

**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 DISMISS COMPLAINT
AND SUPPORTING MEMORANDUM**

The respondent, Joseph R. Banister (“Banister”), by and through counsel, Robert E. Barnes, hereby moves this honorable court, to dismiss the Complainant’s First Complaint. The First Complaint fails to state a claim upon which relief can be granted and should be dismissed as this proceeding violates the respondent’s First Amendment rights to free speech.

The first Complaint alleges that the respondent, Banister, committed “disreputable” conduct by certain advice he gave to several clients and by “positions” he took in representing those clients. However, the Complaint fails to allege how any of that advice or how any of those positions violated the rules. Strikingly, the complaint fails to show how any of Banister’s advice was either false or frivolous. Instead, the complaint alleges mere legal conclusions that the alleged advice or position advocated by Banister violated the rules, without meeting the complainant’s burden to “show” how Banister’s conduct violated the rules.

Indeed, this apparent deficiency reflects an unfortunate pattern of the Internal Revenue Service – refuse to respond to certain questions, then blame the questioner for the answers the questioner assumes to be true as a direct result of the screaming silence of the Internal Revenue Service.

In fact, the very exhibits chosen by the complainant reveal the real motivation for this factually deficient first complaint – the political views of the Respondent. As such, the first complaint should be dismissed.

I. The First Complaint Fails to State a Claim Upon Which Relief Can Be Granted Because It Fails to Allege Sufficient Facts to Put Banister on Notice of the Specific Facts Needed to Permit Banister to Prepare a Defense.

The regulations do not vest unfettered discretion in the Complainant to disbar or suspend practitioners. The regulations governing this proceeding require that a “complaint shall give a plain and concise description of the allegations which constitute the basis for the proceeding.” *See* 31 C.F.R. § 10.56. In assessing whether the allegations contained in the complaint are sufficiently descriptive, the facts within the complaint must be of such specificity that the complaint “fairly informs the respondent of the charges against him so that he is able to prepare his defense.” *See id.*

The first complaint is a demonstration of inadequate pleading. It fails to plead sufficient facts to “fairly inform” the respondent of what facts he must disprove to protect his right to practice before the agency.

The complainant’s first complaint is analogous to a complaint alleging fraud as follows: “John told me the car was green. This was fraud.” The apparent

deficiency in such a complaint is that it never alleges the car was not green. The same defect pervades the Complainant's first complaint.

The Complainant's first complaint repeats the identical error in each and every one of its allegations. For example, the first complaint alleges Banister "took a position" that had "no substantive basis in the law or fact" during Banister's representation of several clients. Yet, the complaint fails to allege which position had "no substantive basis in the law or fact." That portion of the complaint must be dismissed.

Similarly, the complaint alleges that certain advice Banister supposedly gave to clients constituted "false" opinions procured through "gross incompetence." Yet, again, the complaint fails to allege what about the opinion rendered it false. In addition, the complaint fails to allege what was "grossly incompetent" about any opinion.

Indeed, in both its allegations of incompetence and the failure to conduct due diligence, the complaint exhibits another deficiency – the complaint fails to state what standard of care measured the degree of competence or diligence Banister was obligated to meet. That portion of the complaint must also be dismissed.

Further, the first complaint alleges that Banister filed a "frivolous" return for a client. Yet, following the same pattern in its other allegations, fails to state which fact about the return was frivolous. That portion of the complaint must also be dismissed.

Finally, the first complaint alleges that Banister “knowingly counseled” a client to “evade” a tax. Yet, the first complaint fails to allege what about Banister’s advise constituted evasion. This requires that Banister know of a legal duty to pay a tax and advise a client to ignore that duty. Once again, the complainant fails to even allege Bannister knew his client had any particular legal duty to pay a tax or that Banister advised his client to disobey a known legal duty.

After all, a practitioner’s duty is to aid a client in reducing their tax liability when the law warrants. Merely stating that a client is not liable for a tax cannot, as a matter of law, constitute evasion, or every accountant and tax lawyer in America can be disbarred for “counseling evasion.” Instead, the complainant must show what about the advice was “evasion” and must also show that Banister knew the advice constituted evasion. Evasion, of course, requires knowledge of a known legal duty.

In sum, the first complaint does not state a single fact that could form the basis for the conclusory allegations of the Complainant. Alleging mere legal conclusions fails to put Banister on notice of what facts he will need to prepare his defense.

As such, the first complaint fails to fairly inform Banister of what facts he will need to prove or disprove to prepare a defense, requiring dismissal of the complaint. *See* 31 C.F.R. § 10.56.

II. The First Complaint Should be Dismissed Because it Violates Banister's First Amendment Rights.

It is quite apparent from the attachments to the first complaint that Banister's political speech, not his representation of clients, formed the basis for this action. Throughout, the complaint attaches documents relating to Banister's published work, not his advice to clients. Given the evident paucity of factual allegations against Banister for the opinions and advice he purportedly provided to clients – the complaint fails to show how a single statement was false, frivolous, or intended to evade a known legal liability – this complaint is all about prosecuting Banister for his political beliefs. This is improper and warrants dismissal.

The court has held that there “are regulatory measures which, no matter how sophisticated, cannot be employed, in purpose or in effect, to stifle, penalize or curb the exercise of First Amendment rights.” Louisiana ex rel. Gremillion v. National Association for the Advancement of Colored People, 366 U.S. 293 (1961). This is because the “rights of free speech and free association are fundamentally and highly prized and ‘need breathing space to survive.’” Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (U.S. 1963), quoting N.A.A.C.P. v. Button, 371 U.S. 415 (1962). The court framed the test for evaluating the propriety of any civil proceeding: “it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the state convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.” Gibson.

The fact that the complainant not only recites, but relies entirely, on the respondent's public speech as the basis for this proceeding reveals this proceeding as nothing more than an effort "to stifle, penalize and curb" the respondent's "exercise of First Amendment rights," the very conduct prohibited by the Constitution. Therefore, the complaint should be dismissed to preserve and protect the respondent's free speech.

CONCLUSION

The first complaint fails to allege facts sufficient to permit the respondent to adequately prepare a defense to the charges. Rather, the complaint only finds specificity in noting the public speech of the respondents. However, the IRS cannot legally fetter what the constitution guarantees as free.

Wherefore, the respondent moves the honorable Administrative Law Judge, William B. Moran, to dismiss the amended complaint.

Respectfully submitted this 29th day of October, 2003.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that true and correct copies of the foregoing "Motion to Dismiss Complaint 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:

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