Plaintiff claimed the government could not tax his income as it did not come from any of the sources listed in Treas. Reg. § 1.861-8(a). The Tax Court totally rejected this argument, essentially the same argument made by Respondent on behalf of taxpayer Thompson. In rejecting Mr. Williams's arguments, the Tax Court stated that:

> Petitioner's arguments are reminiscent of tax-protester rhetoric that has been universally rejected by this and other courts. We 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." *Crain v. Commissioner*, 737 F.2d 1417, 1417 (5thCir. 1984). Accordingly, we conclude that petitioner is liable for the deficiency determined by respondent.

Williams, *Id.* at 138.

Respondent could easily have found this strongly worded opinion from *Williams* in April 2000, and corrected his prior error if he was unaware of the earlier cases cited above. However, he did not do so. Instead, he continued to maintain his erroneous assertions about I.R.C. § 861 in both correspondence to Internal Revenue Service employees and during the Coleman collection due process hearing. (See Complainant Exhibits 27, 28, 29, 33, 35, and 36). The Complainant does not know of any instance where the Respondent has yet admitted his error and agreed to follow the proper interpretation of I.R.C. § 861 and the related Treasury Regulations as given by the courts.

This Court should give no more regard to Respondent's arguments than the Tax Court did in *Williams*. Having made the frivolous arguments which he could have avoided through good faith review of the tax law, Respondent must now bear the consequences of his actions.

D. 16th Amendment

That ratification of the Sixteenth Amendment to the Constitution occurred 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).

Various Circuit Courts of Appeal have considered arguments made by taxpayers that they need not pay taxes because no ratification of the Sixteenth Amendment occurred. The Seventh Circuit Court of Appeals has given a number of extensive reviews to this issue. In *Miller v. United States*, 868 F.2d 236 (7th Cir. 1989), it addressed the ratification issue in the context of a challenge by the taxpayer to assessment of a frivolous return penalty under I.R.C. § 6702 and a challenge to an injunction imposed by the district court against his bringing similar future claims. Beginning at page 240 of its opinion, the court stated:

> As best we can surmise, Miller, like the plaintiffs in the foregoing cases, has followed the advice of those associated with the "tax protester movement." The leaders of this movement conduct seminars across the country in which they attempt to convince taxpayers that the sixteenth amendment and assorted enforcement provisions of the tax code are unconstitutional. *See, e.g., United States v. Hairston*, 819 F.2d 971, 972 (10th Cir. 1987). Members are encouraged to defy the income tax filing requirements through returns like those noted above. They are then instructed to obtain a jury trial so that potentially like-minded jurors may be persuaded to acquit in the exercise of their power of jury nullification. *See, e.g., United States v. Ogle*, 613 F.2d 233, 236-237 (10th Cir. 1979). The movement's manifesto, Benson and Beckman's *The Law That Never Was*, is a

collection of documents relating to the ratification of the sixteenth amendment, and is intended to be both a call to arms for the movement and "exhibit A" in the trials of tax protesters who argue that the sixteenth amendment was illegally ratified. *Id.* at xvii ("The tax protestor will be the great American hero of 1985 just as in 1776. It was tax protestors, not any political party, or judge or prosecutor who gave us our great Constitutional Republican form of government. The tax protest is more American than baseball, hot dogs, apple pie or Chevrolet!!").

In the eyes of the authors, the most damning evidence of the illegality of sixteenth amendment is a 1913 memorandum from the Solicitor of the Department of State to then Secretary of State Knox outlining the minor grammatical discrepancies in the instruments ratified in many of the states. This circuit has squarely addressed the merits of the ratification argument in two recent cases. *United States v. Foster*, 789 F.2d 457, 462-63 (7th Cir. 1986) (73 years of application of the amendment is very persuasive on the question of validity); *United States v. Thomas*, 788 F.2d 1250, 1253-54 (7th Cir. 1986) (amendment treated as properly adopted under the "enrolled bill rule"). In *Thomas*, we explained that:

Benson and Beckman did not discover anything; they rediscovered something that Secretary Knox considered in 1913. Thirty-eight states ratified the sixteenth amendment, and thirty-seven sent formal instruments of the ratification to the Secretary of State. Only four instruments repeat the language of the sixteenth amendment exactly as Congress approved it. The others contain errors of diction, capitalization, punctuation, and spelling.[the defendant] insists that because the states did not approve *exactly* the same text, the amendment did not go into effect. Secretary Knox considered this argument. The Solicitor of the Department of State drew up a list of the errors in the instruments and--taking into account both the triviality of the deviations and the treatment of earlier amendments that had experienced more substantial problems--advised the Secretary that he was authorized to declare the amendment adopted. The Secretary did so. [his] decision is now beyond review.

Id. at 1253 (emphasis in original). *See also*, *United States v. Stahl*, 792 F.2d 1438, 1439 (9th Cir. 1986) *cert. Denied*, 479 U.S. 1036, 93 L. ED. 2D 840, 107 S. Ct. 888 (1987) (propriety of the ratification process is a political question).

We find it hard to understand why the long and unbroken line of cases upholding the constitutionality of the sixteenth amendment generally, *Brushaber v. Union Pacific Railroad Company*, 240 U.S. 1, 60 l. Ed. 493, 36 S. Ct. 236 (1916), and those specifically rejecting the argument advanced in *The Law That Never Was*, have not persuaded Miller and his compatriots to seek a more effective forum for airing their attack on the federal income tax structure. *See*, *Foster*, 789 F.2d at 463 n. 6 (the propriety of the ratification of a constitutional amendment may be a non-justiciable political question). Determined and persistent tax protesters like

Miller seek to utilize the federal judicial forum without consideration of the significant limitations on the authority of both the district courts and the courts of appeal. One such limitation stems from the bedrock principle of *stare decisis*: lower courts are bound by the precedential authority of cases rendered by higher courts. *U.S. Ex Rel. Shore v. O'Leary*, 833 F.2d 663, 667 (7th Cir. 1987). This limitation on judicial power is one of the cornerstones of the legal structure in that it serves broader societal interests such as the orderly and predictable application of legal rules. This doctrine prevents us from disregarding the Supreme Court's opinions upholding the constitutionality of the sixteenth amendment. The Court's decisions are binding on us and the district court absent strong evidence that the Court will overrule its own cases. *Colby v. J.C. Penny Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987). We perceive no signs that the Supreme Court is harboring any such intentions with regard to the validity of the sixteenth amendment.

Miller would have us disregard this principle and overturn almost three quarters of a century of settled law and declare the sixteenth amendment unconstitutional. He has asked us and the district court to do that which we have no authority to do. He would have us substitute one brand of lawlessness (from his perspective) with a form of lawlessness of our own. 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 advice has been offered on other occasions. *Coleman v. Commissioner of Internal Revenue*, 791 F.2d 68, 72 (7th Cir. 1986) (tax protesters "must choose other forums, and there are many available"). In the circumstances, the sanctions imposed by the district court were appropriate. With particular reference to the injunction limiting Miller's access to the federal courts, we note that the district court was struggling with a persistent tax protester who was undaunted by his failure in two previous cases in as many years. A monetary sanction of $ 500 in the latter of those two cases did not prevent Miller from returning to the federal courthouse for yet a third time with the identical claims. The district court was thus faced with a plaintiff as intransigent as the tax protester we sanctioned in *Lysiak v. C.I.R.*, 816 F.2d 311 (7th Cir. 1987), and properly drew upon the injunctive relief we imposed in *Lysiak* to fashion a remedy to address the parallel strains that Miller's frivolous filings were having on its crowded docket and limited resources. *Id.* at 313. Miller may exercise his right to access the federal courts upon a simple showing that his claim is colorable. *See, Coleman*, 791 F.2d at 72 (there is no constitutional right to bring a frivolous suit). We therefore reject Miller's claim that the sanctions were excessive and hold that the district court did not abuse its discretion in denying his motion for reconsideration.

In *United States v. Benson*, 941 F.2d 598, 607 (7th Cir. 1991), *reh. Denied*, 957 F.2d 301 (7th Cir. 1992), a criminal defendant relied on this same argument and on the book, *The Law That Never Was*[6] Defendant Benson insisted that as the co-author of *The Law That Never Was*, and the man who actually reviewed the state documents "proving" improper ratification, he was uniquely qualified to make the "exceptionally strong showing" the Court spoke of in *United States v. Foster*, 789 F.2d 457, 461-63(7th Cir. 1986).[7] Because of this, Benson argued that the District Court should have at least granted him an evidentiary hearing on the Sixteenth Amendment issue. The court reversed the taxpayer's conviction for tax evasion and failure to file returns, but it also considered and rejected the Sixteenth Amendment arguments. The Court rejected Benson's 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 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

. It should be noted that despite the clear rejection of the arguments made in this book by the Courts, this book was relied upon by the Respondent and cited in his submissions to the IRS on behalf of taxpayer Coleman. See Complainant Exhibits 6 and 7.

[7] In *Foster*, the court stated (after rejecting the argument that the Sixteenth Amendment had never been properly ratified), that "an exceptionally strong showing of unconstitutional ratification" would be necessary to show that the Sixteenth Amendment

(6th Cir. 1986); *Knoblauch v. Commissioner*, 749 F.2d 200, 202 (5th Cir. 1984); *Pollard v. Commissioner*, 816 F.2d 603 (11th Cir. 1987)

Respondent comes before this administrative tribunal asserting that the same arguments regarding the ratification of the Sixteenth Amendment which other courts have considered long ago and rejected as frivolous. Respondent cannot assert this argument in good faith. As a Certified Public Accountant he has an obligation to follow the tax laws of this country. He has no right to demand that the government follow his interpretation of the law when so many courts have already taken the time to consider these arguments and show him and others their error. For example, Respondent's reliance on *The Law That Never Was* is inexcusable in light of the Court decisions that rejected the arguments made in that book long before Respondent's assertions made on behalf of Mr. Coleman . *See e.g., Benson, Id.* at 607. The courts have found this argument so lacking in merit that they have for many years sanctioned people asserting it. For example, in *Miller, Id.* At 242, the Court stated that:

> The present appeal is a patently frivolous one that has generated additional costs for the defendants and this court. Five years ago we warned plaintiffs like Miller that while the doors of the courthouse are open to good faith appeals, "we can no longer tolerate abuse of the judicial abuse process by irresponsible taxpayers who press stale and frivolous arguments. ..In the future we will deal harshly with frivolous tax appeals and will not hesitate to impose sanctions under appropriate circumstances. *Granzow v. C.I.R.*, 739 F.2d 265, 269-70 (7th Cir. 1984).
>
> This is such a circumstance. Although Miller is acting *pro se*, he knew or should have known that his position was groundless..."

In the instant case, Respondent, an experienced Certified Public Accountant and former IRS Special Agent has followed in Miller's footsteps in making frivolous

---

was not properly ratified"." *Id.* at 463

assertions relied upon by clients and which he would now attempt to argue in this administrative forum are not frivolous. Such arguments have been tried and have consistently failed and should not be heard again.

Respondent's advice and encouragement to taxpayers Coleman and Thompson placed them at risk of a variety of civil and criminal penalties. As the Seventh Circuit Court of Appeals noted in *United States v. Sloan*, 939 F.2d 499, 499-500 (7th Cir. 1991), "Like moths to a flame, some people find themselves irresistibly drawn to the tax protester movement's illusory claim that there is no legal requirement to pay federal income tax. And, like moths, these people sometimes get burned." Taxpayers filing returns with frivolous positions may be subject to the accuracy related penalty under § 6662 or the civil fraud penalty under § 6663. Moreover, § 6702 provides for the imposition of a $500 penalty against any individual who files a frivolous income tax return. In the 1980s, Congress showed its concern about taxpayers misusing the courts and obstructing the appeal rights of others when it enacted tougher sanctions for bringing frivolous cases before the courts. Section 6673 allows the courts to impose a penalty of up to $25,000 when they come to any of three conclusions:

-a taxpayer instituted a proceeding primarily for delay,
-a position is frivolous or groundless, or
-a taxpayer unreasonably failed to pursue administrative remedies.

An appeals court explained the rationale for the sanctions in *Coleman v. Commissioner*, 791 F.2d 68, 72 (7th Cir. 1986):

> The purpose of § 6673...is to induce litigants to conform their *behavior* to the governing rules regardless of their subjective beliefs. Groundless litigation diverts the time and energies of judges from more serious claims; it imposes needless costs on other litigants.

In short, Respondent's advice to taxpayers Coleman and Thompson to take frivolous positions regarding their tax obligations subjected them to possible civil and criminal penalties as opposed to assisting them in resolving their tax obligations in a lawful manner.

E. Failure to File Individual Federal Income Tax Returns

In his Amended Answer dated October 29, 2003, the Respondent denies the violations of failure to file his individual Federal income tax returns set forth in the Amended Complaint. However, Respondent does 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); *Strong v. H.G. France*, *Id.* Therefore, the denial of the allegations in and of themselves should not defeat this Motion.

The Respondent in his Motion to Dismiss Amended Complaint alleges that the Amended Complaint fails to fails to put him on notice of what facts he will need to prepare his defense and precludes him from providing an adequate defense. This is simply not true. Respondent can provide a defense to the allegations by providing evidence 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.

The evidence provided by Complainant clearly demonstrates that Respondent failed to file Federal Income Tax returns for tax years 1999, 2000, 2001, and 2002 as required by 26 USC §§ 6011(a),[8] 6012(a) *et. Seq.*, 6013, and/or 6072(a). See Complainant Exhibits 40-44. In this regard, 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 ion evidence without the production of an officer or employee to authenticate them."

Both 31 C.F.R. § 10.51(f)(July 26, 2002), and its predecessor, 31 C.F.R. § 10.51(d)(July 1994), clearly indicate that a willful failure to make a federal income tax return in violation of the revenue laws of the United States constitutes disreputable conduct which can result in the suspension or disbarment of a tax practitioner.

In a Motion to Dismiss Amended Complaint filed October 29, 2003[9], Respondent asserts 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)[10] and claims that this statute only requires a taxpayer to "make" a return. The Respondent then asserts that willful failure to make a return is substantially different

---

[8] Please note that there was a typographical error in the Amended Complaint. Sections IIA, IIB, IIC, and IID referred to 26 U.S.C.§§ 1, 6011(a), 6012(a) *et. seq.*, 6013 and/or 6072(a). the 1, 6011(a) is a typographical error which should read 6011(a). The 1, constitutes the error. The same error appears in the attached affidavit of David Finz in paragraph 15 . Mr. Finz has submitted an affidavit dated October 31, 2003, correcting that typographical error which is herein attached after the last page of his initial affidavit.

[9] The Complainant will respond separately to the Respondent's Motion to Dismiss the Amended Complaint but addresses some of the issues raised in this Motion.

[10] 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

form a willful failure to file a return. However, the Respondent does articulate what he believes this substantial difference to be. In any event, Respondent 's assertion is in error.

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:

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

---

aforementioned sections refer to "failure to make".

Spies v. United States, 317 U.S. 492, 495-96, 63 S. Ct. 364, 87 L. Ed. 418 (1943). addressing the penalties for "failure to make a return", remarked 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". Thus, the Complainant has 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.

Respondent also alleges in his Motion to Dismiss Amended Complaint that a practitioner must be convicted of a criminal offense to be disbarred for a failure to file. Respondent is apparently making his own regulations in this regard. Failure by a taxpayer to timely file a required return can result in a civil penalty for failure to timely file. I.R.C. § 6651(a). Respondent would like to misdirect the court's attention to the possibility of his criminal prosecution for failure to 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 in their lives. The Court should recognize the Respondent's argument as a frivolous attempt to avoid the civil consequences of his own conduct.

It is the position of the Director of Professional Responsibility that the filing of income tax returns is not voluntary; it is required collectively by 26 U.S.C. §§ 6011(a),

6012(a), 6013(a) (in the case of married couples filing jointly), 6072(a) and 6153. *See also*, 26 C.F.R. 1.6011-1(a). See David Finz affidavit attached.

The standard of willfulness employed by the Office in seeking disciplinary sanctions against tax practitioners who fail to 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 v. Brady*, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir. 1991), 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 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 disreputable conduct the Director of Professional Responsibility seeks to sanction through the

disciplinary process set forth in Treasury Department Circular No. 230. The fact that Respondent may have made estimated tax payments for some of the years at issue does not mitigate the offense in question for two reasons. First, the plain language of Section 10.51(f) (formerly known as Section 10.51(d)) of Treasury Department Circular No. 230 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 payment or non-payment of tax. Second, even in cases such as *Owrutsky* 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. See David Finz affidavit attached.

F. Respondent's Affirmative Defense That His First Amendment Rights Are Violated by the Director Of Professional Responsibility's Action to Disbar Him From Practicing Before the Internal Revenue Service Is Without Merit

The Respondent, in his answer, alleges that the institution of the subject proceedings by the Director of Professional Responsibility is constitutionally impermissible as it is violative of his First Amendment rights. For the reasons set forth below, the determination of the Director of Professional Responsibility to institute the subject proceedings against the Respondent is not constitutionally impermissible. Additionally, as will be discussed below, the courts that have addressed First Amendment defenses similar to those raised by the Respondent in the instant case, have clearly ruled that opinions such as those expressed by the Respondent in his letters (Exhibits A-J) are frivolous and have no legal merit.

G. The Decision of the Director of Professional Responsibility to Institute Proceedings to Disbar Respondent From Practicing Before the IRS is Not Constitutionally Impermissible

The decision of the Director of Professional Responsibility to institute the current proceedings against the Respondent seeking his disbarment from practicing before the Internal Revenue Service is not constitutionally impermissible. The court in *U.S. v. Amon*, 669 F.2d 1351 (1981), considered the Defendant's contention that the trial court erred in their finding that he was not selectively prosecuted in violation of his First Amendment rights to freedom of speech for violation of 26 U.S.C. §7205 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.); *United States v. Stout*, 601 F.2d 325, 328 (7th Cir.), *cert. denied*, 444 U.S. 979, 100 S.Ct. 481, 62 L.Ed. 2d 406; *United States v. Catlett*, 584 F.2d 864, 866-867 (8th Cir,); and *United States v. Johnson*, 577 F.2d 1304, 1309 (5th Cir.). 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.

Id. 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 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 Appellant did not establish an unconstitutionally selective prosecution.

The Respondent's allegations of selective prosecution imply a criminal prosecution but this case involves a civil issue of whether he should continue to practice before the Internal Revenue Service. However, his allegations may be analogous to a selective prosecution claim because he appears to assert that the subject complaint seeking his disbarment was instituted only because of his former position as an IRS Special Agent. He also claims that this action is constitutionally impermissible. Based on the facts of the instant case and the court's ruling in *Amon*, it is clear that the Director of Professional Responsibility'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. The Director of Professional Responsibility'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.

Specifically, the decision by the Director of Professional Responsibility to institute proceedings for the Respondent's disbarment from practicing before the IRS 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 clearly frivolous and without merit. Based on these facts, as well as Respondent's failure to file his own individual Federal income tax returns for several years, it is certainly within the Director of Professional Responsibility's discretion to seek Respondent's disbarment pursuant to 31 C.F.R. Section 10.1(b).[11]

Based on the above, it is clear that the Director of Professional Responsibility decision to institute the subject complaint against the Respondent is not constitutionally impermissible. *Also see United States v. Malinowski*, 472 F.2d 850 (1973).[12]

---

[11]As stated in 31 C.F.R. Section 10.1(b), "The Director of Practice [now Director of Professional Responsibility] shall...institute and provide for the conduct of disciplinary proceedings related to attorneys, certified public accountants, enrolled agents, enrolled actuaries and appraisers...". As the Respondent is a Certified Public Accountant who practiced before the Internal Revenue Service, the Director of Practice has the authority to initiate administrative proceedings against him.

[12]The court in *Malinowski*, stated "***appellant's First Amendment argument is but a suggestion that a member of society can be absolved of the responsibility for obeying a given law of community, state , or nation if he can prove a sincere, abiding, and good faith objection to the direct or indirect object of that law. Such a position represents a feeble effort to emasculate basic principles of civil disobedience, and, simply stated, is invalid. Here, the actor wants the best of both worlds; to disobey, yet to be absolved of punishment for disobedience."

H. Respondent's Opinions are Not Entitled to Constitutional Protection Under the First Amendment

(1) Commercial Speech

A standardized 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, 100 L.Ed.2d 475, 108 S.Ct. 1916 (1988). Also *see Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566, 65 L.Ed2d 341, 100 S.Ct. 929 (1980). Applying this test to Respondent's advice to taxpayers, it is clear that if the letters are considered commercial speech, there is no entitlement to protection under the First Amendment, as they are misleading and encourage others 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.*, supra, and *Pacific Gas & Elec. Co. v. P.U.C. of California*, 475 U.S. 1, 106 S.Ct. 903, 908, 89 L.Ed.2nd 1 (1986) (Commercial speech is "speech that proposes a business transaction."). In *Kaun*, the case 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.

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; (3) he provides his background (e.g., Page 2 of Complainant Exhibit 6 wherein 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" and Complainant's Exhibit 2. wherein Respondent states his education, experience and credentials); (4) he clearly holds himself out as a tax adviser (See e.g., Complainant Exhibit 2, wherein Respondent states that: "I believe my experience in the IRS, combined with my experience as a Certified Public Accountant (C.P.A.), 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."); and (5) he states in his ad 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." (See Complainant Exhibit 2); and (6) his ad states that he can be contacted for information as to his fees and availability (See Complainant Exhibit 2).[13] Based on all these facts, Respondent's opinions as reflected in documents submitted to the IRS on behalf of taxpayer's Thompson and Coleman could be considered a commercial activity and thus be viewed as commercial speech. If the Respondent's opinions as expressed in his representation of taxpayers Thompson and Coleman are considered 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 in light of his status as a Certified Public Accountant and former IRS Criminal Special Agent. For example, as set forth on page 2 of Complainant Exhibit 6 of Complainant Exhibit 6 wherein 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*, supra. In fact, taxpayer Frank Coleman, who had been seeking an offer in compromise regarding his outstanding tax liabilities when represented by another Certified Public

[13] There is no reason for the Complainant to believe that the Respondent did not charge Thompson and Coleman a fee for his services.

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 resolve his legitimate tax debts and rely instead on Respondent's incorrect and frivolous advice that his [Coleman's] income was not subject to Federal income tax. See Complainant's Exhibit 6, pp. 1-9 and Complainant's Exhibit 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 "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 or her reliance on Respondent's advice and/or opinions in support of that failure. This is exactly what Mr. Coleman did. See Complainant Exhibits 10 and 27.

(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