(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 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 the Defendant'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, 57 L.Ed.2d 1136, 98 S.Ct. 3095(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. Also, *see U.S. v. Kaun, 827 F.2d 1144, 1152 (7th Cir. 1987)*, in which 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 case, the Respondent may argue that his speech is protected in accordance with the Supreme Court's ruling in *Brandenburg v. Ohio*, 395 U.S. 444, 23 L.Ed2d 430, 89 S.Ct. 1827 (1969), which distinguished between speech which merely advocates violation and speech which incites imminent lawless activity. The former is

protected while the later is not. In accordance with *Buttorff*, Complainant's argument in this regard would be 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...
> In the instant case, Respondent's advice and opinions to taxpayers Thompson

and Coleman did not incite imminent lawless activity. However, similar to the defendant's in *Buttorff*, Respondent's advice and opinions did explain in detail his position as to why individuals do not have to file or pay federal income tax, and encouraged reliance on his 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 are not entitled to First Amendment protection.

Finally, in *U.S. v. Rowley*, 899 F.2d 1275 (2nd Cir.), *cert. denied*, 498 U.S. 828, 112 L.Ed.2d 59, 111 S.Ct. 87 (1990), the Court found the culpability of advisors of individuals who evade their taxes based on that advisor's advice to be equivalent to the actual tax evader, and then went on to discuss 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. For example, *see Hudson v. United States*, 766 F.2d 1288 (1985) in which the Court stated that: "Even 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." Also *see* *United States v. Ness*, 652 F.2d 890, 892 (9th Cir.), *cert. denied*, 454 U.S. 1126, 102 S.Ct 976, 71 L.Ed.2d 113 (1981) in which the Court stated that: "Tax 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.

Therefore, under a variety of legal reasoning relied on by the courts, Respondent's speech as contained in the documents he prepared for the taxpayers should does not qualify for protection under the First Amendment.

The affirmative defense is without merit for the reasons set forth above and should therefore be denied.

I. Respondent's Affirmative Defense That His Fifth 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

Respondent alleges that due to ongoing Grand Jury proceedings, the instant Director of Professional Responsibility action to disbar him violates his Fifth Amendment rights against self-incrimination.[14] Respondent is alleging that the instant disbarment action is being used as a tool to obtain evidence for a criminal prosecution and that he will be compelled to invoke his Fifth Amendment rights during the

[14] The Respondent does not indicate the basis for his Fifth Amendment self-incrimination concern in his Answer. However, On October 29, 2003, Respondent submitted a Motion to Abate the Proceedings due to an ongoing grand jury proceeding convened against the Respondent alleging a violation of Respondent's Fifth Amendment rights. Complainant will be providing a separate response to the

disbarment hearing, depriving himself of the opportunity to present an adequate defense.

The Respondent's affirmative defense is without merit. 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* 133 L.Ed.2d, 49 citing *Federal Savings & Loan Insurance Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989); *Securities & Exchange Commission v. 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. *Id.* At 1374. 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* 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* 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

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Respondent's Motion to Abate the Proceedings but the matter is addressed herein.

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 is clear that the instant 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 as soon as possible as he has advocated clearly erroneous and frivolous contentions and theories before the Service on behalf of at least two of his clients . Although the Respondent may assert that he is no longer making the erroneous and frivolous assertions which has led in part to the instant action,[15] but so long as the Respondent is not disbarred from practicing before the IRS, there is nothing to stop him from doing so at his own choosing.

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 his right against self-incrimination and due process of law in violation of the Fifth Amendment. The Complainant asserts that there would not be any burden on the Respondent. More specifically, since the Respondent admitted in his Answer to his actions with regards to taxpayers Thompson and Coleman deemed disreputable and/or incompetent by the

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

Complainant but denied that those actions constituted disreputable and/or incompetent conduct as defined in Circular 230 (See Respondent's Answer pp. 3-5), it would be clear that it would likewise be 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 cannot 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 case has been scheduled for hearing and witnesses for the Complainant have 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 have indicated that they have an interest in the instant disbarment action not going forward. Unless these taxpayers assert such an interest and articulate specific reasons for that interest, this prong should be viewed in favor of proceeding with the instant action.[16]

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

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[16] It is noted that affidavits or declarations from taxpayers Thompson and Coleman stating that they have an interest in the instant disbarment action not going forward were not presented with Respondent's Motion to Abate the Proceedings filed on October 29, 2003.

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*, it is clear that the instant disbarment proceedings should not be stayed 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,[17] even if

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[17]In an affidavit attached to this motion, 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.

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* at 326 citing *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

J. Respondent's Affirmative Defense That the Director Of Professional Responsibility's Action to Disbar Him From Practicing Before the Internal Revenue Service Is Barred as Impermissible Retaliation is Without Merit

The Respondent alleges as an affirmative defense that the Complainant is taking the instant action for retaliatory purposes. See Respondent's Answer, p. 8. However, Respondent fails to state the nature of his retaliation claim or provide support for such a claim. The Complainant believes that the Respondent's claim is based on his former employment with the Complainant as a Special Agent. However, the 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. This matter was referred to the Director of Professional Responsibility [formerly the Director of Practice] by Revenue Officer Ken Canfield, Jr., as a result of his involvement with the Respondent concerning Respondent's representation of taxpayer Coleman. The Director of Professional Responsibility's actions after receipt of the referral were consistent with his actions in previous cases that involved similar allegations of violations of Circular 230 and were not retaliatory in nature. See attached David Finz affidavit.

K. Respondent's Other Affirmative Defenses Are Vague and Are Without Merit

In addition to the affirmative defenses discussed above, the Complainant also set forth the following additional affirmative defenses: (1) That the Secretary of the Treasury is estopped from attempting to suspend or disbar the respondent by the legal effect of his own acts and/or omissions, or the acts and/or omissions of officers, employees, or agents under his control; (2) that the complaint contains claims which fail to state a claim upon which relief can be granted as against the Respondent; and (3) that prosecution of the complaint violates principles of sound public policy, fundamental fairness, and equity. (See Answer, pp. 7-8).

All of the above stated affirmative defenses are vague and have absolutely no merit. The Respondent admitted in his answer that he has engaged in federal tax practice before the Internal Revenue Service but apparently denies that he is bound by 31 C.F.R. §§ 10.0 *et. seq.* and the rules and regulations contained therein . (See Respondent's Answer, para. 14).

The United States Supreme Court has recognized that the Internal Revenue Service was "organized to carry out the broad responsibilities of the Secretary of the Treasury...for the administration and enforcement of the internal revenue laws." *See Donaldson v. United* States, 400 U.S. 517, 534 (1971). In addition, 26 U.S.C. § 7801 provides that the Secretary of the Treasury has full authority to administer and enforce the internal revenue laws and that this includes the power to create an agency to enforce such laws. Furthermore, 26 U.S.C. § 7803(a) expressly provides for the creation of a Commissioner of the Internal Revenue Service and that such individual is

to administer and watch over the execution and application of internal revenue laws. In addition, § 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 Secretary of the Treasury is authorized, after notice and an opportunity for a proceeding, to suspend or disbar from practice before the Department those representatives who are, inter alia, incompetent, disreputable, or who violate regulations prescribed under section 330 of title 31. *See e.g., Washburn v.* Shapiro, 409 F. Supp. 3 (1976). Under Treasury order 150-97, the Office of the Director of Practice was transferred from the Treasury Office of the Secretary to the Internal Revenue Service. Following that, in 2003, as an organizational redesign, the Office of Professional Responsibility became the successor to the director of Practice.

Pursuant to § 330 of title 31, the Secretary has published the regulations in Circular 230 (31 C.F.R. part 10). Section 10.0 of 31 CFR part 10 states that "This part contains rules governing the recognition of attorneys, certified public accountants, enrolled agents, and other persons representing taxpayers before the Internal Revenue Service." 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 Attachment 2.

Based on the above, it is clear that Respondent's denial that he is bound by Circular 230 is frivolous and completely without merit.

In addition, Respondent's self-serving claim in his answer 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 Answer, para. 10), is disingenuous if not outright false. Respondent's aforementioned statement implies that the arguments made by taxpayers Coleman and Thompson originated with them and that he only acted on their bequest 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). The aforementioned 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

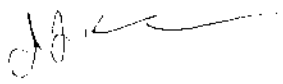
that since he prepared Thompson's amended returns and since his opinions as discussed above are consistent with the positions set forth in those amended returns, that Respondent clearly had an influence on Mr. Thompson's actions.

Based on the above, it is clear that the Respondent influenced the taxpayers to take the actions they did. He was not merely setting forth views originated by the taxpayers as his answer would have one believe.

Conclusion

For the above stated reasons, Complainant requests that summary judgment be entered in favor of the Complainant. Respondent's contumacious conduct in ignoring the rule of law by his own failure to file returns and encouraging his clients to also ignore the rule of law justifies the sanction requested by the government. Even without the charges related to Respondent's individual failure to file returns, the charges related to Respondent's representation of taxpayers Coleman and Thompson both individually and collectively warrant the sanction requested by the government.

Respectfully submitted,



JAY J. KESSLER
Senior Attorney,
General Legal Services

AFFIDAVIT

STATE OF NEW YORK)
) s.s.:
COUNTY OF NASSAU)

DAVID M. FINZ, being duly sworn, deposes and says:

1. I am a Senior Attorney in the Enforcement Unit of the Office of Professional Responsibility, formerly known as the Office of the Director of Practice (hereinafter collectively, "the Office").

2. I have been an employee of the Office since December 4, 2000, and an employee of the Department of the Treasury since October 26, 1998.

3. I have been practicing law since November 3, 1995, and I am admitted to practice in the District of Columbia and the State of Georgia.

4. I am familiar with the disciplinary process set forth in Treasury Department Circular No. 230. During my employment with the Office I have participated in the investigation, litigation and settlement of over one hundred twenty cases involving allegations of disreputable conduct by tax practitioners. The Director has given me express authority in such cases to determine the appropriate penalty to seek at hearings before Administrative Law Judges, and to accept or reject offers of settlement from tax practitioners.

5. I was the individual in the Office responsible for preparing the case of Joseph Banister (hereinafter, "Respondent"). Complaint No. 2003-2, for litigation by the Office of Chief Counsel – General Legal Services. The case was transferred to me after the Director of Practice issued Respondent an allegation letter on April 18, 2001, and after another member of our staff replied to Respondent's May 14, 2001 request for documents under the Freedom of Information Act.

6. Records in the case file indicate that allegations of disreputable conduct by Respondent were initially brought to the attention of the Office as a result of a referral by Mr. Kenneth Canfield, a Revenue Officer in San Rafael, California. Referrals from employees of the Internal Revenue Service such as Revenue Officer Canfield constitute the single most common manner in which allegations of disreputable conduct are referred to the Office.

7. Mr. Canfield's referral alleged that, on May 17, 2000, Respondent submitted a Form 1215 "Request for a Collection Due Process Hearing" on behalf of taxpayer Frank Coleman, for whom Respondent was the designated representative. In an attachment to the form, Respondent argued, *inter alia*, that Mr. Coleman was not liable for taxes for the years 1989-1998 because the Sixteenth Amendment was "not ratified," and because, according to Respondent, 26 U.S.C. s. 861 and the regulations thereunder define "source" of income in such a way as to exclude Mr. Coleman's income from taxation.

Attachment 1

8. An investigation by the Office subsequently revealed that Respondent had also 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, ostensibly due to the fact that 26 U.S.C. s. 861 and the regulations thereunder defined "source" of income in such a way as to exclude Mr. Thompson's income from taxation. The investigation further revealed that, on January 31, 2000 and again on February 29, 2000, Respondent signed as the preparer for taxpayer Walter A. Thompson's Amended U.S. Tax Returns (Forms1040X) for tax years 1998 and 1996, respectively. The aforementioned amended returns, which were filed with the Internal Revenue Service, stated that Mr. Thompson's income for the stated tax years was not taxable income, as per 26 U.S.C. s. 861-865.

9. In the view of the Office, Respondent knew or should have known that courts have rejected his arguments regarding the Sixteenth Amendment to the Constitution. In addition, he knew or should have known that a plain language reading of 28 U.S.C. s. 861 and the regulations thereunder do not state that wages or income from sources in the United States are exempt from taxation. Consequently, it is the position of the Office that Respondent counseled or suggested to clients or prospective clients that they engage in an illegal plan to evade Federal taxes or prospective payment thereof.

10. The manner in which this case was referred to the Office was consistent with numerous other referrals to the Office, and the case was handled in accordance with all standard procedures. Although the Director of Practice was concerned about Respondent's use of his former status as an IRS Criminal Investigation Special Agent to potentially bolster his credibility with clients or prospective clients, his former status as a Special Agent was not the reason a complaint was issued in this case seeking disbarment. The initial reason for the issuance of the complaint was Respondent's representation of a taxpayer in which he took a position that was abased on clearly frivolous assertions, and his preparation of amended tax returns for another taxpayer in which he made similar frivolous assertions. The Office regularly initiates actions to disbar practitioners under similar circumstances.

11. 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 a direct report 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.

12. 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.

13. After the complaint in the instant matter had been filed, Complainant's counsel became aware that Respondent had stated during a radio broadcast that he had not filed his individual income tax returns (Form 1040) for several tax years. Complainant's counsel informed me that he had listened to a replay of this radio broadcast over the Internet, and believed Respondent's statements constituted an admission that he had violated Section 10.51(f) (formerly known as Section 10.51(d)) of Treasury Department Circular No. 230 by willfully failing to make a Federal tax return in violation of the revenue laws of the United States.

14. At the request of Complainant's counsel, I caused a transcript of Respondent's individual income tax account to be produced, under blue cover seal, by the Brookhaven Service Center in Holtsville, New York. The transcript indicates, consistent with Respondent's statements during the radio broadcast, that Respondent has failed to file his individual income tax returns for several tax years.

15. It is the position of the Office that the filing of income tax returns is not voluntary; it is required collectively by 26 U.S.C. Sections 1.6011(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). The Internal Revenue Code (at 26 U.S.C. Section 7203) imposes criminal penalties for the failure to "make" a return of up to $25,000 in fines and up to one year imprisonment upon conviction.

16. 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 y ears. 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.

17. 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."

18. The Office has successfully argued for the application of the Pomponio standard of willfulness in several disciplinary cases involving the failure of tax practitioners to timely file individual income tax returns.

19. In the present case, Respondent's tax filing history evinces the type of disreputable conduct the Office 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, in the view of the Office, 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.

Under penalty of perjury, I declare the statements contained in the above Affidavit, consisting of four (4) pages, to be true and correct, to the best of my information, knowledge and belief.

Date: Oct. 28, 2003

David M. Finz

Sworn to before me this 28th day of October, 2003

Lawrence Ostrow

LAWRENCE OSTROW
Notary Public, State of New York
No. 30-4989447
Qualified in Nassau County
Commission Expires Dec 2, 2005

ADDENDUM TO AFFIDAVIT OF DAVID M. FINZ

Paragraph 15 should read as follows:

It is the position of the Office that the filing of income tax returns is not voluntary; it is required collectively by 26 U.S.C. Sections 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). The Internal Revenue Code (at 26 U.S.C. Section 7203) imposes criminal penalties for the failure to "make" a return of up to $25,000 in fines and up to one year imprisonment upon conviction.

Under penalty of perjury, I declare the statements contained in the above Addendum to be true and correct, to the best of my information, knowledge and belief.

Date Oct. 31, 2003

David M. Finz

Sworn to before me this 31 day of October, 2003

Sophia Felipe
NOTARY PUBLIC, State of New York
No. 01FE6069802
Qualified in Queens County
Commission Expires 2/11/06

From the Tax Adviser

Treasury circular 230 lays down the rules.

From the Tax Adviser:

Practicing Before the IRS

CPAs play an important role in the U.S. tax system, providing a variety of tax services to their clients. In addition to advice on the proper treatment of the tax laws and tax return preparation and review, one of a CPA's major roles is representing a taxpayer's interests in disputes with the Internal

Revenue Service. Therefore, CPAs must be aware of the rules and regulations that govern and limit this conduct.

Practice before the IRS includes all matters connected with a presentation to the service or to any of its officers or employees relating to a client's rights, privileges or liabilities under the laws or regulations the IRS administers. This process is not limited to tax return preparation; it includes most aspects of federal tax practice, including the preparation and filing of documents, communications with the service and representation at conferences, hearings and meetings.

CIRCULAR 230

The actions of all individuals representing taxpayers before the IRS are governed by various rules promulgated by the service; the most important of these is Treasury Department Circular no. 230, *Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries and Appraisers Before the Internal Revenue Service*.

Circular 230 is especially significant because it imposes numerous duties and restrictions on practitioners, as well as providing for sanctions for those who violate its provisions. (**Note**: Individuals involved only in return preparation are not subject to the circular 230 disciplinary rules; however, they are subject to various duties, restrictions and penalties under the Internal Revenue Code.)

THOSE AUTHORIZED TO PRACTICE

Attorneys, CPAs and enrolled agents are entitled to represent taxpayers before the IRS; certain actuaries also are eligible regarding some employee plan issues. An attorney or CPA licensed to practice in one state is allowed to practice before the IRS in *any* state.

Following are some of the duties circular 230 imposes on practitioners:

- ***Furnishing information***. A taxpayer's representative must furnish records or information the IRS requests and not interfere if the service attempts to obtain such information (unless the representative has a reasonable good-faith belief the information is privileged or the request is of doubtful legality).
- ***Knowledge of client's omission***. The representative must advise a client (but not the IRS) promptly if he or she learns the client has not complied with the tax laws or has made an error in or omission from any return or other tax document.
- ***Due diligence***. The representative must use due diligence in preparing returns (or other documents) for the IRS and in determining the correctness of oral or written representations made to the IRS or to clients.
- ***Promptness***. The representative must not unreasonably delay the disposition of any matter before the IRS.
- ***Determining the return preparation standard***. The representative cannot advise a client to take a position on a return unless he or she determines that (1) there is a "realistic possibility" the position can stand on its merits or (2) the position is not frivolous and is adequately disclosed. The representative may rely in good faith and without verification on information provided by a client but cannot ignore the implications of information furnished to (or actually known by) him or her; the practitioner must make reasonable inquiries if that information seems to be incorrect, inconsistent or incomplete. (A practitioner is subject to discipline only if the failure to comply with the realistic possibility standard is willful, reckless or the result of gross incompetence.)

IRS DIRECTOR OF PRACTICE

The Office of the IRS Director of Practice administers and enforces the regulations, including circular 230, that govern individuals who represent taxpayers before the IRS. To help practitioners, it occasionally publishes guidance (in the form of "scenarios" of conduct that may result in disciplinary action) and the director's reasoning and conclusions regarding the conduct.

For a discussion of the Office of the Director of Practice's recent guidance, see the Tax Clinic, edited by Philip Wiesner, in the June 1997 issue of The Tax Adviser.

--Nicholas Fiore, editor
The Tax Adviser

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Complainant's Motion for Summary Judgment with Two (2) Attachments and transmittal letter** was sent this date via facsimile and UPS next day mail to:

The Honorable William B. Moran
U.S. Administrative Law Judge
Office of Administrative Law Judges
1099 14th Street, N.W., Suite 350
Franklin Court Building
Washington, D.C. 20005
Tel: (202) 564-6258
Facsimile Number (202) 565-0044

I hereby further certify that a copy of the **Complainant's Motion for Summary Judgment with Two (2) Attachments and transmittal letter** was sent this date via facsimile, certified mail and regular mail to:

Certified Mail No. 7002 0510 0001 4609 2180
Robert E. Barnes, Esq.
207 East Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333
facsimile number (414) 276-2822

I hereby further certify that a copy of **Complainant's Motion for Summary Judgment with Two (2) Attachments and transmittal letter** was sent this date via certified mail and regular mail to:

Certified Mail No. 7002 0510 0001 4609 2173
Joseph R. Banister, CPA
2282 Sunny Vista Drive
San Jose, CA 95128

Oct 21 [illegible]
Date

Cathy Huntley
Secretary