

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

\_\_\_\_\_  
DIRECTOR OF PROFESSIONAL RESPONSIBILITY )

Complainant, )

v. )

JOSEPH R. BANISTER, )

Respondent. )  
\_\_\_\_\_

COMPLAINT NO. 2003-02

DATE: 06/03/2003

**COMPLAINANT'S MOTION IN LIMINE**

COMES NOW the Complainant, Brien T. Downing, who in his official capacity as Director, Office of Professional Responsibility (formerly the Office of the Director of Practice), Internal Revenue Service, moves the Administrative Law Judge to enter its order in limine<sup>1</sup> barring Respondent from offering or introducing any evidence, testimony, remarks, questions or arguments, either directly or indirectly, with respect to the facts enumerated below. Additionally, the Complainant seeks a modification to Complainant's request for witnesses for the December 1-5, 2003, hearing in this matter.

1. This motion is based on the fact that the evidence set forth herein is irrelevant and inadmissible, would result in undue delay of the proceedings, and would be highly prejudicial.

<sup>1</sup> The decision to grant a motion in limine barring the introduction of evidence rests within the sound discretion of the trial judge. *United States v. Griffin*, 818 F.2d 97 (1<sup>st</sup> Cir. 1987), *cert. Denied*, 484 U.S. 844. Further, 31 C.F.R. § 10.72(a) grants the Administrative Law Judge the authority to exclude evidence that is irrelevant, immaterial, or unduly repetitious.

2. The sole issues presented for hearing are whether Respondent has engaged in incompetent and/or disreputable conduct as set forth in the charges of the complaint and amended complaint, and the appropriate sanction, if any, for that conduct. The following evidence, being irrelevant and immaterial to the resolution of the issues in this case or otherwise redundant of other testimony, is covered by this motion:

I. Objections to Respondent Exhibits

a. Respondent's Exhibit 18. This exhibit appears to be pages 2 through 4 of a letter from the Respondent to former IRS Commissioner Charles Rossotti.<sup>2</sup> The initial objection is that the Respondent is attempting to submit only a portion of the letter and does not explain why the first page was not submitted. As this is an incomplete document it should not be accepted into evidence. More importantly, the letter is irrelevant to the issues in this case. The fact that the Respondent expressed his dissatisfaction with the IRS is not relevant to his failure to file his own individual Federal tax returns or to the charges relating to his representation of taxpayers Coleman and Thompson. Complainant believes the Respondent may be offering this exhibit as an attempt to demonstrate that his beliefs are sincere. Such evidence should not be given any consideration. See, e.g., *Crain v. Commissioner*, 737 F.2d 1417, 1418 (5<sup>th</sup> Cir. 1984), in which United States Tax Court stated:

...that this Court has been flooded with a large number of so-called tax protester cases in which thoroughly meritless issues have been raised in, at best, misguided reliance upon

---

<sup>2</sup> The date of the letter submitted by the Respondent is not indicated as the Respondent did not submit the first page of the letter. However, the Complainant has a copy of this correspondence which indicates the date of the letter as February 25, 1999.

lofty principles...The time has arrived when the Court should deal summarily and decisively with such cases and without engaging in scholarly discussion of the issues or attempting to sooth the feeling of the petitioner by referring to the supposed 'sincerity' of their widely espoused positions. (emphasis added).

The Complainant moves that this exhibit be disallowed.

b. Respondent's Exhibit 35. This exhibit is a letter dated November 10, 1998, from U.S. Department of Justice, Tax Division Attorneys Thomas S.

DiLeonardo and Mark Determan to Billy Brown, the former District Director, Central California District, San Jose, California, praising the respondent for work done on a specific case. The letter is irrelevant to the issues in this case.

The fact that the Respondent was praised for his work as a Special Agent on a particular case is not relevant to his failure to file his own individual Federal tax returns or to the charges relating to his representation of taxpayers Coleman and Thompson when no longer an IRS employee. The Complainant moves that this exhibit be disallowed.

c. Respondent's Exhibit 36. This exhibit is a letter from the Respondent to U.S. Department of Justice, Tax Division Attorneys Thomas S. DiLeonardo dated July 7, 2001, in which Respondent attempts to justify the merits of his tax protester arguments. The letter is irrelevant to the issues in this case. The fact that the Respondent wrote a letter to a U.S. Attorney attempting to justify his views on the legality of the Federal income tax is not relevant. The fact that the Respondent expressed his dissatisfaction with the IRS is not relevant to his failure to file his own individual Federal tax returns or to the charges relating to

his representation of taxpayers Coleman and Thompson. Complainant believes the Respondent may be offering this exhibit as an attempt to demonstrate that his beliefs are sincere. Such evidence should not be given any consideration for the reasons set forth in paragraph 2a above. The Complainant moves that this exhibit be disallowed.

d. Respondent's Exhibit 38. This exhibit is a Merit Program Questionnaire (MPQ), Form 9686 that is not signed and dated by the Respondent. The MPQ was apparently submitted by the Respondent when he applied for promotion to GS-13 Special Agent, Vacancy Announcement Number NPN-WRSI98-559B, January 13, 1998 closing date. This exhibit should not be accepted into evidence because it was not signed and dated by the Respondent. More importantly, this exhibit is not relevant to the matters at issue in the instant case. The information set forth in an MPQ submitted by the Respondent when seeking a promotion in the IRS is not relevant to his failure to file his own individual Federal tax returns or to the charges relating to his representation of taxpayers Coleman and Thompson. The Complainant moves that this exhibit be disallowed.

e. Respondent's Exhibit 39. This exhibit contains two e-mails from January 1999 which discuss Respondent's possible participation as an instructor for a financial investigation/asset forfeiture seminar. The letter is irrelevant to the issues in this case. The fact that the Respondent was requested to serve as an instructor for the aforementioned course is not relevant to his failure to file his

own individual Federal tax returns or to the charges relating to his representation of taxpayers Coleman and Thompson when no longer an IRS employee. In short, Respondent's performance while employed as an IRS Special Agent is not relevant to the matters at issue. The Complainant moves that this exhibit be disallowed.

f. Respondent's Exhibit 42. This exhibit contains program from Respondent's graduation from Special Agent Basic Training on June 3, 1994, and certificates identifying him as an "expert" in the Practical Pistol Course and for academic excellence. Respondent's graduation from Special Agent training and his academic and weapons proficiency is not relevant to his failure to file his own individual Federal tax returns or to the charges relating to his representation of taxpayers Coleman and Thompson. The Complainant moves that this exhibit be disallowed.

g. Respondent's Exhibit 43. This exhibit is a Standard Form 50 (SF-50) dated April 12, 1998, reflecting Respondent's promotion from GS-12 to GS-13 Special Agent. Respondent's promotion while an IRS Criminal Special Agent is not relevant to his failure to file his own individual Federal tax returns or to the charges relating to his representation of taxpayers Coleman and Thompson when no longer an IRS employee. The Complainant moves that this exhibit be disallowed.

h. Respondent's Exhibit 44. This exhibit is a Standard Form 50 (SF-50) dated August 3, 1997, reflecting Respondent's receipt of a performance award.

Respondent's receipt of a performance award while an IRS Criminal Special Agent is not relevant to his failure to file his own individual Federal tax returns or to the charges relating to his representation of taxpayers Coleman and Thompson when no longer an IRS employee. The Complainant moves that this exhibit be disallowed.

i. Respondent's Exhibit 45. This exhibit is a Standard Form 50 (SF-50) dated June 6, 1995, reflecting Respondent's receipt of a special act award.

Respondent's receipt of a special act award while an IRS Criminal Special Agent is not relevant to his failure to file his own individual Federal tax returns or to the charges relating to his representation of taxpayers Coleman and Thompson when no longer an IRS employee. The Complainant moves that this exhibit be disallowed.

j. Respondent's Exhibit 46. This exhibit is an undated Certificate that states "I am proud to be a Special Agent." This certificate is not relevant to his failure to file his own individual Federal tax returns or to the charges relating to his representation of taxpayers Coleman and Thompson when no longer an IRS employee. The Complainant moves that this exhibit be disallowed.

k. Respondent's Exhibit 47: This exhibit is a Memorandum of Appreciation dated June 3, 1994 which commends Respondent for being elected Class President of his Criminal Investigation Special Agent Basic Training Class. This certificate is not relevant to Respondent's failure to file his own individual Federal tax returns or to the charges relating to his representation of taxpayers

Coleman and Thompson when no longer an IRS employee. The Complainant moves that this exhibit be disallowed.

I. Respondent Exhibit 48. This exhibit appears to be questions submitted by the Respondent to an unknown recipient(s) shortly following his February 25, 1999, resignation from the IRS. The fact that the Respondent expressed his dissatisfaction with the IRS is not relevant to his failure to file his own individual Federal tax returns or to the charges relating to his representation of taxpayers Coleman and Thompson. The Complainant moves that this exhibit be disallowed.

## II. Objection to Respondent Witnesses

a. The testimony of Patrick W. McDonough. Respondent desires to call Mr. McDonough, former Director of Practice, as a witness to testify regarding the Office's "alleged" policy of not pursuing complaints while criminal investigations or grand jury proceedings relative to similar matters were ongoing. Mr. McDonough delegates to his staff direct involvement in analysis of charges and participation in hearing. The legal advisor to former Director McDonough, David Finz, will be called as a witness for the Respondent and can fully address the policy issue if necessary. Therefore, the testimony of Mr. McDonough would be redundant and is not necessary. The Complainant moves that this witness be disallowed.

b. The testimony of Timothy Brewer. The Respondent neither identifies who Mr. Brewer is nor states his qualifications to testify as to the Respondent's

character or professional competence. Complainant has no reason to believe that Mr. Brewer has any factual knowledge of this case. Furthermore, his testimony as to the Respondent's professional integrity and competence is not relevant or material to the issues in the instant proceeding. The Complainant moves that this witness be disallowed.

c. The testimony of Robert A. Gorini. The Respondent does not identify who Robert A. Gorini is and does not make a proffer that this witness has any factual knowledge of this case. The Respondent proffers that he would call Mr. Gorini as a witness to testify regarding the Respondent's former employment with the IRS, the circumstances of his separation, and the existence and nature of any on-going criminal investigation or grand jury proceeding. Such testimony is not relevant or material to Respondent's failure to file his own individual Federal tax returns or to the charges relating to his representation of taxpayers Coleman and Thompson. The Complainant moves that this witness be disallowed.

d. The testimony of Paul Varville. The Respondent does not identify who Paul Varville is and does not make a proffer that this witness has any factual knowledge of this case. The Respondent proffers that he would call Mr. Varville as a witness to testify regarding the Respondent's former employment with the IRS, the circumstances of his separation, and the existence and nature of any on-going criminal investigation or grand jury proceeding. Such testimony is not relevant or material to Respondent's failure to file his own individual Federal tax



returns or to the charges relating to his representation of taxpayers Coleman and Thompson. The Complainant moves that this witness be disallowed.

e. The testimony of Ted F. Brown. The Respondent does not identify who Ted F. Brown is and does not make a proffer that this witness has any factual knowledge of this case. The Respondent proffers that he would call Mr. Brown as a witness to testify regarding the Respondent's former employment with the IRS, the circumstances of his separation, and the existence and nature of any on-going criminal investigation or grand jury proceeding. Such testimony is not relevant or material to Respondent's failure to file his own individual Federal tax returns or to the charges relating to his representation of taxpayers Coleman and Thompson. The Complainant moves that this witness be disallowed.

f. The testimony of Charles Rossotti. Mr. Rossotti is the former Commissioner of the Internal Revenue Service. This witness has no factual knowledge of this case. The Respondent proffers that he would call Mr. Rossotti as a witness to testify regarding the Respondent's former employment with the IRS, the circumstances of his separation, and the existence and nature of any on-going criminal investigation or grand jury proceeding. As the former Commissioner of the IRS, Mr. Rossotti would have had many layers of management much more familiar with the Respondent than he himself would be. Such testimony is not relevant or material to Respondent's failure to file his own individual Federal tax returns or to the charges relating to his representation of taxpayers Coleman and Thompson. The Complainant moves that this witness be disallowed.

g. The Respondent should not be permitted to testify regarding the merits and/or sincerity of his tax protester beliefs. See, e.g., *Crain v. Commissioner*, 737 F.2d 1417, 1418 (5<sup>th</sup> Cir. 1984), in which United States Tax Court stated:

...that this Court has been flooded with a large number of so-called tax protester cases in which thoroughly meritless issues have been raised in, at best, misguided reliance upon lofty principles...The time has arrived when the Court should deal summarily and decisively with such cases and without engaging in scholarly discussion of the issues or attempting to sooth the feeling of the petitioner by referring to the supposed 'sincerity' of their widely espoused positions. (emphasis added).

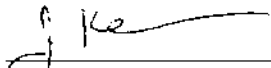
### III. Other Witness Issues

The Complainant requests approval to modify its July 31, 2003, prehearing notice of witnesses. The Complainant wishes to withdraw Edward M. Robbins, Jr. as a witness for the Agency's case in chief. The Complainant does not believe that testimony regarding the unreasonableness of Respondent's beliefs regarding the Sixteenth Amendment and sources of taxable income are necessary based on *Crain v. Commissioner, Id.*, and its progeny (e.g., *Williams v. Commissioner*, 114 T.C. 136, 138 (2000)). However, if the Administrative Law Judge permits the Respondent to testify about the merits or reasonableness of his positions, the Complainant would reserve the right to call Mr. Robbins as a rebuttal witness.

The undersigned certifies that due to the deadline date of October 31, 2003, for filing of the instant motion, Complainant did not attempt to contact Respondent's counsel to attempt to resolve the subject of this motion. It is presumed that Respondent would oppose the motion in whole or in part. In this regard, it should be

noted that the Respondent submitted various motions on October 29, 2003, which were not discussed with Complainant's counsel in advance of filing.

Dated this 30<sup>th</sup> day of October, 2003, at San Francisco, California.

  
\_\_\_\_\_  
JAY KESSLER  
Senior Attorney  
Tel: (415) 848-4850  
Fax: (415) 848-4829

