

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

DIRECTOR OF PROFESSIONAL )  
RESPONSIBILITY, )  
 )  
Complainant, )  
 )  
v. )  
 )  
JOSEPH R. BANISTER, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Complaint No. 2003-2

**MOTION TO ABATE THE CASE  
AND SUPPORTING MEMORANDUM**

The respondent, Joseph R. Banister (“Banister”), by and through counsel, Robert E. Barnes, hereby moves this honorable court, to abate the proceeding. The respondent has reason to believe that the government is conducting a criminal investigation into the respondent. Apparent from the recent amended allegations of the complainant, the lack of due process afforded the Respondent in the initiation of those proceedings, and upon information and belief of the Respondent, the Complainant will utilize these administrative proceedings as a tool of a pending criminal investigation. Therefore, the proper process is to abate the proceedings.

In *United States v. Korbel*, 379 U.S. 1 (1970), the court circumscribed the ability of the government to conduct criminal investigations under the cloak of administrative process. *See id.* The court noted that civil process should not be utilized to obtain evidence for criminal prosecution. *See id.* In addition, if an agency failed to advise a respondent that the respondent was under criminal

investigation, then abatement of the civil proceeding or a comparable remedy should be ordered. *See id.* Furthermore, if the respondent could reasonably fear prejudice from any determinations in the proceeding or other unfair injury, then abatement would be recommended. *See id.* Finally, if the circumstances surrounding the civil proceeding suggested any impropriety or any deprivation of the respondent, then abatement was warranted. *See id.*

This proceeding meets each of the different reasons for abatement. In this case, the respondent is under criminal investigation for related or the same allegations. *See Declaration of Robert G. Bernhoft.*

In addition, the Complainant alleges serious criminal violations, including knowingly counseling a plan to evade a tax liability and willful failure to file returns. The latter allegations only unfolded at the last minute, with no written report by the Director of Practice as required by Section 10.54 of the Code of Federal Regulations. This peculiar process invites further suspicion on the potential use of this agency action to aid in a criminal investigation.

Thus, through this proceeding, the Complainant may obtain evidence for criminal prosecution, as the respondent is under criminal investigation for these allegations. In addition, the Complainant has failed to advise the respondent of a potential criminal prosecution. Further, the Respondent could reasonably fear prejudice from adverse determinations of this proceeding in a subsequent criminal investigation or prosecution.

Forcing the respondent to choose between the assertion of his Fifth Amendment rights against self incrimination and his livelihood in representing clients in this capacity is the very kind of "unfair injury" the court intended to protect against.

Finally, the repeated references to the respondent's personal behavior – his prior employment with the Internal Revenue Service and his status as an alleged whistleblower, his political speech and his private tax activity – all suggest this proceeding lacks Constitutional propriety.

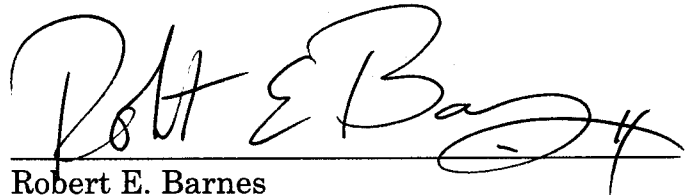
In sum, with a pending criminal investigation into the same allegations and the apparent efforts of the Complainant to pursue these allegations in this proceeding, the proceedings warrant abatement

Wherefore, the respondent moves the honorable Administrative Law Judge, William B. Moran, to abate the proceeding.

Respectfully submitted this 29th day of October, 2003.

THE LAW OFFICE OF ROBERT G. BERNHOFT  
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**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that true and correct copies of the foregoing "Motion to Abate the Case and Supporting Memorandum" and "Certificate of Service" were served on counsel for the Director of Professional Responsibility, by both courtesy facsimile transmission on this very date and by placing the same in the custody of the United States Postal Service for first class delivery, postage prepaid, on October 29, 2003, addressed as follows:

Jay J. Kessler, Esquire  
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