THE DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY Appellee-Complainant, v. JOSEPH R. BANISTER, Appellant-Respondent.	COMPLAINT NO. 2003-02

APPELLEE-COMPLAINANT'S REPLY BRIEF

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APPELLEE-COMPLAINANT'S REPLY BRIEF

Complainant herein, by and through his counsel, submits the following brief in reply to Respondent's Notice of Appeal and Appeal ("Appeal") pursuant to section 10.77 of 31 C.F.R. Part 10 ("Treasury Department Circular No. 230," "Circular 230," or "the Circular"). Despite Respondent's multiple arguments on appeal, this is a simple case involving a Certified Public Accountant (CPA), a former Internal Revenue Service (IRS) employee, who advanced frivolous arguments on behalf of taxpayers and failed to file his own returns for a number of years. Respondent was given a full and fair opportunity to rebut these charges and failed to do so, and the Administrative Law Judge (ALJ) sustained the charges and ordered Respondent's disbarment.

Against this background, Respondent argues on appeal that the decision of the Administrative Law Judge (ALJ) merits no deference from the Secretary of the Treasury, due to its "evident defects in matters of law." Respondent alleged violations of his First Amendment right to freedom of speech, of his Fifth Amendment right against self-incrimination, and numerous due process violations. More specifically, Respondent

argues on appeal that the actions of the agency warrant dismissal of the complaint due to the agency's egregious misconduct, including retaliating against him for whistleblowing, 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 action and recommending disbarment, and failure to follow their own rules and procedures at each stage of what Respondent characterizes as an "inquisition".

Respondent's Appeal should be denied for the reasons discussed below.

Procedural Background

On May 12, 2000, Ken Canfield, Jr., Revenue Officer, Group 1500, San Rafael, California referred the Respondent to the Office of the Director of Practice (currently the Director, Office of Professional Responsibility)(hereafter "Director") for possible violations of 31 C.F.R. §§ 10.23, 10.34, and 10.51(j)(1994) for taking the frivolous position on behalf of a taxpayer who had previously been seeking an offer-in-compromise for unpaid taxes that the taxpayer did not owe any taxes because the source of the taxpayer's income was not taxable. *See* Complainant's Exhibit 39. This position was taken by Respondent despite the taxpayer having previously filed returns that evidenced his income was taxable. *See* Complainant's Exhibits 11-21. The Director subsequently sent a letter to Respondent on April 18, 2001, notifying him that the Office had received information that indicated he may have violated 31 C.F.R. §§ 10.51(b) and 10.51(d) and offered him the opportunity to request a conference or submit a written explanation of the matters set forth in the Director's letter. In a letter dated May 14, 2001, Respondent denied any violation of 31 C.F.R. § 10.51(b) or § 10.51(d) and requested he be provided

evidence of the alleged violations. On June 22, 2001, the Director forwarded Respondent approximately two hundred pages in response to his May 14, 2001 request for records evidencing the alleged violations. On November 22, 2001, the Director provided an additional twenty-three pages to the Respondent in further and final response to his May 14, 2001 letter. On July 16, 2002, the Director forwarded Respondent's case to the Area Counsel, General Legal Services (GLS), San Francisco, California to prepare a complaint to initiate disciplinary proceedings against the Respondent for violations of 31 C.F.R. §§ 10.51, 10.51(d), 10.51(j), 10.34, and 10.22(b) and (c). On October 1, 2002 and on October 28, 2002,[1] counsel for the Director sent correspondence to Respondent informing him of the referral to the Office of Chief Counsel to initiate disciplinary action, informing him of the revised charges, and due to the change in the charges, offered him the opportunity for a conference or to submit a written explanation. Respondent was also offered the opportunity to voluntarily consent to a thirty-six month suspension from practicing before the IRS to resolve the matter. Respondent subsequently retained counsel to represent him in the Director's action and, in a letter dated December 20, 2002, Respondent's counsel, Robert G. Bernhoft, requested a conference with the Director to discuss the allegations.

The conference was held on February 24, 2003 in San Francisco and in attendance was the Respondent, Respondent's Counsel, Robert Bernhoft, Complainant's Counsel Jay Kessler, IRS Counsel paralegal Lollie Myers, and by telephone, David Finz, Senior Counsel for the Director. No resolution was reached at the

[1] There was concern about whether Respondent received the October 1, 2002 letter, so the letter was sent again on October 28, 2002.

conference and by letter dated March 10, 2003, Mr. Bernhoft indicated that Respondent would not agree to a voluntary suspension of his practice before the IRS.

Therefore, on March 19, 2003, Complainant filed a Notice of Institution of Proceeding and the Complaint to Respondent and his counsel as well as to the Chief ALJ for the Environmental Protection Agency (EPA).[2] On March 24, 2003, the EPA Chief ALJ designated ALJ William B. Moran to preside over the Respondent's case. On April 30, 2003, Respondent filed his Answer to the Complaint. On June 9, 2003, the ALJ issued a Prehearing Order requiring the parties to engage in a prehearing exchange. On July 31, 2003, the Respondent and Complainant both filed their respective Prehearing Exchange. On August 8, 2003, Complainant filed a Motion for Leave to Amend the Complaint which included a draft amended complaint and a Motion to Amend the Witness List that was part of the prehearing exchange. The Motion to Amend the Complaint sought to include violations of Circular 230 for Respondent's failure to file federal individual income tax returns for tax years 1999, 2000, 2001, and 2002 based on his admission during a public radio broadcast that he had not filed returns since 1999, and on official IRS records which indicated that the IRS had not received tax returns from the Respondent for the aforementioned tax years. These motions were unopposed. On September 26, 2003 the ALJ issued a Notice of Hearing setting a hearing date of December 1, 2003. On October 17, 2003, the ALJ issued an Order Granting Complainant's Motion for Leave to Amend the Complaint and Amend the Witness List. Also on October 17, 2003, the ALJ issued an Order Setting Deadline for Motions requiring

[2] The Director of Practice cases were being handled at that time by ALJs with the Environmental Protection Agency (EPA).

that any motion in the case be filed no later than October 31, 2003. On October 21, 2003, Complainant filed the Amended Complaint and also filed a Motion to Amend Prehearing Exchange Exhibits to add documentary evidence supporting the failure to file charges in the Amended Complaint. On October 29, 2003, Respondent filed his Answer to the Amended Complaint. On October 29, 2003, Respondent filed the following motions: (1) Motion to Dismiss the Complaint; (2) Motion to Dismiss the Amended Complaint; (3) Motion to Adjourn the Hearing; (4) Motion to Abate the Case; and (5) Motion for Discovery. On October 30, 2003, Complainant filed a Motion in Limine. On October 31, 2003, Complainant filed a Motion for Summary Judgment. On November 4, 2003, Complainant filed its Opposition to Respondent's Motion for Discovery . On November 7, 2003, Complainant filed Responses in Opposition to Respondent's Motions to Abate the Case and Motion to Adjourn the Proceedings. On November 10, 2003, Complainant filed Responses in Opposition to the Respondent's Motion to Dismiss the Complaint and Motion to Dismiss the Amended Complaint. On November 14, 2003 Respondent filed his Opposition to Complainant's Motion in Limine. On November 17, 2003, Respondent filed his Opposition to the Complainant's Motion for Summary Judgment. On November 17, 2003, the ALJ granted Complainant's Motion to Amend the Prehearing Exchange Exhibits. Also on November 17, 2003, the ALJ issued his Order on Respondent's Motion for Discovery denying the requested discovery. On that date he also issued Orders denying Respondent's various Motions to Adjourn the Hearing, to Dismiss the Complaint, and to Dismiss the Amended Complaint. On November 18, 2003, Complainant filed additional prehearing exchange exhibits per the ALJ's Order of November 17, 2003. On

November 19, 2003, the ALJ denied the Respondent's Motion for to Abate the Case. On November 21, 2003, the ALJ issued his Order on Complainant's Motion in Limine. On November 24, 2003, the ALJ issued his Order on Complainant's Motion for Summary Judgment, granting the Motion as to liability but not as to the appropriate sanction to be imposed. On November 25, 2003, Respondent filed an Objection to Venue and a Request for a Public Hearing. Complainant did not object to Respondent's request for a public hearing. On November 25, 2003, Respondent also filed his Proffer of Offers of Proof and Argument at Hearing. On November 26, 2003, the ALJ issued a Notice of Change of Hearing Location and an Order Regarding Admissible Evidence at Sanction Phase of Proceeding.

On December 1, 2003, a public hearing was held in San Francisco, California to determine the appropriate sanction (if any) for Respondent's violations of Circular 230 as determined by the ALJ on summary judgment. On December 24, 2003, the ALJ issued his Decision ordering that Respondent be disbarred from practice before the IRS. On January 23, 2004, Respondent timely filed the instant appeal to the Secretary of the Treasury which was received on January 28, 2004.

Facts Concerning Allegations in Complaint and Amended Complaint

The Director instituted the complaints relevant to the Respondent's instant appeal due to his determination that the Respondent, a Certified Public Accountant (CPA), a former IRS Special Agent, should be disbarred from practicing before the Internal Revenue Service (IRS).[3] The initial complaint was filed as a result of the Respondent's representation of two taxpayers in which he rendered the opinion that the

taxpayers were not required to file Federal income tax returns because the Sixteenth Amendment to the Constitution was not properly ratified and/or because Internal Revenue Code §§ 861-865 excludes certain income earned by the Taxpayer, even though reliance on such arguments have been consistently and repeatedly rejected by the courts. [4] An Amended Complaint was subsequently initiated to include charges that the Respondent failed to file his Individual Federal Income Tax Returns for tax years 1999, 2000, 2001, and 2002.

More specifically, the initial Complaint alleged that Respondent advised taxpayer Frank W. Coleman that he was not liable for income taxes for the years 1989 through 1998 because the Sixteenth Amendment to the Constitution was not ratified. *See* Complainant's Exhibits 6, 9-11, and 21-38. The initial Complaint also alleged that Respondent signed as the preparer for taxpayer Walter A. Thompson's Amended U.S. Tax Returns (Forms1040X) for calendar years 1996 and 1998, respectively. The aforementioned Amended U.S. Tax Returns reflected Respondent's position that taxpayer Thompson was not liable for Federal income taxes for 1996 and 1998 because his income for the stated tax years was not taxable income per I.R.C. §§ 861-865. Specifically, Respondent took this position on behalf of Mr. Thompson based on Respondent's assertion that I.R.C. § 861 and the regulations thereunder defined "source" of income in such a way as to exclude Mr. Thompson's income from taxation.

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[3] *See* Complaint and Amended Complaint.

[4] The core of this argument is that Treas. Reg. 1.861-8(f) overrides the plain words of the I.R.C. § 61 with the result that U.S. citizens and resident aliens earning income in the United States are exempt from the Federal income tax.

Said returns were filed with the Internal Revenue Service. *See* Complainant Exhibits 4 and 5.

Moreover, the Director determined that the Respondent should be disbarred from practicing before the IRS because he encouraged the taxpayers to take actions regarding their tax returns that were clearly inconsistent with well established Federal tax law and because both taxpayers relied upon his incorrect representations (See Complainant's Exhibits 4-6, 9-11, and 21-38)..

As concerns the Amended Complaint, the violations of 31 C.F.R. § 10.51(d)(1994) and § 10.51(f)(2002), for Respondent's failure to file his 1999, 2000, 2001, and 2002 federal income tax returns, initially came to the attention of the Director as a result of Counsel for the Complainant hearing a public radio broadcast during which Respondent asserted that he had not filed returns since 1999 -- ostensibly based on his belief that income earned in the United States is not subject to federal income tax. As a result of the referral to the Director, that Office subsequently verified that the IRS had not received tax returns from Respondent for the tax years 1999, 200, 2001, and 2002. *See* Complainant Exhibits 40-44.

Memorandum Of Law

A. Standard of Review

Under 31 C.F.R. § 10.78, "[t]he decision of the Administrative Law Judge will not be reversed unless the appellant established that the decision is clearly erroneous in light of the evidence in the record and applicable law. Issues that are exclusively matters of law will be reviewed *de novo*."

Respondent's arguments can essentially be reduced to attacks on the hearing process itself and defense of his positions. As a result, the Complainant has addressed Respondent's arguments in that context.

Argument

I. The Hearing Process

A. Respondent's Interpretation of the Law Governing Practice Before the Internal Revenue Service Is in Error

Respondent's self-serving interpretations of the provisions in Circular 230 are clearly erroneous. Respondent's errors begin with his title to paragraph II of his instant appeal, which reads "The Law Governing *Licensing* Practice Before the IRS" (emphasis added). In this regard, Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the *practice* of representatives before the Treasury Department, and to suspend or disbar from practice representatives who are incompetent or disreputable or those who violate the Circular or who willfully and knowingly mislead their client with the intent to defraud. It does not purport to allow the Secretary to *license* CPA's such as Mr. Banister to practice.[5]

[5] As stated above, Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives before the Treasury Department. The duties of the Director, Office of Professional Responsibility (the Secretary's delegate) include instituting and providing for the conduct of disciplinary proceedings relating to attorneys, certified public accountants, enrolled agents, enrolled actuaries, and appraisers. *See* 31 C.F.R. § 10.1(b). In this regard, it should be noted that the American Institute of Certified Public Accountants (AICPA) acknowledges that Certified Public Accountants who practice before the IRS are governed by Circular 230. *See From the Tax Advisor: Practicing Before the IRS, Journal of Accountancy, Online Issues, June 1997.* *See* Complainant's Motion for Summary Judgment, Attachment 2.

Although it is not clear from Respondent's appeal what point he is attempting to make regarding his reference to licensure, it appears that it may be to support his argument that a license is a proprietary interest. However, as discussed below, there is no license or proprietary right at issue here.

To practice before the IRS, a CPA such as the Complainant, must simply meet the requirements of 31 C.F.R. § 10.3(b). 31 C.F.R. § 10.3(b) states:

> Certified public accountants. Any certified public accountant who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service by filing with the Internal Revenue Service a written declaration that he or she is currently qualified as a certified public accountant and is authorized to represent the party or parties on whose behalf he or she acts.

To meet the requirements of 31 C.F.R. § 10.3(b), Respondent would have been required to declare that he was currently qualified as a CPA. In this regard, *California Business & Professional Code* § 5033 provides that: "'Certified public accountant' means any person who has received from the board a certificate of certified public accountant and who holds a valid permit to practice under the provisions of this chapter." The reference to "the board" in California Business & Professional Code § 5033 means the California Board of Accountancy. *California Business & Professional Code* § 5030. The California Board of Accountancy regulates licensing of CPAs, such as the Respondent, who practice accountancy in California. *Id.*

The State of California, through the California Board of Accountancy, controls the "licensing" of the Respondent and not the IRS. If the Respondent was licensed as a CPA by the California Board of Accountancy he was presumptively eligible to represent clients before the IRS. In this regard, the Complaint alleged, and the Respondent's

Answer admitted, that at all times material to the matters set forth in the Complaint, Respondent was a CPA eligible to practice before the IRS. *See* Complaint ¶ 1A and Answer ¶13. *See also* Complainant Exhibit 1. [6]

Based on the above, it is clear that the Director regulates the practice of CPA's who practice before the IRS and not their license to practice, and the Respondent misleads by referring to a "license" in his appeal.

Respondent then asserts that "the license[7] to practice is a protected property interest" and cites to *Bell v. Burson*, 402 U.S. 535 (1971),[8] in support of his assertion. He then goes on to state that "the IRS can only take away this license by due process of law." The Respondent does not explain his purpose in making these assertions or provide their relevancy to his appeal. However, if this is the assertion Respondent is making, it is not relevant to the instant disbarment action because the action against the Respondent was to disbar him from practicing before the IRS and not to take away his CPA license. *Lopez v. United States*, 129 F.Supp.2d 1284 (D.N.M. 2000) addressed this point, where the Court stated that:

> The Secretary's decision in this case does not completely prohibit Plaintiff from practicing his profession as a CPA,

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[6] Complainant's Exhibits 1-44 were admitted into evidence over Respondent's objections. *See* Hearing Transcript, p. 7, lines 1-16.

[7] That Respondent's use of the word "license" is misplaced is revealed by an argument that relies solely on cases involving licenses.

[8] In a case concerning a driver's license, the Supreme Court in *Bell v. Burson*, *supra*, held that: "[o]nce licenses are issued, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."

> but merely restricts his ability to do so by preventing him from appearing before the IRS.

The taking away of Respondent's CPA license can only be accomplished by the State of California, which is not a party to this proceeding. In short, Respondent would not be precluded from practicing as a CPA if his disbarment is affirmed.

Furthermore, even if Respondent's liberty or property interests are deemed to be impacted by the Director's disbarment action, cases such as *Bell v. Burson*, *supra*, address the State's taking away of a property or liberty right without affording the affected individual any due process. In the instant case, that would equate to the Director having sent Respondent a notice informing him that he had been disbarred from practice before the IRS, effective immediately, for violating certain provisions of Circular 230. However, a summary disbarment is far from what occurred in the instant case, as Respondent was afforded the due process required under the regulations, including the instant appeal. [9]

In short, Respondent's purported recitation of the law governing licensing practice before the IRS set forth on pages 3 through 9 of his appeal is simply another instance of the Respondent's often inaccurate, misleading, and hodgepodge interpretation of laws and regulations that are not pertinent to this appeal.

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[9] In footnote 3 of his November 24, 2003 Order on Complainant's Motion for Summary Judgment, the ALJ stated that:

> The Respondent's Response in Opposition attempts to characterize the motion, by incorrectly referring to it as a "Motion for Summary Disbarment.... Summary Judgment is a legitimate procedural device, but "*summary disbarment*" suggests a proceeding where a respondent has no opportunity to contest the allegations. Therefore, the Court will refer to the Opposition correctly, as one opposing summary *judgment*."

B. The Complaint Provided Adequate Notice of the Allegations

Respondent maintains, as he did in his Motion to Dismiss the First Complaint and Motion to Dismiss the Amended Complaint (both denied by the ALJ), that the allegations in each complaint were not specific enough to permit him to prepare a defense. For the reasons set forth below, this position has absolutely no merit.

As to the adequacy of the notice of the charges, the ALJ held that a "Complaint must be viewed objectively to determine if it fairly informs a respondent of the charges being lodged." *See* Order on Respondent's Motion to Dismiss the Complaint, p. 2 (November 17, 2003). Applying the aforementioned test, the ALJ found the Complaint "objectively, plainly and clearly" informed the Respondent of the charges being lodged and concluded that the Complaint provided adequate notice. Id. As to the Amended Complaint, the ALJ also held that adequate notice had been provided stating that: "The charges could not be clearer. The specific regulation involved in listed together with the years of the alleged violations." ALJ's Order on Respondent's Motion to Dismiss the Amended Complaint, p. 2 (November 17, 2003).

As the ALJ determined, each charge in both the Complaint and Amended Complaint adequately informed the Respondent of the specific sections of Circular 230 he was alleged to have violated and stated the specific nature of each of the alleged violations. In this regard, it is well settled that administrative pleadings are "liberally construed" and "easily amended". *See Yaffe Iron and Metal Company v. United States Environmental Protection Agency*, 774 F.2d 1008 (10th Cir. 1985), citing *Southern Colorado Prestress Co. v. Occupational Safety and Health Review Commission*, 586

F.2d 1342, 1347 (10th Cir. 1978); *Mineral Industries & Heavy Construction Group v. OSHRC*, 639 F.2d 1289, 1292 (5th Cir. 1981); and *Usery v. Marquette Manufacturing Co.*, 568 F.2d 902, 906 (2nd Cir. 1977).

Although the Respondent claims the First Complaint did not adequately inform him of his violations of Circular 230, Respondent's Answer to the First Complaint contradicts this allegation. More specifically, Respondent admitted that he advised taxpayer Frank W. Coleman that he was not liable for income taxes for the years 1989 through 1998 because the Sixteenth Amendment to the Constitution was not ratified and because Internal Revenue Code (IRC) § 861 and the regulations thereunder defined "source of income" in such a way as to exclude Mr. Coleman's income from taxation. *See* Answer ¶¶ 17-18. More importantly, Respondent stated that he had researched the 16th Amendment ratification process and found it to be fraudulent. He included that observation in support of the doubt as to liability argument, based on his belief that the actual evidence of fraud he had personally seen had never been sufficiently reviewed, much less decided by any authority. He alleges his position taken on behalf of Mr. Coleman was therefore not frivolous. *See* Respondent's Answer ¶ 9).

Similarly, Respondent's Answer to the First Complaint admitted that on February 29, 2000 and on January 31, 2000, he signed as the preparer for taxpayer Walter A. Thompson's Amended U.S. Tax Returns (Forms 1040X) for calendar years 1996 and 1998 that were filed with the IRS. *See* Answer ¶ 20). He also admitted that he advised taxpayer Walter A. Thompson that he was not liable for income taxes for 1996 and 1998 because his income for the stated tax years was not taxable income per Internal Revenue

Code §§ 861-865 because Internal Revenue Code § 861 and the regulations thereunder defined "source of income" in such a way as to exclude Mr. Thompson's income from taxation. *See* Answer ¶ 19). In addition, Respondent's Answer to the First Complaint states that when he prepared the amended returns for Walter A. Thompson (Complainant Exhibits 4 and 5) no published authority held that income of the type received by Mr. Thompson was not excluded from federal income taxation by the operation of §§ 861-865 and corresponding Treasury Regulations, and that the position taken by him was not frivolous. *See* Answer ¶ 8).

As can be readily observed from the Respondent's Answer to the First Complaint cited above, he was clearly on notice of the charges against him and he even provided defenses that his positions regarding the 16th Amendment and §§ 861-865 were not frivolous. In this regard, the ALJ found that "the Respondent's Answer demonstrates a full appreciation of the charges being lodged. Thus, in this instance, the Answer itself supports the conclusion of the objective analysis." *See* Order on Respondent's Motion to Dismiss the Complaint, p.2 (November 17, 2003).

Based on the above, Respondent's claim in his instant appeal that "the first complaint never alleges any factual statements Banister made "during his representation" of clients and in his presentation to the IRS,"[10] is completely without merit. In addition, Respondent merely reiterates the same arguments he made in his Motion to Dismiss the Complaint that were rejected by the ALJ, and he cites no error of law made by the ALJ in his decision.

Respondent also renews his argument, first made in his October 29, 2003 Motion

to Dismiss the Amended Complaint, that the Amended Complaint failed to allege sufficient facts to enable him to prepare a defense. His Motion was properly denied by the ALJ on November 17, 2003.

The charges as set forth in the Amended Complaint are very clear and straight forward. Each charge informed the Respondent of the specific section of Circular 230 he had violated and the tax years that he failed to file an individual Federal income tax return. In this regard, Respondent is a Certified Public Accountant (CPA) who is authorized to practice before the IRS and a former Special Agent with the IRS Criminal Investigation Division. As such, he was fully aware of his legal duty to report taxable income when filing an income tax return. *See Orwutsky*, v. *Brady*, 925 F.2d 1457 (1991), *citing Spies v. United States*, 317 U.S. 492 (1943).

As stated by the ALJ on p. 2 of his Order on Respondent's Motion to Dismiss the Amended Complaint dated November 17, 2003:

> The charges could not be clearer. The specific regulation involved is listed together with the years of the alleged violations. While those authorized to practice before the IRS are presumed to have sufficient knowledge to deal with IRS matters, even one without such specialized knowledge would be held to appreciate the nature of the charges set forth in the Complaint.

C. The Complaints Provided Notice That Respondent Practiced Before IRS

Initially, the First Complaint and Amended Complaint both clearly alleged that the Respondent engaged in federal tax practice before the IRS. *See* Complaint ¶¶ I(A),I(B), and IV(A) and Amended Complaint ¶ I. In addition, the Respondent acknowledged in his Answers to the Complaint and Amended Complaint that he "engaged in federal tax

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[10] See Appeal, p. 12.

practice before the Internal Revenue Service." *See* Answer ¶¶ 13-14 (p. 5) and Amended Answer ¶ 2. Also, Complainant Exhibits 4, 5, 9, 10, 22, 32, 33, and 34, accepted into evidence by the ALJ, clearly evidence that Respondent practiced before the IRS.

1. Representation of the Taxpayers

Despite the above, Respondent alleges in his instant appeal[11] that neither complaint ever alleged that his conduct took place during his representation of any taxpayer before the IRS or that his conduct constituted practice before the IRS. This argument apparently is based on Respondent's unsupported assertion in his appeal that his "conduct could not be punished by the Director of Practice because the conduct did not constitute "practice before the IRS."[12] In short, Respondent makes a statement that his conduct did not constitute practice before the IRS but he fails to provide any support for his conclusion. For the reasons set forth below, Respondent's arguments in this regard are clearly frivolous and totally without merit.

Under 31 C.F.R. § 10.2(d), practice before the Internal Revenue Service comprehends all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, and representing a client at conferences, hearings, and meetings. In this regard, the actions by

[11] *See* Appeal, p. 11.

`Respondent on behalf of taxpayers Coleman and Thompson clearly constituted "practice before the IRS" as defined in § 10.2(d).

2. Failure to File Tax Returns

In accordance with 31 C.F.R. § 10.50(a), the Director can sanction a practitioner as concerns the practitioner's continued eligibility to practice before the IRS. Under 31 C.F.R. § 10.2(e), the definition of "practitioner" is "any individual described in paragraphs (a), (b), (c), or (d) of § 10.3." Section 10.3(b) identifies Certified public accountants under the category of "Who may practice." Therefore, once a CPA has engaged in practice before the IRS, as did the Respondent, the CPA must thereafter comply with the Circular 230 or be subject to sanctions per § 10.50(a). In addition, the violations *do not* have to concern conduct that occurred in the representation of a taxpayer, despite Respondent's completely unsupported assertion to the contrary. *Orwutsky*, 925 F.2d 1457, concerned essentially the same issue (disbarment of attorney from practicing before the IRS for failing to timely file returns for tax years 1974 through 1979). The court clearly held Respondent could be disbarred for his failure to timely file his own returns. Yet, one need go no further than the text of the regulation itself, which clearly permit sanctions for matters not involving practice before the IRS. For example, the text of the regulation provides "conviction of any criminal offense involving dishonesty or breach of trust" as an example of disreputable conduct for which suspension or disbarment can be sought, without qualifying that the offense must have occurred in practice before the I.R.S. 31 C.F.R. § 10.51(b)(2002). There are other examples.

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[12] See Appeal, p. 10.

D. The Provisions of 31 C.F.R. § 10.65 (2002) Did Not Preclude Amendment of the Complaint

Complainant renews his argument made in his October 29, 2003 Motion to Dismiss the Amended Complaint that the Complainant was precluded by 31 C.F.R. § 10.59 (July 1994)[13] from amending the complaint with supplemental charges because the charges did not reflect conduct that arose within the pending proceedings. For the reasons set forth below, this argument has no merit and was properly rejected by the ALJ in his Order on Respondent's Motion to Dismiss the Amended Complaint dated November 17, 2003.

While the Respondent is correct in noting that 31 C.F.R. § 10.65 (2002) discusses supplemental charges arising from a respondent's conduct within the proceedings, he is incorrect in his conclusion that this section bars the type of amended complaint made in the instant case. There is no language in 31 C.F.R. § 10.65 or anywhere else in the Circular that precludes amending a complaint when additional violations of Circular 230 are discovered after an initial complaint has been filed but before a hearing has commenced. In fact, 31 C.F.R. § 10.50(a) states that: "[t]he Secretary of the Treasury, or his or her delegate, *after notice and opportunity for a proceeding*, may censure, suspend, or disbar any practitioner...." (emphasis added). Based on the provisions of § 10.50(a), Complainant could properly amend the complaint so long as the Respondent had notice and an opportunity to respond. In the instant case, the Respondent received notice well before the hearing date, when the Complainant filed its Motion for Leave to

[13] The section in the revised July 2002 regulations is §10.65. Complainant will refer to the revised section of Circular 230 as it is the one applicable to the instant action.

Amend the Complaint with a Draft Amended Complaint in early August 2003. Due to the inclusion of the draft amended complaint with its motion, Respondent was on notice of the charges that the Director was seeking to add,[14] and he was being offered the opportunity for a proceeding in the form of the then-ongoing proceedings. Therefore, Respondent was afforded the rights promised by Circular 230, and the ALJ properly rejected this argument.

In rejecting Complainant's argument concerning 31 C.F.R. § 10.65 (2002), the ALJ agreed with the Complainant's position that 31 C.F.R. § 10.65 (2002) in no way limited the amendment of a complaint in the manner suggested by Respondent. Order on Respondent's Motion to Dismiss the Amended Complaint, p. 3 (November 17, 2003). The ALJ went on to state that 31 C.F.R. § 10.65 (2002), "is obviously a tool to inhibit those facing a complaint from any temptation to make groundless denials in answers or to otherwise subvert the disciplinary process." *Id.* Finally, the ALJ concluded that the Complainant was "correct in its understanding of the clear precept that complaints and answers, generally may be freely amended."

In renewing his § 10.65 argument in the instant appeal, Respondent fails to identify any error in law made by the ALJ in his decision. He merely recycles his original Argument, which was properly rejected by the ALJ, and which should once again be rejected as having no merit.

E. The Amended Complaint Did Not Violate Respondent's Due Process

Respondent reiterates his argument initially made in his October 29, 2003 Motion

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[14] On October 17, 2003, the ALJ issued an Order Granting Complainant's Motion for Leave to Amend the Complaint

to Dismiss the Amended Complaint, that the Amended Complaint was issued in violation of the administrative procedural protections contained in 5 U.S.C. § 558, and in 31 C.FR. § 10.53 and 10.60(c)(2002),[15] which must be followed before a complaint can be initiated. This argument was properly rejected by the ALJ and should be rejected here for the reasons set forth below. Order on Respondent's Motion to Dismiss the Amended Complaint, p. 3 (November 17, 2003).

As stated above, it is well settled that administrative pleadings are "easily amended". *See Yaffe Iron and Metal Company v. United States Environmental Protection Agency*, 774 F.2d 1008; *Southern Colorado Prestress Co. v. Occupational Safety and Health Review Commission*, 586 F.2d 1342; *Mineral Industries & Heavy Construction Group v. OSHRC*, 639 F.2d 1289; and *Usery v. Marquette Manufacturing Co.*, 568 F.2d 902. In the instant case, the Complainant's Motion for Leave to Amend the Complaint requested that such leave be granted in the interests of judicial economy. In this regard, it is well founded, that leave to amend is "freely given when justice so requires" [Fed. R. Civ. P. 15], as a matter of judicial economy. *See, e.g., Dole v. Arco Chemical Company*, 921 F.2d 484 (3rd Cir. 1990);*Hernandez v. Ciba-Geigy Corp. USA*, 200 F.R.D. 285 (S.D. Tex. 2001).

The alternative to amending the complaint would have been for the Complainant to begin a separate action on the new charges that would serve no purpose other than to fragment and delay adjudication unnecessarily. In this regard,

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[15] Respondent cites to 31 C.F.R. §§ 10.53 and 10.54 (2000). However, the applicable regulations would be 31 C.F.R. §§ 10.53 and 10.60(c) of the 2002 Regulations. *See* Appeal, pp. 6-8.

Respondent was aware of the amended charges concerning his tax returns in August 2003, and he had approximately four months to prepare a defense concerning the failure to file charges. At that point, there is nothing in the regulations or elsewhere that precluded Respondent from providing evidence to the Complainant that the charges therein were in error. [16] Neither is there any bar to the Complainant considering such evidence before the hearing and seeking leave from the ALJ to withdraw a complaint or portion of a complaint, if that is appropriate based on evidence provided by the Respondent.

It is also important to note that Respondent *did not oppose* the Complainant's Motion for Leave to Amend the Complaint. Respondent could and should have objected at that time if he believed that the regulations precluded amending the complaint. However, he did not oppose the Complainant's Motion to Amend, and the ALJ subsequently granted the Agency's motion on October 17, 2003.

In addressing the Respondent's due process contention that the Amended Complaint "skipped every part of the process" which must be followed before a complaint can be initiated, the ALJ stated that:

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[16] The Respondent also raises in his instant appeal the argument that he was never given the opportunity to achieve compliance as to the allegations in the Amended Complaint. *See* Appeal, p. 15. Assuming, for the sake of argument only, that this provision might act as a limitation in proceeding in some cases, in this case, Respondent had repeatedly failed to file his returns, and had repeatedly engaged in disreputable behavior, such that late-found "compliance" with the tax law was not really an issue. In any event, Respondent is being disingenuous in implying he would have belatedly filed the returns, as he made no attempt to do so during the four month period between when he first became aware of the allegations in the Amended Complaint and the hearing date. As revealed by his unsworn testimony at hearing, he did not express any intent to comply.

> IRS Regulations 10.53, 10.54 and 10.55 (10.53, 10.60 and 10.61 respectively, under the revised regulations), do not bar the IRS from amending a complaint as Respondent has suggested. Section 10.53 addresses the duty of IRS employees to report suspected practice violations, but it certainly does not act as a de facto barrier, by imposing a condition precedent to the institution of a complaint. As for Section 10.54, that section refers to the institution of a proceeding. That has already occurred in this case by virtue of the filing of the original (i,e, First Complaint). In addition, even that provision provides an exception to the procedures where, among other exceptions, willfulness is involved.

See Order on Respondent's Motion to Dismiss the Amended Complaint, p. 3.

Based on the above, it is clear that the ALJ's decision was proper for reasons of judicial economy, was not an abuse of due process or the ALJ's discretion.

F. Denial of Respondent's Discovery Did Not Violate His Rights to Due Process

Respondent argues on appeal that "the courts long ago acknowledged that the complete denial of discovery [17] in an administrative procedure would likely be a due process violation." However, Respondent does not cite even one case which supports the aforementioned argument, while the Complainant can cite a number of cases that demonstrate that discovery can be denied in an administrative proceeding. *See, e.g., Hasan v. Department of Labor*, 2002 WL 448410 (7th Cir. 2002)(holding that a court has broad discretion to deny discovery, which decision will not be overturned, absent a showing of actual and substantial prejudice to the complaining litigant); *see also Bissell v. United States*, 2003 WL 22171499 (9th Cir. 2003); *Lamb v. Department of the Interior*,

[17] Respondent's allegation of "a complete denial of discovery" must be viewed in light of the specific discovery requested and whether denial was appropriate in light of the specific requests being made and the relevant regulatory limitations (if any) on discovery.

342 F.3d 1080 (9th Cir. 2003). [18] In any event, for the reasons set forth below, the ALJ's denial of the specific discovery requested by the Respondent was appropriate and not in violation of any of the provisions of Circular 230 or any other legal standard.

Respondent's Motion for Discovery and Supporting Memorandum (October 29, 2003) stated that discovery was necessary because Complainant failed to cite with specificity what facts constituted the claims against him, thereby forcing him to disprove a fact that had not been alleged. He sought interrogatories from eighteen individuals including Complainant's counsel. The motion indicated that requests for production of documents and admissions would be served on the Complainant directly. [19] These requests were very basic and in some cases did not have a correct name. For example, Respondent requested interrogatory from "Vicki White, IRS employee." In support of his request he states: "Relevance: has information related to the respondent's representation of Banister's clients, including Thompson."

Complainant opposed Respondent's Motion for Discovery on November 4, 2003 setting forth very specific objections, including objections to interrogatories relating to each individual from whom Respondent sought interrogatories. For example, Complainant's objection to the interrogatory of "Vicki White" stated as follows:

> Complainant believes that the actual person Respondent desires to depose by interrogatory is Vicki L. Willis. See Respondent Exhibit 40. Ms. Willis is a Taxpayer Advocate, North Highlands, California post of duty. Complainant objects to the taking of this individual's deposition by interrogatory based on vagueness and relevancy grounds. The request is vague because it does not indicate the specific knowledge or information that he is seeking from Ms. Willis

[18] See the discussion, *infra*, of *Lopez v. United States*, 129 F. Supp.2d 1284 (U.S.D.C. New Mexico, 2000), *aff'd Lopez v. United States*, 21 Fed. Appx. 879 (10th Cir. 2001) and *Kelly v. United States*, 203 F.3d 519, 523 (7th Cir. 2000).

[19] Requests for Production of Documents and Admissions were never served.

> concerning Respondent's representation of his clients, including taxpayer Walter Thompson. Secondly, the Respondent has not indicated what information Ms. Willis has that would be relevant or could lead to relevant evidence in the instant case

The ALJ in his November 17, 2003 Order on Respondent's Motion for Discovery held that Respondent's stated premise for discovery, that [t]he Complainant failed to cite with specificity what facts constituted claims against the respondent," has no legitimacy.[20] *See id.* p. 2. He similarly determined that Respondent's assertion that he has been forced "to disprove a fact that has not even been alleged" also had no legitimacy. *See id.* p. 2. The ALJ found that with the "stated reason for seeking discovery found to be meritless," denial of Respondent's Motion for Discovery based on that reason alone was appropriate. *See id.* p. 2. However, the ALJ also denied the Respondent's Motion for Discovery because "the Regulations Governing Practice Before the Internal Revenue Service ("Regulations") do not contemplate interrogatories", and because Respondent had not identified a legitimate basis in his Motion for taking interrogatories of the individuals he identified in his Motion.[21] *See id.* pp. 2-4.

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[20] The ALJ had previously addressed and rejected this contention in his Orders regarding Respondent's Motions to Dismiss the Complaint and Amended Complaint.

[21] 31 C.F.R. § 10.73(b) permits deposition by written interrogatories and not interrogatories per se. In this regard, Respondent's Motion for Discovery requested interrogatories and not depositions by interrogatory. Complainant liberally construed Respondent's request as being for deposition by written interrogatory because he was asking to conduct interrogatories of various individuals. Typically, interrogatories are served on the opposing party for response and not served on individuals. However, in addressing this matter in his Order on Respondent's Motion for Discovery, the ALJ stated that: "While the IRS has guessed that the Respondent might be seeking depositions taken upon written interrogatories, the Respondent has not asked for this type of deposition. The word "deposition" appears nowhere within the Respondent's Motion and neither the IRS nor the Court should have to speculate about, or interpret, just exactly what the Respondent is seeking. Respondent is operating with legal counsel, not pro se,

As concerns the Respondent's assertion made in his instant appeal that discovery would have provided evidence of selective prosecution demonstrating that "the real motivations for prosecuting [him] were purely retaliatory for [his] political speech...," [22] this reason for conducting the specific discovery sought by Respondent was properly denied. In order to be entitled to discovery in a selective prosecution case, a plaintiff must offer "at least a colorable claim" that (1) he or she was singled out for prosecution from among others similarly situated, and (2) that his or her prosecution was improperly motivated. *See Branch Ministries v. Richardson*, 970 F.Supp. 11, 16 (D.D.C. 1997), *citing United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983); *Attorney General v. Irish People, Inc.*, 684 F.2d 928, 932 (D.C. Cir. 1982); *Synanon Church v. United States*, 579 F.Supp. 967, 977 (D.D.C. 1984). In the instant case, the Respondent never made a "colorable claim" that he was singled out from among others similarly situated. In fact, Respondent's Motion for Discovery never stated that an objective of said discovery was to obtain evidence of selective prosecution. [23] The Respondent was represented by counsel, who certainly could have raised this line of inquiry with the ALJ at that time.

A more important basis for denying discovery, as argued by Complainant, is as the ALJ noted in his Order denying Respondent's Motion for Discovery, Circular 230 does not provide for interrogatories. The Regulations also do not provide for requests for

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and counsel has demonstrated awareness of the regulations in the other motions filed in this matter." See Order on Motion for Discovery, p. 2.

[22] See Appeal, p. 27.

[23] As Respondent's Motion for Discovery did not state that a purpose was to obtain evidence of selective prosecution, the ALJ did not discuss that issue in his Order on Respondent's Motion for Discovery. The issue is addressed here only because it is now raised in the Respondent's appeal.

admissions, or requests for production of documents. In this regard, 31 C.F.R. § 10.70(b) specifically allows the ALJ to take or authorize the taking of depositions and not to authorize other forms of discovery. See § 10.70(b)(6). Secondly, 31 C.F.R. § 10.73 provides that "[d]epositions for use at hearing may be taken, with the written approval of the Administrative Law Judge...." *See, e.g., N.L.R.B. v. Sprague*, 428 F.2d 938 (1st Cir. 1970)(observing that denial of a request to take a deposition is within the discretion of the Administrative Law Judge). Again, there are no similar provisions addressing interrogatories, requests for admissions, or requests for production of documents. In addition, 31 C.F.R. § 10.72 provides that "the rules of evidence prevailing in courts of law and equity are not controlling in hearings or proceedings conducted under this part." Also

Regulations aside, there is no Fifth Amendment due process right to discovery in an administrative hearing. In *Lopez v. United States*, 129 F. Supp.2d 1284 (D.N.M. 2000), *aff'd Lopez v. United States*, 21 Fed. Appx. 879 (10th Cir. 2001), involving a CPA who had engaged in disreputable conduct and was disbarred from practicing before the IRS, the Court rejected the Plaintiff's argument that his due process rights had been violated because he was not allowed to conduct the entire discovery he wanted prior to his administrative hearing, stating "there is no general constitutional right to discovery in an administrative proceeding." *Id.* at 1288-1289, *citing Kelly v. United States*, 203 F.3d 519, 523 (7th Cir. 2000). [24] The Court in *Lopez* also noted that the Complainant had provided Respondent with a number of documents, which is also true in the instant

[24] This is in direct contradiction to Respondent's unsupported argument in the instant appeal that "the courts long ago acknowledged that the complete denial of discovery in an administrative adjudication would likely be a due process violation." See Appeal, p. 26.

case.[25] *Id.* at 1288. In fact, Respondent in the instant case had been provided with all of the documents he needed to be able to respond to the charges and prepare a defense.[26]

Based on the above, the ALJ's denial of Respondent's discovery was appropriate and did not violate Respondent's due process. Respondent has not made any showing that he suffered actual and substantial prejudice as a result of ALJ not permitting the discovery requested and has not even shown that the discovery requested was due or even permissible under Circular 230.[27] Therefore, this ground for appeal should be denied.

G. Summary Judgment Is Permissible in These Disciplinary Proceedings

The Respondent argues on appeal that the ALJ was in error for granting summary judgment and not holding a hearing on the merits. In making this assertion, Respondent appears to argue that the ALJ erred when he concluded that "one does not get a right to a hearing to resolve facts simply by denying the allegations." See Appeal, p. 32. However, Respondent sets forth no legal support for his position that the ALJ erred in this determination. The Respondent also conclusively states that per 31 C.F.R. §

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[25] See Order on Respondent's Motion for Discovery, p. 2.

[26] The Respondent's conclusory and definitive statements about what discovery would have yielded had it been permitted and the relevancy of such matters to the proceedings is totally without merit. For example, Respondent states that had he been permitted to engage in the requested discovery, it would have revealed that there was no evidence he had any legal duty to file any return given the facts of his situation. However, there was nothing in his Motion for Discovery that identified this as a reason for any of the sought-after interrogatories, and the instant appeal provides no clarification (e.g., from whom he expected such information to come from). His other requests were similarly lacking.

[27] See *Hasan*, 2002 WL 448410.

10.70, no order of disbarment can issue until the conclusion of a hearing and that the ALJ attempted to evade § 10.70's requirement for a hearing "by holding a 'show' hearing *after issuing judgment against him on the merits.*" *See* Appeal, p. 32. Finally, Respondent argues that there were material facts in dispute that precluded summary judgment.

For the reasons discussed below, summary judgment is permitted in these proceedings, and the ALJ was correct in granting summary judgment to Complainant in the instant case as no material facts were placed in dispute.

Summary judgment is appropriate when there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Jung v. FMC CorCorp.* 755 F.2d 708, 710 (9th Cir. 1985). The moving party bears the initial burden of establishing, through affidavits or otherwise, the absence of a genuine issue as to any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *see T.W. Elec. Service, Inc v. Pacific Elec. Contractors Assn*, 809 F.2d 626, 630 (9th Cir. 1987). If the moving party meets its initial burden, "the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense." *Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991)(quoting *Richards v. Nielsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987)). The necessary significant and probative evidence "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of material fact exists when the non-moving party produces evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law

places on that party. *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The existence of a genuine issue of material fact may be demonstrated through the use of affidavits, depositions, answers to interrogatories, and admissions. [28] In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits or admissible discovery material which support its contention that the dispute exists. Fed. R. Civ. P. 56(e); *U.A. Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1471 (9th Cir.) *cert. denied* 516 U.S. 912 (1995), and *Strong v. H.G. France*, 474 F.2d 747, 749 (9th Cir. 1973).[29] In this regard, the ALJ fully addressed the Respondent's failure to raise any issues of material fact so as to preclude summary judgment.[30] For example, the ALJ observes on p. 2 of his Order on Complainant's Motion for Summary Judgment that: "[a]fter stating that summary judgment 'Should be Denied Because Material Facts are Disputed and that the IRS is not Entitled to Judgment as a Matter of Law' Respondent fails to deliver any showing of material facts in dispute."

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[28] The Respondent argues on appeal that summary judgment must be denied because he was not permitted to engage in discovery. In this regard, while it is true that Rule 56(c) mandates that an entry of summary judgment should occur after adequate time for discovery, this does not mean that the opposing party can engage in any discovery he desires. In the instant case, the Respondent was given adequate time to conduct discovery and he has not alleged otherwise. In addition, the ALJ did not prevent the Respondent from engaging in discovery, he only prevented him upon motion from the Complainant from engaging in discovery that was determined to be irrelevant, and this is certainly permissible.

[29] Additionally, the more implausible the claim or defense asserted by the opposing party, the more persuasive its evidence must be to avoid summary judgment. *United States ex rel, Anderson v. Northern Telecom Inc.*, 52 F.3d 810, 815 (9th Cir.), *cert. denied*, 516 U.S. 1043 (1996).

[30] *See* Order on Complainant's Motion for Summary Judgment, pp. 2-4.

Later, in the aforementioned Order,[31] the ALJ discussed the Respondent's failure to demonstrate that any material facts were in dispute in greater detail stating that:

> Material facts would involve, theoretically, evidence that Banister did not advise clients Coleman and Thompson, as alleged. Banister's own Answer, however, appears to preclude this contention. Further, Banister has never amended his Answer to claim otherwise, nor does the Opposition suggest any retraction from the Answer. Thus, the uncontradicted evidence is that Banister did so advise clients Coleman and Thompson, as alleged in the first Complaint. As for the charges in the Amended Complaint, Banister, having denied that he failed to file his returns, could show, theoretically, that the returns were filed or he could show his income was below the threshold for filing a return. The Opposition, however, does not present any such facts to contradict the IRS evidence. That IRS evidence, as reflected in IRS prehearing exchange exhibit 40, shows that for the years in question (1999 through 2002) the IRS has no record of any return filed by the Respondent. Thus, the uncontradicted evidence is that Banister did not file any individual tax returns for the years alleged and he has presented no evidence that his income level was such that no return was required to be filed.

To prevail on a summary judgment motion, the moving party does not necessarily have to put on evidence which negates the opponent's claim. *Celotax Corps v. Catrett*, 477 U.S. 317, 323 (1986). Where the opposing party will bear the burden of proof at trial on a particular issue, the moving party may prevail by simply pointing out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the *absence* of a genuine issue of material fact. *Id.* (emphasis added).

In the instant case, the Respondent's opposition to the Complainant's Motion for Summary Judgment contained no legally admissible facts, but rather asserted a number

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[31] *See id.*, pp. 3-4.

of legally conclusory contentions framed as arguments. *United States v.Bell*, 27 F.Supp. 2d 1191, 1198 (1998). Respondent did not come forward with sufficient evidence demonstrating to the ALJ that there were genuine issues of material fact to be decided at hearing. *See Rand v. Rowland*, 154 F.3d 953 (9th Cir. 1998).

Respondent also argues on appeal that the absence of a hearing precluded an order of disbarment per 31 C.F.R. § 10.70. *See* Appeal, p. 32. The Respondent's argument is clearly erroneous. Section 10.71(a)(2002) is the applicable section of the regulations and not 31 C.F.R. § 10.70. In this regard, 31 C.F.R. § 10.71(a) states in part that:

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

Based on the above, it is clear that the regulation controlling disciplinary proceedings instituted by the Director allows for dispositive motions, including summary judgment. To that end, the right to a hearing is not an absolute, but is tempered by a rule that only in those cases where there exists a dispute over facts material to the proposed disbarment is such a hearing afforded. The foregoing standard mirrors that of Rule 56 of the Federal Rules of Civil Procedure. *See Sterlingware of Boston, Inc. v. United States*, 11 Cl. Ct. 879, 884-885 (1987). However, even absent an express regulation addressing the topic, the sheer wastefulness of conducting a merits hearing where no genuine issue of material fact is enough reason to refrain from doing so. Due process does not require an agency to convene an evidentiary hearing when no genuine issue of

material fact exists. *See, e.g., Puerto Rico Aqueduct and Sewer Auth. V. U.S. EPA*, 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

II. Merits

A. Amended Complaint Properly Charged Respondent With Failure to File

The Respondent repeats the argument made in his Motion to Dismiss Amended Complaint filed October 29, 2003 and subsequently rejected by the ALJ, wherein he asserted that the Complainant has inappropriately alleged that Respondent "failed to file" personal Federal income tax returns for the years 1999 through 2002. More specifically, Respondent points to the Complainant's cited reliance on 31 C.F.R. § 10.51(f) and claims that this regulation only requires a taxpayer to "make" a return. [32] The Respondent then asserts that willful failure to make a return is substantially different form a willful failure to file a return. However, the Respondent, as he did in his Motion to Dismiss the Amended Complaint, once again fails to articulate what he believes this substantial difference to be. For the reasons set forth below, Respondent's arguments have no merit and should be rejected.

To "make" a return, a taxpayer must prepare the return on the required forms following the instructions provided and must also submit or file the return with the Internal Revenue Service. Certainly a taxpayer can prepare the required forms and hold them, but those forms do not become a return until filed. To have a valid return, the taxpayer must:

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[32] Complainant relied on both 10.51(d)(July 1994) and on § 10.51(f)(July 2002) per the Complainant's Motion to Amend the Amended Complaint. In any event, both of the aforementioned sections refer to "failure to make."

(1) Prepare the return on the required form and following the official instructions, I.R.C. § 6011; Treas. Reg. § 1.6011-1;

(2) Provide sufficient information in the return for the Internal Revenue Service to process it, I.R.C. § 6611(g);

(3) Sign the forms under penalties of perjury, I.R.C. § 6065; Treas. Reg. § 1.6065-1;

(4) File it with the government, I.R.C. §§ 6012(a), 151(d); Treas. Reg. § 1.6012-1(a)); and

(5) File it as a good faith attempt to comply with the law and intending that the government rely on the return as a voluntary agreement to the assessment of the taxes shown therein, *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986).

Until the taxpayer files the required forms with the government he has not made a return but has merely collected and organized information. The Supreme Court in *Spies v. United States*, 317 U.S. 492 (1943), addressing the penalties for "failure to make a return," observed that "punctuality is important to the fiscal system, and these are sanctions to assure punctual as well as faithful performance of these duties." *Id.* at 496. In other words, filing a return in a timely manner is part and parcel of "making a return."

Respondent's assertion that "failure to file" a return is substantially different from "failure to make a return" is also refuted by *Orwutsky v. Brady*, 925 F. 2d 1457, 1991 U.S. App. LEXIS 2613 (4th Cir. 1991). The Court in *Orwutsky* affirmed the disbarment from practice before the Internal Revenue Service of an attorney for violation of 31

C.F.R. § 10.51(d),[33] for *willfully failing to file* timely returns for the tax years 1974 through 1979. The Court's decision in *Orwutsky* clearly demonstrates that 31 C.F.R. § 10.51(d) was the correct charge for failure to file. [34]

The ALJ agreed with the position of the Complainant as set forth above. In doing so, the ALJ stated that:

> It would be nonsense to interpret this regulation as Respondent suggests. Such an interpretation would be inconsistent with the complete text of Section 10.51(f) and its broad intent to address those who would evade the duty to make a return when required by the revenue laws. *See also*, *Orwutsky v. Brady*, 1991 U.S. App. LEXIS 2613 at #4 (4th Cir. 1991) in which that court repeatedly referred to an attorney who failed to file his personal federal income tax returns and then cited the predecessor regulation to Section 10.51 f),(i.e. Section 10.51(d)), in support of the attorney's disbarment. Both versions refer to "willfully failing to *make* a federal tax return.""

See Order on Respondent's Motion to Dismiss the Amended Complaint, p.2 (November 17, 2003).

Based on the above, the ALJ was correct in his determination that Complainant properly charged Respondent with violating 31 C.F.R. § 10.51(d)((July 1994) and 31 C.F.R. § 10.51(f)(July 2002) for his failure to file returns, and the Respondent offered no argument in the instant appeal to disturb that determination.

B. Criminal Conviction for Willful Failure to File Not Required

Respondent once again argues as he did in his Motion to Dismiss the Amended Complaint that a practitioner must be convicted of a criminal offense of willful failure to

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[33] "Willfully *failing to make* federal tax return(s) in violation of the revenue laws of the United States". (Emphasis added).

[34] 31 C.F.R. § 10.51(f)(July 2002).

file to be subject to sanctions by the Director. In support of this argument, Respondent refers to 31 C.F.R. § 10.51(a).[35] This argument was rejected by the ALJ and should be rejected again for the reasons set forth below.

Respondent's reliance on 31 C.F.R. § 10.51(a) to support his argument that willful failure to file only constitutes disreputable conduct if there has been a criminal conviction for willful failure to file conveniently ignores the remainder of § 10.51, including § 10.51(f) which includes "[w]illfully failing to make a Federal tax return in violation of the revenue laws of the United States...." It also ignores the preamble language of § 10.51 which introduces the list of examples of misconduct with: "Incompetence and disreputable conduct for which a practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service includes, *but is not limited to* —... ."(Emphasis added).

The standard of willfulness employed by the Office of Professional Responsibility in seeking disciplinary sanctions against tax practitioners who fail to file or timely file their own income tax returns is one of a "voluntary, intentional violation of a known legal duty." *See United States v. Pomponio*, 429 U.S. 10, 12 (1976). In *Owrutsky, supra*, the court reversed a lower court's finding of a lack of willful motive, and upheld the Office's disbarment of an attorney from practice before the Internal Revenue Service on grounds that the attorney had failed to timely file his individual income tax returns for six consecutive years. Rejecting the practitioner's argument that his eligibility for refunds precluded a finding of willfulness, the court cited *Pomponio*, and noted that as an

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[35] *See* Appeal, p. 16.

experienced practicing attorney, the practitioner knew or should have known that he had a legal duty to timely file returns, regardless of his ultimate tax liability. Additionally, in *Joseph Poole v. United States*, No. 84-0300, 1984 U.S. Dist. LEXIS 15351 (D.D.C. 1984), the court affirmed the disbarment of a Certified Pubic Accountant who failed to timely file his individual income tax returns for three consecutive years, holding that "willful failure to file tax returns, in violation of the Federal Revenue laws, is dishonorable, unprofessional, and adversely reflects on the practitioner's fitness to practice. This is particularly true in a tax system whose very effectiveness depends upon voluntary compliance."

In the instant case, Respondent's tax filing history evinces the type of conduct the Director seeks to address through the disciplinary process set forth in Circular 230. In fact, suspension and disbarment has been sought and sustained against practitioners who failed to file tax returns, even when they would have received refunds had they filed, and these practitioners did not have criminal convictions for willful failure to file. *See, e.g., Orwutsky supra.*[36] In this regard, the plain language of Section 10.51(f) (formerly section 10.51(d)) of the Circular speaks of "willfully failing to make a Federal tax return in violation of the revenue laws of the United States," which is not dependent upon the prerequisite of a criminal conviction. In fact, even in cases such as *Owrutsky, supra*, in which no tax is owed and a refund is due the practitioner, courts have nevertheless held that the tax practitioner's willful failure to file an income tax return provides a basis for disciplinary action.

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[36] There is no indication that Owrutsky had been convicted for failure to timely file.

While the failure to make or file the return can result in criminal sanctions under I.R.C. § 7203, the instant action does not deal with criminal sanctions but with the need to protect the public from a tax practitioner who will not comply with the rule of law in his personal life, and who advocates that others ignore the rule of law with respect to their tax obligations.

Based on the above, Respondent's argument that willful failure to file only constitutes disreputable conduct if there has been a criminal conviction for willful failure to file is clearly misplaced and should be rejected.

C. The Record Supported Summary Judgment

One of the major themes of Respondent's appeal is that summary judgment was not appropriate because he should have been permitted to raise reliance and/or "good faith" as a defense to the charges against him. In this regard, Respondent states in his appeal that: "[t]he denial of so much exculpatory evidence-demonstrating convincingly that [his] 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." *See* Appeal, p. 46. This statement from Respondent's appeal suggests that his objective in the disbarment proceedings was to use the proceedings as a forum to make arguments that have been repeatedly rejected by the courts under the guise of "reliance" and "good faith." In short, the Respondent sought to present evidence at a hearing to support his argument that his research led him to the good faith belief that the Sixteenth Amendment had been fraudulently ratified and that the sources of Coleman's, Thompson's, and presumably his own income were not

reportable under I.R.C. §§ 861-865. He also wanted to present evidence that the IRS failed to respond to his requests that they show him where his research was in error and that, when the IRS did not respond, he relied upon that failure as evidence that he was correct. His contention is that such evidence would have resulted in a finding that he did not violate the regulations as charged in the Complaint and Amended Complaint because, if he was acting in good faith or in reliance on the IRS's failure to respond to him, he would not have been in "willful" violation of the regulations in Circular 230.

In rejecting such arguments as a valid reason to deny Complainant's Motion for Summary Judgment, the ALJ was acting consistently with a number of cases that have determined Respondent's position on the Sixteenth Amendment and on I.R.C. §§ 861-865 to be frivolous and completely without merit. This is especially the case where such frivolous positions are being advocated by a CPA and tax practitioner such as the Respondent.

There are a number of cases that clearly refute the Respondent's argument on appeal that his § 861 return position was not frivolous.[37] *See, e.g., Benson v. United States*, Nos. 84-4182, 95-4061, 1995 WL 674615 (10th Cir. 1995)(following *Lonsdale*), *cert. denied*, 519 U.S. 851 (1996); *Reese v. United States*, 24 F.3d 228, 231 (Fed. Cir. 1994)(wherein the court stated, "an abiding principle of federal tax law is that, absent an enumerated exception, gross income means all income from whatever source derived."); *United States v. Latham*, 754 F.2d 747 (7th Cir. 1985); *Sullivan v. United States*, 788 F.2d 813 (1st Cir. 1986); *Peth v. Breitzman*, 611 F.Supp. 50 (E.D. Wis. 1985); *Solomon v. Commissioner*, T.C. Memo 1993-509, 66 T.C.M. (CCH) 1201 (1993), *aff'd without*

published opinion, 42 F.3d 1391 (7th Cir. 1994); *Aiello v. Commissioner*, T.C. Memo 1995-40, 69 T.C.M. (CCH) 1765 (1995); *see also Williams v. Commissioner*, 114 T.C. 136 (2000), *quoting Crain v. Commissioner*, 737 F.2d 1417 (5th Cir. 1984)(imposing sanctions against a taxpayer asserting the § 861 argument stating: "[w]e shall not painstakingly address petitioner's assertions with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit."); *Furniss v. Commissioner*, T.C. Memo 2001-137, 81 T.C.M. (CCH) 1741 (2001)(summary judgment for the Commissioner in a decision that specifically rejected the § 861 argument); *Madge v. Commissioner*, T.C. Memo 2000-370, 80 T.C.M. (CCH) 804 (2000).

Because the Respondent is unable to provide the citation of a single court case in which his positions have been found to have merit, Respondent instead argues on appeal that U.S. Tax Court opinions such as *Aiello*, *Solomon*, and *Crain*, are "hardly the sort of cases responsible tax practitioners even read, much less rely on." *See* Appeal, p. 37. In support of this contention, Respondent argues on appeal that "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* Appeal, p. 39 (citing IRM 4.10.7.2.9.8). For the reasons set forth below, Respondent's argument has no merit and should be rejected.

First and foremost, the Respondent never claimed that he relied on the cited Internal Revenue Manual (IRM) provision as the basis for his ignoring the large number of cases that have rejected his § 861-865 and Sixteenth Amendment ratification arguments. Secondly, the cited provision does not state what the Respondent claims it states. IRM 4.10.7.2.9.8, entitled "Importance of Court Decisions" states:

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[37] *See* Appeal, p. 37.

(1) Decisions made at various levels of the court system are considered to be interpretations of tax laws and may be used by either examiners or taxpayers to support a position.

(2) Certain court cases lend more weight to a position than others. A case decided by the U.S. Supreme Court becomes the law of the land and takes precedence over decisions of lower courts. The Internal Revenue Service must follow Supreme Court decisions. For examiners, Supreme Court decisions have the same weight as the Code.

(3) Decisions made by lower courts, such as Tax Court, District Courts, or Claims Court, are binding on the Service only for the particular taxpayer and the years litigated. Adverse decisions of lower courts do not require the Service to alter its position for other taxpayers.

It is clear that IRM 4.10.7.2.9.8 does not direct the IRS to ignore all but U.S. Supreme Court cases. The provision merely points out correctly that U.S. Supreme Court cases take precedence over lower court decisions and must be followed. As to other court decisions, the above IRM provision essentially provides that these cases are given the weight that the IRS determines they warrant based upon the given situation. For example, an examiner considering an IRS refund case in California would likely assign more weight to a Ninth Circuit decision as opposed to a Fifth Circuit Decision. Alternatively, a case directly on point on an issue from another circuit may be given more weight than a case that is not directly on point from the local circuit.

Based on the above, it is clear that the Respondent cannot rely upon the provisions of IRM 4.10.7.2.9.8 to support his frivolous arguments, rejected by *every* court that has considered them, in violation of the Circular, based on his self-serving and mistaken premise that he could ignore such cases if they are not U.S. Supreme Court cases because the IRS can choose to ignore them.

As concerns the Sixteenth Amendment ratification position Respondent raised

on behalf of taxpayer Coleman, Respondent argues on appeal that asserting this position to the IRS was proper, citing *Miller v. United States*, 868 F.2d 236 (7th Cir. 1988) in support of this argument. More specifically, Respondent cites the Court's statement in *Miller* that: "Miller and his fellow protesters would be well advised to take their objections to the federal income tax structure to a more appropriate forum."

This argument should be rejected because there is nothing in the *Miller* case or any other court decision which directs tax practitioners to raise frivolous arguments before the IRS in violation of the Circular.. In this regard, ratification of the Sixteenth Amendment to the Constitution remains long settled. The Supreme Court ruled on this question in *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 18-20 (1916) and affirmed the validity of a statute based on the authority of, and passed after, the Sixteenth Amendment. Subsequent cases of the court make reference to the ratification of the Sixteenth Amendment to the Constitution as an established fact. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 615 (1983); *Baldrige v. Shapiro*, 455 U.S. 345, 353 (1982); *United States v. Donruss Co.*, 393 U.S. 297, 303 (1969).[38]

In addition, Respondent's self-serving claim in his Answer and in his instant appeal that he "advised and fully disclosed to both Mr. Thompson and Mr. Coleman that the arguments they instructed him to make on their behalf were contrary to IRS custom and policy, and could precipitate adverse IRS action against them," see Respondent's

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[38] It is curious that Respondent argues in his appeal that "the IRS's own manual makes clear that any opinion issued by any court other than the Supreme Court are not [sic] binding on the IRS," see Appeal, pp. 38-39 (citing IRM 4.10.7.2.9.8), but yet he argues in this instance that the IRS is the proper forum for him to raise the Sixteenth Amendment ratification issue, where the IRS would be bound by the Supreme Court decisions finding the Sixteenth Amendment was valid.

Answer ¶ 10 and Appeal, p. 36, is disingenuous if not outright false. Respondent's statement implies that the arguments made by taxpayers Coleman and Thompson originated with them and that he only acted on their request after warning them that their arguments were problematic. Nothing could be further from the truth, as evidenced by Mr. Coleman's statements, Complainant Exhibits 10 and 27, and Respondent's own statement, which he submitted to the IRS during his representation of Mr. Coleman. Complainant's Exhibit 6, pp. 2-3. These statements clearly evidence that Mr. Coleman allowed the Respondent to make the arguments only after the Respondent convinced him that the argument had merit. For example, Respondent stated that:

> Mr. Coleman contacted me to discuss his situation and he subsequently asked me to assist him with his tax matters. Mr. Coleman described his business and the sources of his income. I told Mr. Coleman that based upon my research, training, and experience, it was my opinion that federal law did not impose a tax on his income and he therefore was not required to file a federal tax return.

See Complainant Exhibit 6, p. 2.

As concerns taxpayer Thompson, the amended tax returns prepared by the Respondent on his behalf refer to "advice received by professionals." *See* Complainant Exhibits 4 and 5. Although the Respondent is not mentioned by name, it is fair to assume that since he prepared Thompson's amended returns, and since his opinions as discussed above are consistent with the positions set forth in those amended returns, that Respondent clearly had an influence on Mr. Thompson's actions.

Based on the above, one can do nothing but infer that the Respondent influenced the taxpayers to take the actions they did. He was not merely setting forth views originated by the taxpayers as he would have one believe through his answer.

In regard to the Amended Complaint and the charges contained therein alleging Respondent's failure to file tax returns, Respondent in his Amended Answer dated October 29, 2003, denied the violations of failure to file his individual Federal income tax returns set forth in the Amended Complaint. However, Respondent did not state the basis for his denial. As stated previously, in attempting to establish the existence of this factual dispute, the opposing party may not rely simply upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits or admissible discovery material which support its contention that the dispute exists. . Fed. R. Civ. P. 56(e); *U.A. Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, and *Strong v. H.G. France*, 474 F.2d 747. Therefore, the mere denial of the allegations in and of themselves was not sufficient to defeat Complainant's Motion for Summary Judgment..

The Respondent in his instant appeal stated that: "the IRS adduced no evidence that [his] financial condition required him to file a return," and argued that the ALJ erred in holding that he had the burden of proof on whether his income could trigger a duty to file a return. *See* Appeal, pp. 42-43. However, the ALJ made no such holding. The ALJ found that Complainant had charged Respondent with a failure to file his own federal income tax returns for the tax years 1999 through 2002 and had presented documentary evidence to support the failure to file charges in the form of transcripts. *See*, Decision of the Administrative Law Judge, p. 3 (December 24, 2003). More specifically, the

transcripts (certified with official seal) provided by Complainant clearly evidenced that Respondent failed to file Federal Income Tax returns for tax years 1999, 2000, 2001, and 2002 as required by 26 USC §§ 6011(a), 6012(a) *et. seq.*, 6013, and/or 6072(a). *See* Complainant Exhibits 40-44. In this regard, it should be noted that 31 C.F.R. § 10.72(c) provides that "official documents, records, and papers of the Internal Revenue Service and the Office of the Director of Practice are admissible in evidence without the production of an officer or employee to authenticate them."

Respondent in the instant appeal (p. 14) and in his earlier Motion to Dismiss Amended Complaint, alleges that the Amended Complaint failed to put him on notice of what facts he would need to prepare his defense and precluded him from providing an adequate defense. This is simply not true. As the ALJ noted in his December 24, 2003 decision (at p. 3), Respondent could have placed material facts at issue as well as provided a defense to the allegations by providing some evidence (even in the form of his own sworn affidavit) that he did in fact file his returns for the tax years at issue or that he did not have sufficient income for each of the identified tax years which required his filing returns. However, as the ALJ noted in his decision (at p. 3), Respondent "never offered any contradictory facts to rebut the official IRS records which showed that Respondent never filed returns for the years alleged."

In his instant appeal, Respondent disingenuously "implies"[39] for the first time that his failure to file was the result of not meeting the minimum threshold for filing returns,

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[39] We use the term "implies" because Respondent does not claim that his income was beneath the minimum income requirements for filing a return. He only states that the Complainant did not provide evidence that he did have the requisite income.

when he has at the same time argued that the failure to file charges originated "from the political monitoring of [his] free speech on a radio show and the secret, illicit audit by an IRS official."[40] *See* Appeal, p. 11. In this regard, Respondent is fully aware that his statement on the radio show that he had not filed returns since 1999 was based on his erroneous assertion that U.S. citizens earning income in the United States are not required to file tax returns and not on his not meeting the legal minimum threshold for filing.

Complainant met its burden of proof for summary judgment on the Amended Complaint as they provided to the ALJ Form 4340s, Certificates of Assessments, Payments and Other Specified Matters, under seal, which showed that Respondent's records did not indicate that the IRS ever received a Federal income tax return from the Respondent for the tax years at issue. Respondent, in turn, failed to meet his burden to defeat summary judgment as he never presented any credible evidence indicating that he filed tax returns for the tax years at issue, nor did he establish that his failure to file was on account of cause that is reasonable. *See Mehner v. Commissioner of Internal Revenue*, T.C. Memo 2003-203, 2003 WL 21545885 (U.S. Tax Court 2003). That being the case, the ALJ properly found that Respondent's failure to file was willful and a violation of both 31 C.F.R. § 10.51(f)(July 26, 2002), and its predecessor, 31 C.F.R. § 10.51(d)(July 1994).

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[40] The allegation of "political monitoring of free speech and a secret, illicit audit" is without merit. Respondent appeared on a public radio station and his admission of a possible violation of law on public radio was made at his own risk. A person is not immunized from a crime if they confess to it in public. The admission of failure to file also provided reasonable cause to report the potential violation of Circular 230 to the Director and for the Director to determine if Respondent's admission on the radio show could be

In conclusion, the ALJ did not commit error when he granted summary judgment on the merits of the case in favor of Complainant.

D. Respondent's Argument That His First Amendment Right To Free Speech Was Violated by the Director's Action to Disbar Him Is Without Merit

The Respondent argues on appeal that the ALJ erred in not dismissing the Complainant's disbarment action against him based on his affirmative defense that the action violated his First Amendment right to free speech. In this regard, the Respondent essentially repeats the arguments he made in his October 29, 2003 Motion to Dismiss the Complaint and in his November 17, 2003 Opposition to Complainant's Motion for Summary Judgment -- both rejected by the ALJ.

For the reasons set forth below, the Complainant's disbarment action in no way violated the Respondent's First Amendment right to free speech, and the ALJ did not err in rejecting this affirmative defense.

First and foremost, the Respondent's attempt to rely on the protection of the First Amendment under the circumstances of this case is clearly misplaced. The Director's action against Respondent was based on his representation of two taxpayers before the IRS and on his own failure to file tax returns for a number of years. This was not an action instigated by Complainant to disbar Respondent from practice before the IRS because he expressed certain views or opinions to the public despite Respondent's assertions to the contrary. This was an action initiated against Respondent for violating specific provisions of the Circular, that concern his representation of two specific taxpayers and his own failure to file tax returns. The ALJ noted this distinction on pages 3-4 of his

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corroborated.

November 17, 2003 Order on Respondent's Motion to Dismiss the Complaint wherein he stated that:

> In the context of specific instances, the First Amendment right to free speech is not evaluated with ignorance to the content of the speech and the circumstances of its utterance. Individuals can not drape themselves in the First Amendment as a means of insulating themselves from their actions. The conduct regarding Respondent was not made, for example at a political rally or symposium in which he expressed his views regarding the legitimacy of the ratification of the Sixteenth Amendment or his interpretation of the types of income included within Sections 861-865 of the Internal Revenue Code. Rather, those views are alleged to have been made in connection with his tax advisor role to taxpayers Thompson and Coleman. If, as IRS contends, Banister's views have been clearly rejected by the courts, the Respondent can not, in the context of representing individuals in IRS matters, continue to urge taxpayers to assert such discredited views, using the First Amendment as a shield for that activity. Obviously the Director has an interest in removing practitioners who engage in disreputable conduct, such as by advocating frivolous positions. Having considered the Respondent's Motion and the IRS Response thereto, including the cases cited by the Parties, the Court rejects Respondent's assertion that Mr. Banister's First Amendment rights have been implicated in the Complaint.

In short, the Respondent cannot violate the provisions of the Circular, and then assert that his First Amendment rights immunize him from those violations. For example, 31 C.F.R. section 10.51(j) prohibits practitioners from "Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or a pattern of providing incompetent opinions on questions arising under the Federal tax laws....". Following the Respondent's faulty logic, a practitioner charged with violating § 10.51(j) could simply assert that he or she was only exercising the right to free speech under the First Amendment when giving false opinion(s) and be immunized from the charge. The result would be that the provision would have no effect on regulating practice before the IRS, as it could easily be defeated by a First

Amendment free speech claim. Clearly, such a result was not intended, and a First Amendment analysis in this case is not warranted. However, even if the Respondent's opinions to taxpayers Coleman and Thompson were analyzed using the legal tests to determine if speech is protected, the Respondent's affirmative defense would have no merit for the reasons set forth below.

1. Commercial Speech

As discussed below, Respondent's opinions in his representation of taxpayers Coleman and Thompson constituted commercial speech.

A legal test has been devised for commercial speech cases. Under the test, such speech receives constitutional protection only if it concerns lawful activities and does not mislead; if the speech is protected, government may still ban or regulate it by laws that directly advance a substantial governmental interest and are appropriately tailored to that purpose. *Shapero v. Kentucky Bar*, 486 U.S. 466 (1988); *see also Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). Applying this test to Respondent's advice to taxpayers Coleman and Thompson, it is clear that if his advice is considered commercial speech, there is no entitlement to protection under the First Amendment, as it is misleading and encourages these taxpayers to commit violations of the law. The Supreme Court has defined commercial speech as "expression related solely to the economic interest of the speaker ...." *See U.S. v. Kaun*, 827 F.2d 1144 (7th Cir. 1987), *citing Central Hudson Gas & Electric Corp.*, 447 U.S. 557, and *Pacific Gas & Elec. Co. v. P.U.C. of California*, 475 U.S. 1, 106 S.Ct. 903, 908, (1986) (Commercial speech is "speech that proposes a business transaction.").

Kaun concerned an injunction which, in part, prohibited the Appellant from advertising, marketing, or selling any documents or other information advising taxpayers that wages, salaries, or other income not specifically excluded from taxation under Title 26 of the United States Code are not taxable income. The Appellant challenged this portion of the injunction as being violative of his First Amendment right to free speech. In considering this issue, the Court found that: "Insofar as Kaun holds himself out as a tax adviser, his advertising and marketing activities in that regard are commercial speech." The Court in *Kaun*, also stated that: "The States and Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading." The Court found the injunction's restrictions to be clearly acceptable restrictions on false commercial speech. *See also* 31 C.F.R. § 10.30.

In the instant case, Respondent's opinions as expressed in his representation of taxpayers Thompson and/or Coleman meet the test for commercial speech because (1) he clearly identifies himself as a Certified Public Accountant; (2) he uses business letterhead which also identifies his status as a Certified Public Accountant; (3) he provides his background (e.g., "I told him [Frank Coleman] that I was a Certified Public Accountant and that I had spent 5 ½ years as an IRS Criminal Investigation Division Special Agent," Complainant Exhibit 6, p.2; and Complainant's Exhibit 2, wherein Respondent states his education, experience and credentials); (4) he clearly holds himself out as a tax adviser with offerings such as:

> "I believe my experience in the IRS, combined with my experience as a Certified Public Accountant, uniquely qualifies me to assist you should you be contacted by

the agency. You may have received notices or other correspondence from the IRS, or you may have been selected for an audit. If I can assist you with your tax consulting needs, please contact me.

Complainant Exhibit 2; (5) he states in his advertisement that:

If you or your business have become the target of an income tax or other financial investigation, my investigative and trial preparation experience can help you understand and defend against the charges leveled against you. If I can assist you with your civil or criminal litigation needs, please contact me.

Complainant Exhibit 2; and (6) his advertisement states that he can be contacted for information as to his fees and availability. Complainant Exhibit 2. Based on all these facts, Respondent's opinions as reflected in documents submitted to the IRS on behalf of taxpayer's Thompson and Coleman would be considered a commercial activity and thus be viewed as commercial speech.

In commenting on the Complainant's position that the Respondent's opinions as expressed in his representation of taxpayers Thompson and Coleman constituted commercial speech, the ALJ stated on p. 8 of his order on Complainant's Motion for Summary Judgment that:

> Apart from the various factors listed by the IRS in its showing that Banister's opinions constitute commercial speech, the Court observes simply that the Respondent's tax avoidance theories were applied in the context of his representation of taxpayers Coleman and Thompson and that his Answer conceded this. Thus, the actions listed in the original Complaint were commercial speech.

If Respondent's opinions as expressed in his representation of taxpayers Thompson and Coleman constituted commercial speech, that speech should not be

protected by the First Amendment as it is misleading and encourages violation of the law. The misleading nature of Respondent's commercial speech is made even more egregious by his assertions of expertise based on his Certified Public Accountant and former IRS Criminal Special Agent status. *See, e.g.*, Complainant Exhibit 6, p.2 (where Respondent states: "I told him [Frank Coleman] that I was a Certified Public Accountant and that I had spent 5 ½ years as an IRS Criminal Investigation Division Special Agent."). In addition to being misleading, Respondent's advice would also not be entitled to First Amendment protection because it encourages illegal activity. *See Shapero*, 486 U.S. 466. In fact, taxpayer Frank Coleman, who had been seeking an offer in compromise regarding his outstanding tax liabilities when represented by another Certified Public Accountant, changed his course of action as a direct result of Complainant's advice. *See* Complainant Exhibits 10 and 27. This advice encouraged Mr. Coleman to cease his efforts to legitimately resolve his tax debts and to rely instead on Respondent's incorrect and frivolous theories that his [Coleman's] income was not subject to Federal income tax. *See* Complainant's Exhibits 6 (pp. 1-9) and 10. As Respondent's advice clearly encourages taxpayers to evade the payment of federal income tax, a violation of 26 U.S.C. §§ 7201 or 7203, his "speech" would not be protected by the First Amendment. Additionally, the First Amendment does not protect communications that are part of conspiracies to commit unlawful acts. *United States v. Dahlstrom*, 713 F.2d 1423, 1431 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984). Therefore, even if the Respondent's advice and opinions are not viewed as encouraging taxpayers to evade the payment of federal income tax, there is no doubt that the thrust of his advice and opinions was to

provide the recipients with a cover for their failure to file tax returns or their failure to pay their Federal taxes. This would amount to a conspiracy to commit an unlawful act, as the taxpayer who is called to task for failure to file and/or failure to pay their Federal income tax would indicate his reliance on Respondent's advice and/or opinions in support of that failure.[41]

Based on the above, even if Respondent's speech is viewed as protected speech (and Complainant contends it is not), there is clearly a substantial Government interest in regulating such speech if made by a tax practitioner, and Circular 230 is appropriately tailored for that purpose. Therefore, Complainant did not violate Respondent's First Amendment right to free speech by seeking sanctions against him based on his advice to taxpayers Coleman and Thompson. *See, e.g., Shapero v. Kentucky Bar*, 486 U.S. 466. and *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). As a result, the ALJ's decision was without error and should be affirmed.

2. Non-Commercial Speech

If Respondent's advice and/or opinions are not considered to be commercial speech, then he is still not entitled to protection under the First Amendment due to the contents of his advice and/or opinions. In *United States v. May*, 555 F.Supp 1008 (1983), the court considered the Defendant's argument that it would be a violation of the First Amendment if he was enjoined from: (1) distributing forms which he claims are acceptable as income tax returns; (2) disseminating information in any form advising taxpayers that wages, salaries or business income are not taxable; and (3) preparing or

[41] This is exactly what Mr. Coleman did. *See* Complainant Exhibits 10 and 27.

assisting in the preparation of any federal tax return in which the wages, salaries, or business income of the taxpayer is not included in adjusted gross income. While May's argument was based on the general rule against prior restraint, the Court found that even if the injunction was a prior restraint (it had determined that it was not), it did not violate the First Amendment. Citing *United States v. Buttorff*, 572 F.2d 619, 622-24 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978), the Court in *May* found that the Defendant's actions in fraudulently misleading people into believing they can lawfully avoid paying taxes on wages was not protected by the First Amendment. The Court stated that May's speech was more objectionable than that in *Buttorff*, where the defendants had incited people to knowingly disobey the tax laws as a form of protest. *See also U.S. v. Kaun*, 827 F.2d 1144, 1152 (7th Cir. 1987)(where the court stated that speech used to further an illegal activity -- namely, the preparation of a false income tax return -- is not constitutionally protected).

In the instant appeal, Respondent argues that his speech is protected in accordance with the Supreme Court's ruling in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which distinguished between speech which merely advocates violation of law and speech which incites imminent lawless activity. The former is protected, while the latter is not. Under *Buttorff*, *supra*, Complainant's argument in this regard is without merit. In *Buttorff*, the court found that:

> Although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This speech is not entitled to first amendment protection...

572 F.2d at 624.

The instant case is similar to that in *Buttorff*, since Respondent's advice and opinions explained in detail his position as to why individuals do not have to file or pay federal income tax, and he encouraged reliance on this "expert" advice. In that regard, it is apparent that Respondent's opinions and advice were relied upon by Taxpayers Thompson and Coleman to justify their actions and to impede enforcement actions of the Internal Revenue Service. Therefore, Respondent's speech as contained in his advice and/or opinions to taxpayers Thomson and Coleman is not entitled to First Amendment protection.

Finally, in *U.S. v. Rowley*, 899 F.2d 1275 (2nd Cir.), *cert. denied*, 498 U.S. 828 (1990), the Court found culpable advisors of individuals who evade their taxes, discussing at length the various reasoning that courts have used in finding that the liability for a false or fraudulent tax return cannot be avoided by evoking the First Amendment. *See, e.g., Hudson v. United States*, 766 F.2d 1288 (1985)(where the Court stated: "[e]ven if appellant's conduct was entitled to first amendment protection, it is sufficiently outweighed by the broad public interest in maintaining a sound and administratively workable tax system."); *see also United States v. Ness*, 652 F.2d 890, 892 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981)(where the Court stated: "[t]ax violations are not a protected form of political dissent."). In the present case, it can be argued that the Respondent is as culpable as the taxpayers who failed to pay their federal income tax obligations based on his advice and assurances.

The ALJ agreed with the Complainant's position that even if the Respondent's

speech was considered to be "non commercial," it would still not come within First Amendment protection. *See* Order on Complainant's Motion for Summary Judgment, p. 8.

Therefore, under a variety of legal reasoning relied on by the courts, Respondent's speech as contained in the documents he prepared for taxpayers Coleman and Thompson do not qualify for protection under the First Amendment, and the Respondent has not offered any argument which indicates otherwise. As a result, Respondent's argument in the instant appeal that his First Amendment rights were violated by the Complainant's disbarment action should be rejected, as they were by the ALJ.

3. Complainant's Action Was Not Constitutionally Impermissible Selective Prosecution or Retaliation for Respondent's Exercising First Amendment Rights to Free Speech

The Respondent appears to argue in the instant appeal that the Director's decision to institute the disbarment action against him was due to his political activities (e.g., his appearance on radio shows and *60 Minutes*) and was therefore constitutionally impermissible.[42] In this regard, Respondent is not specifically alleging selective prosecution, as the Director's disbarment action was not a criminal prosecution. However, Respondent's allegation of selective enforcement is analogous to a selective prosecution claim because the allegation is that his selection for disbarment was constitutionally impermissible. *See, e.g., Church of Scientology v. Commissioner*, 823

[42] *See* Appeal, pp. 27 and 45.

F.2d 1310 (9th Cir. 1987). In a closely related argument, he also alleges that the action was taken in retaliation for his "whistleblowing" against the IRS.

It is well settled that when governmental action is challenged on First Amendment grounds, that action requires close judicial scrutiny. *See Church of Scientology v. Commissioner*, 823 F.2d 1310; *Teague v. Alexander*, 662 F.2d 79, 83 (D.C. Cir. 1981). Such scrutiny will necessarily depend on the facts of each case, and, in cases involving actions by the IRS, the reasons for the actions taken by the IRS.

In *Teague*, *supra*, the court considered allegations by the plaintiff that his selection for audit by the IRS was directly related to, and resulted from, his dissident views on the Vietnam War in violation of his First Amendment right to freedom of speech. *Id.* at 82. Teague had been randomly selected by the Activist Organization Committee (AOC)[43] of the IRS for referral to determine if he had filed tax returns. The court, citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962), stated that: "the exercise of some selectivity in enforcement of the laws is not in itself and always a federal constitutional violation. A selection based on an unjustifiable standard, such as race, religion, or other arbitrary classification is impermissible." 662 F.2d at 83. The court, then citing *Cox v. Louisiana*, 379 U.S. 536, 581 (1965), stated that: "[a]mong such impermissible classifications are protected political activities." 662 F.2d at 83.

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[43] The AOC, which was formed in 1969 and disbanded in 1973, gathered information on activist organizations and persons prominently identified with them. The AOC had its genesis in indications that individuals and organizations were violating the Internal Revenue laws by: (1) refusing to pay taxes, as a protest to the Vietnam War; (2) transporting, selling and using firearms and explosives; (3) violating statutes relating to the tax-exempt status of organizations; (4) failing to file gift tax returns for large contributions; and (5) other actions. *Teague* at fn. 2.

The court found no First Amendment violation in the referral which was based on Teague's anti-war protestations (protected political activity under First Amendment) because the referral only resulted in a finding that Teague had not filed taxes. It was Teague's failure to file that led to his audit. In making this determination, the court stated:

> Teague says he would not have been audited but for his selection by the AOC. It is apparent, however, that Teague's cause-and-effect analysis is flawed. He was audited, by a separate branch of the IRS, because the records of that branch indicated he had failed to file required tax returns. The audit itself was thus justified.

662 F.2d at 82.

The *Teague* court found that the "IRS has an interest in, and duty to enforce, laws relating to the tax-exempt status of organizations and contributing activities of individuals, a status dependent on avoidance of 'carrying on propaganda, or otherwise attempting, to influence legislation,' 26 U.S.C. Section 501 (c)(3)." 662 F.2d at 83, fn. 6. The court found that no censorship or prior restraint of Teague's expression was attempted or resulted. No sanction, direct or indirect, was placed upon his exercise of First Amendment rights. There was no discriminatory denial of a tax exemption for engaging in speech. *See Speiser v. Randall*, 357 U.S. 513 (1958). The court thereby concluded that the selection of Teague for audit was not based on an unjustifiable standard.

Similarly, in the instant case, although the Respondent's appearance on a radio show was mentioned in the original referral made to the Director by Ken Canfield, it was clearly Respondent's frivolous position on behalf of a taxpayer that led to the referral. Likewise, it was Respondent's statement on a radio show that he had not filed returns for

a number of years that resulted in the referral that led to the charges in the Amended Complaint, and not Respondent's opinions as expressed on that radio show. It was these legitimate concerns, clearly potential violations of Circular 230, which resulted in the Director's disbarment action. As in *Teague*, *supra*, no prior censorship or prior restraint of Respondent's expression was attempted or resulted. No sanction, direct or indirect, was placed upon Respondent's exercise of First Amendment rights.

Respondent's claim would also be without merit if measured under a higher standard applied in criminal cases. For example, the Tax Court, in *Church of Scientology*, 83 T.C. 381, 448-449 (1984), analyzed the petitioner's selective enforcement Constitutional violation claims using a selective prosecution analysis [44] referring to *Karme v. Commissioner*, 673 F.2d 1062 (9th Cir., 1982). In *Karme*, the Ninth Circuit expressed it's concern that examining the IRS's actions using the standard applied in criminal selective prosecution cases may be too stringent a test. 673 F.2d at 1064. [45] Nevertheless, using the more stringent analysis, the Tax Court still found "that petitioner's contention that respondent selectively enforced the tax laws against them out of religious or political animosity falls short of the mark." 83 T.C. at 452. While the Tax

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[44] The Tax Court citing to numerous precedent stated that: "In the criminal field, a case of selection prosecution is made out when the defendant shows: (1) the decision to prosecute was based on impermissible grounds such as race, religion, or the exercise of constitutional rights; and (2) that others similarly situated are generally not prosecuted." *Id.* at 448.

[45] In considering Church of Scientology's appeal of the Tax Court ruling, the Ninth Circuit stated: "[e]ven examining the IRS's actions under the selective prosecution standard -- a standard which is arguably too stringent for review of a mere revocation of tax exempt status -- we cannot hold that there is an impropriety in the revocation." 823 F.2d at 1320.

Court acknowledged evidence of the IRS's political and religious hostility towards the plaintiff, it still found that the decision by the IRS to revoke the petitioner's exemption was based upon legitimate agency concerns. *Id.* at 450. The Tax Court also determined that the petitioner had failed to meet the second prong of the criminal selective enforcement test because it failed to demonstrate that agency had not enforced the provisions of section 501(c)(3) against others similarly situated. *Id.* at 453.

The court in *U.S. v. Amon*, 669 F.2d 1351 (1981), considered a defendant's contention that the trial court erred in their finding that he was not selectively prosecuted under U.S.C. § 7205 in violation of his First Amendment rights to freedom of speech because he was an active and outspoken tax protester. Although the Court of Appeals in *Amon* found that the defendant *had* been selected for prosecution because he was an active and outspoken tax protester, they concluded that the defendant's asserted claim of a First Amendment infringement was not sufficient, citing *United States v. Rickman*, 638 F.2d 182, 183 (10th Cir. 1980); *United States v. Stout*, 601 F.2d 325, 328 (7th Cir.), *cert. denied*, 444 U.S. 979 (1979); *United States v. Catlett*, 584 F.2d 864, 866-867 (8th Cir. 1978)); and *United States v. Johnson*, 577 F.2d 1304, 1309 (5th Cir. 1978). The Court in *Amon* stated:

> Merely showing that the Government elected, under established IRS directives, to prosecute an individual because he was vocal in opposing voluntary compliance with the federal income tax law, without also establishing that others similarly situated were not prosecuted and that prosecution was based on racial, religious or other impermissible considerations, does not demonstrate an unconstitutionally selective procedure.

669 F.2d at 1356.

The Court upheld the trial court's ruling on the ground that the defendant Amon did not satisfy the second requirement -- that the prosecution was based on racial, religious or other impermissible considerations.

When considering the *Amon* case, the Court of Appeals also considered the similar appeal of a co-appellant, Dunbar. The trial court in the Dunbar case also found that there was not selective prosecution in violation of the First Amendment. The Court stated that ". . .it would be anomalous if an individual were immunized from prosecution merely because his protest is against the very law which he is violating or because the Government has not prosecuted everyone who has violated the same law." *Id.* at 1356. The Court of Appeals concurred with the lower court's ruling in finding that the appellant did not establish an unconstitutionally selective prosecution.

Based on the facts of the instant case and the court rulings cited above, it is clear that the Director's decision to institute the subject complaint seeking Respondent's disbarment from practice before the IRS were not in violation of Respondent's constitutional rights. Initially, the Director's determination that a complaint be issued seeking Respondent's disbarment was not based on racial, religious or other impermissible considerations but was done for valid and lawful reasons. Moreover, the Director's decision to institute proceedings was taken in part because Respondent's opinions, *as expressed in his representation of taxpayers Thompson and Coleman*, are clearly erroneous. The taxpayer recipients of his advice relied on Respondent's opinions to make arguments that were frivolous. In addition, Respondent failed to file his own

individual Federal income tax returns for several years. The Director has brought many of these actions against practitioners. Therefore, there was no selective enforcement.

The ALJ agreed with the Complainant and correctly rejected the Respondent's assertion that he had been selectively prosecuted, citing *Amon* in support of his decision. *See* Order on Complainant's Motion for Summary Judgment, p.8. The Respondent has not made any argument in his instant appeal which should lead to a different result.

The ALJ also properly rejected Respondent's related argument on appeal (and throughout the disbarment proceedings) that Complainant instituted the disbarment action to retaliate against him for his "whistleblower" activities against the IRS. In rejecting this argument, the ALJ correctly stated in his Order on Complainant's Motion for Summary Judgment, p. 9, that:

> Critically, the Respondent has not backed up the assertion that this disbarment proceeding is a retaliatory action. As the IRS notes it has brought actions against many other practitioners for alleged disreputable conduct and these include actions against practitioners who have not been former IRS employees. Further, as the Court noted, this is not a whistleblower case and in any event the Respondent has not claimed that he ever filed such an action.

As stated by the ALJ, Complainant has instituted actions against numerous practitioners who were not former employees of the IRS for the reasons set forth in the Complaint and Amended Complaint. The ALJ noted that he had himself presided over such cases. See Order on Complainant's Motion for Summary Judgment, p. 9, fn. 17.

Based on the above, it is clear that the Respondent's arguments that he was the subject of selective prosecution and/or retaliation are without merit, and the ALJ was correct in rejecting these arguments.

E. Respondent's Affirmative Defense That His Fifth Amendment Rights Were Violated by the Director's Action to Disbar Him From Practicing Before the Internal Revenue Service Is Without Merit

Respondent repeats the unsuccessful arguments of his October 29, 2003 Motion to Abate the Proceedings and Opposition to Complainant's Motion for Summary Judgment -- that the Complainant's disbarment proceedings violated his Fifth Amendment right against self-incrimination. Respondent is essentially alleging that the disbarment action was being used as a tool to obtain evidence for a criminal prosecution and that he would be compelled to invoke his Fifth Amendment rights during the disbarment hearing, depriving himself of the opportunity to present an adequate defense.

At the outset, we note the inconsistency in the Respondent's assertion that the disbarment proceeding should have been abated because it would have forced him to testify, thereby endangering his Fifth Amendment rights, *see* Appeal, p. 24,[46] while on the other hand arguing that the ALJ wrongfully excluded his testimony at hearing. *See* Appeal, pp. 27-32. [47] In short, Respondent argues that the ALJ erred in allowing the disbarment proceeding to go forward because he would be unwilling to testify to protect his Fifth Amendment rights, while also arguing that the ALJ erred in limiting his testimony.

The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (1995), *cert. denied* 516 U.S. 827, *citing Federal Savings & Loan Insurance Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989); *Securities & Exchange Commission v.*

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[46] As there was summary judgment on the merits, and the Respondent chose to provide an unsworn statement not subject to cross-examination at the sanctions hearing, it appears that Respondent's Fifth Amendment argument is moot, as he never had to invoke his Fifth Amendment rights during the proceedings.

Dresser Industries, 628 F.2d 1368 (D.C. Cir. 1980), *cert. denied* 449 U.S. 993 (1980). "In the absence of substantial prejudice to the rights of the parties involved, simultaneous parallel [civil and criminal] proceedings are unobjectionable under our jurisprudence." *S.E.C. v. Dresser Indus.*, 628 F.2d at 1375. A defendant has no absolute right to not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment right. *See Keating*, 45 F.3d at 326.

The decision to stay civil proceedings in the face of a parallel criminal proceeding should be made "in light of the particular circumstances and competing interests involved in the case." *See Molinaro*, 889 F.2d at 902. This means the decision maker should consider "the extent to which the defendant's Fifth Amendment rights are implicated." *Id.* In addition, the decision maker should generally consider the following factors: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation. *Id.* at 903.

In applying the factors set forth in *Molinaro* to the instant case, it was clear that the disbarment action should proceed despite the ongoing Grand Jury proceedings.

As to the first prong of the *Molinaro* test, the Complainant has a significant interest in proceeding with this disbarment action. In this regard, the Respondent's representation of clients before the Internal Revenue Service needs to be stopped

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[47] The matter of the exclusion of Banister's testimony will be addressed separately.

immediately, as he has advocated clearly erroneous and frivolous contentions and theories before the Service on behalf of at least two of his clients. Even if the Respondent stated that he is no longer making the erroneous and frivolous assertions which led in part to the instant action,[48] so long as the Respondent is not disbarred from practicing before the IRS, there is nothing to stop him from resuming his past practices.

As concerns the second prong of the *Molinaro* test , the Respondent has not articulated any burden that would result from the instant disbarment action proceeding at the same time as a Grand Jury proceeding -- other than a vague reference to a right against self-incrimination and due process. The Complainant contends that there would not be any burden on the Respondent. Since the Respondent admitted in his Answer to the actions with regard to taxpayers Thompson and Coleman deemed disreputable and/or incompetent by the Complainant, but he denied that those actions constituted disreputable and/or incompetent conduct as defined in Circular 230, see Answer, pp. 3-5, it is likely his contention that he did not commit any criminal violations by the same conduct. As to the "failure to file" charges set forth in the Amended Complainant, the Respondent has denied the alleged violations. See Respondent's Amended Answer and Affirmative Defenses, pp.1-2. Therefore, the Complainant could not foresee a need for the Respondent to invoke his Fifth Amendment right against self-incrimination based on its burden to him.

The third prong of the *Molinaro* test concerns the convenience of the court in the management of its cases, and the efficient use of judicial resources. In this regard, the

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[48] Since he has not done so, Complainant has no reason to believe that Respondent is still not actively advocating his erroneous views.

case had been scheduled for hearing, and witnesses for the Complainant had been directed to be available on the hearing dates.

The fourth prong of the *Molinaro* test concerns the interests of persons not parties to the instant case. In the instant case, neither taxpayers Coleman or Thompson ever indicated that they had an interest in the disbarment action not going forward. As these taxpayers never asserted such an interest, much less articulated specific reasons for that interest, this prong would be viewed in favor of proceeding with the disbarment action.[49]

Finally, the fifth prong of the *Molinaro* test addresses the interest of the public in the pending criminal and civil action. In this regard, it is the Complainant's contention that the public needs protection from practitioners who provide advice to clients based on theories that courts have consistently found to be without merit and frivolous. This is especially true when the practitioner uses his former position as an IRS Criminal Special Agent to increase his credibility.

Based on the above discussion of the factors set forth in *Molinaro*,[50] it is clear that the disbarment proceedings against Respondent should not have been stayed or

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[49] Affidavits or declarations from taxpayers Thompson and Coleman stating that they had an interest in the disbarment action not going forward were not presented with Respondent's Motion to Abate the Proceedings filed on October 29, 2003, or anytime thereafter.

[50] Respondent makes no mention of *Molinaro* in the instant appeal. He ignores the case that formed the basis for the main part of Complainant's argument on the Fifth Amendment issue, as well as the rationale for the ALJ's denial of Respondent's Motion to Abate the Case. *See* Order Regarding Respondent's Motion to Abate the Case (November 19, 2003). *Molinaro* is a 9th Circuit decision, which Respondent indicates on p. 29 of his appeal is the law that would be employed on judicial review.

abated pending the outcome of the Grand Jury proceedings. In this regard, not only is it permissible to conduct the instant civil proceeding at the same time as the related Grand Jury proceeding,[51] even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in the civil proceeding. *Keating* 45 F.3d at 326, *citing* *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

In rejecting the Respondent's affirmative defense that his Fifth Amendment rights would be violated if the disbarment proceedings went forward, the ALJ concurred with the

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[51] In an affidavit attached to the Complainant's Motion for Summary Judgment, David Finz, Attorney-Advisor to the Director of Practice stated the following:

> Respondent has alleged that the former Director of Practice, Patrick McDonough, had a "policy" of not instituting actions under Treasury Department Circular No. 230 against tax practitioners who had criminal proceedings pending against them arising from matters related to the substance of the potential Circular No. 230 complaint. At the time of the Office's investigation into Respondent's alleged misconduct, I was reporting to Mr. McDonough. The actual policy of the former Director of Practice in such instances was to confer with the employee within the Criminal Investigation Division ("CID") of the Internal Revenue Service assigned to the related criminal matter. If the CID expressed no objection to a simultaneous action by the Office, then the Director of Practice would proceed with the filing of a complaint under Circular No. 230. However, if the CID preferred that the Circular No. 230 action not proceed until the related criminal matter was resolved, then the Director of Practice would hold the Circular No. 230 case in abeyance pending resolution of the related criminal matter. In the instant case, the file indicates that on or about February 1, 2001, Ernest Barone, an Appeals Officer on temporary detail to the Office, conferred with Chris Gerhart, the Special Agent within the CID assigned to the related criminal matter, and that Special Agent Gerhart expressed no objection to the Director of Practice proceeding immediately with a complaint for Respondent's disbarment from practice before the Internal Revenue Service. Additionally, on or about July 29, 2002, Complainant's counsel verified, at the Director of Practice's request, that the Assistant United States Attorney assigned to the related criminal matter also had no objection to the Office moving forward with the Circular No. 230 complaint for Respondent's disbarment from practice before the Internal Revenue Service. See David Finz affidavit attached.

above-stated application of the *Molinaro* test to the instant case. As stated by the ALJ in his Order on Respondent's Motion to Abate the Case, p. 4 (November 19, 2003):

> This case is solely about whether the matters raised in the Complaint, and the Amendments to it, constitute incompetent or disreputable conduct. Clearly, on this record, this administrative proceeding is not a subterfuge to acquire information for use in any potential criminal action. This administrative proceeding has independent legitimacy in carrying out the IRS's important responsibility to protect the public from practitioners who engage in disreputable or incompetent behavior. Where a legitimate disbarment proceeding is in progress, it would be [sic] odd situation to allow alleged offenders to continue practice before the IRS where a grand jury in also conducting an investigation, while no such delay would be faced for those practitioners who were only dealing with disbarment. The public would be ill served by such a result.

Therefore, the ALJ did not commit error when he rejected Respondent's affirmative defense that his Fifth Amendment rights would be violated if the disbarment proceedings went forward.

F. The ALJ Properly Placed Certain Limitations on Respondent's Testimony

Respondent argues on appeal the his due process was violated because the ALJ would not permit him to testify as to what amounts to his "good faith belief" in the positions he took on behalf of taxpayers Coleman and Thompson and for his own failure to file tax returns. In support of this ground of appeal, Respondent cites to a number of cases, such as *Moser v. United States*, 341 U.S. 41 (1951), which he argues support the premise that a defendant's reliance upon representations made by government officials are a defense to government sanctions. *See* Appeal, pp. 29-31. Somewhat related are the cases concerning "good faith" belief, such as *United States v. Cheek*, 498 U.S. 192 (1991),[52] in which the Supreme Court determined that a defendant being criminally

[52] The cases discussing a "reliance" defense are different than the cases on "good faith belief," although reliance can arguably be a factor for a good faith belief. The

prosecuted for willful failure to file tax returns should have been permitted to present evidence to the jury concerning his belief that he was not a taxpayer and that his wages were not subject to income. *Id.* at 206-207. Respondent asserts that these cases are relevant because they support his argument that his due process was violated as a result of the ALJ's precluding him from presenting a reliance and good-faith defense.

For the reasons set forth below, the ALJ's decision to limit Respondent's testimony was proper, did not result any violation of Respondent's due process, and this ground for appeal should therefore be rejected.

First and foremost, all of the cases cited by the Respondent are criminal cases. In this regard, Respondent does not provide any support for applying such defenses to an administrative proceeding addressing his conduct as a CPA who practices before the IRS, as opposed to a criminal proceeding.

Secondly, none of the cases cited by the Respondent concern any facts analogous or even remotely similar to the instant case. Beyond that, this case concerns a CPA who *practices* before the IRS. In this regard, *United States v. Boyle*, 469 U.S. 241 (1985) is extremely relevant. In *Boyle*, the U.S. Supreme Court addressed the issue of reasonable cause in connection with a taxpayer's *reliance upon professional tax advice* to escape the penalty imposed by the IRS for delayed filing. As explained by the Supreme Court, "[c]ourts have frequently held that 'reasonable cause' is established when a taxpayer shows that he reasonably relied on the advice of an accountant or an

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Respondent does not cite the case of *United States v. Cheek*, 498 U,S, 192 (1991) in his argument regarding the ALJ's limitations on his testimony. Instead, he includes it in his argument on the issue of whether summary judgment was appropriate. See Appeal, p. 41-42. We will primarily address it here, as it goes to the "good faith" testimony that he

attorney that it was unnecessary to file a return, even when that advice turned out to have been mistaken. *Id.* at 250. Even then, a taxpayer may only establish the existence of "reasonable cause" when the taxpayer demonstrates that his reliance on the erroneous advice of an accountant or attorney was reasonable. *See e.g., Cooper v. United States*, 834 F.Supp. 669, 672-673 (D.N.J. 1993).

In the instant case, Respondent *is not a layperson*, but a tax professional on whom taxpayers rely, and he is held to a higher standard by the nature of his professional status as a CPA who practices before the IRS. This is reflected by the regulatory requirement that tax practitioners exercise due diligence in determining the correctness of representations to the Department of Treasury and in making representations to clients with respect to any matter administered by the IRS. 31 C.F.R. § 10.22. In addition, under 31 C.F.R. § 10.34, a practitioner may not advise a client to take a position which does not have a realistic possibility of being sustained on the merits or to take a frivolous or "patently improper" position.

In this regard, Respondent asserts in his appeal that the ALJ's limitations on his testimony prevented him from testifying about his knowledge of beneficial arrangements for taxpayers advancing the arguments he allegedly made. Respondent never identified any evidence which indicated that the IRS had accepted *as valid on the merits* the positions he took on behalf of taxpayers Coleman and Thompson. Instead, based upon the evidence presented by the Respondent, he intended to testify about his reliance on a small number of cases in which there were [erroneous] refunds made to taxpayers who had asserted positions similar to the ones he made on behalf of Coleman and Thompson.

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wanted to provide.

He would have further testified that those cases indicated to him that his arguments "had a reasonable chance of success on the merits for any taxpayer who advanced the argument." *See* Appeal, p. 28.

Such testimony would have no merit because it merely addresses a relatively small number of cases where errors were made by the IRS, rather than an acceptance of the merits of a position. Such errors by the IRS do not result in the position meeting the realistic possibility standard set forth in 31 C.F.R. § 10.34(a). In this regard, section 10.34(d)(1) provides that:

> A position is considered to have a realistic possibility of being sustained on its merits if a reasonable and well informed analysis of the law and the facts by a person knowledgeable in the tax law would lead such a person to conclude that the position has approximately a one in three, or greater, likelihood of being sustained on its merits.

In addition, section 10.34(d)(1) also states that:

> The possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account.

In short, the realistic possibility test cannot be met by a practitioner's hope that his erroneous position will not be caught by the IRS. At best, this is what the Respondent's testimony would have demonstrated, and it would not have aided his case in any way. Despite the Respondent's completely unsupported assertion in his instant appeal that his arguments had a reasonable chance of success on the merits for any taxpayer who advanced them, he provided no evidence in support of this assertion, and it is unthinkable that any judicial or quasi-judicial official is under an obligation to entertain such testimony.

The Respondent also appears to argue on appeal that because the IRS did not

respond to his arguments, he could rely on this failure to respond as evidencing the correctness of his positions. In this regard, no court should give credence to a reliance and/or good-faith defense based on the IRS's refusal to respond to a tax practitioner making frivolous arguments -- arguments that had been made by many others before and consistently rejected.

For example, the report prepared by the Respondent detailing his so-called "extensive" research into the federal tax laws entitled "*Investigating the Federal Income Tax, A Preliminary Report*"(Copyright 1999)(Complainant Exhibit 8), includes reference to Lowell H. Becraft, Jr., whom Respondent describes as "incredibly knowledgeable about the legal and constitutional issues surrounding the federal income tax." *See* Complainant Exhibit 8, p. 17. Respondent makes this assertion about Becraft in his 1999 report despite the Ninth Circuit opinion in *Becraft v. United States*, 885 F.2d 547 (9th Cir., 1989)(approximately a decade earlier) finding that Becraft's argument that the Sixteenth Amendment does not authorize a direct non-apportioned income tax on resident United States citizens, and thus such citizens are not subject to federal income tax laws, "hardly deserved comment due to the patent absurdity and frivolity of such a proposition." The Court in *Becraft* noted that in the case of *Lovell v. United States*, 755 F.2d 517, 519 (7th Cir. 1984), the Court sanctioned *pro se* appellants for raising the Sixteenth Amendment and other federal tax exemption claims on appeal. *Becraft,* 885 F.2d at 549. More significantly, the Court in *Becraft*, stated that "[i]f a claim is sufficiently frivolous to warrant sanctions against a *pro se* appellant, it unarguably supports the assessment of sanctions against a seasoned attorney with considerable experience in the federal courts." *Id.* In

taking the rare step of imposing sanctions against Becraft, a criminal defense attorney, the Court commented that "it is beyond our comprehension that a competent attorney, which Becraft certainly is, could harbor a good faith belief...." *Id.*

In another example, Respondent devotes a large number of pages in his report, Complainant Exhibit 8, pp. 49-62, to the Bill Benson book "The Law That Never Was" and the contention that the Sixteenth Amendment was never properly ratified. However, in *United States v. Benson*, 941 F.2d 598, 607 (7th Cir. 1991), *reh. denied*, 957 F.2d 301 (7th Cir. 1992), the Court rejected Benson's Sixteenth Amendment ratification argument stating that:

> In *Thomas*, we specifically examined the arguments made in *The Law That Never Was*, and concluded that "Benson... did not discover anything." We concluded that Secretary Knox's declaration that sufficient states had ratified the Sixteenth Amendment was conclusive, and that "Secretary Knox's decision is now beyond review."

United States v. Thomas, 788 F.2d 1250, 1254 (7th Cir. 1986).

Other U.S. Circuit Courts of Appeal have also rejected this argument when it came to them for review. *See, e.g., United States v. Sitka*, 845 F.2d 43 (2d Cir. 1988); *United States v. Stahl*, 792 F.2d 1438 (9th Cir. 1986); *Sisk v. Commissioner*, 791 F.2d 58, 60 (6th Cir. 1986); *Knoblauch v. Commissioner*, 749 F.2d 200, 202 (5th Cir. 1984); *Pollard v. Commissioner*, 816 F.2d 603 (11th Cir. 1987). In fact, many courts have found this argument so lacking in merit that they have for many years sanctioned people asserting it. However, despite all of these clear rejections, the book "The Law That Never Was" was relied upon by the Respondent in his report and cited in his submissions to the IRS on behalf of taxpayer Coleman. *See* Complainant Exhibits 6 and 7.

In his decision to not entertain a good-faith defense by the Respondent, the ALJ considered and discussed the *Cheek* case asserted by the Respondent and correctly concluded that the case was not applicable to the disbarment action. However, despite his aforementioned conclusion, the ALJ went on to find that even if *Cheek* were applied to Respondent's case it would have no bearing on the case. See Order on Complainant's Motion in Limine, p. 5 (November 21, 2003). In this regard, the Supreme Court in *Cheek* specifically stated that:

> the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreements with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

Cheek, 498 U.S. at 203.

The Supreme Court in *Cheek* also specifically held that arguments about the unconstitutionality of the tax laws may not be raised in a good faith defense. The Court held that claims of unconstitutionality of the tax code "do not arise from innocent mistakes caused by the complexity of the Internal Revenue Code. Rather, they reveal full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are unenforceable." *Id.* at 205.

The ALJ determined that Respondent's arguments regarding the Sixteenth Amendment and Section 861 that he made on behalf of taxpayers Coleman and/or Thompson were not new and had been uniformly rejected by all courts that had considered them. The ALJ also noted that the arguments made by the Respondent are

so worn that courts now routinely refuse to discuss their merits.[53] *See, e.g., Abrams v. Commissioner*, 82 T.C. 403, 410 (1984), in which the United States Tax Court lamented:

> ...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).

Based on the above, the ALJ was not in error in his decision to not permit Respondent, a CPA and tax practitioner, who also had over five years experience as a Special Agent for the Criminal Investigation Division of the IRS, as well as the extensive training that went with that position, from raising a good-faith and/or reliance argument in the disbarment proceedings. In making this determination, the ALJ was in keeping with the Ninth Circuit's loud and clear statement in *Becraft* that it was necessary to send a message to Becraft "that frivolous arguments will no longer be tolerated." 885 F.2d at 549.

G. The ALJ Properly Denied Respondent's Witness Requests

Respondent argues on appeal that the ALJ committed error by disallowing witnesses to testify or be cross-examined and that such error violated his right to due process and was in violation of Administrative Procedure Act (APA), 5 U.S.C. § 556. For the reasons set forth below, the ALJ's decision regarding the exclusion of witnesses was proper and not in violation of the APA or of Respondent's due process.

On October 30, 2003, Complainant submitted a Motion in Limine to the ALJ

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[53] *See* Order on Complainant's Motion in Limine, p. 5.

requesting in part that the ALJ disallow the testimony of a number of witnesses the Respondent wanted to call at hearing. The Respondent had provided this witness list on July 31, 2003, in response to the ALJ's order of June 9, 2003. The decision to grant a motion in limine barring the introduction of evidence rests within the sound discretion of the trial judge. *See United States v. Griffin*, 818 F.2d 97 (1st Cir. 1987), *cert. denied*, 484 U.S. 844. Furthermore, 31 C.F.R. § 10.72(a) grants the ALJ the authority to exclude evidence that is irrelevant, immaterial, or unduly repetitious.

The Complainant provided specific objections to witnesses identified in the Respondent's prehearing exchange. *See* Complainant's Motion in Limine (October 30, 2003) and the ALJ's order on that motion dated November 21, 2003. Contrary to the Respondent's claim in the instant appeal, the testimony of Ken Canfield, Sue Erwin, and Priscilla Ousley were never excluded, as these individuals were never listed as witnesses by the Respondent. *See* Respondent's Prehearing Exchange (July 31, 2003). In this regard, Respondent appears to be confusing the witness list he provided on July 31, 2003 with the list of individuals to which he wanted to propound interrogatories under his October 29, 2003 Motion for Discovery and/or his November 25, 2003, Proffer of Offers of Proof and Argument at Hearing. As stated in the Complainant's Opposition to Respondent's Motion for Discovery, the deadline for providing a witness list had already passed per the ALJ's Order of June 9, 2003 at the time of Respondent's Motion for Discovery, and well before the Respondent's Proffer of Offers of Proof submitted on November 25, 2003. [54]

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[54] The ALJ's Prehearing Order dated June 9, 2003 stated that "[t]he parties are hereby advised that testimony of witnesses which have not been identified...as required above,

The Respondent states in his instant appeal that "[t]he denial of so much exculpatory evidence, demonstrating that [his] conduct was not a willful disregard of the rules, but rather an honest attempt to communicate the truth as he knew it...", indicates the purpose of the excluded testimony was to advance a "good-faith" and or reliance defense by Respondent.[55] As discussed previously, the ALJ had determined that such defenses were not relevant to the disbarment action, thereby making exclusion of witnesses whose testimony would allegedly support such defenses irrelevant and immaterial in any event.[56] Therefore exclusion of such testimony, if any occurred, was proper, and the ALJ did not commit error in disallowing such testimony.

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may not be introduced into evidence at the hearing."

[55] For example, Respondent wanted to take interrogatory of Patricia Ousley. Ms. Ousley appears to be a Tax Examining Assistant in the Chamblee, Georgia post of duty. In Complainant's Opposition to Respondent's Motion for Discovery, Complainant objected to the taking of Ms. Ousley's deposition on vagueness grounds. Respondent did not indicate Ms. Ousley's individual authority and/or role in the IRS's alleged acceptance of his position on the merits in other cases. Respondent did not indicate whether it concerns the identical positions he took in the Coleman and/or Thompson cases. Respondent did not provide any exhibits in the parties pre-hearing exchange which supports his apparent assertion that Ms. Ousley accepted Respondent's position regarding the ratification of the Sixteenth Amendment and/or his position regarding sources of income under I.R.C. §§ 861-865. *See* Complainant's Opposition to Respondent's Motion for Discovery, p. 3 (November 4, 2003). IRS understands that there have been some instances where taxpayers have had requests to relieve them of liability granted by low level employees based on frivolous positions. Such errors on the part of the agency do not ratify Respondent's frivolous and legally incorrect positions. The ALJ concurred with the Complainant's position regarding Ms. Ousley, and denied the interrogatory of Ms. Ousley. *See* Order on Respondent's Motion for Discovery, p. 3 (November 24, 2003).

[56] Complainant asserts that even if a good-faith or reliance defense was available to Respondent, the excluded witnesses would not have provided testimony supportive of those defenses.

III. Disbarment Was the Appropriate Sanction

After a hearing to determine sanctions held on December 1, 2003, the ALJ issued a decision on December 24, 2003, concluding that "nothing less than disbarment" is appropriate for Respondent. In making this determination, the ALJ relied on the evidence of record, the sworn testimony of Complainant witness David Finz, Senior Attorney, Office of Professional Responsibility, who testified about the reasoning behind his Office's determination to seek Respondent's disbarment,[57] the unsworn statement of the Respondent,[58] and the arguments made by the parties.

In his decision, the ALJ stated that he found that Respondent had committed a number of violations of 31 CFR Part 10, and these violations demonstrated incompetent

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[57] Respondent alleges egregious misconduct on the part of David Finz, Senior Attorney in the Office of Professional Responsibility. More specifically, Respondent alleged that Mr. Finz committed perjury during his testimony at the sanctions hearing. See Appeal, pp. 47-49. This allegation is utterly without merit. First, the appeal characterizes Mr. Finz as an "unknown official." However, Respondent knew or should have known of Mr. Finz as a result of various filings by the Complainant and by virtue of Mr. Finz's participation in a conference with Respondent and Mr. Bernhoft that took place on February 24, 2003. Respondent apparently bases his allegation of perjury on Mr. Finz's statement in his affidavit of October 28, 2003, Complainant's Motion for Summary Judgment, Attachment 1, that "the Director had given [him] express authority ... to determine the appropriate penalty to seek at hearings before the Administrative Law Judge...." Respondent claims that Mr. Finz's response to his counsel's question at hearing as to whether he had express authority to determine penalty contradicted his statement in the sworn affidavit because Mr. Finz replied "No, I don't have the authority to determine penalty." Mr. Finz's testimony clearly explains that he has express authority to recommend to the Director an appropriate penalty, but he never testified or stated in his affidavit that such authority had been made in writing or that his decision was not subject to review by the Director. In short, Mr. Finz had explicit authority, as stated in his affidavit, to determine the penalty to seek at hearing and that statement is not inconsistent with his testimony at hearing that the Director would make the final determination as to what penalty to seek at hearing. There was no perjury.

[58] Respondent was not subject to cross-examination as a result of giving an unsworn statement.

and/or disreputable conduct that amply warranted disbarment. The ALJ went on to state that in his view:

> either the violations found to have been committed in the original Complaint or the additional violations, which were also found to have occurred, independently warrant nothing short of disbarment. It should be obvious that the combination of both these grounds only serve to make it worse.[59]

As noted by the ALJ in his decision, the Respondent had an obligation to follow the federal tax laws and to comply with Circular 230, and he failed to do so. These violations were willful in every respect. Respondent's actions were detrimental to the effectiveness of the Internal Revenue system. In addition, Respondent was not remorseful for his actions and did not give any indication throughout the proceedings that he would engage in any different conduct if he was permitted to continue to practice before the IRS. Therefore, his disbarment was clearly appropriate.

Conclusion

For the above stated reasons, Complainant requests that Respondent's appeal be denied and the ALJ's Decision ordering disbarment be sustained. Respondent's encouragement of his clients to ignore well established law and his failure to file his own returns justifies the sanction of disbarment ordered by the ALJ.

Respectfully submitted,

Jay J. Kessler
Senior Attorney
General Legal Services

[59] *See* Decision of the Administrative Law Judge, p. 9 (December 24, 2003).

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing **Appellee-Complainant's Reply Brief** in opposition to Respondent's Notice of Appeal and Appeal were delivered this date by personal service to:

Cono Namorato
Director, Office of Professional Responsibility
Internal Revenue Service
1111 Constitution Ave., N.W. Suite 7238
Washington, D.C. 20224

I hereby further certify that a copy of the foregoing **Appellee-Complainant's Reply Brief** in opposition to Respondent's Notice of Appeal was sent this date via certified mail and regular mail to:

Certified Mail No. 7003 0500 0003 8757 2399
Robert G. Bernhoft, Esq.
207 East Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202

FEB 2 7 2004
Date

Francis C. Inserra
Office of Associate Chief Counsel
(General Legal Services), IRS