



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ADMINISTRATIVE LAW JUDGES
MAIL CODE 1900L
1200 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20460

TELEPHONE: 202 564-6255 FACSIMILE: 202 565-0044

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From: Judge Morau

To: Jay J. Kessler, Esq.
Internal Revenue Service
Office of Chief Counsel
333 Market Street, Suite 1200
San Francisco, CA 94105

(415) 848-4850
415-848-4829 fx

Robert G. Bernhoff, Esq.
207 East Buffalo St., Suite 600
Milwaukee, WI 53202

414-276-3333
414-276-2822 fax

Hard Copy To Be Mailed: X Yes No
Any Questions or Problems May Be Directed To:

Nelly Torres

Telephone: 202 564-6258

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

DIRECTOR,¹ OFFICE OF PROFESSIONAL RESPONSIBILITY,)	
)	
Complainant,)	
)	
v.)	Complaint No. 2003-2
)	
JOSEPH R. BANISTER,)	
)	
Respondent.)	

**ORDER ON COMPLAINANT'S MOTION
FOR SUMMARY JUDGMENT²**

In this action seeking to have the Respondent, Joseph R. Banister, disbarred from practice before the IRS, Complainant, Director, Office of Professional Responsibility, filed a Motion for Summary Judgment on October 31, 2003. Respondent filed its Response on November 17, 2003. As the IRS notes, it initiated this action based on the assertion that Mr. Banister, in the course of his representation of taxpayers Coleman and Thompson, advised them that they were not required to file federal tax returns because the Sixteenth Amendment to the Constitution was not properly ratified and because Sections 861-865 of the Internal Revenue Code defines "income" in a manner which excluded their earnings. By virtue of the first amendment to the Complaint, the IRS added Banister's alleged failure to file his individual federal tax returns for the years 1999

¹The Director, Office of Professional Responsibility, Internal Revenue Service, Department of the Treasury was formerly known as The Director of Practice. For convenience and as a practical frame of reference, the Court will refer to the Complainant as the "IRS."

²Some of the issues raised in this motion have been addressed in the Court's earlier issued Orders. Therefore, the Court's prior Orders are incorporated by reference in this Order. Those Orders, issued between November 17 and November 21, 2003 are as follows: Order on Respondent's Motion to Dismiss the Complaint; Order on Respondent's Motion to Dismiss the Amended Complaint; Order Regarding Respondent's Motion to Adjourn the Hearing; Order on Respondent's Motion for Discovery; Order on Complainant's Motion to Amend the Amended Complaint and Motion to Amend the Prehearing Exchange Exhibits; Order Regarding Respondent's Motion to Abate the Case; and Order Regarding Complainant's Motion in Limine.

through 2002, as an additional basis for Respondent's disbarment. Thus, the Complaint identifies two independent grounds of disreputable conduct warranting the Respondent's removal from practice before the IRS: Respondent's improper advice to taxpayers, and Respondent's failure to file required federal tax returns.

The "Respondent's Brief in Opposition to the IRS Motion for Summary Disbarment"³ begins by repeating contentions made in earlier motions that the proceeding should be dismissed or abated because of Fifth Amendment considerations and "sound public policy."⁴ The Court has already addressed this contention in its earlier Orders and will not do so again. Further, while Respondent correctly notes that summary *judgment* is "inappropriate where material disputed facts exist" and the moving party is not "[e]ntitled to judgment as a matter of law," it then incorrectly claims that Banister has not had the opportunity to develop his affirmative and special defenses and that the IRS has not met its evidentiary burdens. The Court has already ruled on the legitimacy of the Respondent's discovery requests. Regarding the claim about evidentiary burdens, Respondent has ignored its own admission that this Order must address whether there are material facts in dispute.

After 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. Opposition at 5. Later, Respondent again suggests that it is about to address the immediate question before the Court - - whether there are material facts in dispute - - by proclaiming that "Material Facts in Dispute Preclude [Summary Judgment]," but Respondent never brings forward such material facts in dispute in its response. Opposition at 7. Instead, it asserts that the IRS motion fails to "allege the requisite facts and to provide an evidentiary basis for those facts as to each and every element of its claims." From there, Respondent's counsel repeats procedural objections that it raised in its other motions, and asserts Fifth Amendment due process objections, all aimed at attacking the issuance of the Complaint. Opposition at 7 - 9. While the Respondent's Opposition continues to make an array

³The Response in Opposition attempts to characterize the motion, by incorrectly referring to it as a "Motion for Summary Disbarment." The Motion actually is a Motion for Summary Judgment, which is a common device employed in civil proceedings where it is contended that there is no material fact in dispute. If found to be the case, a decision can be made upon application of the law to the undisputed material facts. 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*.

⁴Respondent rehashes this argument at pages 2 - 5 of its Brief in Opposition. Following this, in Section II of its Opposition, Respondent suggests that it will begin addressing whether there are material facts in dispute. However this does not occur, as the Opposition resumes its objections based on Fifth Amendment and discovery-based themes. Opposition at pages 5 - 7.

of off-the-mark assertions,⁵ it never presents with any *material* facts to demonstrate that there are such facts in dispute in this proceeding. *Id.* at 10 - 14. When the Respondent's Opposition turned to addressing the subject of the Amended Complaint, that is, the Respondent's alleged failure to file his income tax returns, it continued its arguments on the same themes. Notably, it also continued with its failure to present any material facts in dispute. Instead, Respondent's counsel asserted that the IRS has failed to prove that Banister is guilty of "a voluntary, intentional violation of a known legal duty."⁶ *Id.* at 14.

Upon reaching the last third of Respondent's Opposition, the Court began to question whether the Respondent would ever present any material facts which are in dispute. Those concerns were not dispelled by the remainder of the Opposition. Instead of identifying material facts in dispute, Respondent's counsel continued to assert that Banister's First Amendment rights of free speech were being assailed: "this case implicates powerful First Amendment rights and the public interest in protecting political speech." *Id.* at 17. Along with that theme, Respondent's counsel attempted to insert straw men into the case by asserting that "Banister's private life and political positions are clearly protected speech." *Id.* at 18. The problem with such grand statements is that the IRS has not contended otherwise. Given the tenor of the Opposition, the Court has doubts that the Respondent, and perhaps Respondent's counsel, will process what the Court has stated repeatedly in its Orders, but it will make the point one last time: this case is *not* about Banister's political positions or his freedom of speech. Rather, it is about whether the conduct Banister admitted to in the first Complaint amounts to disreputable conduct such that a sanction should be imposed. It is also about whether Banister failed to file his individual federal income tax returns for the years alleged in the Amendment to the Complaint and, if demonstrated, the consequence of such failures in terms of his fitness to practice before the IRS.

Accordingly, the motion for summary judgment concerns itself with material facts surrounding those factual allegations. 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

⁵Respondent continues the same refrain as stated in its other motions: the 861 issue is not really all that clear; whether Banister "knowingly counseled" the named clients of an illegal plan to evade taxes is a "fact" in dispute; the Supreme Court has never addressed the question of whether the Sixteenth Amendment was fraudulently ratified; Banister's speech never incited others to lawless action and so on

⁶In this regard, Respondent has already raised its claims regarding the elements to demonstrate 'willfulness' and it repeats its interpretation of *United States v. Cheek*, 498 U.S. 192. The Court has already discussed this in its earlier issued Orders in this case.

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 in fact 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.

In the last section of Respondent's Opposition, Banister's counsel asserts that "Estoppel and Equity Require Dismissal..." As with all that preceded this section, Respondent never raises material facts in dispute. Instead the Opposition claimed that the action cannot continue because of "IRS acts of omission and commission ... [which also operate to] negate[] the requisite willfulness element of the offenses charged." *Id.* at 20. To support its estoppel claim Respondent refers to cases such as those involving the possession of firearms, arms smuggling, and a government agent's silence, as examples of a criminal defendant's reliance on government officials as a valid defense. From these inapt examples, Respondent's counsel asserts that the IRS is estopped from proceeding with the Complaint because it "never corrected any statement Banister made, never answered any questions Banister asked, and never afforded Banister a simple opportunity to achieve compliance." *Id.* at 23. Instead, Counsel for Respondent asserts "the IRS answer was a conspiracy of silence ... [and that] such silence equals fraud." *Id.* The Court can only remark that Respondent's last contention, its 'Estoppel and Equity' claim, deserves no response other than to note that it is completely without merit and therefore absolutely rejected.

Thus, from beginning to end, Respondent's Opposition is an attempt to polemicize the case but nowhere does it identify a single material fact which is in dispute. Accordingly, the Court must analyze the Motion for Summary Judgment by considering the IRS motion and the facts presented by the IRS in support of it.⁷ Summary judgment is appropriate where there is no genuine issue of material fact and the moving party should prevail as a matter of law. A material fact is one that might affect the outcome of the proceeding. The purpose of summary judgment is to assess the proof to determine whether there is a genuine need for trial. A party opposing summary judgment may not rely upon mere allegations or denials in the pleadings or upon unsubstantiated assertions that a fact issue exists. *See, for example, Taylor v. U.S. Internal*

⁷In *Lopez v. United States*, 2001 WL 1429412 (10th Cir. 2001), involving a CPA who appealed the administrative decision disbaring him from practice before the IRS, the Appeals Court noted that "although [Lopez] has alleged that disputed material facts exist, he has not identified any. Rather, the matters he characterize[d] as factual issues are issues of law ... [m]oreover, vague references to the existence of disputed facts, without identifying the factual matters in dispute are insufficient." *Id.* at **2. Banister's Opposition suffers from the same infirmities.

Revenue Service, 192 F.R.D. 223 (S.D. Tex. 1999), *Barnes v. Internal Revenue Service*, 60 F. Supp. 2d 896 (S.D. Ind. 1998), *McQueen v. United States*, 264 F.Supp. 2d 502 (S.D. Tex. 2003).

The IRS Taxpayer Advice claim.

The IRS asserts that the Respondent should be disbarred because of the opinions expressed in his representation of taxpayers Coleman and Thompson. For his client Coleman, Banister advised that he was not liable for income taxes for the years 1989 through 1998 because the Sixteenth Amendment to the United States Constitution had not been ratified. Banister admitted this in his Answer. Regarding client Thompson, Banister signed as his tax preparer for his 1996 and 1998 amended 1040 tax returns. Those amended returns asserted that Thompson was not liable for income taxes under Sections 861-865 of the Internal Revenue Code, because those sections define "source of income" so as to exclude Thompson's income from taxation.⁸ Banister admitted this in his Answer as well. As Banister's admitted opinions to his client taxpayers were at odds with well established federal law, having been "consistently and repeatedly rejected by the courts," IRS contends that Banister engaged in disreputable conduct.

The IRS adds that the "Taxpayers' actions regarding their federal tax returns were based at least in part on their reliance on Respondent's advice."⁹ Motion at 10. However, the Court does not believe that it is critical for the IRS to show that Taxpayer Coleman, or any taxpayer, *acted* on the Respondent's advice. Any IRS practitioner that espouses views to clients, in connection with IRS matters, which views have been uniformly rejected by federal courts and thus are at odds with well-established law, is subject to sanction for continuing to urge such views, whether or not a client actually acts on those views. The IRS can not afford to have those who practice before it advise clients in a manner which is inconsistent with the established law. A client, for example, may *believe* that his representative is correct, but aware, as virtually any citizen would be, that such a position is highly unusual and would produce the highly unlikely result *that most United States citizens would not be obligated to pay federal taxes*, still opt to act on the cautious side, reject the adviser's advice, and pay federal income taxes. While action on

⁸Taxpayer Thompson contended that his earlier reported income came from income not listed in 26 U.S.C. § 861-865 and consequently was not reportable income.

⁹Regarding Taxpayer Coleman, IRS quotes from his statement that "It is my sincere belief that had I known the information, seen the documentation, and heard the explanations provided by Mr. Banister prior to the preparation and filing of Form 1040 for [each year from 1985 through 1998], I never would have filed such forms because I would have realized that there was no statute or regulation that required me to file them." IRS proposed exhibits 10 and 27. As for taxpayer Thompson, for whom Banister prepared his amended returns, Thompson asserted that his amended returns were made after he obtained the advice of professionals who were familiar with the applicable sections of the Internal Revenue Code. For this claim, the IRS deduced that Banister had to be one of those professionals providing advice to Thompson, as Banister was his tax preparer. This moved beyond a deduction with Banister's admission in his Answer.

such advice makes matters worse, action by taxpayers on such advice is by no means the *sine qua non* to demonstrate disreputable conduct.

The IRS motion also addresses the grounds for Respondent's sincere belief in the "Section 861" and "Sixteenth Amendment" arguments. As it notes, the "IRC 861 Argument"¹⁰ has been considered by many federal courts and its fallacy exposed.¹¹ Consequently, the IRS urges that, as Banister concedes he asserted that taxpayers Coleman and Thompson "could rely on I.R.C. §§ 861- 865 to exclude their income from taxable income subject to Federal income tax," this constitutes a frivolous assertion, as demonstrated by the long-established federal case law on the issue. Further, IRS asserts that the Court should reject Banister's contention that his position arose from a sincere and good faith belief, as any modest research by Banister, or his attorney, would have demonstrated there is no support for the position.

As with the "Section 861" argument, the courts have emphatically laid to rest the tax protester claim that the Sixteenth Amendment was never legally ratified. The only difference, in terms of the court pronouncements on these claims, is that the Sixteenth Amendment arguments have been buried longer.¹² Beginning with the 1916 decision of the Supreme Court in *Brushaber v. Union*, and in a long series of cases since then,¹³ the conclusion has been the same: the

¹⁰As succinctly expressed by IRS, the core of the "861 Argument" is that Treasury Regulation Section 1.861-8(f) overrides the plain words of Internal Revenue Code Section 61 with the result that U.S. Citizens and resident aliens earning income in the United States are exempted from the federal income tax. Thus, for example, under the theory of these advocates, those individuals one would naturally presume to be subject to a federal income tax, those citizens earning income in the United States, are exempt from taxes. Interestingly, the language of IRC Section 61 is the same as that used in the Sixteenth Amendment. Thus, the 861 argument and the non-ratified Sixteenth Amendment argument share a related lunacy in that, for differently concocted reasons, neither accomplishes the presumed goal of creating a federal income tax on United States citizens.

¹¹IRS cites, among others, *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), *Williams v. Commissioner*, 114 T.C. 136 (2000), *Furniss v. Commissioner*, T.C. Memo 2001-137, 81 T.C.M. (CCH) 804 (2000), and *Peth v. Breitzman*, 611 F.Supp.50 (E.D. Wis. 1985).

¹²As far back as 1916 the Supreme Court affirmed a statute which depended upon the validity of the Sixteenth Amendment. *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916).

¹³An extended discussion of this claim appears in *Miller v. United States*, 868 F.2d 236 (7th Cir. 1989). See also *United States v. Thomas*, 788 F.2d 1250. (7th Cir.1986)

Sixteenth Amendment was ratified.¹⁴

Thus, as summed up by the IRS:

Respondent comes before this [Court] asserting 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.

IRS Motion at 26.

The IRS claim as to Respondent's Failure to File his Federal Income Tax Returns.

Although the IRS acknowledges that, unlike the Complaint's allegations regarding the frivolous advice to taxpayers, Banister has denied failing to file his individual federal income tax returns, it notes that denial alone is not sufficient to withstand summary judgment. This means Respondent must present evidence of its own to show that there is at least a factual dispute. For example, hypothetically, the Respondent could show that in fact he did file his returns for the years alleged in the Complaint or Respondent could demonstrate that his income did not reach a reportable level. For its part, the IRS has carried its case as far it possibly could, by presenting its own official records. Those records reflect that, for the years charged in the Complaint, no returns were filed by the Respondent. Conspicuously, the Respondent has not put anything on the table to support his denial of these charges.

With this state of the evidence, the Court can reach only one conclusion regarding the underpinning of this charge: the Respondent failed to file his Federal Income Tax Returns for 1999, 2000, 2001, and 2002 and was obligated to do so. From this finding, reaching the conclusion of disreputable behavior is ineluctable because 31 C.F.R. § 10.51(f) (2002) and 31 C.F.R. § 10.51(d) (1994) make clear that a willful failure to file ones federal income tax return in violation of the United States revenue laws constitutes disreputable conduct, warranting suspension or disbarment.¹⁵ This of course makes eminent sense. Those who represent

¹⁴The Court has not found any federal courts reaching a different conclusion, nor has Respondent's counsel called any such decisions to the attention of the Court. In contrast, the IRS has cited numerous Circuit Courts of Appeal that have upheld the legitimacy of the Sixteenth Amendment's ratification. IRS Motion at 25-26.

¹⁵This Court has already denied the specious argument that one can "make" a federal tax return without actually "filing" one's return. It will not revisit this argument here. See the

individuals before the IRS can hardly remain qualified if they ignore compliance with the tax laws themselves.

The IRS Position as to the Respondent's Affirmative Defenses.

A. Respondent's Affirmative Defense that this action to disbar him violates his First Amendment rights.

The Court has addressed this issue in its earlier Orders. Accordingly the observations, conclusions and findings made in its Order Regarding Complainant's Motion in Limine are incorporated by reference. As this Court has discussed, this is a disbarment proceeding which concerns whether the Banister's conduct, as alleged in the Complaint, constitutes disreputable conduct. Banister has not demonstrated that Complainant has engaged in selective prosecution but as pointed out by 10th Circuit in *United States v. Amon*, 669 F.2d 1351 (1981), it would be bizarre if one could be insulated from prosecution of the very law about which the individual protests, by arguing that not every such protester has been prosecuted. *Id.* at 1357. The IRS Complaint sets forth grounds which, if proven, plainly provide a basis for a sanction against the Respondent.

Citing *U.S. v. Kaun*, 827 F.2d 1144 (7th Cir. 1987) ("*Kaun*"), the IRS also maintains that the First Amendment does not insulate the Respondent from the actions alleged in the Complaint because such actions constitute commercial speech. *Kaun*, like Banister, was an accountant, and a tax protester. In upholding an injunction against *Kaun*, the Seventh Circuit held that to the extent he held himself out as a tax adviser, his activities were commercial speech. The court stated that where speech is used to further an illegal activity, such as the preparation of a false income tax return, it is not constitutionally protected speech. *Id.* at 1152. 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.¹⁶

Court's November 17, 2003 Order on Respondent's Motion to Dismiss the Amended Complaint.

¹⁶Alternatively, the IRS asserts that even if it were assumed that Banister's speech was not commercial speech, it would still not come within First Amendment protection because it does not extend to activities such as Banister's which have as their objective advocating frivolous schemes to avoid the tax laws. *United States v. May*, 555 F. Supp. 1008 (E.D. Mich. 1983), holding that fraudulently misleading people into believing they can lawfully avoid paying taxes on wages is not protected First Amendment activity. In *U.S. v Rowlee*, 899 F.2d 1275 (2nd Cir.), cert. denied, 498 U.S. 828 (1990), a case upholding a conviction for aiding an assisting in the filing of false amended returns, the Second Circuit noted that the First Amendment does not protect such activity. *Id.* at 1279. The Court agrees that if, for the sake of argument, Banister's actions were considered non-commercial speech, it would still not come within First Amendment

B. Respondent's Affirmative Defense that this disbarment action violates his Fifth Amendment rights.

The Court has also addressed this contention in its earlier Orders. See the Court's November 19, 2003 Order Regarding Respondent's Motion to Abate the Case and its November 17th Order Regarding Respondent's Motion to Adjourn the Hearing. There is no merit to the Respondent's Fifth Amendment claims.

C. Respondent's Affirmative Defense that the Complainant's action seeking disbarment is motivated by retaliatory purposes.

This affirmative defense has also been mentioned in the Court's earlier Orders. 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 never been former IRS employees.¹⁷ Further, as the Court noted, this is not a whistleblower case and in any event the Respondent has not claimed that he has ever filed such an action. Thus this affirmative defense is also without merit. Jj

D. Respondent's Affirmative Defense that the Secretary of the Treasury is estopped from pursuing this Complaint because of the acts and/or omissions of the Secretary or his officers, employees or agents.

The contention that the Respondent is not bound by the Rules of Practice, as set forth at 31 C.F.R. Part 10, is without merit. 31 U.S.C. § 330 authorizes the Secretary of the Treasury to regulate the practice of representatives before it.¹⁸ There is no contention that these regulations were invalidly promulgated. The other aspects of this claim have already been discussed in this Order. Accordingly, the Court finds that there is no merit to this claim either.

E. Respondent's Affirmative Defense that the Complaint fails to state a claim upon which relief can be granted.

protection because his admitted actions, in connection with clients Thompson and Coleman, constitutes "speech brigaded with action."

¹⁷The Court itself has presided in cases in which practitioners charged with disreputable conduct have never been IRS employees.

¹⁸*Washburn v. Shapiro*, 409 F.Supp. 3, (S.D. Fla. 1976) involved the review of a disbarment of an accountant who practiced before the IRS. In upholding the administrative law judge's decision, ordering disbarment, the federal district court noted that the authority to disbar those who practice before the IRS stems from 31 U.S.C. § 1026. *Id.* at 9.

The Court has already addressed this contention in its Order on Respondent's Motion to Dismiss the Complaint and Order on Respondent's Motion to Dismiss the Amended Complaint, both of which were issued on November 17, 2003. As determined in that earlier Order, this assertion is also meritless.

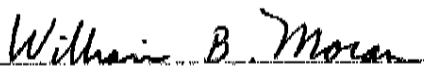
F. Respondent's Affirmative Defense that the prosecution of the Complaint violates principles of sound public policy, fundamental fairness and equity.

This contention has been addressed and it too is completely devoid of any merit.

Conclusion

Based on the foregoing analysis and discussion, Complainant IRS's Motion for Summary Judgment is GRANTED, as to liability. The IRS has demonstrated, through clear and convincing evidence, that the Respondent, Joseph R. Banister committed the violations set forth in the original Complaint, as well as those charges added by the Amended Complaint. There remains for decision, the appropriate sanction to be imposed for these violations. That matter will be addressed in a subsequent Order.

SO ORDERED.



William B. Moran
United States Administrative Law Judge

Dated: November 24, 2003
Washington, D.C.

In the Matter of Joseph R. Banister, Respondent
Complaint No. 2003-2

CERTIFICATE OF SERVICE

I hereby certify that the **Order on Complainant's Motion for Summary Judgment**, dated November 24, 2003 was sent this day in the following manner to the addressees listed below:



Nelida Torres
Legal Staff Assistant

By Facsimile and Regular Mail to:

Jay J. Kessler, Esq.
Internal Revenue Service
Office of Chief Counsel
333 Market Street, Suite 1200
San Francisco, CA 94105

By Facsimile, Certified and Regular Mail to:

Robert G. Bernhoff, Esq.
207 East Buffalo St., Suite 600
Milwaukee, WI 53202

Regular Mail to:

Joseph R. Banister, CPA
2282 Sunny Vista Drive
San Jose, CA 95128