged an open grand jury contemplating indicting Banister for the same conduct it alleged in this case. (*See* Complainant's Mot. for Summ. J., p. 46.) Such a Faustian bargain – lose your right against compelled, coerced speech or suffer a badge of infamy stripping you of your license – required abatement of the proceeding. The judge's denial thereof was reversible error.

Indeed, an agency may only compel testimony from an accused if the agency immunizes the declarant from subsequent criminal prosecution. *See id*. In this regard, parallel proceedings are "unobjectionable" only so long as there is no "substantial prejudice to the rights of the parties involved." *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C.App. 1980). The *Dresser Court* also outlined under what circumstances civil proceedings must be stayed:

> Other than where there is specific evidence of agency bad faith or malicious government tactics, **the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter**. The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand the rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case.

*Dresser*, at 1376 (emphasis added).

This disbarment action is exactly the "strongest case for deferring civil proceedings" identified in *Dresser*. *Id.* Forcing Banister to testify endangers Banister's Fifth Amendment rights, allowing the impermissible realization of all the evils anticipated by the *Dresser Court* – undermining Banister's right not to speak, expanding the scope of criminal discovery beyond the rules of criminal procedure, exposing the basis of Banister's possible defense to the prosecution in a preview of a potential criminal trial, and otherwise prejudicing Banister's defense.

Compounding matters, the IRS never informed Banister of the pending criminal investigation and grand jury proceeding, although the IRS admits it knew about both and even conferred with criminal investigators in February of 2001, well before the IRS filed the complaint which commenced this action. Banister's pre-hearing exchange materials and contemplated hearing testimony also evidence the sort of agency bad faith and malicious tactics decried in *Dresser*.

The agency ambushed Banister by refusing to answer his questions regarding the scope and nature of federal income taxation during his IRS tenure as a special agent, coercing his resignation in lieu of the required response, and then waiting until after he made public statements it disliked to convene a concurrent criminal investigation, grand

jury proceeding, and disbarment action. The agency's repeated violation of its own regulations in dealings with Banister reflects a deviation from the norm only explained by IRS bad faith. Finally, if knowledge of criminal investigations and grand jury proceedings during this civil action's pendency, surveillancing Banister's political conversations and public appearances, and demanding summary disbarment without either a hearing or discovery aren't "malicious" tactics, it is difficult to imagine what would be.

The "summons" law cited by IRS further supports Banister's argument for dismissal or, in the alternative, abatement of this disbarment action. The IRS cites *Donaldson v. United States*, 400 U.S. 517, 534 (1971), which discusses the many problems of IRS concurrent civil and criminal investigations. *Donaldson* involved a civil administrative summons issued by IRS – a much less intrusive device than economic reprisal via disbarment; still, the court held that a summons could not be enforced if the IRS had referred the target's case to the Department of Justice for criminal prosecution.

Unlike *Donaldson*, the IRS is not merely "considering" a criminal referral regarding Banister; instead the IRS has actually made a criminal referral and presumably received authority from the Department of Justice to prosecute Banister criminally. With this background, the IRS now seeks summary disbarment and apparently hopes to force Banister to choose between forfeiting his livelihood and asserting his Fifth Amendment right against self-incrimination, in direct violation of *Donaldson* and its progeny. In fact, the Fifth Circuit condemned the very IRS practices involved here as the kind of "sneaky, deliberate deception" warranting the harshest sanctions against the agency. As the court held in *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977):

> **'Silence can only be equated with fraud** where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading.' . . . From the facts we find that the agent's **failure to apprise the appellant of the obvious criminal nature of this investigation was a sneaky deliberate deception by the agent** under the above standard and a **flagrant disregard for the appellant's rights.**

*Id.* (citing *United States v. Prudden*, 424 F.2d 1021, 1032 (5th Cir. 1970) (emphasis added).

Here, the IRS stood silent from February of 2001 until the eve of the hearing, never disclosing to Banister the private conferencing of the IRS agents with criminal investigators. Indeed, shockingly, the IRS admits they followed the guidance of the criminal investigators in initiating this proceeding. (*See* IRS' Motion for Summary Jjudgment, p. 46.) The IRS's silence under such circumstances works a fraud against Banister, and as *Tweel* held, such unconscionable conduct reflects a "flagrant disregard" for Banister's rights, necessitating dismissal.

If parallel criminal proceedings with identical civil proceedings do not endanger Banister's Fifth Amendment rights, then the Fifth Amendment holds little value against government coercion. When the state hides this fact from Banister and secretly conferences with the prosecutor, then the Fifth Amendment mandates abatement.

The ALJ's failure to abate the case abated justice. Hence, the disbarment must be discarded and the proceeding dismissed, if the Fifth Amendment protections mean anything.

**4. The Complete Denial of Discovery Violated Banisters' Right to Due Process.**

The courts long ago acknowledged that the complete denial of discovery in an administrative adjudication would likely be a due process violation. Yet, that is exactly what happened here in this already extraordinary proceeding. *See Order of Respondent's*

*Motion for Discovery; See Order Regarding Admissible Evidence at Sanction Phase of Proceeding*, December 26, 2003; *See also Order Regarding Complainant's Motion in Limine*, November 21, 2003. In short order, the court denied the respondent any opportunity to substantiate his defense.

Indeed, the evidence excluded from discovery exculpated Banister, documenting all of the following: that his arguments had a reasonable chance of success on the merits, as other IRS officials routinely approved it in reducing the tax liability of taxpayers; that he informed the IRS officials his client was not claiming the income tax was unconstitutional as his reason for requesting a collection due process hearing; and that there was no evidence Banister had any legal duty to file any return given the facts of his situation. *See Respondent's Proffer of Offer of Proof*, November 25, 2003.

Moreover, the evidence would have also shown that the real motivations for prosecuting Banister were purely retaliatory for Banister's political speech, with the choice to prosecute him resulting from Banister's appearance on Sixty Minutes, where Banister aired allegations of fraud he uncovered during his tenure with his former agency. *See Respondent's Proffer of Offer of Proof*, November 25, 2003.

Finally, discovery could have yielded exculpatory evidence that the IRS was estopped by principles of equity from prosecuting Banister when they routinely refused to answer citizen questions on these issues, including Banister's sincere questions.

Thus, the denial of discovery was as prejudicial as it could be.

**5. Excluding Banister's Testimony Violated Banister's Right to Due Process and Violated the Rules.**

The court denied Banister any right to testify as to the diligence of his research,

the community standard under which he operated, his knowledge of beneficial arrangements for taxpayers advancing the argument he allegedly made, or even as to his history of never willfully violating any federal law. *See Order of Respondent's Motion for Discovery; See Order Regarding Admissible Evidence at Sanction Phase of Proceeding*, December 26, 2003; *See also Order Regarding Complainant's Motion in Limine*, November 21, 2003. The court also denied Banister the right to call a host of witnesses, including the taxpayers allegedly injured by Banister's advice or a host of witnesses who had exculpatory and mitigating information. *See id.* The court erred in all of its holdings.

The rules and the law expressly mandate:

> A party is **entitled** to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for **a full and true disclosure of the facts**.

5 U.S.C. § 556.

This ALJ, and the IRS, were obsessed with preventing just that – a full and true disclosure of the facts. The facts would have shown that Banister's arguments had a reasonable chance of success on the merits for any taxpayer who advanced the argument; that other IRS officials routinely approved Banister's arguments in reducing the tax liability of taxpayers; that Banister informed the IRS officials his client was not claiming the income tax was unconstitutional as his reason for requesting a collection due process hearing; and that there was no evidence Banister had any legal duty to file any return given the facts of his situation; that the IRS was estopped by principles of equity from prosecuting Banister when they routinely refused to answer citizen questions on these issues, including Banister's sincere questions; and that the real motivations for prosecuting Banister were purely retaliatory for Banister's political speech, with the

choice to prosecute him resulting from Banister's appearance on Sixty Minutes, where Banister aired allegations of fraud he uncovered during his tenure with his former agency *See Respondent's Proffer of Offer of Proof*, November 25, 2003.

As one illustration, the court's gagging of Banister denied Banister the opportunity to present a reliance defense. This particular case emphasizes the relevance of any reliance defense, including reliance on the conduct of another professional or the agency involved.

Here, Banister alleged that the IRS was estopped from proceeding against him by virtue of IRS acts of omission and commission. In addition to supporting his estoppel defense, though, reliance on agency conduct also negates the requisite willfulness element of the offenses charged. Willfulness is a required element for any violation of a Treasury Circular 230 regulation where the IRS fails to afford the target an opportunity to comply, and this required element is a disputed material fact which precludes summary disbarment on any of the claims submitted by IRS.

Repeatedly, courts hold that evidence relating to a defendant's reliance upon representations made by government officials, whether judges or executive department officers and agents, are a defense to government sanctions. In *Moser v. United States*, 341 U.S. 41 (1951), the Court held that reliance on government conduct could constitute a defense to actions taken by the government. These decisions are buttressed by others such as *Raley v. Ohio*, 360 U.S. 423 (1959), *Cox v. Louisiana*, 379 U.S. 559 (1965), *United States v. Laub*, 385 U.S. 475 (1967), and *United States v. Penn. Industrial Chemical Corp.*, 411 U.S. 655 (1973).

The 9th Circuit, which is the circuit in which Banister resides, and would be the appellate court reviewing any agency action in this matter, also addressed this issue. In

*United States v. Tallmadge*, 829 F.2d 767, 775 (9th Cir. 1987), the defendant was being prosecuted for possessing firearms after conviction for a felony. I n defense, Tallmadge demonstrated that a licensed arms dealer, held to be a government agent, represented to him that it was lawful for him to acquire firearms. Because Tallmadge relied upon the word of this government agent, that court held that it would violate due process to convict him:

> The prosecution and conviction of Tallmadge for the receipt and possession of firearms, after he was **misled by the government agent** who sold him the weapons into believing that his conduct would not be contrary to federal law, violated due process.

*Tallmadge*, 829 F.2d at 775; *see also United States v. Albertini*, 830 F.2d 985 (9th Cir. 1987).

In *United States v. Clegg*, 846 F.2d 1221 (9th Cir. 1988), the defendant was charged with arms smuggling in Pakistan and sought to defend himself with the factual defense that high government officials approved his activities. While such conduct was clearly illicit under the laws, the court held that the defendant's reliance on government officials constituted a valid defense. State courts also acknowledge this defense. In *Schiff v. People*, 141 P.2d 892 (1943), the defendant received stolen property and informed the police about it, who instructed him to simply retain possession. Later, the state charged him with possessing stolen property. Though he knew the property was stolen and possessed it, the court reversed his conviction for possessing stolen property based on his reliance on the government.

Similarly, in *People v. Markowitz*, 223 N.E.2d 572 (1966), public officials led a defendant to believe that he did not need a license to sell merchandise at Yankee Stadium. Despite his lack of a license, the court vacated his conviction due to his

reliance on government officials. Again, in *State v. Ragland*, 233 A.2d 698 (1967), the court vacated a conviction of a defendant for driving without a license based merely upon the fact that he drove a car on the occasion at the request of police officers.

Merely misinterpreting government forms or government practices properly provides a reliance defense to government sanction. In *Connelly v. State*, 351 S.E.2d 702 (1987), a defendant who had relied upon a misleading driver's license form had his conviction for driving offenses reversed. In *State v. Chiles*, 569 So.2d 45 (La.App. 4 Cir. 1990), a pawn shop owner who relied upon the practices of the local sheriff's office had her conviction for failure to abide by record keeping laws reversed.

Finally, silence alone provides a reliance defense whenever such silence would mislead another intentionally or wherever there is either a legal or moral duty to speak. As the court held in *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977):

> **'Silence can only be equated with fraud** where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading' . . . From the facts we find that the agent's **failure to apprise the appellant of the obvious criminal nature of this investigation was a sneaky deliberate deception by the agent** under the above standard and a **flagrant disregard for the appellant's rights.**

*Id.* (citing *United States v. Prudden*, 424 F.2d 1021, 1032 (5th Cir. 1970).

Hence, whenever an unanswered inquiry would intentionally mislead someone, the law and morality impose a duty to answer. The IRS never corrected any statement Banister made, never answered any questions Banister asked, and never afforded Banister a simple opportunity to achieve compliance. Consequently, the IRS is estopped from proceeding against Banister on the very issues it refused to provide answers on.

In sum, Banister and his client followed the rules, petitioned an administrative body for redress, and honestly expressed their beliefs. And, again, the IRS answer was a

conspiracy of silence, a deafening scream to ordinary Americans with simple requests. As *Tweel* held, such silence equals fraud. For all these reasons, the evidence documented the need for its admission.

Clearly, this exclusion of evidence prejudiced Banister and resulted in a disbarment without due process of law, requiring reversal.

**6. Denying Banister Any Hearing on the Merits of the Allegations Against Banister Denied Banister's Right to Due Process, Violated the Administrative Procedures Act, and Violated the IRS' Own Rules.**

The ALJ held that "one does not get a right to a hearing to resolve facts simply by denying the allegations." *See Order Regarding Complainant's Motion in Limine*, November 21, 2003, at 2. Then, when does a person have a right to hearing, if not when the person denies the allegations? This is even more egregious than the court denying Banister any discovery and gagging him from testifying on his own behalf.

No order of disbarment can issue until "the conclusion of a hearing." *See* 31 C.F.R. § 10.70. The ALJ attempted to evade this stricture by holding a "show" hearing *after issuing judgment against him on the merits*. Even this "show" hearing was limited as the ALJ gagged Banister again, prohibited the testimony of the allegedly injured taxpayers, and informed Banister's attorneys they could not argue freely on their client's behalf. *See Order Regarding Admissible Evidence at Sanction Phase of Proceeding*, December 26, 2003.

The absence of a hearing precluded an order of disbarment and requires reversal.

**7. Denying Banister Any Right to Cross-Examine Any of His Accusers on the Merits of the Allegations Denied Banister's Right to Due Process, Violated the Administrative Procedures Act, and Violated the IRS' Own Rules.**

With no discovery, no depositions in lieu of testimony at a hearing, no hearing on

the merits, and excluding witnesses at the sanction hearing, the ALJ denied Banister any cross examination of any of his accusers as to the merits of the allegation.

The right to cross-examine is fundamental to American jurisprudence. Denying Banister that right denied him due process of law and again violated the statutory requirements for a hearing. The rules and the law expressly mandate:

> A party is **entitled** to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for **a full and true disclosure of the facts**.

5 U.S.C. § 556.

The exposure of Finz' probably perjury – revealed on cross examination by Banister and conveniently ignored by the ALJ – indicates the importance of cross examination to a "full and true disclosure of the facts." But, as this entire proceeding was about masking the facts from the public, Banister never received the opportunity to fully cross-examine Finz, cross-examine any other witness, or cross-examine anyone on the merits of the case.

The ALJ's denial of Banister's right "to conduct such cross-examination as may be required for a full and true disclosure of the facts" violated the statute, violated Banister's right to due process, and rendered this disbarment order invalid.

The Administrative Procedures Act, the regulations of Treasury Circular 230, and the Constitution itself mandate reversal of the disbarment order and dismissal of this proceeding in its entirety.

**8. Applying The Wrong Standard for Summary Judgment Violated Banister's Right to Due Process and Violated the Rules.**

The code precludes summary disbarment proceedings with vague allegations and paper rulings. Yet, that is exactly what happened here, in a case that the IRS claims only

coincidentally involves a former high-profile IRS whistleblower. The court held that a respondent, never afforded any opportunity for discovery and subject to a pending parallel criminal proceeding, must "produce evidence" to negate factual claims that constitute the elements of the government's case even when the IRS never alleged any such facts in their complaints. *See Order on Complainant's Motion For Summary Judgment,* November 24, 2003.

At the outset, the limited authority delegated to the IRS to disbar practitioners for their practice before the IRS requires notice of the allegations, an opportunity to comply, and a full hearing before stripping a practitioner of their economic livelihood. By necessary implication, such rules never authorize, nor could the rules authorize, summary judgment in a contested case without violating fundamental Fifth Amendment Due Process rights.

It is well settled that a respondent in an IRS disbarment proceeding is entitled to all requisites of elementary fairness, due notice, and opportunity to be heard. *See Washburn v. Shapiro*, 409 F. Supp 3 (S.D.Fla. 1976). A hearing necessarily entails the opportunity to confront evidence, present arguments, and be represented by counsel before an independent administrative law judge. As the statute codifies:

> A party is **entitled** to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for **a full and true disclosure of the facts**.

5 U.S.C. § 556.

The court's order for summary judgment violated the regulations and the "elementary" requirements of Fifth Amendment due process mandated by the courts, and should therefore be denied

Second, only "after adequate time for discovery" can summary judgment should be granted. See *Celotex*, 477 U.S. at 317. The denial of discovery required a hearing.

Turning to the alternative analysis, summary judgment cannot be granted unless there are no material facts in dispute and the movant is entitled to judgment as a matter of law. *See Celotex Corp., v. Catrett*, 477 U.S. 317 (1986). When the party holding the burden on the issues moves for summary judgment, that party cannot rely on the mere pleadings, but must show the court from affirmative evidence that there is no "material" fact in dispute. *Celotex*, 477 U.S. at 317; *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985). A fact is material if it bears on the elements of the claim or the elements of a defense alleged by the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In fact, when the moving party has the burden of proof, summary judgment by assumption, inference and implication is not allowed. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); see also *Anderson, supra*. Thus, a court is not entitled to weigh the evidence and resolve disputed underlying factual issues." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992) (citing *Morales v. Merit System Protection Bd.*, 932 F.2d 800, 803 (9th Cir. 1991)). Moreover, when the moving party holds the burden of proof on the issue, the movant must offer evidence sufficient to support a finding upon every element of its claim for relief, or the motion must be denied. *See Lockwood v. Wolf Corp.*, 629 F.2d 603, 611 (9th Cir. 1980). Thus, a moving party with the burden of proof must affirmatively show the court, through evidence, not assumptions or assertions, that the most generous reading of the record in favor of the non-movant shows no possible fact in dispute as to a single element of any claim or defense in any part of the case. The IRS never met that heavy burden.

The IRS failed to even allege the requisite facts constituting the elements of the offenses charged, and hence could not meet its burden of establishing the necessary foundation of undisputed facts as to each element of the offenses. In contrast, the undisputed facts show Banister's First and Fifth Amendment rights would be substantially violated by summary disbarment or any adverse action by the agency at this time. Similarly, those undisputed facts demonstrate that Banister is entitled to dismissal on grounds of equitable estoppel.

Turning to the specific allegations, the IRS alleged in its original complaint that Banister violated three practice regulations in his practice before IRS; e.g., 31 C.F.R. §§ 10.22 (diligence as to accuracy), 10.34 (standards for tax return preparation position or advice), and 10.51 (disreputable conduct). Banister denied each of these allegations in his answer. (*See* Answer, ¶¶ 12-25.)

Regarding Section 10.22, the quality of Banister's "diligence" cannot be determined on this record because there is no evidence other than the complaint's allegations and Banister's denials. It bears noting, however, that the IRS attached Banister's "Investigating the Federal Income Tax: A Preliminary Report" to its original complaint, which report apparently resulted from several years of intensive investigation on Banister's part. If anything, the best evidence strongly suggests that Banister performed the requisite due diligence under Section 10.22 – a contention he expected the IRS to contest at a hearing on the merits.

Regarding Section 10.34, that regulation sets out detailed "safe harbor" criteria for a practitioner advising a client with respect to tax return positions or preparing or signing returns. *See* 31 C.F.R. § 10.34 (2000). In addition to denying the Section 10.34 allegations, Banister's "Statement of Facts" alleged that he had, in fact, performed the

various safe harbor acts. (*See* Answer, ¶¶ 8, 10-11.) Furthermore, the IRS references just one single instance of filing one return on behalf of one client in its complaint against Banister. And Banister, following the rules, disclosed the details of the basis for the taxpayer's position to the IRS and disclosed the risk of penalty to his clients. *See id.* Moreover, the IRS points to no evidence that the so-called "861" return position was "patently improper," or that Banister's conduct in this regard was "willful, reckless, or a result of gross incompetence." 31 C.F.R. § 10.34(a)(4)(ii)(b).

Notably for this case, the IRS did not even issue a formal opinion on the "861" position until well over a year after Banister allegedly prepared the return in question. *See* IRS Notice 2001-40, Issued: June 6, 2001. But in an apparent attempt to resolve the question on summary judgment whether Banister's return position was "frivolous" (defined as "patently improper," whatever that means), "reckless, or a result of gross incompetence," the IRS contends that Banister could have relied on three U.S. Tax Court opinions: *Aiello v. CIR*, T.C. Memo. 1995-40; *Solomon v. CIR*, T.C. Memo. 1993-509; and *Crain v. CIR*, 737 F.2d 1417 (5th Cir. 1984).

In *Aiello*, the argument made by the pro se petitioner was "unclear" and appeared to involve a broad claim that no remuneration for labor could be taxed. *Id.* The Thompson return took no such position. In *Solomon*, another pro se litigant claimed citizens of Illinois were not citizens of the United States. Again, the Thompson return took no such position. Finally, the IRS citation to *Crain* is particularly curious, where Crain, another pro se litigant, claimed he wasn't subject to the jurisdiction of "the state" and failed to support a single assertion of his claim. *See Crain v. CIR*, 737 F.2d at 1417. In each of these cases, the arguments by the pro se litigants were either unclear or

unsupported – hardly the sort of cases responsible tax practitioners even read, much less follow.

Banister followed the IRS' recommended procedures in the return preparation, and the taxpayer involved filed his return with a detailed explanation of the return's position. No undisputed evidence supports a finding that the return Banister prepared was willfully or recklessly frivolous, or the product of gross incompetence.

Moreover, the tax code is anything but clear; it is, as the IRS's own prior Commissioner acknowledged, "unintelligible," an "inexplicable maze," and "equally mysterious" to its own specially trained employees. *See* Former IRS Commissioner Shirley Peterson, Address at Southern Methodist University, April 14, 1993.

Finally with respect to the original complaint, the IRS alleged broadly that Banister engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51. Those allegations, however, are all grounded loosely on the allegations and minimal supporting facts IRS asserted regarding alleged violations of 31 C.F.R. §§ 10.22 and 10.34. And again, whether Banister "knowingly counseled" anyone "of an illegal plan to evade Federal taxes or the payment thereof" is a material fact in dispute, because Banister's state of mind cannot be known at this stage in the litigation. (*See* Compl., ¶ IV.B.)

Similarly, the IRS misapplies the standards for a tax court petition with a simple request for an administrative hearing before an executive agency enforcing income tax collection.

Under 26 U.S.C § 7122, the IRS has the administrative authority to reduce the amount of a tax liability if the taxpayer presents evidence regarding doubt as to liability for the tax demanded by IRS. The statute does not limit those "doubt as to liability"

arguments to court-approved assertions. In addition, the IRS's own manual makes clear that any opinion issued by any court other than the Supreme Court are not binding on the IRS. *See* IRM § 4.10.7.2.9.8.

Finally, the very court opinions cited by the IRS show that those courts recommended taking political issues like the alleged fraudulent ratification of the Sixteenth Amendment to the executive branch of government, contrary to the IRS's claims on brief that numerous Court decisions "rejected" the factual claims and arguments concerning possible fraud in the Sixteenth Amendment ratification process.

In fact, the only courts to address the issue of 16th Amendment ratification fraud raised by historians and others, including Banister, have held that issue to be a political question outside the jurisdiction of the courts and best addressed by other forums – such as the executive branch allegedly issuing the fraudulent ratification document in 1913. As the 9th Circuit opined on this important subject:

> Stahl's claim that ratification of the sixteenth amendment was fraudulently certified constitutes a political question because we could not undertake independent resolution of this issue without expressing lack of respect due coordinate branches of government.

*United States v. Stahl*, 792 F.2d 1438, 1440 (9th Cir. 1986).

Thus, the question of fraudulent ratification, which the Supreme Court has never addressed, was a "nonjusticiable, political question" whereby the Constitution itself reveals a "textually demonstrable" decision to commit the issue "to a coordinate political branch." *Stahl*, 792 F.2d at 1440. By so holding, the courts implicitly directed those concerned with this significant constitutional issue to seek review and remedy with coordinate political branches of government. This implicit advisement was made explicit by the very case cited by the IRS, *Miller v. United States*, 868 F.2d 236 (7th Cir. 1988).

There, the court advised those concerned with the issue to "take their objections" to "a more appropriate forum" of which there were "many available." As this record stands, once the IRS apprised Banister in writing that the IRS considered itself an inappropriate forum for resolving this issue – even though the IRS is the agency of the very executive branch the courts held were the only ones who could constitutionally address the issue – the IRS has provided no evidence that Banister ever raised the issue in any representation of a taxpayer again – and there is none.

The IRS's treatment of Sixteenth Amendment ratification case law exemplifies the difficult circumstances practitioners face in representing taxpayers before the IRS. By the direct suggestion of the courts in the very case cited by the IRS, taxpayers with questions like ratification would be "well advised" to "take their objections" to a "more appropriate forum." *Id.* And that is precisely what the IRS alleged Banister did – exactly what the courts recommended. Importantly, the IRS admits Banister's political speech never incited anyone to imminent lawless conduct, (*see* Complainant's Opp'n to Resp't Mot. to Dismiss, p. 12), and Banister directed these important political concerns to the very government forums recommended by court opinions the IRS now cites as authority against Banister.

And what forum would be more appropriate than the executive branch of government that issued the ratification proclamation, and what agency within that branch more appropriate than the agency charged with conducting collection due process tax hearings? Yet, the IRS's position is that when taxpayers heed the direct admonition of federal courts and bring such matters to the agency's attention, the IRS is justified in seeking disbarment against any taxpayer representative who dared utter these "dangerous" words – all in spite of the fact that the IRS never informed the practitioner

that statutory collection hearings were an inappropriate forum to address or adjudicate the issue.

Turning to the IRS's amended complaint, the IRS alleged that Banister violated 31 C.F.R. § 10.51(f) by failing to file allegedly required tax returns, and attached thereto were certain IRS transcripts. Although that regulation requires a specific finding of "willfulness," the IRS failed to plead that necessary element in its amended complaint. By agency admission, this element requires the IRS to prove that Banister is guilty of a "voluntary, intentional violation of a known legal duty." (*See* Complainant's Mot. for Sum. Judgment, p. 32.) The Supreme Court has recently clarified the required elements of such "willfulness."

> Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.

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

Thus there are three separate elements to the offense: (1) the law imposed a duty on Banister to file a return for the years in question; (2) Banister knew that the law imposed a duty on him to file a return for the years in question; and (3) Banister voluntarily and intentionally violated his duty to file such return.[1] An element of the offense of willfulness is "awareness" of the duty at issue, and the Government cannot prove that element if the defendant had any good faith belief that he owed no such duty. *See id.* Moreover, the trier of fact must be "free to consider any admissible evidence

[1] Of note, the IRS failed to allege required elements two and three along with supporting facts in its amended complaint, one of the grounds upon which Banister moved for dismissal. Banister again requests dismissal of the complaint for failure to state a claim upon which relief can be granted. Axiomatic rules of civil and criminal procedure, applicable in all courts, require that a complainant plead all necessary elements or suffer dismissal of the claim, count, or cause of action.

from any source" to determine the credibility and sincerity of Banister's beliefs. *Id.* at 203.

Explicating this issue further in overturning the defendant's conviction of willful failure to file tax returns, the Court instructed that:

> [I]f Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief. Of course, in deciding whether to credit Cheek's good-faith belief claim, the jury would be free to consider any admissible evidence from any source. We thus disagree with the Court of Appeals' requirement that a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue. Knowledge and belief are characteristically questions for the factfinder, in this case the jury. Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it…it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty.

*Id.* at 203.

Significantly, the Court held that even if the defendant's belief was "irrational," it would defeat the Government's claim as long as the belief was sincerely held. In this case, the IRS never alleged Banister knew of any duty to file tax returns, much less willfully disregarded it. To the contrary, the sparse evidence that does exist on this record reflects Banister's good faith belief regarding the scope and nature of federal income taxation.

The IRS adduced no evidence that Banister's financial condition required him to file a return. The burden of proof remains with the IRS, not Banister. *See* 5 U.S.C. § 556. Thus, the court erred in holding that Banister, not the IRS, had the burden of proof on whether his income could trigger a duty to file a return. *See Decision of the Administrative Law Judge*, December 29, 2003, at 2.

The IRS interprets its' scope of authority as investing the agency with an inquisitorial power over anyone who was ever a "practitioner" before the IRS even when the practitioner's conduct falls outside the scope of the rules. The only "disreputable" conduct under such circumstances is the conduct of the IRS.

The ALJ could not issue judgment on behalf of the IRS without ignoring the rules governing disciplinary procedures, the administrative practice rules, the rules for summary judgment, and the rules allocating the burden of proof. Instead, the ALJ required Banister to produce evidence on claims the government had the burden on and issued judgment without discovery and without a hearing.

The multiple and manifest errors of law in the orders of the ALJ require reversal and dismissal of the entire proceeding.

**9. Excluding the Exculpatory Testimony of All of Banister's Witnesses Violated Banister's Right to Due Process and Violated the Rules.**

The court excluded the testimony of Ken Canfield, the IRS Revenue Agent who began this investigation of Banister and was the only person to make any written referral against Banister. *See Order of Respondent's Motion for Discovery; See Order Regarding Admissible Evidence at Sanction Phase of Proceeding*, December 26, 2003; *See also Order Regarding Complainant's Motion in Limine*, November 21, 2003.

Canfield's testimony was explosive. Canfield's testimony would have exposed the impermissible and illicit motivations of the agency, as well as exculpatory and mitigating information concerning Banister's conduct. *See Respondent's Proffer of Offer of Proof*, November 25, 2003.

Canfield initiated his investigation of Banister before Banister ever even spoke to Canfield concerning his client. *See id.* In fact, Canfield surveilled Banister's political

appearances and decided to start an investigation into Banister based on those political appearances. *See id.* Canfield even spoke with the office of the IRS Director of Practice about investigating Banister for alleged "disreputable" practice based on Banister's political speech on talk radio. *See id.* Canfield then surreptiously contacted Banister's former employment supervisors, supervisors who informed Canfield that Banister was entirely honorable in his work record. *See id.* Canfield even knew that Banister was not challenging the constitutionality of the tax system in his representation of clients before the IRS, but merely informing the IRS of his own political opinions and his client's political opinions, as recommended by the IRS own Offer in Compromise publication. *See id.*

Canfield also had no knowledge of what Banister would actually argue on behalf of any taxpayer, because Canfield never gave any Banister client a hearing. *See id.* Further, Canfield will admit that he knew the IRS granted taxpayers reduced tax liabilities based on these same arguments. *See id.* Canfield knew that Banister knew this. *See id.* Finally, Canfield's testimony would have revealed that Canfield never notified Banister he was conducting a private investigation into Banister and attempting to entrap Banister after the fact. *See id.* His own written notes and written referral would have further corroborated and confirmed many of these details. *See id.*

The court excluded the testimony of Priscilla Ousley, another IRS employee, with significant information relevant to the Banister's state of mind, the lack of frivolity in Banister's arguments, and the tax benefits to clients whose representatives advocated the arguments Banister did. *See Order of Respondent's Motion for Discovery; See Order Regarding Admissible Evidence at Sanction Phase of Proceeding*, December 26, 2003; *See also Order Regarding Complainant's Motion in Limine*, November 21, 2003.

Ousley would have testified that the IRS reduced the tax debts of taxpayers who made identical argument to the ones Banister allegedly made around the time Banister made them involving similar taxpayers to Banister's clients. *See Respondent's Proffer of Offer of Proof*, November 25, 2003. Thus, her testimony would have proven that any taxpayer allegedly aided by Banister in their tax return would have had a reasonable probability of success in reducing their tax liability due to the complicated and complex issue of the interpretation of the internal tax code given the unique facts of that taxpayer.

The court excluded the testimony of Sue Erwin, the IRS appeals officer involved the case, and Patrick McDonough, the individual who signed the written complaint against Banister. *See Order of Respondent's Motion for Discovery; See Order Regarding Admissible Evidence at Sanction Phase of Proceeding*, December 26, 2003; *See also Order Regarding Complainant's Motion in Limine*, November 21, 2003.

These two witnesses all know one critical fact – that the IRS chose to bring this complaint against Banister after he appeared on Sixty Minutes II. *See Respondent's Proffer of Offer of Proof*, November 25, 2003. In fact, their own written notes would have reflected that Sue Erwin, an IRS employee, contacted the Director's office and inform them that her contacts told her Banister would be appearing on Sixty Minutes II. *See id.* The private notes also reflected that the Director of Practice decided to bring charges if and after Banister appeared on the show. *See id.* McDonough would also testify that the Director of Practice knew about a pending criminal investigation into Banister, a criminal investigation the Director kept hidden from Banister during the entire proceeding until the Director ambushed Banister on the eve of the hearing. *See id.*

The court excluded the testimony of Commissioner Rossotti. *See Order of Respondent's Motion for Discovery; See Order Regarding Admissible Evidence at*

*Sanction Phase of Proceeding*, December 26, 2003; *See also Order Regarding Complainant's Motion in Limine*, November 21, 2003. Rossotti's testimony validated Banister's equity and intent defenses. Rossotti would have testified that Banister had asked the IRS questions concerning identical issues and Rossotti would have testified that the IRS never refuted any of Banister's interpretations. *See Respondent's Proffer of Offer of Proof*, November 25, 2003.

The court even prohibited the taxpayers allegedly injured by Banister from testifying. *See Order Regarding Admissible Evidence at Sanction Phase of Proceeding*, December 26, 2003; *See also Order Regarding Complainant's Motion in Limine*, November 21, 2003.

Again, the law makes clear that Banister enjoyed a right to introduce such evidence as part of presenting his case. As the statute codifies:

> A party is **entitled** to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for **a full and true disclosure of the facts**.

5 U.S.C. § 556.

The denial of so much exculpatory evidence – demonstrating convincingly that Banister's conduct was not a willful disregard of the rules, but rather an honest attempt to communicate the truth as he knew it – requires reversal of the recommendation of disbarment and dismissal of the entire proceeding.

**10. Relying on Testimony From an IRS Official Who Perjured Himself and Who Lacked Authority to Testify Violated Banister's Right to Due Process and Violated the Rules.**

The only person who ever swore any oath testifying against Banister – every other government official, including the people who made the original allegations against

Banister, fled from the case and failed to file a single sworn affidavit in the case or ever testify under oath – committed perjury in this case.

The only person testifying against Banister was David Finz, an unknown official claiming to represent the Director of Practice. Finz swore under oath that the Director of Practice gave him "express authority" in cases involving allegations of disreputable conduct "to determine the appropriate penalty to seek at hearings" involving such cases. *See Affidavit of David M. Finz,* Paragraph 4. As it turns out, Finz lied.

At the sanction phase of the hearing, Finz admitted he had no express written authority at all from the Director of Practice. *See Transcript of Sanction Hearing*, pp. 27-30. He further admitted that the Director, not he, "determined the appropriate penalty" to seek. *See id*.

Rather than confront this evident perjury, the Administrative Law judge ignored all the admissions on cross-examination. *See Decision of the Administrative Law Judge*, December 29, 2003. Instead, the Administrative Law Judge relied on Finz' claims concerning the motives of the agency and intentions of the agency when Finz had no legal authority to speak to either. *See Decision of the Administrative Law Judge*, December 29, 2003.

The cross-examination below exposes Finz' lies. *See Transcript of Sanction Hearing*, pp. 27-30.

CROSS-EXAMINATION

BY MR. BARNES:

Q Mr. Finz, do you have express authority to determine the penalty that should be issued against Mr. Banister?

A **No, I don't have the authority to determine penalty**; I have the authority to recommend to counsel what penalty to seek. The determination of penalty's made by the Administrative Law Judge.

Q But, so you do have the -- in terms of the director's office, you do have the authority to determine what penalty should be sought in this proceeding?

A In consultation with the director.

Q Well, do you have the authority or do you not have the authority?

A I make the recommendation and the director concurred with it.

Q **Oh, so, well, my question is, is it the director who has the authority, or do you have the authority?**

**A No, the director has the authority under the regulations.**

Q Okay --

A I can make a recommendation to the director as to what penalty I've determined is appropriate for us to seek, and then if the director does not concur with that, then the director has the final say.

> Q **So in fact the director has the authority, not you?**
>
> A **That's correct.**

Later, Finz admitted he had no written authority to seek any penalty, further confirming his materially misleading and false statement under oath in his earlier affidavit in the case. As Finz admitted under cross-examination, *See Transcript of Sanction Hearing*, pp. 27-30:

> Q Does the director in writing give you the authority to determine or recommend the appropriate penalty to be sought in disciplinary proceedings?
>
> A No, I don't have anything in writing to show you, if that's what you mean.

The pattern of conduct by the only IRS official willing, or permitted, to testify in this proceeding embodies all the flaws in this Kafkaesque process. The only real fraud remains where it began when Banister left the IRS after discovering governmental fraud in that agency – with the IRS.

## CONCLUSION

No notice, no discovery, no depositions, no testimony, and no hearing. Political surveillance, parallel secret criminal proceedings, conferencing with criminal prosecutors, illicit secret audits, and retaliation against a whistleblower. If this is administrative justice, the Secretary might as well take the word "justice" out of it.

This case embodies all that the rules, statutes, and Constitutional proscriptions intended to prevent. The ALJ summarily adjudicated Banister guilty and then disbarred the former IRS whistleblower, without answering the questions Banister asked of them, without affording him an opportunity to achieve compliance with the rules prior to

initiating the proceeding, without alleging the requisite facts that constitute the offense, without informing him he was under a parallel criminal investigation, without affording him any discovery, without permitting him to even "argue" as to the merits of the statements IRS seeks disbarment for, and without even affording him meaningful notice or a meaningful hearing. Any one of these circumstances demands reversal; their aggregation necessitates dismissal of this entire proceeding.

Respectfully submitted this 23rd day of January, 2004.

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