

UNITED STATES OF AMERICA  
THE DEPARTMENT OF THE TREASURY

DIRECTOR,<sup>1</sup> OFFICE OF )  
PROFESSIONAL RESPONSIBILITY, )

Complainant, )

v. )

JOSEPH R. BANISTER, )

Respondent. )

Complaint No. 2003-2

**ORDER REGARDING ADMISSIBLE EVIDENCE**  
**AT SANCTION PHASE OF PROCEEDING**

On November 24, 2003, the Court issued an Order on Complainant's Motion for Summary Judgment, finding that the IRS 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. The only remaining matter for decision is the appropriate sanction to be imposed.<sup>2</sup> The range of sanctions are set forth at 31 C.F.R. § 10.76 (2002).<sup>3</sup>

The Court, in the numerous Orders issued in this proceeding, determined that many of the arguments raised by Respondent were not material or relevant. Because the Respondent has

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<sup>1</sup>The 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."

<sup>2</sup> An amended notice of the hearing location was sent to the parties via facsimile on November 26, 2003. This Order Regarding Admissible Evidence at Sanction Phase of Proceeding was also sent to the parties, via facsimile, shortly before the conference call which was held on November 26, 2003.

<sup>3</sup>Prior to the revision of these Regulations, this section was found at 31 C.F.R. §10.70 (1994).

raised such immaterial and/or irrelevant matters, the Court, in a conference call held on November 24<sup>th</sup>, required that the Respondent make a proffer of the evidence it intended to present at the sanction phase. The sanction phase of the proceeding is intended to allow the parties to offer their perspectives on the appropriate sanction. Nevertheless, such perspectives cannot be based on irrelevant considerations. For example, the Court has ruled that Mr. Banister's sincere beliefs about the validity of the ratification of the Sixteenth Amendment cannot be considered as a mitigating factor for the sanction issue *in a disbarment proceeding*.

Respondent submitted its Proffer of Offers of Proof and Argument at Hearing and the IRS has provided a Response to it. The Court considered the Proffer and the IRS Response. Respondent states that Mr. Banister should "be allowed to appear personally before the court and make a statement regarding the appropriate sanction to be imposed against him in this proceeding." Proffer at 1. The Court agrees and Mr. Banister will be permitted to make a statement regarding the appropriate sanction. However, Banister's counsel<sup>4</sup> also asserts that, as counsel, he should be allowed to "make oral argument, based on the pleadings, records, and files of this case, *regarding that same matter* at the hearing scheduled for December 1, 2003." *Id.* The Court will not permit a de facto relitigation of the matters already decided by virtue of the Court's prior orders.<sup>5</sup> Accordingly, Banister's counsel will not be permitted to present evidence or to argue: "that someone in Banister's position could reasonably believe taxpayers could benefit from Banister's political opinions;" "that the IRS deliberately misled Banister and instigated this proceeding merely for the impermissible purpose of punishing political speech;" or that "Banister has never knowingly and willfully disobeyed any federal law in his entire professional life." *Id.* at 2.

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<sup>4</sup>Banister actually now has two attorneys, with the same law firm, representing him: Mr. Robert Bernhoft and Mr. Robert E. Barnes.

<sup>5</sup>The Court has concerns about the representations made by Banister's counsel in its Proffer. That Proffer asserts: "In this proceeding, the IRS denied Banister the required opportunity to correct the record or achieve compliance with any applicable rules and/or regulations. The IRS denied Banister an opportunity to know the specific facts of the charges alleged. The IRS denied Banister an opportunity to conduct any discovery. The IRS denied Banister an opportunity to cross-examine any of the Director's witnesses or evidence. The IRS denied Banister an opportunity to introduce witnesses on his behalf as to the charges alleged. The IRS denied Banister an opportunity to introduce any evidence, testify, or even have counsel argue as to the merits, reasonableness, or sincerity of his statements and positions even though the allegations against him all require proof of willfulness." Proffer at 2. The Court has already ruled on these matters and the representations in the quoted material are either misleading or false. Respondent's counsel may not attempt to relitigate these matters at the sanction phase of the proceeding. If counsel believes the Court erred in any of its rulings, those assertions should be reserved for any appeal that may be filed.

The Respondent's Proffer then proceeds to list witnesses it would call for the sanction phase and the expected testimony of those witnesses. Respondent would call: Mr. Ken Canfield, who is described as the "IRS Revenue Agent who began this investigation of Banister..."; Ms. Priscilla Ousley, an IRS employee who, Respondent asserts, "would testify that the IRS reduced the tax debts of taxpayers who made identical argument to the ones Banister allegedly made ..."; Ms. Sue Erwin and Mr. Patrick McDonough, who, Respondent asserts, "know ... that the IRS chose to bring this complaint [after Banister] appeared on [a television new program]"; Mr. Jay Kessler, the IRS counsel in this case, who, Respondent asserts "eavesdropped on the political conversations of Joe Banister ..."; and former IRS Commissioner Rossotti, who, Respondent asserts, "would testify that Banister had asked the IRS a host of questions concerning identical issues and asked the Commissioner to correct any errors by Banister ... but ... Rossotti never [responded]." Proffer at 3-5. The Court holds that none of these witnesses have any material or relevant evidence to offer on the only subject remaining for determination: the appropriate sanction to be imposed upon Mr. Banister. Therefore, neither Banister nor his counsel may raise these contentions at the hearing as to the appropriate sanction to be imposed.

In the last part of Respondent's Proffer, counsel states: "Banister also anticipates calling the witnesses named on his witness list to testify as to his good character, extraordinary skill, and exceptional ability as a practitioner on behalf of his clients, which saved them thousands of dollars in federal and state tax liability, and finally, his stellar record of government service." Proffer at 5. However in its Order Regarding Complainant's Motion in Limine, the Court ruled that Respondent's proposed witnesses Patrick McDonough, Frank Coleman, Walter Thompson, Timothy Brewer, Robert Gorini, Paul Varille, Ted Brown and Charles Rossotti may not testify. Order re Motion in Limine at 9-10. That Order stands.

**So Ordered.**

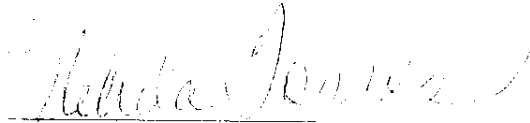
  
William B. Moran  
United States Administrative Law Judge

Dated: November 26, 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 Regarding Admissible Evidence at Sanction Phase of Proceeding** dated November 26, 2003 was sent this day in the following manner to the addressees listed below:



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Legal Staff Assistant

By Facsimile and Regular Mail to:

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Internal Revenue Service  
Office of Chief Counsel  
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By Facsimile, Certified and Regular Mail to:

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