

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF PROFESSIONAL RESPONSIBILITY
WASHINGTON DC

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

Monday
December 1, 2003

Courtroom 2-1350
450 Golden Gate
San Francisco, California

The parties met, pursuant to notice of the Judge,
at 10:01 a.m.

BEFORE: HON. WILLIAM B. MORAN
Administrative Law Judge
Environmental Protection Agency

APPEARANCES:

For the Complainant:

JAY J. KESSLER, ESQ.
BRIDGETTE M. GIBSON, ESQ.
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For the Respondent:

ROBERT G. BERNHOFT, ESQ.
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I N D E X

WITNESSES:DIRECT CROSS REDIR RECR

David Finz12 32 55 62

STATEMENT OF THE RESPONDENT PAGE

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EXHIBITS:

IDENTIFIED

RECEIVED

None

P R O C E E D I N G S

JUDGE MORAN: Good morning. My name is Judge William B. Moran. I am a United States Administrative Law Judge. We are here this morning, December 1st, 2003, for a proceeding brought by the Internal Service.

Proceeding is captioned as Director, Office of Professional Responsibility, Complainant, vs. Joseph R. Banister, Respondent, Complaint No. 2003-2.

Will the counsel for the parties please rise and identify yourselves for the record, beginning with the IRS.

MR. KESSLER: Jay J. Kessler, counsel for the IRS.

MS. GIBSON: Bridgette Gibson, counsel for the IRS.

MR. BERNHOFT: Attorney Robert Bernhoft for the Respondent, Joseph R. Banister.

MR. BARNES: Attorney Robert Barnes for the Respondent, Joseph R. Banister.

JUDGE MORAN: Okay, I'm going to make a brief opening statement about this case, about the status of this case.

We are now in this proceeding in what is known as the sanctions phase of the proceeding. I previously issued an order on the IRS motion for summary judgment, and I granted that motion. That means that I found that there was no material issue of fact, that the facts were clear and I was able to rule as a matter of law that Mr. Banister did indeed violate the provisions and the counts named in the complaint. And therefore that Mr. Banister was found to

have engaged in disreputable conduct as alleged in the complaint for each of the counts.

So today, this morning, there is a narrow purpose for the sanctions phase, and that is the Court is here this morning to hear argument and a statement from Mr. Banister as to the parties' respective position as to what the appropriate sanction should be, instituted by the Court in these proceedings.

Now the sanction that the Court can impose, and this is under 31 CFR 10.50, the sanctions that I can impose range from a low mark of a censure up to suspension and finally the ultimate sanction that I can impose is that of a disbarment.

Now the Court wants to make reference on the record here that it has issued a number of orders in this case, and I'm going to list what those orders have been thus far. The first group of orders were issued between November 17th and November 21st, 2003, and they were as follows.

The Court's order on the Respondent's motion to dismiss the complaint; the order on the Respondent's motion to dismiss the amended complaint; the order regarding Respondent's motion to adjourn the hearing; an order on the Respondent's motion for discovery; an order on the Complainant's motion to amend the amended complaint; and a motion to amend the prehearing exchange exhibits, which was filed at the same time.

An order regarding Respondent's motion to abate the case, and an order regarding Complainant's motion in

limine. In addition to that, what I mentioned at the outset of this proceeding, the Court issued its order on Complainant's motion for summary judgment, which was issued on November 24th.

Last week, on November 26th, the Court issued its latest order in this proceeding. It is described as the Court's order regarding admissible evidence at the sanction phase of the proceeding.

Now there's one other housekeeping matter that I need to refer to before we begin with the IRS putting on its testimony as to the sanction phase, and that's pertaining to the official introduction of exhibits in this proceeding. The Court, is, for the record, admitting the prehearing exchange exhibits of the IRS. Those are, as I understand it, Mr. Kessler, IRS Exhibits 1 through 40?

MR. KESSLER: 1 through 44, Your Honor.

JUDGE MORAN: 1 through 44, excuse me. Okay, and for the Respondent, Mr. Banister, the Court has admitted the exhibits which Mr. Banister included in his prehearing exchange, except for those exhibits which I excluded in my motion in limine, and I won't review that, but I went over in a prehearing conference just now with the counsel for the parties, and they understand the exhibits that were forbidden by my motion in limine order, and also those that were determined to be admissible.

MR. BERNHOFT: Your Honor, if I might, for the record, as we previously discussed, the Respondent would object to the admission of Complainant's Exhibits 1 through

44 on grounds of relevance, ultimate admissibility, and other reserved objections.

JUDGE MORAN: Okay, and as I indicated in the conference with counsel, I am overruling that objection and I want to make a couple of notes about that.

The first point is that at no point up until just now did counsel for Respondent object to any of the prehearing exchange exhibits. There was no -- as there was for the Internal Revenue Service -- there was no motion in limine filed by counsel for the Respondent to have any of the exhibits excluded.

The last point I want to make about this is that in the Court's ruling on the motion for summary judgment, it's important for everyone to be aware that while not exclusive, the court's determination was based in part upon the Respondent's admissions to the charges in the original complaint. And as to the amended complaint, and in that amended complaint the IRS alleged that the Respondent failed to file his federal tax returns for the years 1999 through the year 2002, in that I would note for benefit of counsel that we have official records that were submitted as part of the prehearing exchange, and the Court, of course, can take judicial notice of those without any formality or other steps to have them admitted into evidence.

Now with that, we can begin. Did the parties want to make any sort of an opening statement on -- as to the sanction phase or are we waiving that?

Beginning with Mr. Kessler.

MR. KESSLER: I have a very brief opening statement.

JUDGE MORAN: Okay, go ahead, Mr. Kessler.

MR. KESSLER: May it please the Court, Respondent Joseph Banister is a certified public accountant, eligible to practice before the Internal Revenue Service. There are many professional activities which a CPA can engage in which do not involve practice before the IRS. However, when a CPA chooses to engage in practice before the IRS, as the Respondent did, he must comply with the regulations governing such practice that are set forth in 31 CFR section 10 et seq., also referred to more commonly as Circular 230.

By engaging in practice before the IRS, tax practitioners such as the Respondent are subject to the disciplinary authority of the Secretary of the Treasury under the Director of Professional Responsibility, per 31 USC section 330(b) and 31 CFR section 10.50. The disciplinary authority permits the censure, reprimand, suspension or disbarment from practice before the IRS of a tax practitioner who fails to comply with the regulations that are set forth in Circular 230.

As stated in the case of Sicignano vs. United States, that's S-i-c-i-g-n-a-n-o, the purpose of this disciplinary authority is not to punish the Respondent, but to protect the public and those who would rely on him for advice and service and to maintain the integrity of practitioners before the IRS.

In the instant matter, the Director of Professional Responsibility, formerly the Director of Practice, initiated the complaint and amended complaint that resulted in this Court's determination that the Respondent violated sections 10.22(b), 10.22(c), 10.34, 10.51, 10.51(d) and 10.51(j) of Circular 230.

By each of these violations of Circular 230 taken individually could warrant Respondent's disbarment from practice before the IRS; taken together, they clearly warrant nothing less than his disbarment. In this regard, the Complainant will be calling David Finz, senior attorney to the IRS Office of Director of Professional Responsibility, as a witness. Mr. Finz's testimony will support Complainant's contention that disbarment is the appropriate sanction in this case.

Thank you.

JUDGE MORAN: Thank you, Mr. Kessler.

Mr. Kessler, what is the cite for that Sicignano case?

MR. KESSLER: Yes, I have an actual copy of the case for the Court and for Mr. Bernhoft.

JUDGE MORAN: Okay, but I'd like, for the record, read the cite.

MR. KESSLER: Yes. 127 F.Sup.2d 325 (2001).

JUDGE MORAN: Thank you.

MR. BERNHOFT: Thank you.

Your Honor, Respondent declines to make an opening statement.

JUDGE MORAN: Okay. By the way, the parties in a telephone conference with me last week agreed that there will be no post-hearing briefs filed in this matter. Is that still the understanding between counsel?

MR. KESSLER: Yes, Your Honor.

MR. BERNHOFT: Yes, sir.

JUDGE MORAN: Okay, and so within a week you'll be getting my order determining the appropriate sanction in this proceeding.

Okay, Mr. Kessler, are you ready?

MR. KESSLER: Yes. Ms. Gibson will be handling our first witness, who is David Finz.

JUDGE MORAN: Okay.

MR. KESSLER: Our only witness.

JUDGE MORAN: Mr. Finz.

Whereupon,

DAVID FINZ,

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE MORAN: State your name and spell it for the court reporter, please.

THE WITNESS: My name is David Maurice Finz, and the last name is F as in Frank-i-n as in Nancy-z as in zebra.

MS. GIBSON: Good morning, Mr. Finz.

THE WITNESS: Morning.

MS. GIBSON: Welcome to San Francisco.

DIRECT EXAMINATION

BY MS. GIBSON:

Q Who are you employed with?

A I'm a senior attorney for the IRS Office of Professional Responsibility, which was formerly known as the Office of Director of Practice.

Q And how long have you worked for the Office of Professional Responsibility?

A Since December of 2000. Actually at that time it was still known as the Office of Director of Practice, and it underwent a reorganization and was renamed the Office of Professional Responsibility in January of this year.

Q Please explain the role of the Office of Professional Responsibility as it relates to the IRS as an entity?

A The Office of Professional Responsibility is charged with implementing and enforcing the regulations set forth in 31 CFR Part 10, which is also known as Treasury Department Circular 230. This involves the oversight of the practice of attorneys, certified public accountants and enrolled agents who practice before the Internal Revenue Service. It includes administering the special enrolled agent examination and monitoring compliance with continuing professional education standards for enrolled agents, and also the part that I am more specifically involved in, which is the institution of disciplinary proceedings with respect to attorneys, CPAs and enrolled agents who are believed to have violated the standards of conduct set forth in Circular 230.

Q And what are your specific duties as a senior attorney for the Office of Professional Responsibility?

A My primary responsibility is to serve as a point of contact or liaison between our office and the office of chief counsel, General Legal Services, which serves as the attorneys of record in our disciplinary proceedings. That involves preparing case summaries and reviewing cases prior to their referral to General Legal Services for the issuance of a complaint, and that includes recommending the appropriate penalty which, in consultation with the Director, we ask General Legal Services to seek in a given proceeding.

During the course of the proceeding I serve as a technical assistant to General Legal Services, and I also represent the Director at hearings such as these. In addition to these duties, I'm also responsible for training and reviewing the work of more junior attorneys on staff, although I am not their direct supervisor, and I also represent the office at continuing legal education and continuing professional education seminars.

Q How long have you been an attorney?

A Eight years.

Q And there's been mention of Circular 230; could you briefly tell us what is Circular 230?

A Circular 230 is a shorthand, if you will, for a brochure that is put out by the Treasury Department, which reprints the regulations that are found at 31 CFR Part 10. These are the regulations enacted pursuant to the Department

of Treasury's authority which is given to it under 31 USC section 330 for the oversight of the practice of attorneys, CPAs and enrolled agents before the Internal Revenue Service.

Q Could you please just give us some background information about the organizational structure of the Office of Professional Responsibility?

A Currently the office has two components to it. One is the enrollment unit. This is the unit that is responsible for administering the special enrolled agent examination and monitoring compliance with CPE requirements for enrolled agents.

And then there's the enforcement unit, which is the unit to which I belong, and that is the unit responsible for instituting disciplinary proceedings such as these through our counsel of record, General Legal Services, and also for reviewing administrative appeals involving the denial of enrollment to enrolled agents.

Q And approximately how many employees work in the enforcement unit, your unit, of the Office of Professional Responsibility?

A We're in the process of hiring several new attorneys and paralegals at this time, so I really couldn't give you an exact number. I'd say it's somewhere around 15.

Q And to whom do you report as your supervisor?

A Currently I report directly to Brien Downing, the director of the office. However, that is because we don't currently have an acting chief of enforcement. The deputy

director, Steve Whitlock, is serving in that role, so essentially at this point I report to the both of them. And when that chief of enforcement position is filled I will report to the chief of enforcement rather than directly to Mr. Downing.

Q Would you please explain your involvement in this case?

A I became involved in the case involving the Respondent once the allegation letter had been issued, a response was received from the practitioner and also a request was made for documents under the Freedom of Information Act. That request was fulfilled and then at that point the matter was still unresolved and it was forwarded to me for preparation for referral to General Legal Services.

That is typically, though not always, the stage of the process that I will get involved in a case, is once the allegation letter has been issued and the matter remains unresolved.

Q Let's just back up a little bit and if you could just explain to us how the allegations regarding Mr. Banister, how did those allegations come to your office's attention?

MR. BARNES: Objection, Your Honor, this would appear to be beyond the scope as we go in; Your Honor made a ruling that we were not allowed to go into the reasons for the instigation of this proceeding, including our allegations that there were impermissible political

motivations. This testimony would appear to go to that issue and would permit us to cross as to that issue, but I wouldn't want to go into that if it were beyond Your Honor's order.

JUDGE MORAN: Well, I don't agree with your premise that that would allow you to do that. I'm going to allow Mr. Finz to answer that question as brief background information, briefly.

THE WITNESS: It's my understanding that our office received a referral, as we called them, from the field, specifically from a revenue officer by the name of Ken Canfield, and pursuant to that referral, an allegation letter was issued by our office. It was signed by the then Director of Practice.

This all predates the file having been transferred to me.

BY MS. GIBSON:

Q Is it unusual for your office to receive referrals from the field?

A That is in fact the typical way that referrals come into our office. Though not the only way.

Q Generally could you give us an overview of how your office processes cases from receipt until the case is referred to GLS, General Legal Services, for litigation?

A When a referral comes into our office it is currently assigned to a staff attorney within our office's enforcement unit. I should point out that at the time that this referral came into our office, we were still working

under the Director of Practice and due to short-staffing in our office, there were several appeals officers on detail to our office to assist us in case development. And in fact, this particular case assigned to one of those appeals officers.

But they essentially perform the same function that today is performed by OPR staff attorneys. So when the case comes in it is assigned to a staff member who at that point reviews the referral to determine whether our office has jurisdiction over the practitioner; to determine whether the conduct is in fact actionable under Circular 230; and also to determine whether the allegations have been made in a timely fashion. Assuming that the allegation -- the referral, rather, passes all three of those initial threshold tests, the attorney assigned to the case will develop it by reviewing documentary evidence and perhaps collecting more as appropriate, speaking to witnesses as necessary and also researching the applicable legal authority. Assuming at that point that the staff attorney determines that the allegations taken as true would appear to suggest a violation of Circular 230, an allegation letter is issued to the practitioner, who then has an opportunity to respond either in writing or by requesting a conference, or both.

Q And did Mr. Banister's case follow that general process and procedure that you just described to us?

A Yes, it did. There was one additional issue that came up. It is not unique to the Respondent's case,

although it does not come up in every case, and that is the issue of the apparent pendency of grand jury proceedings with respect to the Respondent.

Q To what extent do your duties require you to be conversant in tax law?

A Only to the extent necessary to be able to determine the appropriate standards of conduct that a practitioner should have followed in a given situation, and the extent to which the practitioner may have deviated from those standards.

Q So do you have any obligation or are you in any way does your office consider the underlying tax matters that precipitate the cause of action in these disciplinary matters; do you look at those underlying cause-of-actions technically?

A Well, typically the determination as to the underlying tax matter will have been made prior to the case being referred to our office. So our objective at that point is to determine whether the practitioner's conduct with respect to that underlying tax matter was in compliance with Circular 230.

So we would not need to necessarily reach the merits of the underlying tax matter itself.

Q This case involves the term "disreputable conduct" and generally, and that's defined in the regulations, but generally how does your office assess whether disreputable conduct has in fact occurred in a given case?

A Well, typically when a referral comes into our office, the referring party, be it an IRS employee or in some cases someone from the public, may even suggest which sections of Circular 230 they believe may have been violated. We're certainly not obligated to confine our inquiry to those sections, but it typically would be a good starting-point.

What we would do is to look at the conduct at issue and at that point determine whether the regulations contained in Circular 230 have been violated. So, for example, if the case involved the way a practitioner handled an audit, perhaps cancelling audit appointments on very short notice and failing to provide documents that were requested, we might at that point look to the revenue agent's reports, the examination work papers, and try to determine whether there was a pattern of delay on the part of the practitioner. If there was, there's certain sections of Circular 230 that may be implicated there.

So we have to compare the conduct at issue, the facts in the given case, with the standards in Circular 230, and we'll talk to witnesses, review documents and research legal authority as appropriate.

Q With respect to Mr. Banister's case, what, if any, documentation did you or your office rely upon in determining whether or not Mr. Banister had in fact engaged in disreputable conduct?

A Well, there's several different allegations involved here, and in light of the public nature of these

proceedings, I'm going to refer to the taxpayer matters here simply by the first initial of the last name, in order to protect the confidentiality of the taxpayers.

With respect to taxpayer C, there were several documents in the file relating to those allegations, and they included a request for a collection due process hearing, correspondence that was sent by the Respondent on behalf of his client to the revenue officer, records received from the field in relation to the collection due process hearing itself --

MR. BERNHOFT: Your Honor, although I'm loath to interrupt Mr. Finz's testimony, I just want to put on the record a continuing objection to the broad scope of very specific facts regarding the institution, investigation and proceeding based on the Court's previous orders.

JUDGE MORAN: Okay, I'm overruling your objection. But I do want you to cut to the chase quickly and get to --

MS. GIBSON: Okay.

JUDGE MORAN: -- I want to understand Mr. Finz's position representing the IRS as to how it was they determined that the sanction of disbarment be the recommended sanction from IRS's perspective, as opposed to what I may determine.

And, for instance, how it was that they determined as opposed to representing -- to seeking a censure or suspension, as opposed to disbarment.

MS. GIBSON: Okay.

JUDGE MORAN: I consider this important foundational material for his testimony to make sense, Mr. Bernhoft.

MR. BERNHOFT: Yes, Judge.

THE WITNESS: Your Honor, may I just complete the --

JUDGE MORAN: Yes, go ahead and --

THE WITNESS: -- response?

JUDGE MORAN: -- complete the thought.

THE WITNESS: Okay, and then with respect to the matter involving taxpayer T, there were two 1040-X amended individual income tax returns that were prepared by the Respondent on behalf of this client that I reviewed, one, I believe, from tax year 1996 and the other from tax year 1998. Those were the allegations in the initial complaint.

Subsequent to that the complaint was amended and the tax transcripts relating to the Respondent's individual income tax account were reviewed as well.

BY MS. GIBSON:

Q Okay, we'll now move to the penalty, into the sanction part of this, your testimony. What factors, if any, does your office consider in determining which sanction to seek in a given case?

A Well, Circular 230 does not specifically provide an analytical framework by which to determine penalty except that it does require the director to specifically state in the complaint what sanction to seek. That being said, each

case is reviewed on its merits and it's not something that is readily reduced to a mathematical formula.

Essentially we look to the nature and severity of the offense, the repetitiveness of the conduct, the -- any prior disciplinary history, with respect to the practitioner in their capacity as a practitioner before the Service, any other aggravating and mitigating factors that may apply, and also the impact that not disciplining the practitioner or not sufficiently disciplining the practitioner may have on the practitioner community and the taxpayer public at large.

Q Okay, let's look at each of those factors individually and apply them to this case. Explain how the nature and severity of the offenses in this case, how did that weigh in your decision with respect to the penalty that you recommended here?

A Well, in reviewing the file and again specifically now speaking to the allegations relating to taxpayer C and taxpayer T, I considered this conduct, and I know in consultation with the director, the director also considered this conduct, to be of an egregious nature. The arguments that had been raised, the positions that had been advanced with respect to each of these tax matters, involved positions that had been consistently rejected by the courts and persistence on the part of the Respondent in making those arguments and advancing those positions, in our view, was frivolous.

And the very nature of the sanctions were egregious -- I mean, the very nature of the allegations, rather, were egregious.

Q Moving to the second factor you mentioned, repetitiveness of the offenses, and what was your assessment of that with respect to Mr. Banister's conduct?

A Well, the arguments here and especially with respect to the code section 861 arguments were made with respect to more than one taxpayer matter. So there was a repeated advancing of these positions. Subsequently we learned of the issue of the Respondent's individual income tax accounts, and again there was a repeated violation there of a failure to file individual income tax returns as required.

Q I didn't hear you mention anything regarding the fact that Mr. Banister had no prior disciplinary proceedings or instituted with respect to your office; how did that in any way impact your decisions?

A To my knowledge, there has been no prior disciplinary action by our office with respect to the Respondent. That is a fact; however, in the office's view that does not tip the scales, if you will, does not change the equation with respect to the sanction that we're seeking here.

Q Were there any factors that you deemed to be aggravating in this case?

A One factor that we considered to be aggravating was the fact that the Respondent was advancing these

positions in light of his experience and professional education. It is an undeniable fact that the Respondent, in addition to being a certified public accountant, is a former IRS special agent with the criminal investigation division, and while that fact in and of itself does not provide a motive or reason for our office to be instituting this proceeding, and even absent that fact, we would believe that the circumstances would warrant disbarment, it is an aggravating factor because, first of all, the Respondent certainly should know of the frivolous nature of the positions that he has advanced; and secondly, makes frequent mention of his experience with the Service in his own -- in the course of his own practice, in an apparent attempt to lend credibility to the positions that he takes.

Q Based on your review of the documentation in this case and just your review of the case as a whole, did you note any mitigating factors?

A No mitigating factors that I can recall, other than, as I previously mentioned, that there was no prior disciplinary history vis-a-vis the Respondent.

Q As the judge has indicated, there's a broad range of penalties that, you know, you could have applied, anything from a censure to a suspension, disbarment being the ultimate, and why wasn't a lesser penalty imposed or recommended in this case?

A Well, the reason that the recommendation of our office was to seek disbarment is because there is no indication that the practitioner has shown any type of

remorse or repudiation with respect to the positions that he is advancing. The first allegation letter was issued by our office in April of 2001. It has now been two and a half years and even at the point that the referral was made to General Legal Services requesting that a complaint be issued, that was July of 2002, well over a year after the allegation letter was first issued.

And so not disbarring the practitioner, seeking anything less than a disbarment, we believe, would send a message to the practitioner community and to the taxpaying public that these arguments and positions are somehow legitimate. It lends an air of legitimacy to the positions that the practitioner advances.

Q Other than you, who else in your office provides or gives input into the decision regarding which penalty you're going to recommend?

A Well, there's actually several individuals involved. As I mentioned previously, the referring party, which is typically, though not always, an IRS employee, may suggest specific sections that they believe have been violated. In addition to that, the attorney or in the case of this particular matter, the appeals officer who initially developed the case, may identify specific sections and as a result of that what penalty they believe is appropriate.

Ultimately when the case is ready for referral to General Legal Services, I make the recommendation as to what penalty to seek and that recommendation is made in consultation with the director and now that we have a deputy

director, it would also be with the deputy director's involvement.

And ultimately that decision is the director's call.

Q Now based upon an analysis of the factors that you just amplified for us, what was your office's decision or what was your office's recommendation in terms of penalty regarding Mr. Banister's conduct?

A The recommendation to counsel was that we seek disbarment.

Q You indicated that this case came into your office during the time that you were formerly under the Director of Practice?

A That's correct.

Q Since that time we've changed over, you've changed over, to the Office of Professional Responsibility; has the current director had an opportunity to weigh in on this recommendation, and if so, what was his opinion regarding the penalty?

MR. BARNES: Objection, Your Honor, calls for hearsay.

JUDGE MORAN: Well, hearsay is admissible in these proceedings. Overruled.

THE WITNESS: When the referral was originally made to General Legal Services, you are correct, that was under the Director of Practice, and so the recommendation that we seek disbarment was one that the Director of Practice concurred with. At the time that the new director

came into office in January of this year, this was one of many cases that I briefed the director about, and he has concurred with our office seeking disbarment at this proceeding.

MS. GIBSON: And I have one final question.

BY MS. GIBSON:

Q Is this case a case of first impression for your office in terms of seeking disbarment where these types of arguments have been raised by a practitioner?

A No, it is not. There have been several other cases. I wouldn't say they're numerous but there have been several other cases that our office has pursued involving the advancing of positions that have been rejected by the courts as frivolous and typically in those cases our office has sought disbarment.

MS. GIBSON: I've nothing further.

MR. BARNES: Mr. Finz --

JUDGE MORAN: Cross-examination, yes, you're going to do this, Mr. Barnes?

MR. BARNES: Yes, Your Honor.

JUDGE MORAN: All right.

CROSS-EXAMINATION

BY MR. BARNES:

Q Mr. Finz, do you have express authority to determine the penalty that should be issued against Mr. Banister?

A No, I don't have the authority to determine penalty; I have the authority to recommend to counsel what

penalty to seek. The determination of penalty's made by the Administrative Law Judge.

Q But, so you do have the -- in terms of the director's office, you do have the authority to determine what penalty should be sought in this proceeding?

A In consultation with the director.

Q Well, do you have the authority or do you not have the authority?

A I make the recommendation and the director concurred with it.

Q Oh, so, well, my question is, is it the director who has the authority, or do you have the authority?

A No, the director has the authority under the regulations.

Q Okay --

A I can make a recommendation to the director as to what penalty I've determined is appropriate for us to seek, and then if the director does not concur with that, then the director has the final say.

Q So in fact the director has the authority, not you?

A That's correct.

Q Do you remember signing an affidavit in this case?

A Yes.

Q In that affidavit, do you not say that you had express authority to determine the penalty that should be recommended?

A To determine the penalty to seek, yes.

Q But now you're saying you don't have that authority?

A The director has given me the authority to work the case and determine what penalty to seek. That does not mean that I don't have the responsibility to report to the director.

Q Is that authority in writing?

A It's part of my duties. I'm not quite sure what you mean by in writing.

Q Does the director in writing give you the authority to determine or recommend the appropriate penalty to be sought in disciplinary proceedings?

A No, I don't have anything in writing to show you, if that's what you mean. That is part of my duties and the director signed the allegation letter that originally went out to your client in April of 2001. That letter expressly states that our office was considering seeking disbarment, and that letter predated my involvement in the case.

Q In that letter, was any opportunity to achieve compliance expressly given to the Respondent?

A During the 30-day period that was extended to the Respondent to make a response to the allegation letter, the Respondent certainly could have repudiated or disavowed any positions --

MR. BERNHOFT: Move to strike as unresponsive, Your Honor.

JUDGE MORAN: No, overruled.

BY MR. BARNES:

Q Did you expressly give him that opportunity in writing in the letter?

A I didn't write the letter but as best as I can recall, the letter does not state you have an opportunity to disown the positions you previously advanced.

Q What, was your office aware of the fact that Mr. Banister had made an appearance on 60 Minutes alleging fraud and abuse against the IRS?

MS. GIBSON: Objection.

THE WITNESS: Yes.

MR. BARNES: I'm just asking whether he's aware of it.

MS. GIBSON: It's objection.

JUDGE MORAN: The objection is sustained. You're going afield, Mr. Barnes.

MR. BARNES: Okay.

BY MR. BARNES:

Q Let's talk about what foundation when you determine what, whether disbarment should or should not be the recommendation, do you consider the person's prior record as a professional in terms of their record with the -- as an accountant or as an attorney with the local or state professional regulatory board or licensing board?

A Well, I should say that we are aware of the fact that the Respondent is a certified public accountant, I believe with the California Board of Accountancy. But we do not consult with the state licensing authority in seeking to institute a disciplinary proceeding here that might suggest

to the state licensing authority that the person has done something improper when in fact there's been no finding of wrongdoing.

So other than to verify their licensing status, no, we do not.

Q Do you investigate whether or not they've ever been sued before for malpractice or anything like that?

A Typically not.

Q Do you talk to their former clients or their current clients?

A No, we do not.

Q Do you --

A I should clarify one thing, though, however; if a former client has indicated their willingness to testify in a hearing, for example, if they are the referring party, then in a situation like that we might in fact speak to them.

That was not done here.

Q Okay, so there was no complaint by any taxpayer that Mr. Banister represented to the agency regarding his conduct?

A None that I am aware of.

Q Let's talk about you said there have been other similar cases to this one; can you give me the facts of those similar cases?

A Well, without mentioning the identity of the practitioners, I can tell you, for example, that several months ago there was a hearing brought under Circular 230 in

which the Administrative Law Judge presiding over that hearing disbarred a practitioner for having taken positions similar to those taken with respect to code section 861 and code section 61, I believe involving not only their personal tax matters but also with respect to their representation of taxpayers before the Service.

Again, I'd rather not identify the practitioner --

JUDGE MORAN: You shouldn't.

THE WITNESS: -- by name.

MR. BARNES: The --

JUDGE MORAN: Let me just interrupt for a second.

Mr. Finz, are these, are the decisions of Administrative Law Judges published anywhere, are they not published?

THE WITNESS: Well, there's no ready digest of them, and unless they reach the level of a District Court proceeding I don't think they're even retrievable on Lexis.

JUDGE MORAN: But are they, they're not considered to be something that the public could not have access to, those decisions, are they considered to be privileged or --

THE WITNESS: Well, again, the regulations require the parties to deal with the issue of whether the proceeding's made public. Here that has been done. In the one that I'm referring to, I don't think there was any such motion made by the parties.

JUDGE MORAN: Go ahead, Mr. Barnes.

BY MR. BARNES:

Q Do you take into consideration whether the practitioner has asked questions about the specific issues to the agency before raising the questions in an administrative hearing?

A I'm not quite sure I understand your question.

Q For example, let's say a taxpayer was confused about the interpretation of a particular provision of the code, and they had an interpretation that might be different than the IRS's interpretation. If they specifically asked the IRS to clarify that and the IRS doesn't respond, do you take that into consideration when determining the appropriate penalty if they do later raise the argument in an administrative hearing?

A See, the difficulty I'm having in answering your question is because you stated this in the form of dealing with a taxpayer. We're not dealing with the Respondent here in his capacity as a taxpayer, we're dealing with him in his capacity as a tax practitioner, one who is presumed to know the state of existing law, and would not make arguments that are contrary to the state of existing law.

So I'm not quite sure that your question speaks to the issue that we're really dealing with here.

JUDGE MORAN: Well, but that's not up to you to comment on. Just say you can't answer it or whatever but without the --

THE WITNESS: Okay, we wouldn't --

JUDGE MORAN: -- additional comment.

THE WITNESS: -- we wouldn't be dealing with someone in their capacity as a taxpayer, but let's assume for the sake of argument a tax practitioner were to say, hey, I wrote a letter to the Commissioner expressing my positions, I never got an answer, or I wrote a letter to a tax examining technician and I never got an answer to that question.

We would look to the state of existing law as is readily knowable by any tax practitioner. The courts have ruled on issues regarding the ratification of the 16th Amendment and code 861. So the fact that the practitioner may not have received what they consider to be a satisfactory answer to a question they have would not in and of itself bar us from instituting this proceeding. And ultimately that would be for the judge to determine what relevance that might be.

MR. BERNHOFT: Move to strike as unresponsive, Your Honor.

JUDGE MORAN: Overruled.

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BY MR. BARNES:

Q In determining the -- do -- have other people ever raised -- have other tax practitioners raised arguments contrary to Tax Court opinions before the IRS?

A Sure they have.

Q Were all of them disbarred?

A I can't tell whether all of them have been disbarred because I can't tell you that our office is

necessarily aware of the identities of all of them. I can tell you that the ones that came to the attention of our office are cases in which we have sought, and in some cases have obtained and in others the cases are still pending, disbarment.

I can also only speak to issues regarding cases that I've been involved with since joining the staff of the office three years ago.

Q Do you always seek disbarment if someone advances an argument that's contrary to a Tax Court opinion?

A I could imagine there would be circumstances in which we would not necessarily seek disbarment. I don't believe this is one of them.

Q Is the -- are the revenue officers and appeals officers of the IRS obligated to follow the opinions of Tax Courts?

A Are the revenue officers and appeals officers obligated to follow the opinions of Tax Courts. With the respect to the discharge of their own duties?

Q With respect to adjudicating the tax liability of a taxpayer?

A Yes, I'm not really in a position to answer that question because I'm not, I've never worked in those functions or served as their manager. One would imagine that they would --

JUDGE MORAN: Okay --

THE WITNESS: -- consult with existing law.

JUDGE MORAN: -- you cannot answer that.

Go ahead.

BY MR. BARNES:

Q So the -- your position is that a tax -- the position of the director's office is that a tax practitioner cannot advance arguments that are contrary to the legal opinions of a Tax Court; is that correct?

A The position of our office is that if we believe the positions advanced by a practitioner are frivolous by nature we will institute or seek to institute a disciplinary proceeding for their disbarment or suspension from practice. To the extent to which there may be some legitimate ambiguity in the state of existing law, I believe Circular 230 provides for a realistic possibility standard to apply; however, the positions taken cannot be frivolous, and frivolous is defined in the regulations as patently improper.

Q Isn't it the case that the regulations do not prohibit referencing frivolous opinions in a collection due process hearing; that in fact that provision only applies to the filing of tax returns?

A The provision that I just cited to you, 10.34, deals with the preparation of returns, which is one of the matters before this Court.

Q The -- but, so, in fact, there's no prohibition on issuing frivolous opinions or talking about or having a frivolous opinion in an administrative hearing in a collection due process case?

A No, I didn't say that.

Q Okay, but, well, is there, can you tell me which --

A Yes --

Q -- regulation prohibits --

A -- I would commend you to section 10.51(1) which was formerly known as 10.51(j), and though you will not find the word "frivolous" in that paragraph, I believe you will see there that the giving of an opinion knowingly, recklessly or through gross incompetence is actionable under Circular 230 and specifically provides there that positions taken that involve a knowing misstatement of law or positions that are not grounded in existing law are considered to be opinions given knowingly, recklessly or through gross incompetence.

I would also point to section 10.22, which requires a practitioner to exercise due diligence with respect to representations made to the Treasury and to the practitioner's own clients.

Q If a taxpayer wants to petition the IRS as to a political issue, are they free to do so, or not?

MS. GIBSON: Objection. This has been ruled on. He's getting outside of the scope of testimony.

MR. BARNES: I --

JUDGE MORAN: Yes, I believe so, that's over -- the -- it's -- objection sustained.

BY MR. BARNES:

Q The -- are you aware that revenue officers and appeals officers do not have to follow Tax Court opinions when they make decisions about taxpayer liability?

MS. GIBSON: Objection. I'm objecting because I think he's getting to the argument that you ruled on in the November 26th motion or order. He's trying to get to the issue of a taxpayer or IRS employee in Georgia who issued a refund and --

JUDGE MORAN: Well, I --

MS. GIBSON: -- did something inconsistent with what happened in this case and you ruled on it.

JUDGE MORAN: I don't know that I would go as far as trying to interpret what Mr. Barnes is doing but I sustain your objection.

BY MR. BARNES:

Q What, does the Director of Practice have any issuing policies or procedures or guidelines about determining when to seek disbarment or when to seek a different sanction?

A No, I believe I've already testified that it's not something that's reduced to a formula. There is a requirement in section 10.62(b) that the office specify in the complaint what sanction it is seeking, and I've outlined for the Court the fact --

MR. BERNHOFT: Your Honor, surely --

THE WITNESS: -- there's a likeness in here --

MR. BERNHOFT: -- unresponsive, and the question was very straightforward, very direct. Mr. Barnes simply

queried the witness as to whether there were guidelines in writing. I mean, it seems to me to be a yes-or-no answer.

JUDGE MORAN: Why don't you just try and give more direct answers. If you feel it's important to give a complete answer, you can do that after you give a yes or no.

THE WITNESS: Okay, the direct answer is no, there are not published guidelines as to sanction.

If I may follow up on that, I just again would like to reiterate that I've outlined the factors that were considered in this case, which are applied at least since I have joined the staff consistently to all cases that are referred to General Legal Services for the issuance of a complaint.

BY MR. BARNES:

Q The -- you've talked about aggravating and mitigating factors; what goes into -- what would be a mitigating factor for a practitioner in determining whether or not to seek disbarment?

A That would depend on the circumstances. It would depend on the nature of the allegations of misconduct. For example, if we were dealing with a case that involved no other allegation but a practitioner's own failure to timely file their individual income tax returns, our office might look favorably upon a circumstance that looked like a discrete event that could explain the person's initial noncompliance and their subsequent compliance with their filing obligations.

So if a person were to say my spouse died or there was a divorce or there was a fire and records were destroyed and I wasn't able to get my return in on time, I wasn't aware of the possibility of filing for an extension, and I got my returns filed as soon thereafter as I could.

It doesn't appear to be something that's going to repeat itself in the future. That's a mitigating factor.

Q The alleged behavior in this case regarding the representation of the two taxpayers took place in the year 2000; is that correct?

A I know the returns in the matter involving taxpayer T were filed, the 1040-Xs were filed, in 2000. I don't remember the exact date of the CDP hearing but it was probably somewhere around that time.

Q And since then there have been no written referrals from IRS employees or taxpayers alleging any misconduct against Mr. Banister; is that correct?

A When you say since then, the initial referral came into our office in late 2000 or early 2001 with respect to taxpayer C.

Q Since --

A Subsequent to that we learned about the matter involving taxpayer T and additionally we learned in the summer of this year, I believe it was, about the issue involving the Respondent's own personal tax noncompliance.

So those two matters came to our attention subsequent to 2000.

Q But there's only been one written referral in this case; is that correct?

A No, I'm not quite sure that when you say only one written referral that is correct, because I do have correspondence relating to the personal tax compliance issue that came in to me from counsel.

Q But those are the only two?

A The matters involving taxpayers C and T being one of them and the matter involving the practitioner's own compliance being the other? Yes.

Q There have been cases where someone has not, has failed to file a return where the IRS has not sought disbarment; is that correct?

A Cases in which a practitioner has failed to timely file their own individual income tax return?

Q Correct.

A And the IRS has not sought disbarment? And there are no other issues in the case but the failure-to-file issues?

Q Yes.

A Yes, that would be correct.

Q And there are cases where someone has advanced an argument that IRS considered frivolous, and the IRS has not sought disbarment?

A No, that I can't say for certain. I said I could envision a possibility of that coming up.

Q But in your 120 cases or so that you've done, those, that fact pattern, hasn't appeared?

A There's only been a handful of cases involving the advancing of arguments that our office would consider frivolous, and in every one of those cases our office has sought disbarment.

Q You yourself were aware of Mr. Banister's, the Respondent's, prior status as an agent of the IRS, correct?

A His status as an IRS special agent?

Q Yes.

A Yes, that is correct.

Q And you considered that an aggravating factor in this proceeding; is that correct?

A Not in and of itself that he was an IRS special agent, but the fact that he is apparently referencing that in his own practice as a way to, again, lend credibility to his positions.

Q Where was that information referenced?

A Where was that information referenced? The information is referenced in the Respondent's book, Investigating the Federal Income Tax, A Preliminary Report, which was part of the referral that was sent to General Legal Services.

Q The -- let's see -- when you evaluate the public interest prong of the decision to disbar, do you consider the need for the public to petition the government or free speech, do you take those factors into consideration as to the public interest? Or what constitutes public interest?

JUDGE MORAN: You can say --

THE WITNESS: Okay --

JUDGE MORAN: -- if you do that.

THE WITNESS: -- yes, the practitioner is certainly free to express what, any points of view that he may wish in the public forum in terms of his political rights under the First Amendment, freedom of speech, freedom of assembly, freedom of association, freedom of expression. This is about his practice before the Service, and in a representational capacity there are standards of conduct that need to be followed.

And I believe the Court has already spoken to the issue of the inapplicability of these First Amendment arguments to a proceeding such as this.

JUDGE MORAN: Well, that's true. I was going to add, Mr. Barnes, you know that in one or more of my orders I made reference to that which you used in your last question.

BY MR. BARNES:

Q Who else did you have conversations with in determining whether or not to seek disbarment?

A The appeals officer that initially developed the case.

Q Who was that?

A Ernest Barone. The then Director of Practice, Patrick McDonough. And in making the referral to General Legal Services I necessarily had conversations with our attorney of record, Jay Kessler.

Once Mr. Downing became the director of the office at that point the case was already in the process of litigation. But I certainly briefed him about the existence

of the case, so at that point I had a conversation about it with Brien Downing.

And Brien, for the record, is spelled B-r-i-e-n.

Q Did you have any discussion with the Department of Justice attorneys or criminal investigation division employees or anybody like that?

A I did not have any discussions with the Department of Justice regarding this case. I believe that there was a discussion between Ernest Barone and representatives from criminal investigation but I did not personally speak to CI.

MR. BARNES: No further questions, Your Honor.

JUDGE MORAN: Okay.

Ms. Gibson, anything on redirect?

MS. GIBSON: Yes.

We need to get some exhibits together, Your Honor, at this point.

(Pause.)

JUDGE MORAN: Just for your benefit, Ms. Gibson, it's my view that unless it was something that was brought up during the cross-examination that there's no need for you and I'd be listening to objections if you start to enter into new territory.

MS. GIBSON: Okay, no, this deals specifically with the question regarding where in specific documents did Mr. Banister reference his CI employment with the IRS or his former employment with IRS as criminal investigator.

JUDGE MORAN: Okay.

It references what?

MS. GIBSON: His employment, former employment with the IRS as criminal investigator. And I was going to refer the witness to various documents and then let him expound on that, those issues. So now here's a copy for you.

JUDGE MORAN: You have a copy for counsel to Respondent?

MS. GIBSON: They're exhibits that the agency's already submitted and I will refer to them. They should have their copy already with them. Going to be Complainant's Exhibits 2, 3, 8, 26, 27, 28 and 29.

JUDGE MORAN: All right.

Mr. Barnes, do you need a copy?

MR. BARNES: We don't need the document, Your Honor.

JUDGE MORAN: All right.

REDIRECT EXAMINATION

BY MS. GIBSON:

Q Mr. Finz, there -- you were, specifically, you were asked during cross-examination whether or not or where in documents had Mr. Banister made reference to his former employment with the IRS. And I'll give you a set of documents, and if you could just please go through those documents starting with Complainant's Exhibit 2, tell us what that document is, what, how you recognize it, and if there is a reference, and if so, what's the page?

A Okay, with respect to Complainant's Exhibit 2, this appears to be a printout from a website entitled WWW-dot-JosephBanister-dot-com.

I don't know the extent to which you want me to read this into the record, but it clearly makes reference to his education, experience and credentials, and it states 1993 to 1999, IRS criminal investigation division, special agent.

Q Okay, and what page are you on in that exhibit?

A That's on the first page of Complainant's 2.

Q Okay, looking at Complainant's Exhibit 3, same information, please?

A Okay, this is from a website, a printout from a website, entitled WWW-dot-freedomabovefortune-dot-com; it displays a photograph which has the likeness to the Respondent; and it does contain a reference here to the Respondent is former IRS criminal investigation division special agent who learned of serious Constitutional questions.

JUDGE MORAN: Which page is that on, sir?

THE WITNESS: The first page.

JUDGE MORAN: Okay.

BY MS. GIBSON:

Q Looking at Complainant's Exhibit No. 8, would you please answer those same questions?

A Yes, this is the publication that I made reference to during my testimony on cross-examination. This is a publication authored by the Respondent entitled

Investigating the Federal Income Tax, A Preliminary Report, and this publication makes reference to the practitioner's former employment with the Service.

Trying to find the --

JUDGE MORAN: Can you direct --

MS. GIBSON: Yes.

JUDGE MORAN: -- the witness, it's a lengthy exhibit, Ms. Gibson.

For the record, this exhibit, I believe, contains 95 pages.

MS. GIBSON: I think it would be the cover page -- I'm not sure if your cover page --

THE WITNESS: Well, I'll --

MS. GIBSON: -- photocopied.

THE WITNESS: -- the back cover actually makes reference, says about the author, and it says he became a licensed certified public accountant, CPA, in 1991 but left the practice of public accounting in 1993 to accept appointment to the US Department of the Treasury, IRS criminal investigation division, as a special agent, parentheses, (criminal investigator).

MS. GIBSON: Let the record reflect, Your Honor, that the agency's copy has the back cover as the top document, top page of the document itself.

JUDGE MORAN: I see.

MS. GIBSON: So it's the about-the-author section there.

JUDGE MORAN: All right, and when I, when the Court referred to the number of pages in the document, I wasn't quite accurate. There are enumerated some 95 pages but before the numbering begins there are four preliminary pages before the page 1 which is entitled Introduction. So actually there's 99 pages, or 98 -- okay, 99.

BY MS. GIBSON:

Q Mr. Finz, directing your attention now to Complainant's Exhibit 26, do you see a reference there regarding Mr. Banister's former employment with the IRS, and if you could also tell who authored that document?

A The author of the document is clearly the Respondent, Joseph R. Banister, CPA, bears his name and signature. It's going to take me a moment to find the reference -- oh, it's in the second paragraph of the first page.

For your information, I spent five and a half years as an Internal Revenue Service criminal investigation division special agent.

Q Directing your attention to Complainant's Exhibit 27, same information, I'm asking the same question?

A Exhibit 27 does not appear to have been authored by the Respondent. It bears the name and signature of the person that we're referring to as taxpayer C.

Q On page 1 in the third paragraph, do you see a reference to Mr. Banister's former employment with the IRS?

A Towards the end of the third paragraph it says

Mr. Banister further told me that he knew of no statute or regulation that imposed a federal income tax on the income that I had reported. Mr. Banister also told me that in his capacity as an IRS criminal investigation division special agent he had asked the Internal Revenue Service to show him where such income might be taxable.

Q Looking now at Complainant's Exhibit 28, same question?

A Okay, this one does appear to have been authored by the Respondent and bears his name and signature. It is addressed to Ken Canfield, the revenue officer who had made the initial referral to our office. And at the bottom of the first page it says as I mentioned I spent five and a half years as an IRS criminal investigation division special agent. I brought this to your attention on the telephone not to seek any special favors but rather to convey to you that this issue should not be dismissed or taken lightly.

Q Okay, and finally, looking at Complainant's Exhibit 29, specifically, the second page of that document, and I'll direct your attention to the latter portion of that second paragraph under background, do you see any reference there?

A Yes, I do. Now the second page would be the first page following the cover letter, and that is a form 12-153 request for a collection due process hearing. At the bottom of the page it says I further told -- and I'm going to refer to this person again as taxpayer C -- I knew of no statute or regulation that imposed a federal income tax on the

income that he had reported. I further told, again, taxpayer C that in my capacity as an IRS criminal investigation division special agent I had asked the Internal Revenue Service to show me what statute or regulation made the income of the average American subject to the income tax.

Q Okay, and looking at the upper portion of the same page you're on, can you identify who authored this document? That's first page after the cover --

A It says representative and author of this statement, Joseph R. Banister, CPA.

MS. GIBSON: Okay, I have nothing further.

MR. BARNES: The --

JUDGE MORAN: One second.

MR. BARNES: Sorry.

JUDGE MORAN: Mr. Finz, how many years have you been doing this now with the IRS in their Office of Professional Responsibility?

THE WITNESS: I've been with the office for three years.

JUDGE MORAN: All right. Do you have an opinion whether, if there were no Exhibits 2, 3, 8, 26, 27, 28 and 29, Complainant's exhibits all, in other words, if there had not been as an element of this case, if there had not been any touting of one's prior experience, do you have an opinion about whether the IRS would still be seeking disbarment if you removed that consideration from this case?

THE WITNESS: We absolutely would still be seeking
disbarment.

JUDGE MORAN: Mr. Barnes.

REXCROSS-EXAMINATION

BY MR. BARNES:

Q So you reviewed all those documents prior to
making the determination as to seeking disbarment?

A I can tell you for certain that I reviewed
Investigating the Federal Income Tax, A Preliminary Report.
I can tell you -- that's Exhibit 8. I can tell you for
certain that I reviewed Exhibits 26, 27, 28 and 29.

I know that I was aware of the existence of the
two websites referenced here, JosephBanister-dot-com and
freedomabovefortune-dot-com. I can't recall exactly when
was the first time that I reviewed these particular web
pages. I believe I referenced their existence in the
referral to General Legal Services, though.

Q But you reviewed both of them prior to your
testimony today?

A Prior to my testimony today I reviewed
Investigating Federal Income Tax, Preliminary Report -- how
long prior to my testimony, you mean at any point?

Q Yes.

A Prior to my testimony?

A Exactly.

Q Again I repeat what I just said, I reviewed all of
these with the exception of the website pages prior to
making the referral. I can't tell you exactly when I

reviewed these but it was before my testimony here today, and probably before the complaint was issued.

Q And the statements in those documents were considered aggravating factors to determine whether or not to seek disbarment?

A Well, as I just testified, our office would have been likely seeking disbarment again, I would have conferred with the director if the facts were different. I have little doubt it would not have changed the equation. They exist, they are an aggravating factor. Had they not existed, I would have still recommended to the director that we seek disbarment and it would have been the director's decision.

But I am quite confident it would not have changed the equation.

Q Is it your position that someone who is a former agent of the IRS who espouses these ideas is more of a threat to the public than a regular practitioner who espouses these ideas?

A I'm not quite sure the word is more of a threat. It's troubling that a practitioner would use their prior experience with the Service to lend credibility to these positions. Again, either way, our office would see permitting the practitioner to continue practicing as a danger to the taxpaying public who might rely on these positions.

So I don't know if it's a matter of more or less. It is aggravating but again the threat is the underlying

positions that are being taken. To the extent that the Respondent cites to his former employment, I assume it's something we can't ignore.

MR. BARNES: No further questions, Your Honor.

JUDGE MORAN: Okay.

MS. GIBSON: Nothing further.

JUDGE MORAN: All right.

Thank you, Mr. Finz.

THE WITNESS: Thank you. May I return these to counsel?

JUDGE MORAN: Yes.

(Witness excused.)

JUDGE MORAN: Just one moment.

(Pause.)

JUDGE MORAN: Because we do have a number of people in the -- observers here of public, I want to explain the next phase of this proceeding for all.

By prior agreement with the parties, Mr. Banister, who could come up and give sworn testimony, that would be one of his options, he has decided with assistance of his counsel instead to make a statement.

Is that right, Mr. Bernhoft?

MR. BERNHOFT: Yes, Judge.

JUDGE MORAN: And that statement will not be under oath, and for that reason the statement will not be subject to cross-examination by the Internal Revenue Service. So I don't want you to assume anything from that, I'm just explaining to the people in the public there what's

happening next and how it's different from some -- what can happen in some proceedings.

Are you ready, Mr. Banister, to stand and make your statement, sir?

MR. BANISTER: Yes, Your Honor.

JUDGE MORAN: Or sit, whatever you're comfortable with.

MR. BANISTER: I prefer to stand, please.

JUDGE MORAN: Okay.

MR. BANISTER: I don't know if the microphone is picking up properly, I'm kind of tall.

THE REPORTER: It is.

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STATEMENT OF THE RESPONDENT

MR. BANISTER: I would first like to assure the Court that I have read and understand the order limiting what I am able to say in these proceedings.

I object to the order limiting what I can say in these proceedings.

I will respect and adhere to it.

I have had a unique opportunity to view the administration, compliance and enforcement of the federal income tax system and the operations of the Internal Revenue Service from different perspectives: the perspective of citizen, the perspective of a certified public accountant assisting clients with IRS matters before my IRS employment, the perspective of an IRS criminal investigation division

special agent, and lastly, the perspective of a certified public accountant assisting clients with IRS matters after my IRS employment, a perspective which has undoubtedly contributed to the reason that I stand here today.

As a citizen, my perspective on the federal income tax system, the Internal Revenue Service, has not been unlike most Americans'. I was first exposed to the federal income tax system at the age of 12 when I was assigned my first newspaper route and was told by the San Jose Mercury-News and my parents that some of the money I earned would be deducted out of my pay for income taxes.

In my adolescent years, I learned that in order to reacquire some of the earnings taken out of my paycheck I had to file an income tax form to get the earnings back. I had no negative perception or adverse reaction to performing whatever income tax compliance accompanied earning my pay. I did what I believed was required of me. In fact, my perception of the federal income tax system as a citizen was positive enough that I enrolled in and graduated from the accounting program at San Jose State University where income taxation was heavily emphasized. I pursued licensure as a certified public accountant and purposely developed expertise in income tax matters. And my perception about the income tax system was positive enough to make me want to pursue a lifetime career as an Internal Revenue Service criminal investigation division special agent.

Clearly, my entire academic and professional life revolved around the federal income tax system. And for over

a decade of my professional life I committed myself to creating a reputation of excellence in that field. For over a decade of my professional life and nearly 30 years of my personal life I viewed the federal income tax system as one of many legitimate and necessary functions of government and was proud to have developed expertise in that discipline, first as a tax professional and later as a criminal investigator for the Treasury Department.

I am as surprised as anyone that my perspective on the federal income tax system and the Internal Revenue Service changed during time I served as an IRS special agent. I sacrificed a great deal to become an IRS special agent and I was more than willing to make those sacrifices because I believed I was using my financial skills to protect the US Treasury against frauds and cheats.

For example, I willingly submitted myself to two thorough background investigations, one administered by the FBI and one administered by the IRS, where the most personal aspects of my life were examined. I lost my job because the FBI background investigation alarmed the firm I was working for that I would not be able to continue in my position and I therefore spent the next two years unable to find permanent work.

I willingly experienced a 15-to-20-thousand-dollar initial cut in pay to become an IRS special agent and was set back financially by tens of thousands of dollars as I awaited my annual promotions at the IRS. I was subjected to a routine employee tax audit whereby an IRS tax auditor

examined three years of my previously filed federal income tax returns. I was told beforehand that the auditor would treat me, quote, "just like any other taxpayer", unquote, and I soon learned what that warning meant.

After thoroughly reviewing my returns and the income and deduction evidence I had submitted to him, the IRS auditor alleged that I owed thousands of dollars in back taxes. I was shocked that an IRS auditor would make such an allegation, not only because I sincerely believed I had prepared my returns accurately, but because I wondered what such an allegation, if sustained, would do to my credibility as an IRS criminal investigator.

Fortunately for me, I knew how to evaluate the IRS auditor's allegations. I determined that he was misapplying the applicable statutes and regulations and I showed him the proof. While reviewing my old documents I discovered other deductions that I had neglected to take, and brought these to the attention of the IRS auditor. Eventually he was forced not only to retract his allegation of additional tax due, but approve a refund for the deductions that I had missed.

What started as a claim by an IRS agent that thousands of dollars in back taxes was owed, turned into a \$1000 refund in my favor and a letter from the district director commending me on my honesty. But only because I knew how to rebut the IRS auditor's claim, and I was not afraid to do so.

This experience most definitely affected my perspective on the manner in which the federal income tax system is administered and it caused me to wonder what such an audit might be like for the average citizen and what happens to them when they are not sophisticated enough or brave enough to battle with an IRS auditor who is demanding back income taxes based on incorrect assertions.

As further sacrifices that I engaged in, I spent 16 weeks away from my wife and children as I trained to become an IRS special agent, I willingly withstood the questioning and even scorn of other CPAs who inquired why I would move from the lucrative private sector into government service. I also worked extremely hard while serving as an IRS special agent. For example, I was elected president of my training class for the first eight-week session by over 40 of my peers, and maintained a 95 percent academic average. My peers re-elected me president of my training class for the second eight-week session, and I maintained a 93 percent academic average.

I earned as a special agent a special act award in June of 1995. I earned a certificate of recognition in March of 1996. I earned a performance award in September of 1996. I earned a sustained superior performance award in August of 1997. I earned a top athlete award in December of 1997. And I served as the asset forfeiture coordinator and the organized crime drug enforcement task force coordinator for the IRS criminal investigation division, central California district. And I earned at least five grade and

step-within-grade promotions beginning at the GS-7 level and eventually progressing to the GS-13 level.

During the last two years of my employment with the IRS criminal investigation division, I encountered and accumulated information and evidence about the inception and administration of the federal income tax system and the practices of the Internal Revenue Service that deeply disturbed me and contributed to a change in my perspective. I believed that I had a moral, ethical and legal duty to evaluate the information and evidence.

Once my evaluation of the information and evidence was substantially completed, I believed I had a moral, ethical and legal duty to submit it to my supervisors for their evaluation and comment. I fulfilled that duty.

They refused to address my concerns and encouraged my resignation. After my resignation, I humbly asked the local IRS office to meet with me to discuss what the tax laws required of me. The district director wrote me a very gruff response providing only a pamphlet and a refusal of my request for a meeting.

I have travelled to Washington, DC, numerous times where I joined many other Americans in an attempt to petition government officials for answers and guidance, including the IRS and the US Department of Justice. The IRS and Department of Justice went to extraordinary lengths not to answer our questions or petitions, even reneging on oral and written promises to answer our questions.

The Court has prohibited me from describing the information and evidence I encountered and the beliefs I have formulated both during and subsequent to my years at the IRS, dismissing all of it as, quote, "tax protester arguments" and, quote, "tax protester beliefs". Interestingly enough, my perspectives and beliefs are an integral component of the allegations levelled against me, given that the IRS allegations used words like "willfully misleading", "willfully making", "knowingly misleading", "conscious disregard", "intentionally misleading", "reckless conduct", "gross indifference" and "gross inadequacy".

I have been forbidden from confronting my IRS accusers to evaluate what, if any, evidence they have accumulated to prove that my conduct was willful, knowing, conscious disregard, intentional or reckless. I have been forbidden from introducing my own evidence proving that my conduct was not in any way willful, knowing, conscious disregard, intentional or reckless. I've been forbidden from presenting evidence of the number of time I have petitioned government officials in good faith for a redress of grievances in connection with the income tax and IRS injustices that I have encountered.

For reasons I do not understand, I have been unable to impress upon my IRS supervisors, IRS collection personnel, IRS appeals personnel, IRS management, the IRS Assistant Commissioner, the IRS Commissioner, the Treasury Inspector General's office, the Treasury Department, the US House of Representatives, the US Senate, the Supreme Court,

the Clinton administration, the Bush administration and even an Administrative Law Judge from the Environmental Protection Agency that the IRS as an agency is engaged in serious wrongdoing.

Which brings me to the point of describing the most recent perspective I have gained about the federal income tax system, that of my role as a certified public accountant assisting clients with IRS matters after my resignation from the IRS. It is the performance of that role, of course, that has brought me to this courtroom.

Once I resigned from the Internal Revenue Service, my detailed knowledge of the IRS's wrongdoing increased at a seemingly exponential rate. I believe that the IRS routinely skips or ignores its administrative due process procedures because I have witnessed it. I believe that the IRS treats citizens who refer to or quote from sections of the Internal Revenue Code, Code of Federal Regulations, the internal revenue manual or, heaven forbid, the US Constitution, basically anyone who desired to compare IRS agent conduct with the laws that govern their conduct as, quote, "tax protesters", unquote, rather than concerned citizens, because I have witnessed it.

I believe that IRS agents routinely and illegally exceed their delegated authority, because I have witnessed it. I believe that the IRS purposely and fraudulently manipulates its individual master file computer system to achieve desired results against the unsuspecting public, because I have witnessed it. And I believe the IRS targets

for economic reputation and livelihood destruction anyone who opposes it, because I have witnessed it.

Indeed, I have lived it.

I believe my perspective about the federal income tax and the IRS, as a certified public accountant assisting clients with IRS matters, is consistent with the teachings of my Christian faith and the ethics of my profession. The teachings of my Christian faith were indelibly etched in my mind, especially as a young man attending Bellarmine College Preparatory, San Jose, California, where the school motto has always been, quote, "Be a man for others", unquote.

My father, who also graduated from that same institution, made sure that this phrase became more than a motto in my life, but a code to live by. My Christian faith forbids me from bearing false witness against my neighbor. I therefore have always been candid and truthful in my personal and professional life. The ethics of my profession instruct that I must not only do my best to distinguish between right and wrong but always try to do what is right.

I have adhered to the ethical principles of my profession throughout my career and most fervently during my service as an IRS special agent, and over the last four years since resigning from the Internal Revenue Service. In fact, upon resigning from the IRS I was required to take a mandatory ethics examination to reactivate my CPA certificate. The preparation material spoke of the following guidelines which I had highlighted at the time for emphasis, quote, "Ethical decisions always consider the

effects on others; unethical decisions disregard the human consequences", unquote.

Quote, "Every person is an independent moral agent capable of making choices and accountable for the consequences of those choices", unquote.

Quote, "A separate and morally superior source of ethical obligation is the individual's ethical value system which forms the conscience", unquote.

Quote, "A common excuse made by those who act improperly is that they were required to do so at the risk of their job or career; this excuse does not free one of the obligations of conscience and ethical duty, since neither popular opinion nor occupational or regional norms of behavior override sincerely held ethical values", unquote.

I believe that I have a moral and ethical obligation to zealously advocate on behalf of my clients. I worked diligently for them and I believed I had an obligation to make sure the administrative record reflected as many relevant facts as possible. I have performed many hours of diligent research and consulted with knowledgeable people. I incorporated provable facts and evidence into documents submitted to the IRS. I was honest and open with my clients and with IRS personnel. I never made statements that I knew to be false. I believed I was following my client's instructions in attempting to defend them against IRS officials who were determined to devour them.

To my knowledge, neither of them have ever complained about the services I rendered to them. In fact, they complimented me on my vigorous defense.

I truly believe that the Internal Revenue Service officials both past and present had at the very least deceived and the very most defrauded my clients and it was my obligation to come to their aid.

In closing, I would ask the Court to consider that its decision to eliminate all discussion and examination of my credibility, experiences, beliefs and intentions in connection with my conduct when all of the allegations levelled against me are based on just such criteria, impugning my beliefs and experiences while denying me an opportunity to have those beliefs and experiences displayed -- displayed, I'm sorry -- and examined is wrong and inconsistent with the American tradition of fairness and justice.

I hope that the Court will recognize that my core belief system would never allow me to knowingly, intentionally or willfully engage in any of the conduct the IRS has alleged in its complaint. Silence in the face of wrongdoing is as bad as the wrongdoing itself.

Thank you.

JUDGE MORAN: Okay, thank you, Mr. Banister.

Now is there anything else people are -- I'm going to make a closing statement -- is there anything else that the -- do the parties want to make closing statements about this case? Yes?

MR. KESSLER: Yes, Your Honor.

MR. BERNHOFT: Yes, Your Honor.

JUDGE MORAN: Okay, I want to, before I allow you to do that, I want to make a comment.

First of all, if you remember at the outset I said that I would be issuing a decision within a week. Actually I misspoke about that. I -- the decision will be issued within a week after I receive the transcript, because I'll want to review that and include certain portions of the transcript in my decision.

Now the second point I would like to make is that because the public has an interest in this case, I would ask for IRS to work with counsel for Mr. Banister and to see if the decision can be made public so that the public can understand the Court's rationale in deciding what the sanction should be. Otherwise, the public that's here gets shut out and doesn't understand the Court's rationale for whatever sanction I decide to impose.

So I ask, Mr. Kessler, work with Mr. Finz and with Mr. Bernhoft, and then to notify me shortly, within, let's say, a few days as to whether an arrangement can be made so that the public can read what I have to say about this matter.

All right, take note of that.

MR. KESSLER: Yes, Your Honor.

JUDGE MORAN: All right. So now we'll have the closing statements, beginning with the IRS.

MR. KESSLER: May it please the Court, Benjamin Franklin once said that the only two things in life that were certain were death and taxes. Many people fear death and few people enjoy paying taxes, especially income taxes, and many people attempt to avoid or limit their tax liabilities through legal or illegal means. Since no one, including the Respondent, has found a way to market immortality, Respondent instead markets what he -- what amounts to tax avoidance materials such as his publication that we have here as an exhibit, Investigating the Federal Income Tax, A Preliminary Report.

Now there are many out there who market their various tax avoidance schemes or strategies or plans, but the Respondent does so with unique qualifications that make him more credible to the public and possibly even more persuasive. In this regard, he makes no secret that he is a certified public accountant who for over five years was a special agent for the criminal investigative division of the IRS. After all, to those gullible enough or for those seeking an excuse or validation for not meeting their lawful tax obligations, Respondent offers a very tempting sales pitch, having been a former special agent for the IRS.

However, it is not Respondent's sales pitch or his prior employment as an IRS special agent per se which has resulted in the Director of Professional Responsibility's action to disbar him from practicing before the IRS, it was Respondent's blatant disregard for the regulations which govern his practice before the IRS that was the cause of the

action. As a certified public accountant who is authorized to practice before the IRS, and as a former IRS special agent, Respondent clearly has a more heightened awareness of the legal requirements related to the filing of returns and the payment of taxes.

As a practitioner before the IRS, Respondent has a duty to exercise due diligence and further viable arguments in representing clients before the IRS. Instead, the Respondent has shown an utter disregard for the rule of law he must comply with as a tax practitioner before the IRS. This utter disregard is evidenced by his failure to file his own income tax returns for a number of years and his reliance on arguments that have been consistently rejected by the courts to the point where sanctions are ordered and injunctions obtained against individuals making the very same claims as the Respondent.

A number of cases have been cited in the various filings made in this case by the Complainant and the Court's orders in which a number of courts have clearly rejected the positions taken by Respondent on behalf of the two taxpayers related to this case. These cases cited are by no means all the cases which have rejected these frivolous arguments. More importantly, not a single court has ruled in Respondent's favor on these issues.

It is hard to believe that despite his stated extensive research into the subject of federal taxation, the Respondent, a certified public accountant, who also received extensive training to become a special agent for the IRS's

criminal investigative division, and then served in that capacity honorably for five years, approximately, failed to be aware of or discover the numerous cases that have refuted the frivolous positions he has taken. Such a failure would clearly evidence incompetence on the Respondent's part.

What is more likely is that Respondent was fully aware of these cases but conveniently chose to ignore them because their holdings were, of course, contrary to the tax avoidance advice that he was providing to his clients.

This case concerns a practitioner's -- a tax practitioner's -- failure to comply with the regulations that govern practice before the IRS. While Respondent's guise may be that of a man doing only what he believes is right and helping others to do the same, it is clear that his real aim is to flaunt (sic) the system and avoid the requirements that every other taxpayer must comply with.

Attorneys can be disbarred from practice and doctors can lose their licenses to practice for violating various professional and ethical standards. The same is true for tax practitioners who wish to practice before the IRS. Respondent can have the belief he wants to have. He can advocate that the Internal Revenue Code be changed. He can advocate that there be a flat tax in this country to make it simple. But if he wants to practice before the IRS, he must comply with the regulations which govern such practice based on the laws as they are today, whether he personally disagrees with those laws or not.

The provisions of 31 CFR section 10.50 permits suspension or disbarment of a practitioner who is shown to be incompetent or disreputable or who refuses to comply with any of the regulations in 31 CFR Part 10. This Court has found Respondent to have committed a number of violations of 31 CFR Part 10, demonstrating incompetent and/or disreputable conduct that warrants his disbarment.

In this regard, the Court has heard testimony from David Finz, senior attorney to the Director of Professional Responsibility, in which he set forth the reasons as to why disbarment is the appropriate sanction in Respondent's case. Mr. Finz testified that as a certified public accountant who practices before the IRS, Respondent has an obligation to follow the laws of this -- the tax laws of this country and comply with the Circular 230 regulations.

He also testified that disbarment is consistent with sanctions given to other tax practitioners who have committed similar violations, including those who were not previously employed by the IRS in any capacity.

Finally, Mr. Finz also testified that Respondent's conduct is highly detrimental to the effectiveness of the entire revenue system.

At the end of the day, Your Honor, this case is about a tax practitioner who demands that the government follow his interpretation of the law when so many courts have already taken the time to consider these arguments and shown him and others the error of their ways. It is about a tax practitioner who quickly alleges that this action is

being taken in retaliation for his having been a former IRS criminal special agent when he uses that very fact in his advertisements and in his letters to the IRS on behalf of his clients.

In this regard, Respondent wears his former position well when it suits him. He clearly attempts to rely on his former position to bolster his credibility with gullible members of the public and in his communication with IRS employees, and it's our position that this is an aggravating factor in Respondent's case.

Another aggravating factor is that Respondent committed several offenses of disreputable conduct regarding both his personal tax matters and the representation of others. His actions in both instances show a clear pattern of refusing to comply with established principles of tax laws. Further aggravating misconduct is the fact that it was willful.

Respondent's attempt to break down the IRS's ability to enforce tax laws while appearing directly before the IRS is a most important aggravating factor.

Finally, Respondent has shown no remorse over his actions. In fact, Respondent further promoted the specious correctness of his actions and tactics during the instant proceedings, thereby giving us no reason to believe that he would engage in any different conduct in his future dealings with clients and with the IRS.

Respondent's 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 of disbarment requested. Respondent presented no evidence of any genuinely mitigating circumstances while Complainant has presented evidence of aggravating circumstances. Even without the charges related to Respondent's individual fail (sic) to file returns, the charges related to his representation of the two taxpayers, both individually and collectively, are very egregious and warrant the sanction of disbarment requested by the Director of Professional Responsibility, and we respectfully request the Court to impose this sanction.

Thank you.

JUDGE MORAN: Thank you, Mr. Kessler.

One second.

(Pause.)

JUDGE MORAN: Okay, who's going to do this?

Go ahead, Mr. Bernhoft.

MR. BERNHOFT: We do have a brief closing argument, Your Honor.

Counsel, may it please the Court, there's been a lot of talk here today and some testimony with respect to the public interest. But I think that before the Court judges Mr. Banister we should make an important distinction between the parochial interests of the IRS and the public interest.

On the one hand, Mr. Finz's testimony makes clear that the IRS wants to punish Mr. Banister as harshly as possible, cloaking that desire in the rubric and rhetoric of

public interest furtherance. We have no doubt that IRS interests would be served by the draconian sanction sought, disbarment. The IRS is, after all, a bureaucracy with its own unique institutional interest, concerns and commitments.

But it is our view, and frankly, the view of many Americans, that many times the IRS agenda directly conflicts with important Constitutional rights and the concerns of ordinary Americans, as recently evidenced by the Congressional hearings over fraud and abuse in audits and collection procedures that took place on the Hill several years ago.

And when one looks to the historical record, it is unfortunate but one does see a fairly longstanding history of fraud, waste and mismanagement, and these issues have been thoroughly documented by various respected watchdog groups and by our own United States General Accounting Office in a series of reports.

So before we take Mr. Kessler's argument too seriously, or Mr. Finz's testimony too seriously, I think that it's important to recognize that much of the IRS agenda, including, we believe, this disciplinary proceeding, and we urge, is not in the public interest at all. And so we might ask the question, what is the public interest with respect to government action in general and tax collection in particular, because that is the matter here.

Well, we believe, for one, that American citizens do have a right to the most competent, zealous advocacy before the IRS comes knocking at the proverbial door, not

the sort of meek and ingratiating tax representation the IRS most likely prefers. Now Mr. Banister was a zealous advocate, and in the process we believe he did provide a valuable outlet for Americans concerned over certain IRS tactics, policies and practices.

We also believe that Americans have a paramount right to petition the government for redress of grievance, including tax grievances. There are not nor should there be tax exceptions to fundamental principles of Constitutional right and traditions, traditional notions, of fair play and substantial justice.

We would observe that if Americans can't take their tax concerns directly to the administrative agency responsible for tax collection, then where indeed should they take those concerns? And if they can't do that, then the right to petition for redress of grievance does ring hollow, in our view.

Finally, we believe that Americans do have a fundamental right to unfettered exchange of information and ideas, and that this proceeding and the sanction requested would chill effective advocacy before the IRS. We live in the world, the lawyers up here, we live in the world of the hurly-burly and sometimes bare-knuckle courtroom drama of adversarial give and take. But I think that in this age of concern over ideas, particularly post nine eleven, the tendency to marginalize people who hold different views than we might hold, that has to be looked at as against the

necessity of adversarial process and the value of the loyal opposition.

Liberty of conscience is justifiably enshrined in America's founding documents and it's here in the very fabric of our law and politics, particularly regarding legal and political matters where liberty of conscience is most important and therefore perfect, speaking directly to this issue of certain court cases that have held certain propositions, that they didn't approve certain propositions or a certain legal argument wasn't correct. In light of that, I think it's important to recognize that even former United States presidents and former IRS commissioner have termed the Internal Revenue Code, and I'm paraphrasing, but accurately paraphrasing, a maze of byzantine complexity that not even specially trained IRS employees wholly completely understand.

And yet here the IRS would have the Court disbar Mr. Banister from practice because he dared assert a legal position that some obscure Tax Court memo apparently hadn't approved of. Now that position, we believe, is unacceptable and frankly disingenuous. It's a double standard, and an unacceptable one. For on the one hand, admittedly with a professional training background but no formal legal training, he was supposed to apparently recognize that he was bound by an old Tax Court opinion, but that same court opinion would not be binding on IRS.

And to be frank, my professional sensibilities are offended by that, because I come from the legal tradition

where precedent cuts both ways; what's good for the goose is certainly and should be good for the gander. And to be clear about that, the IRS asserts in its internal revenue manuals that no federal court tax opinion is binding on it or its employees saving US Supreme Court opinions.

And our question that we believe merits the Court's careful and thoughtful consideration is: how can that sort of a double standard constitute a legitimate basis to even impose a sanction on Mr. Banister?

Our view is that we have a case here that pits a man, in my personal view, my personal interactions with him, and from talking to people that know him, professionally, personally and in family sense, he's a man of demonstrated honor and integrity; and frankly, although it's unfortunate, pits him against an agency that has a dubious reputation.

And we urge that the Court decline to sanction Mr. Banister whatsoever as a result of this proceeding, because we believe that imposing any sanction whatsoever would indeed violate fundamental principles of law, equity and public policy, and offend traditional notions of fair play and substantial justice.

In closing, I am reminded, and I was reflecting on this with co-counsel, we were both reminded of Erskine's defense of Thomas Payne when Mr. Payne was charged with sedition in England for publishing his little book, *The Rights of Man*. And in that famous case, the jury sold out justice, convicted Payne in exchange for the Crown's offer of two English guineas and a free meal. But not until

Erskine instructed the world that, and I quote, "Every man not intending to mislead, but seeking to enlighten others with what his own reason and conscience, however erroneously, have dictated to him as truth may address himself to the universal reason of a whole nation without sanction. Other liberties, perhaps, are held under government, but the liberty of opinion keeps government itself in due subjection to their duties."

And I would also point out that I recall a time when mankind thought that the world was flat, and that certainly hasn't proved to be the case for future generations.

I would close with a paraphrase of Thomas Jefferson, going directly to the question of the appropriate sanction; we believe that reason alone must be the answer to errors and opinion, not state sanction.

Thank you, Your Honor.

JUDGE MORAN: Thank you, Mr. Bernhoft.

Picking up on what I said earlier, I think it's important, Mr. Kessler, and Mr. Finz, and I lost your name --

MS. GIBSON: Gibson.

JUDGE MORAN: What?

MS. GIBSON: Gibson.

JUDGE MORAN: Gibson, sorry. It's important that arrangements be made so that my decision can be disseminated to the public for their edification. That also would include, it seems to me, some way, some vehicle, besides

relying upon Mr. Bernhoft, for example, that the public be aware that -- where they can receive copies of the decision; in other words, some sort of announcement that a decision will be issued and available.

Seems that it would be useful, assuming that any problems can be worked out between the parties that it be made public.

All right. Thank you all for your professional presentation.

This hearing will now come to a close.

MR. BERNHOFT: Thank you, Judge.

MR. KESSLER: Thank you, Your Honor.

(Whereupon, at 11:48 a.m., the hearing in the above-entitled matter was concluded.)

C E R T I F I C A T E

This is to certify that the attached proceedings
before the US Department of the Treasury, Office of
Professional Responsibility, in the matter of
Director, Office of Professional Responsibility,

Complainant,

vs.

Joseph R. Banister,

Respondent,

Complaint No. 2003-2,

were held in San Francisco, California, on Monday, December
1, 2003, as therein appears, and that this is the original
transcript thereof for the files of the Department.

KENT ANDREWS

Official Reporter

Date: 12/9/03