

United States  
Department of the Treasury

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Director, Office of Professional Responsibility,	)	
	)	
Appellee-Complainant,	)	
	)	
v.	)	COMPLAINT
	)	NO. 2003-02
Joseph R. Banister,	)	
	)	
Appellant-Respondent.	)	
	)	

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Decision on Appeal

Under the authority of General Counsel Order No. 9 (January 19, 2001) and the authority vested in her as Acting Assistant General Counsel of the Treasury who was the Acting Chief Counsel for the Internal Revenue Service, on April 9, 2004, Emily A. Parker delegated to the undersigned the authority to decide disciplinary appeals to the Secretary of the Treasury filed under Part 10 of Title 31, Code of Federal Regulations (Rev. 7-2002) ("Practice Before the Internal Revenue Service," sometimes known and hereafter referred to as "Treasury Circular 230"). This is such an appeal by the Respondent, Joseph R. Banister, filed pursuant to §10.77 of Treasury Circular 230.

Pursuant to §10.91 of Treasury Circular 230, any proceedings under Treasury Circular 230 instituted after July 26, 2002, are governed by Subparts D (the Rules Applicable to Disciplinary Proceedings, §§10.60-10.82) and E (the General Provisions, §§10.90-10.93) of Treasury Circular 230, but conduct engaged in prior to July 26, 2002 is judged by the provisions of

Treasury Circular 230 in effect at the time the conduct occurred. This is such a proceeding. Thus in determining both whether the conduct forming the basis of the Complaint and Amended Complaint filed against Respondent violated the duties and restrictions relating to practice before the Internal Revenue Service (Subpart B, §§10.20–10.34, of Treasury Circular 230) and what sanctions are appropriately imposed against the Respondent for any violations of such duties and restrictions (Subpart C, §§10.50–10.53, of Treasury Circular 230), the provisions of Subparts B and C of Treasury Circular 230 in effect on the date of Respondent’s conduct control.

### Preliminary Statement

These proceedings were initiated by the Director of the Office of Professional Responsibility (Complainant)<sup>1</sup> against Joseph R. Banister (Respondent) on March 19, 2003 by the filing of a Complaint pursuant to Section 10.60(a) of Treasury Circular 230. In the complaint filed on March 19, 2003 (hereafter the “Initial Complaint”), Complainant made five specific charges against the Respondent.

First, Complainant charged that the Respondent failed to exercise due diligence in violation of §§10.22(b) and 10.22(c) of Treasury Circular 230 and engaged in disreputable conduct in violation of §§10.34, 10.51, and 10.51(j) of Treasury Circular 230 by giving advice to two taxpayers [each United States citizens residing during all years in issue in the United States (hereafter, Taxpayer C and Taxpayer T)] that had no basis in law or fact and, while representing the same taxpayers before the Internal Revenue Service, took a position that had no substantive basis in law or in fact. Specifically, Complainant alleged that:

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<sup>1</sup> On the date of the filing of the Complaint, the Director of the Office of Professional Responsibility was Brien T. Downing. Mr. Downing continued to serve in that capacity when the Amended Complaint was entered in these proceedings. At present, the Director of the Office of Professional Responsibility is Cono R. Namorato, who continues to prosecute the Complaint as amended.

With respect to Taxpayer C's tax liabilities for the taxable years 1989 through 1998, inclusive, Respondent advised Taxpayer C that he was not liable for income taxes because the Sixteenth Amendment to the United States Constitution was "not ratified;"

With respect to Taxpayer C's tax liabilities for the taxable years 1989 through 1998, inclusive, Respondent advised Taxpayer C that § 861 of the Internal Revenue Code of 1986 and the regulations thereunder defined "source" of income in such a way as to exclude Taxpayer C's income from taxation;

With respect to Taxpayer T's tax liabilities for the taxable years 1989 through 1998, inclusive, Respondent advised Taxpayer T that § 861 of the Internal Revenue Code of 1986 and the regulations thereunder defined "source" of income in such a way as to exclude Taxpayer T's income from taxation;

With respect to the preparation of Taxpayer T's Amended U.S. Individual Income Tax Returns for the years 1996 and 1998, Respondent on February 29, 2000 signed as preparer Taxpayer T's Form 1040X for 1996 and on January 31, 2000, Respondent signed as preparer Taxpayer T's Form 1040X for 1998, in each instance stating that Taxpayer's income for those years was not taxable income per §§ 861-865 of the Internal Revenue Code of 1986, which returns were filed with the Internal Revenue Service, thereby engaging in disreputable conduct in violation of § 10.34 of Treasury Circular 230.

Second, with respect to the above-referenced advice rendered to Taxpayer C and Taxpayer T, and in preparing Taxpayer T's Amended Individual Income Tax Returns (Forms 1040X) for the years 1996 and 1998, Complainant alleged that Respondent knowingly counseled Taxpayer C and Taxpayer T of

an illegal plan to evade Federal taxes or the payment thereof in violation of §10.51(d) of Treasury Circular 230.

Third, with respect to the above-referenced advice to Taxpayer C and Taxpayer T, Complainant alleged that Respondent violated §10.51(j) of Treasury Circular 230 by providing false opinions, either knowingly, recklessly, or through gross incompetence, to Taxpayer C and Taxpayer T.

Fourth, with respect to providing advice to Taxpayer C and Taxpayer T and by preparing Amended Individual Income Tax Returns for Taxpayer T for the years 1996 and 1998, Respondent failed to exercise due diligence in determining the correctness of oral and/or written representations he made to Taxpayer C, Taxpayer T and Internal Revenue Service personnel in violation of §§10.22(b) and 10.22(c) of Treasury Circular 230.

Fifth, with respect to his preparation of Taxpayer T's amended individual income tax returns (Forms 1040X) for the years 1996 and 1998, Respondent violated §10.34 of Treasury Circular 230 by signing as the preparer federal income tax returns that did not have a realistic possibility of being sustained on their merits and were clearly frivolous.

Complainant alleged in the Initial Complaint that each of the above charges, if proven, justified disbarment or suspension from practice before the Internal Revenue Service.

On March 24, 2003, Susan L. Biro, Chief Administrative Law Judge of the Environmental Protection Administration, designated Administrative Law Judge William B. Moran to act as the Administrative Law Judge in these proceedings.

On April 30, 2003, Respondent filed his Statement of Facts, Answer and Affirmative Defenses in these proceedings.

On June 9, 2003, Judge Moran filed his Prehearing Order in these proceedings. The prehearing exchange contemplated by

the Prehearing Order included (A) a list of the names of any witnesses, including expert witnesses, intended to be called at the hearing, together with a brief narrative description of their expected testimony, (B) copies of all documents and exhibits intended to be introduced into evidence (including the curriculum vita or resume of each identified expert witness), and (C) an estimate of the time needed to present the party's direct case.

On August 8, 2003, Complainant filed a Motion to Amend the Initial Complaint, indicating that subsequent to the filing of the Initial Complaint, Complainant and Complainant's counsel had become aware that Respondent had failed to file individual income tax returns (Forms 1040) for the taxable years 1999, 2000, 2001 and 2002. Complainant sought leave to amend the Initial Complaint to add four additional charges, in each instance indicating that Respondent was required by 26 USC §§ 1, 6011(a), 6012(a) et seq., 6013 and/or 6072(a) to file an individual income tax return (Form 1040) for one of the four years specified no later than April 15<sup>th</sup> of the following year, that in each instance Respondent had failed to do so with respect to the year in question, and that each such allegation, if proved, constituted disreputable conduct punishable by disbarment or suspension under §10.51(d) of Treasury Circular 230.

By letter dated September 23, 2003, Christopher J. Ertl, acting in his capacity as Counsel for Respondent, wrote Judge Moran, stating:

"Please be advised that the Respondent, Joseph R. Banister will take no position on the Petitioner's [sic] motion to amend the complaint. We will wait for the court's order regarding this matter prior to taking a position on answering the proposed amended complaint."

On October 17, 2003, Judge Moran entered an Order granting Complainant's Motion to Amend the Initial Complaint.

On October 17, 2003, Judge Moran also entered an Order setting October 31, 2003 as the cut-off date for motions in these proceedings.

On October 21, 2003, Complainant filed the Amended Complaint in these proceedings.

On October 21, 2003, Complainant also filed a Motion to Amend Prehearing Exchange Exhibits in these proceedings. The additional exhibits sought to be introduced related to the charges raised for the first time in Complainant's Amended Complaint and consisted of business records of the Internal Revenue Service indicating that Respondent had not filed individual income tax returns for the tax years 1999, 2000, 2001 and 2002.

On October 29, 2003, Respondent filed a Motion to Abate the Case and Supporting Memorandum, as well as a Declaration of Robert G. Bernhoft in these proceedings. Respondent alleged that the Government was utilizing these proceedings as a means of obtaining evidence for a criminal prosecution under the "cloak" of a civil process.

On October 29, 2003, Respondent also filed a Motion for Discovery and Supporting Memorandum seeking to issue interrogatories to eighteen (18) current or former Internal Revenue Service or IRS Chief Counsel employees, including Complainant's counsel in these proceeding.

On October 31, 2003, Complainant filed a Motion for Summary Judgment in these proceedings.

On November 4, 2003, Complainant filed a document entitled Motion in Opposition to Respondent's Motion to Abate the Case in these proceedings. However, the document was in substance an Opposition to Respondent's Motion for Discovery filed in these proceedings, and is hereafter referred to, as it was by Respondent, as Complainant's Motion in Limine.

On November 7, 2003, Complainant filed a Motion in Opposition to Respondent's Motion to Abate the Case in these proceedings.

On November 7, 2003, Complainant also filed an Opposition to Respondent's Motion to Adjourn the Proceedings in these proceedings.

On November 10, 2003, Complainant filed an Opposition to Respondent's Motion to Dismiss the Amended Complaint in these proceedings.

On November 14, 2003, Respondent filed a Brief in Opposition to Complainant's Motion in Limine in these proceedings.

On November 17, 2003, Respondent filed a document entitled, "Respondent's Brief in Opposition to the IRS's Motion for Summary Disbarment" in these proceedings. In substance, the document was a Brief in Opposition to Complainant's Motion for Summary Judgment filed in these proceedings on October 31, 2003, and hereafter will be referred to as Respondent's Opposition to Complainant's Motion for Summary Judgment.

On November 17, 2003, Judge Moran entered an Order on the Respondent's Motion to Dismiss the Complaint, denying the Respondent's Motion.

On November 17, 2003, Judge Moran also entered an Order on Respondent's Motion for Discovery, denying the Respondent's Motion.

On November 17, 2003, Judge Moran also entered an Order on Complainant's Motion to Amend the Amended Complaint and to Amend Complainant's Prehearing Exchange Exhibits, granting both of Complainant's motions.

On November 17, 2003, Judge Moran also entered an Order Regarding Respondent's Motion to Adjourn the Hearing, denying Respondent's Motion.

On November 17, 2003, Judge Moran also entered an Order on Respondent's Motion to Dismiss the Amended Complaint, denying Respondent's Motion.

On November 19, 2003, Judge Moran entered an Order Regarding Respondent's Motion to Abate the Case, denying the Respondent's Motion.

On November 21, 2003, Judge Moran entered an Order Regarding Complainant's Motion in Limine. With the limited exceptions noted in his Order, Judge Moran granted the Complainant's Motion.

On November 24, 2003, Judge Moran entered an Order on Complainant's Motion for Summary Judgment. The Order, which incorporated by reference the other Orders entered in these proceedings between November 17, 2003 and November 21, 2003, granted Complainant's Motion as to liability, finding that Complainant had demonstrated by clear and convincing evidence that Respondent had committed each of the violations described in the Initial Complaint, as well as each of the violations first described in the Amended Complaint. As to the choice of a sanction to be imposed for these violations, Judge Moran reserved that issue to be addressed in a later Order.

On November 25, 2003, Complainant filed a Revised Witness List in these proceedings, noting that since the issues to be considered during the hearing had been limited to a consideration of the sanction to be imposed, David Finz, a Senior Attorney in the Office of Professional Responsibility, would be the Complainant's sole witness at the hearing.

On November 25, 2003, Respondent filed a Proffer of Offers of Proof and Argument at Hearing, requesting that six current or

former Internal Revenue Service or IRS Chief Counsel employees be called to testify at the hearing. Respondent also proposed to call undesignated witnesses named on his earlier filed witness list to testify as to his "good character, extraordinary skill, and exceptional ability as a practitioner on behalf of his clients . . .," as well as his record while in public service.

On November 25, 2003, Complainant filed a Response to Respondent's Proffer of Offers of Proof and Argument at Hearing.

On November 26, 2003, Complainant filed a Motion to Move Complainant Exhibits into Evidence at the Hearing.

On November 26, 2003, Judge Moran entered an Order regarding Admissible Evidence at the Sanctions Phase of Proceeding in which Judge Moran denied Respondent the right to introduce much of the evidence Respondent sought to introduce in his Proffer, on which Judge Moran had ruled previously in his Order on Complainant's Motion in Limine filed earlier in these proceedings. Judge Moran allowed Respondent to make a statement in his own behalf without being sworn or cross-examined, but refused Respondent's request that his counsel be permitted to present oral argument in the sanctions phase of the proceeding on subjects that had earlier been found by Judge Moran to be either immaterial or irrelevant to both the liability and sanction determinations to be made in these proceedings.

On December 1, 2003, Judge Moran presided at the hearing in these proceedings. The hearing consisted of: the direct, cross, re-direct and re-cross examination of the Complainant's sole witness, Mr. Finz; the reading of an unsworn statement by the Respondent (with respect to which Respondent was not cross-examined); and closing arguments by the counsels for the parties.

On December 24, 2003, Judge Moran entered the Decision of the Administrative Law Judge in these proceedings, finding the Respondent to have committed each of the violations

described in the Initial Complaint and the Amended Complaint, and disbarring the Respondent from practice before the Internal Revenue Service. In his Decision, Judge Moran noted that proof of either the charges contained in the Initial Complaint or the charges added by the Amended Complaint alone would support his decision to disbar Respondent.

On January 23, 2004, Respondent filed a Notice of Appeal and Appeal to the Secretary of the Treasury in these proceedings.

On February 27, 2004, Complainant filed Appellee-Complainant's Reply Brief, responding to the Respondent's Appeal in these proceedings.

The remainder of this Decision is divided into five parts. Part 1 deals with the scope and purpose of Circular 230 and the functions and purposes of the Administrative Law Judges and the Secretary of the Treasury or his or her delegate acting as the appellate authority in Treasury Circular 230 disciplinary proceedings. Part 2 deals with the allegations contained in the Initial Complaint. Part 3 deals with the allegations introduced by Complainant for the first time in the Amended Complaint. Part 4 deals with various constitutional and/or procedural objections raised by Respondent in his Appeal with respect to actions of the Complainant or Administrative Law Judge in these proceedings. Part 5 sets forth the Final Agency Decision in these proceedings.

1. Treasury Circular 230: Scope, Purpose and Roles of the Administrative Law Judge and Secretary's Delegate

31 U.S.C. §330, the statute under which Treasury Circular 230 was promulgated, provides the Secretary of the Treasury with express authority to regulate the practice of practitioners before the Department of the Treasury. 31 U.S.C. §330 provides, in pertinent part:

“(a) Subject to section 500 of title 5 [5 U.S.C. § 500],

the Secretary of the Treasury may –

- (1) regulate the practice of representatives of persons before the Department of the Treasury; and
- (2) before admitting a representative to practice, require that the representative demonstrate –
  - (A) good character;
  - (B) good reputation;
  - (C) necessary qualifications to enable the representative to provide to persons valuable service; and
  - (D) competency to advise and assist persons in presenting their cases.”

“(b) After notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department a representative who –

- (1) is incompetent;
- (2) is disreputable;
- (3) violates regulations prescribed under this section; or
- (4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented.”

Moreover, Federal courts have long recognized that an administrative agency has general inherent authority to adopt rules of procedure, including the right to set standards for who may practice before it, even absent an express statutory grant of such authority. Goldsmith v. U.S. Board of Tax Appeals, 270 U.S. 117, 120-122 (1926). See also, Herman v. Dulles, 205 F.2d 715, 716 (D.C. Cir. 1953); Touche Ross & Co. v. SEC, 609 F.2d 570, 581-582 (2d Cir. 1979).

The scope and purpose of Treasury Circular 230, and of the statutory authority granted the Secretary of the Treasury by 31 U.S.C. § 330 and its statutory predecessor, 31 U.S.C. § 1026, have been considered by several Federal courts. See, e.g., Alker v. Humphrey, 247 F.2d 22 (D.C. Cir. 1957), cert. denied, 355 U.S.

841 (1957); Harary v. Blumenthal, 555 F.2d 1113 (2d Cir. 1977); Owrutsky v. Brady, 925 F.2d 1457 (4<sup>th</sup> Cir. 1991); Washburn v. Shapiro, 409 F. Supp. 3 (S.D. Fla. 1976); Poole v. United States, 84-2 U.S. Tax Cas. ¶ 9612 (D.D.C. 1984); Sicignano v. United States, 127 F. Supp. 2d 325 (D. Conn. 2001). These precedents establish that Treasury Circular 230 and its authorizing statute apply only to persons who practice before the Internal Revenue Service. In these proceedings, Respondent has admitted in his Answer, and the administrative record clearly reflects, both that Respondent, as a certified public accountant licensed to practice in the State of California, was authorized to practice before the Internal Revenue Service, and that he in fact has represented clients before the Internal Revenue Service. Accordingly, this threshold jurisdictional requirement for the application of Treasury Circular 230 to Respondent has been met.

The first case to examine in detail the scope and purpose of Treasury Circular 230 was Poole v. United States, *supra*. Poole, a certified public accountant authorized to practice and who in fact did practice before the Internal Revenue Service, was disbarred for willfully failing to file tax returns for three taxable years. Poole asserted that the statute under which Treasury Circular 230 was promulgated applied only to those who represented "claimants" before the Internal Revenue Service, which Poole asserted included only those individuals seeking monetary reimbursement. Poole also asserted that Congress' only concern was protecting the interests of claimants seeking reimbursement from the Department of the Treasury. Accordingly, Poole asserted that, even if the term "claimant" was expanded to include the representation of any taxpayer on any matter before the Internal Revenue Service, his conduct in failing to file his own tax returns was unrelated to these areas of Congress' concern.

The Court found that "neither the plain language of 31 U.S.C. § 330 (formerly § 1026) (1983), its legislative history, nor common sense supports plaintiff's interpretation." Rather than finding the language of the statute or its legislative history to be

so limited in scope or purpose, the Court found that, “[r]ather, Congress intended to regulate, in a general way, the activities of practitioners before the Treasury Department.”

The Court also found that whatever ambiguity may have existed concerning the original Congressional debate surrounding the enactment of 31 U.S.C. §1026 had been well settled by subsequent Congressional and administrative developments. Noting that (i) the Treasury Department had interpreted its statutory authority to permit the regulation of all those who practice before the Internal Revenue Service since 1922, (ii) courts must uphold an agency’s reasonable interpretation of a statute it administers (citing Howe v. Smith, 452 U.S. 473, 485 (1981), and Udall v. Tallman, 380 U.S. 1, 16 (1965)), and (iii) the Department’s interpretation of its statutory authority enjoyed prior judicial approval (citing Goldsmith v. U.S. Board of Tax Appeals, *supra*), the Court concluded that an administrative agency has the inherent authority to prescribe its rules of procedure and as part thereof may set standards for determining who may practice before it.

Poole next argued that his failure to file his own tax returns did not constitute “disreputable conduct” which could appropriately make him subject to disbarment. In effect, Poole argued that the failure to file a tax return, while clearly defined as disreputable conduct under §10.51(d) of Circular 230, did not constitute “disreputable conduct” within the meaning of 31 U.S.C. §1026 (later 31 U.S.C. §330). The Court disagreed, finding that the word “disreputable” has several different meanings, depending on the context in which the term is used. The Court went on to note:

“With respect to attorneys or other agents, ‘disreputable’ conduct has generally included ‘unprofessional’ conduct and, at the time the Act of July 7, 1884 was written, was well understood to include ‘any conduct violative of the ordinary standard of professional obligation and honor.’ Garfield v. United States ex rel.

Stevens, 32 App. D.C. 109, 140 (1908). That failure of a certified public accountant to file his own tax returns falls outside the range of ordinary professional obligation seems plain enough. Cf. *Evans v. Watson*, 269 F.2d 775, 778 (D.C. Cir. 1959), cert. denied, 361 U.S. 900 (1959) . . . .”

The Court went on to note that a disbarment proceeding under Treasury Circular 230 had been found by the Court in *Harary v. Blumenthal*, supra, to be essentially a determination of one’s “fitness to practice” before the Internal Revenue Service, and further found that it was appropriate for the agency to consider factors in determining whether to allow someone to continue to practice before the agency that would not appropriately have been considered in determining his or her initial admission to practice (finding Poole’s failures to file to be such a factor). The Court concluded:

“As determined by the Treasury Department, willful failure to file tax returns, in violation of federal revenue laws, is dishonorable, unprofessional, and adversely reflects on the petitioner’s fitness to practice. This is particularly true in a tax system whose very effectiveness depends upon voluntary compliance.”

Treasury Circular 230’s purpose was further explained in *Sicignano v. United States*, supra:

“[T]he Treasury Department’s rules and regulations governing practice before the IRS are aimed at protecting the integrity of a tax system that depends upon voluntary compliance.”

Id. at 332.

To insure that integrity, and in recognition of the fact that practitioners who represent taxpayers before the Internal Revenue Service discharge both obligations to their clients and obligations to the agency before which they practice, Treasury

Circular 230 sets forth rules and regulations relating to a practitioner's activities as a taxpayer representative, as an adviser to taxpayers and relating to the practitioner's conduct of his or her own tax and other affairs.

In United States v. Boyle, 469 U.S. 241 (1985), a case involving a civil penalty imposed against an executor for the late filing of an estate tax return, the issue before the United States Supreme Court was whether the executor had "reasonable cause" for his late filing because he had relied on a tax practitioner to assure that he met his filing obligations in a timely manner. The record showed that Boyle had hired a competent lawyer and had been diligent in following up with the lawyer concerning his obligations as executor, including his obligation to timely file an estate tax return. The Court nevertheless found that his failure to timely file was not due to "reasonable cause" and upheld the Internal Revenue Service's assertion of a civil failure to file penalty against him. In so holding, the Court discussed the importance of timely compliance with our tax laws and the duties and responsibilities assigned to taxpayers and practitioners alike in assuring that compliance:

"Deadlines are inherently arbitrary; fixed dates, however, are often essential to accomplish necessary results. The Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards. Any less rigid standard would risk encouraging a lax attitude toward filing dates. Prompt payment of taxes is imperative to the Government, which should not have to assume the burden of ad hoc determinations.

"Congress has placed the burden of prompt filing on the executor, not on some agent or employee of the executor. The duty is fixed and clear; Congress intends to place upon the taxpayer an obligation to ascertain the statutory deadline and then to meet that deadline, except in a very narrow range of situations. Engaging an attorney

to assist in the probate proceedings is plainly an exercise of the 'ordinary business care and prudence' prescribed by the regulations . . . , but that does not provide an answer to the question we face here. To say that it was 'reasonable' for the executor to *assume* that the attorney would comply with the statute may resolve the matter as between them, but not with respect to the executor's obligations under the statute. Congress has charged the executor with an unambiguous, precisely defined duty to file the return within nine months; extensions are granted fairly routinely. That the attorney, as the executor's agent, was expected to attend to the matter does not relieve the principal of his duty to comply with the statute.

"This case is not one in which a taxpayer has relied on the erroneous advice of counsel concerning a question of law. . . .

"When an accountant or attorney advises a client on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. . . .

"By contrast, one does not have to be an expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due. . . ."

Id. at 249-251 (footnote omitted).

This language underscores the importance of assuring the competence and integrity of practitioners given practitioners' important role in assuring compliance with our tax laws and in making a fair determination of correct tax liabilities in our self-assessment tax system. It is that which the Department of the Treasury seeks to assure through Treasury Circular 230.

The powers of the Administrative Law Judge in disciplinary proceedings initiated under §10.60 of Treasury Circular 230 are specified in §10.70(b) of Circular 230. In general, they include the power to (1) administer oaths and affirmations; (2) make rulings on motions and requests; (3) determine the time and place of hearing and regulate its course and conduct; (4) adopt and

modify rules of procedure; (5) rule on offers of proof, receive relevant evidence and examine witnesses; (6) take or authorize the taking of depositions; (7) receive and consider oral or written argument on facts or law; (8) hold or provide for the holding of conferences for the settlement or simplification of issues to be considered with the consent of the parties; (9) perform such acts and take such measures as are necessary or appropriate to the efficient conduct of any such proceeding; and (10) make decisions. In effect, the Administrative Law Judge acts as the trial court in the proceedings, determining, among other things, whether the Director of the Office of Professional Responsibility has met his burden of proof with respect to the specific allegations supporting the charges leveled in the complaint (or, in these proceedings, in the Initial Complaint and the Amended Complaint). All such determinations are made de novo. Under § 10.76(a) of Treasury Circular 230, the extent of the Complainant's burden of proof in any proceeding depends upon the sanction the Complainant seeks to have imposed. If the requested sanction is either censure or suspension for a period of less than six months, the Complainant must prove his case by a preponderance of the evidence. If the requested sanction is suspension for a period of six months or more, or disbarment (as in these proceedings), the Complainant must prove his case by clear and convincing evidence.

The decision of the Administrative Law Judge is the initial determination of the agency. If neither the Complainant nor the Respondent appeals the Decision of the Administrative Law Judge within thirty days, the decision of the Administrative Law Judge becomes the final decision of the agency without further proceedings. §10.76(b) of Treasury Circular 230.

If either the Complainant or the Respondent timely appeals the decision of the Administrative Law Judge, the Secretary of the Treasury or his or her delegate acts as an appellate authority to review the Administrative Law Judge's preliminary decision. §10.77 of Treasury Circular 230. The Director of the Office of Professional Responsibility provides a copy of the entire record

in the proceedings to the Secretary or his or her delegate and it is that record which forms the basis of the appellate review. Id. Decisions of the Administrative Law Judge will not be reversed unless the appellant establishes that the decision is clearly erroneous in light of the facts in the record and the applicable law. However, issues that are exclusively questions of law (as opposed to questions of fact or mixed questions of fact and law) are reviewed de novo. In the event that the Secretary or his or her delegate determines that there are unresolved issues raised by the record, the case may be remanded to the Administrative Law Judge to permit the development of additional testimony or evidence. Decisions of the Secretary or his or her delegate in any such appeals constitute final agency action. §10.78 of Treasury Circular 230.

## 2. Allegations Raised in the Initial Complaint

The Initial Complaint in these proceedings contained five charges alleging various violations of Treasury Circular 230 by Respondent:

Complainant charged that Respondent failed to exercise due diligence in violation of §§10.22(b) and 10.22(c) of Treasury Circular 230 and engaged in disreputable conduct in violations of §§10.34, 10.51, 10.51(d) and 10.51(j) by giving advice to Taxpayer C and Taxpayer T that had no basis in law or fact and, while representing the same taxpayers before the Internal Revenue Service, took a position that had no substantive basis in law or fact. Complainant made four specific allegations in support of this charge which are delineated in the Preliminary Statement above. Specifically, Complainant alleged that, with respect to Taxpayer C, Respondent advised the taxpayer with respect to his tax liabilities for the taxable years 1989 through 1998, inclusive, that (1) Taxpayer C was not liable for income taxes because the Sixteenth Amendment to the Constitution of the United States was "not ratified" and (2) §861 of the Internal Revenue Code of 1986 and the regulations thereunder defined "source" of income in such a way as to exclude Taxpayer C's income from taxation.

Futher, Complainant alleged that, with respect to Taxpayer T and his tax liabilities for the years 1989 through 1998, inclusive, Respondent (1) advised Taxpayer C that §861 of the Internal Revenue Code of 1986 and the regulations thereunder defined “source” of income in such a way as to exclude Taxpayer T’s income from taxation, and (2) signed as a paid preparer Taxpayer T’s Amended U.S. Individual Income Tax Returns (Forms 1040X) for the years 1996 and 1998, in each instance stating that Taxpayer T’s income for these years was not taxable income per §§861-865 of the Internal Revenue Code of 1986, which returns were filed with the Internal Revenue Service, thereby engaging in disreputable conduct in violation of §10.34 of Treasury Circular 230. Of the four specific allegations supporting these charges contained in the Initial Complaint, only the fourth [relating to the preparation of Taxpayer T’s Amended Tax Returns (Forms 1040X) for 1996 and 1998 supports the charge that Respondent violated §10.34 of Treasury Circular 230.

§§10.22(b) and 10.22(c) of Treasury Circular 230, as amended and in effect on the dates of the alleged conduct, provided, in pertinent part:

“Each attorney, certified public accountant, enrolled agent, or enrolled actuary shall exercise due diligence:

\* \* \* \* \*

(b) In determining the correctness of oral or written representations made by him to the Department of the Treasury; and

(c) In determining the correctness of oral or written representations made by him to clients with reference to any matter administered by the Internal Revenue Service.”

§10.34 of Treasury Circular 230 (setting forth standards for advising with respect to tax return positions and for preparing or signing returns), as amended and in effect as of the dates of the

conduct forming the basis of these charges, provided, in pertinent part:

(a) *Standards of Conduct* – (1) *Realistic possibility standard*. A practitioner may not sign a return as a preparer if the practitioner believes that the return contains a position that does not have a realistic possibility of being sustained on its merits (the realistic possibility standard) unless the position is not frivolous, and is adequately disclosed to the Service. A practitioner may not advise a client to take a position on a return, or prepare the portion of the return on which the position is taken, unless –

(i) The practitioner determines that the position satisfies the realistic possibility standard; or

(ii) The position is not frivolous and the practitioner advises the client of any opportunity to avoid the accuracy-related penalty in section 6662 of the Internal Revenue Code of 1986 by adequately disclosing the position and of the requirements for adequate disclosure.

(2) *Advising client on potential penalties*. A practitioner advising a client to take a position on a return, or preparing or signing a return as a preparer, must inform the client of the penalties reasonably likely to apply to the client with respect to the position advised, prepared or reported. The practitioner also must inform the client of any opportunity to avoid any such penalty by disclosure, if relevant, and of the requirements for adequate disclosure. This paragraph (a)(2) applies even if the practitioner is not subject to a penalty with respect to the position.

\* \* \* \* \*

(4) *Definitions*. For purposes of this section:

(i) *Realistic possibility*. A position is considered to have a realistic possibility of being sustained on its merits if a reasonable and well-informed analysis by a person knowledgeable in the tax law would lead such a person to conclude that the position had

approximately a one in three, or greater, likelihood of being sustained on its merits. The authorities described in 26 CFR 1.6662-4(d)((3)(iii), or any successor provision, of the substantial understatement penalty regulations may be taken into account for purposes of this analysis. The possibility that a position will not be challenged by the Service (e.g., because the taxpayer's return may not be audited or because the issue may not be raised on audit) may not be taken into account.

(ii) *Frivolous*. A position is frivolous if it is patently improper.

(b) *Standard of discipline*. As provided in §10.52, only violations of this section that are willful, reckless, or a result of gross incompetence will subject a practitioner to suspension or disbarment from practice before the Service."

§10.51 of Treasury Circular 230, as amended and in effect on each of the dates in issue, provided in pertinent part:

"Disreputable conduct for which an attorney, certified public accountant, enrolled agent, or enrolled actuary may be disbarred or suspended from practice before the Internal Revenue Service includes, but is not limited to:

\* \* \* \* \*

(d) Willfully failing: to make a Federal tax return in violation of the revenue laws of the United States, or evading, or attempting to evade, or participating in any way in evading or attempting to evade any Federal tax or payment thereof, knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof, or concealing

assets of himself or another to evade Federal taxes or the payment thereof.

\* \* \* \* \*

(j) Giving a false opinion, knowingly, recklessly or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or a pattern of providing incompetent opinions on questions arising under the Federal tax laws. False opinions described in this paragraph include those which reflect or result from a knowing misstatement of fact or law; from an assertion of a position known to be unwarranted under existing law; from counseling or assisting in conduct known to be illegal or fraudulent; from concealment of matters required by law to be revealed; or from conscious disregard of information indicating that material facts expressed in the tax opinion or offering material are false or misleading. For purposes of this paragraph, reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A willful pattern of conduct is a factor that will be taken into account in determining whether a practitioner has acted knowingly, recklessly or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client."

While not a provision referred to by Complainant in the Initial Complaint, also germane to these charges is §10.52 of Treasury Circular 230, which provides:

“A practitioner may be disbarred or suspended, from practice before the Internal Revenue Service for any of the following:

- (a) Willfully violating any of the regulations contained in this part.
- (b) Recklessly or through gross incompetence (within the meaning of § 10.51(j)) violating §10.33 or § 10.34 of this part.”

§10.33 of Treasury Circular 230, as amended and in effect on the dates in issue, deals with standards applicable to tax shelter opinions and has no relevance to the charges contained in the Initial Complaint. As noted above, §10.34 of Treasury Circular 230, as amended and in effect for the dates in issue, has relevance to the charges contained in the Initial Complaint only with respect to Respondent’s actions in preparing Taxpayer T’s Amended U.S. Individual Income Tax Returns (Forms 1040X) for 1996 and 1998, both of which were submitted to the Internal Revenue Service. Accordingly, with respect to all other charges contained in the Initial Complaint, only willful violations of the provisions of Treasury Circular 230 form a basis for disbarment or suspension from practice before the Internal Revenue Service. §10.52(a) of Treasury Circular 230.

With respect to a practitioner’s actions in preparing tax returns, a practitioner must either (1) ascertain that an asserted position has a realistic possibility of being sustained on the merits, or (2) assure both that the position be adequately disclosed to the Internal Revenue Service and that the position not be frivolous. The “realistic possibility” standard, borrowed from the civil penalty regime established under § 6662(d)(2)(B)(i) of the Internal Revenue Code of 1986, as amended and in effect during the periods in issue, excludes items for which there is a “realistic possibility” that the position will be sustained on its

merits and, in some instances, items that are adequately disclosed and non-frivolous from the calculation of “substantial understatements” of income tax. The “realistic possibility” standard is a substantially higher standard than the requirement that an item not be frivolous. §10.34(a)(4) of Treasury Circular 230 requires that a reasonable and well-informed analysis of the law and the facts by a person knowledgeable in the tax law would lead that person to conclude that there was a one in three, or greater, chance of the taxpayer’s position on the issue being sustained on its merits.

While Treasury Circular 230 does not provide an extensive definition of “frivolous” (§10.34(a)(4)(ii) of Treasury Circular 230 defining the term only as meaning “patently improper”), the term has been widely used by many courts in cases involving the determination of whether it is appropriate to impose both civil and criminal tax penalties, and is applied by the courts in determining the permissible scope of advocacy before tribunals.

For example, Rule 33(b) of the Rules of Practice of the United States Tax Court provides, in pertinent part:

“RULE 33. SIGNING OF PLEADINGS.

\* \* \* \* \*

(b) Effect of Signature: The signature of counsel or a party constitutes a certificate by the signer that the signer has read the pleading; that, to the best of the signer’s knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”

Likewise, Rule 11(b) of the Federal Rules of Civil Procedure

provides:

**“Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, formed after an inquiry reasonable under the circumstances, --

- (1) it is not being presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.”

See also Rule 38 of the Federal Rules of Appellate Procedure (discussed at p. 27, infra).

Similarly, with regard to oral and written representations made to either the Treasury or to a client in connection with any

matter administered by the Internal Revenue Service, each attorney, certified public accountant, enrolled agent and enrolled actuary is required to exercise due diligence in determining the correctness of such statements. §§ 10.22(b) and 10.22(c) of Treasury Circular 230. These obligations exist both with respect to factual representations and representations with respect to the law and the law's application to the facts present in a particular case. Certainly, any argument that is found frivolous is also incorrect, and an argument that is found to be frivolous is certainly incapable of meeting the higher "realistic possibility" standard.

Respondent has asserted that his conduct should be judged by the state of the law as it existed on the dates of his alleged violations. Respondent has also asserted that in assessing his conduct, the Secretary should be mindful of the need to preserve zealous advocacy by practitioners on behalf of taxpayers, and that particular sensitivity to such concerns is appropriate in unsettled areas of the law.

While I am in general agreement with these propositions, none stands without limits. Zealous advocacy does not constitute license for the assertion of frivolous positions when representing taxpayers before the Internal Revenue Service. Nor does the concept extend, at least in the same manner, to a practitioner's functions as an adviser. Moreover, while it is true that the Secretary should exercise particular sensitivity in challenging arguments in unsettled areas of the law, that does not mean that it is never appropriate to question the assertion of clearly erroneous positions merely because they have never before been considered by the courts. In addition, while I agree that a practitioner's conduct should be considered solely in light of the state of the law on the date(s) of his conduct, if a later decision considers the merits of an argument and does so in a manner that casts light on the legitimacy of the argument on earlier relevant date(s), that later consideration may also shed light on whether the theory was frivolous on those earlier date(s). Finally, for the reasons set forth below, I find that these theories

have little effect on these proceedings since I agree with Judge Moran that the law, both with respect to Respondent's Sixteenth Amendment argument and with respect to his "source" argument under §§ 861-865, was well settled on the relevant dates.

The constitutionality of the 16<sup>th</sup> Amendment to the United States Constitution was sustained by the United States Supreme Court as early as 1916. Brushaber v. Union Pacific Railroad Company, 240 U.S. 1 (1916). Subsequently, an uninterrupted line of decisions by various United States Courts of Appeals have reaffirmed that conclusion against claims that the 16<sup>th</sup> Amendment was either "not ratified" or "fraudulently adopted." See, e.g., Miller v. United States, 868 F.2d 236 (7<sup>th</sup> Cir. 1989); United States v. Sitka, 845 F.2d 43 (2d Cir. 1988); Pollard v. Commissioner, 816 F.2d 603 (11<sup>th</sup> Cir. 1987); United States v. Thomas, 788 F.2d 1250 (7<sup>th</sup> Cir. 1986); United States v. Stahl, 792 F.2d 1438 (9<sup>th</sup> Cir. 1986); Sisk v. Commissioner, 791 F.2d 58, 60 (6<sup>th</sup> Cir. 1986); Knoblauch v. Commissioner, 749 F.2d 200, 202 (5<sup>th</sup> Cir. 1984); Parker v. Commissioner, 724 F.2d 469, 471 (5<sup>th</sup> Cir. 1984).

Several of these decisions were either criminal convictions involving willfulness determinations or findings by the courts in civil tax cases that the argument asserted was frivolous. See, e.g., Miller v. United States, *supra*; Knoblauch v. Commissioner, *supra*. In Knoblauch v. Commissioner, *supra*, the Court of Appeals imposed sanctions under Rule 38 of the Federal Rules of Appellate Procedure against a taxpayer proceeding pro se, finding that the appeal was baseless, presented no colorable claim of error and raised repeatedly rejected contentions. Rule 38 of the Federal Rules of Appellate Procedure, which serves a function similar to Rule 11 of the Federal Rules of Civil Procedure, provides:

"If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

Similarly, in Miller v. United States, *supra*, the court found the appeal (premised, inter alia, on Sixteenth Amendment arguments) “patently frivolous” and, quoting Granzow v. Commissioner, 739 F.2d 265, 269-270 (7<sup>th</sup> Cir. 1984), noted “we can no longer tolerate abuse of the judicial review process by irresponsible taxpayers who press stale and frivolous arguments . . . .” Id. at 242.

In summary, more than a decade before the conduct giving rise to Respondent’s alleged violations, the courts had both uniformly sustained the constitutionality of the 16<sup>th</sup> Amendment and found that arguments to the contrary were frivolous when asserted by ordinary taxpayers, let alone by experienced tax practitioners.

Respondent’s argument premised on the “sourcing” rules of §§ 861-865 of the Internal Revenue Code of 1986, as amended and in effect during the years in issue, stand on no firmer footing. §§1(a), 1(b), 1(c) and 1(d) of the Internal Revenue Code of 1986, as amended and in effect during the years in issue, imposed a tax on the taxable income of (i) married individuals filing joint returns and surviving spouses, (ii) heads of households, (iii) unmarried individuals (other than surviving spouses and heads of households), and (iv) married individuals filing separate returns, respectively. §61(a) of the Internal Revenue Code of 1986, as amended and in effect during the years in issue, provided:

“Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) [fifteen enumerated items].” (Emphasis added.)

§1.61-1(a) of the Treasury Regulations further elaborated on this statutory language:

“**Gross income.** – (a) *General definition.* Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in

any form, whether in money, property, or services. Income may be realized, therefore, in any form, whether in money, property or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash. Section 61 lists the more common items of gross income for purposes of illustration. For purposes of further illustration, § 1.61-14 mentions several miscellaneous items of gross income not listed specifically in section 61. Gross income, however, is not limited to the items so enumerated." (Emphasis added.)

The language of §61(a) itself and the language of the regulations issued thereunder, which have the force and effect of law, both demonstrate that Congress intended §61(a) to encompass all sources of income. The courts have also recognized the all-encompassing scope of §61(a) and the fact that it is intended to have an ambit equaling that of the Sixteenth Amendment. See, e.g., Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955), where the United States Supreme Court noted that, "Congress applied no limitations as to the source of taxable receipts." Id. at 429.

In each of the years here in issue, in the case of United States citizens and resident aliens, the United States generally taxed the worldwide income of such individuals under §§ 1(a), 1(b), 1(c) or 1(d) of the Internal Revenue Code of 1986, as amended and in effect. With two limited exceptions, the sourcing rules of §§861-865 of the Internal Revenue Code of 1986, as amended and in effect during those years, had no effect on the determination of the United States tax liabilities of United States citizens and resident alien individuals. § 911(a) of the Internal Revenue Code of 1986, as amended and in effect for the years in issue, excluded from the gross income of an electing qualified individual, (1) the "foreign earned income" of that individual (an amount subject to an inflation adjusted "cap") and (2) the "housing cost amount" of the individual. Also, to ameliorate the effects of double taxation on income of United States persons (including United States citizens and resident alien individuals)

from sources “without the United States,” §§ 901-908 of the Internal Revenue Code of 1986, as amended and in effect during the years in issue, allowed such persons a limited credit against their United States tax liabilities for taxes paid with respect to sources of income without the United States that were subjected to specified forms of tax imposed on the same income by those foreign jurisdictions. Neither of these specific provisions departing from the general rules had any application to Taxpayer C or Taxpayer T.

The source of income rules, now codified as §§861-865 of the Internal Revenue Code of 1986, had their origin in provisions adopted as early as 1913. The Revenue Act of 1913, ch. 16, 38 Stat. 114, imposed a tax on nonresident aliens with respect to net income “from all property owned and of every business, trade or profession carried on in the United States by persons residing elsewhere,” and on foreign corporations with respect to net income “accruing from business transacted and capital invested within the United States. Revenue Act of 1913, ch. 16, §§II(A)(1), II(G)(a), 38 Stat. 114, 166, 172. The sourcing rules were then more explicitly addressed in the enactment of the Revenue Act of 1916, which imposed a tax on the net income of foreign persons (nonresident alien individuals and foreign corporations) from sources within the United States. Ch. 463, 39 Stat. 756. These rules were not substantively modified by the Revenue Act of 1917, which only changed the statutory rates on the income so subjected to tax. Ch. 63, §§2-3 (nonresident aliens) and §4 (foreign corporations), 40 Stat. 300, 301, 302.

Initially, neither these statutory provisions nor the regulations issued thereunder (see, e.g., Treas. Reg. 33, art. 66 (1918)) provided detailed rules or methodologies for determining the sources of income. Over the years, both the statutes themselves and the regulations issued thereunder adopted more specific source of income rules. However, both the statutes and regulations continued to reflect Congress’ basic statutory scheme of taxing the worldwide income of U.S. persons (including U.S. citizens, resident aliens and U.S. corporations,

while adopting a “water’s edge” regime for the taxation of foreign persons (including nonresident alien individuals and foreign corporations). Thus the purpose and intent of the “source of income rules was hardly a closely guarded secret at the time of Respondent’s conduct. For example, the opening “PORTFOLIO DESCRIPTION SHEET” of BNA’s Tax Management Portfolio 905 (Source of Income Rules) at all times relevant to these proceedings provided:

“Tax Management Portfolio 905, *Source of Income Rules*, analyzes the rules applicable in determining whether income is treated as from sources within the United States or from foreign sources. In the case of persons who are not citizens or residents of the United States or domestic corporations, and thus are not subject to tax on their worldwide income, the source of income rules generally are pivotal in determining whether the tax jurisdiction of the United States extends to the income. In addition, in the case of all persons who are subject to U.S. tax, the source of income rules are critical to determining to what extent a credit is available for income taxes or taxes in lieu of income taxes paid to a foreign government. The source of income rules are applied in conjunction with the rules governing the allocation and apportionment of expenses between domestic and foreign sources in order to determine foreign source taxable income for purposes of the foreign tax credit limitation prescribed for each separate limitation category under § 904.”

Blessing, 905 T.M., *Source of Income Rules*. See also Section I.A.1 of the Detailed Analysis contained in the same secondary source material (dealing with the taxation of “U.S. persons,” defined to include United States citizens, resident alien individuals and U.S. corporations), Id. at A-1. In addition, several IRS publications providing general information to taxpayers provide information on the appropriate uses of §§861-865’s “source of income” rules. See Publication 54 (US Tax Guide for US Citizens and Resident Aliens Living Abroad), Publication 514

(Foreign Tax Credit for Individuals), Publication 515 (Withholding of Tax on Nonresident Individuals), and Publication 519 ((US Tax Guide for Aliens).

The purpose and intent of the “source of income” rules were hardly a closely guarded secret at the time of Respondent’s conduct. The argument advanced by Respondent and his counsel, also asserted by Respondent in a submission pertaining to a Collection Due Process Hearing Respondent sought on behalf of Taxpayer C, and by Respondent in the 1996 and 1998 amended federal individual income tax returns (Forms 1040X) he prepared for Taxpayer T for 1996 and 1998 that were later filed with the Internal Revenue Service, would stand the sourcing rules on their head, using them as a basis for limiting the tax liabilities of U.S. citizens and resident aliens residing in the United States with respect to income sourced within the United States.

These arguments were first directly considered by a court in Solomon v. Commissioner, T.C. Memo. 1993-509, 66 T.C.M. (CCH) 1201 (1993), affirmed without published opinion, 42 F.3d 1391 (7<sup>th</sup> Cir. 1994), where Judge Dawson found that neither §§861(a)(1) and 861(a)(3) nor § 911(d)(2)(A) provided a basis for excluding from gross income (i) interest income from sources within the United States or (ii) compensation received for the performance of personal services within the United States when received by a United States citizen residing in the United States.

A similar argument was next considered by the Tax Court in Aiello v. Commissioner, T.C. Memo 1995-40, 69 T.C.M. (CCH) 1765 (1995) where the taxpayer asserted that (1) no Federal statute imposed a tax on the income of citizens or residents of the United States that is derived from sources within the United States and (2) Federal income taxes were imposed only on the privilege of nonresident aliens and foreign corporations to receive income from sources within the United States. Noting that the taxpayer’s first argument was clearly rebuffed by the existence of § 61(a) and that his argument that the source rules

of §861 somehow limited the all inclusive scope of §61(a)'s gross income definition was unclear, Special Trial Judge Wolfe held that the taxpayer was clearly required to include income from whatever source derived in calculating his gross income, his taxable income and his liability for tax.

The Tax Court next considered the argument in Williams v. Commissioner, 114 T.C. 136 (2000), where the Tax Court clearly stated that the taxpayer was arguing that since his income was not from any of the sources enumerated in § 1.861-8(a) of the regulations, that income was not appropriately subject to taxation in the United States. In assessing this argument, Judge Vasquez stated:

"We shall not painstakingly address petitioner's assertions 'with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit.' *Crain v. Commissioner*, 737 F.2d 1417, 1417 (5<sup>th</sup> Cir. 1984). Accordingly, we conclude that petitioner is liable for the deficiency determined by respondent."

Id. at 139.

Judge Vasquez then considered whether he should sustain the §6673 penalty imposed against the pro se petitioner. Noting that such a penalty is appropriately imposed only if the position taken is frivolous, Judge Vasquez noted that a position is frivolous only "where it is 'contrary to established law and unsupported by a reasoned, colorable argument for a change in the law.'" Id. at 144 (citing Coleman v. Commissioner, 791 F.2d 68, 71 (7<sup>th</sup> Cir. 1986)). Considering this standard, Judge Vasquez nonetheless imposed the §6673 penalty against the taxpayer.

The Tax Court again considered the arguments first advanced in Solomon v. Commissioner, supra, in Furniss v. Commissioner, T.C. Memo 2001-137, 81 T.C.M. (CCH) 804 (2001). Judge Marvel found that "[n]either section 911 nor section 861

operates to prevent section 61 from applying to petitioner's receipts."

Accordingly, on four separate occasions, three different Judges and one Special Trial Judge of the United States Tax Court determined that the § 911 argument, the § 861 argument or both in combination did not prevent the income of a United States citizen, residing in and earning income from sources within the United States, from being included in gross income under §61(a) and from being subject to tax under §§1(a), 1(b), 1(c) or 1(d). The only decision of the Tax Court appealed was affirmed on appeal, again prior to the dates of Respondent's conduct.

Moreover, even earlier, in 1985, a United States District Court issued an opinion in Peth v. Breitzmann, 611 F. Supp. 50 (E.D. Wisc. 1985), in which a pro se taxpayer sought to enjoin collection of Federal income taxes and to obtain a refund of taxes alleged to have been wrongfully withheld from his pay. The taxpayer argued, inter alia, that his compensation was excludable from the definition of gross income under §861(a)(3)(C)(ii) as "compensation . . . for labor or services performed in the United States as an employee of or under a contract with . . . an individual who is a citizen or resident of the United States, a domestic partnership, or a domestic corporation, if such labor or services are performed for an office or place of business maintained in a foreign country or in a possession of the United States by such individual, partnership, or corporation." The court gave short shrift to this argument, noting:

"Suffice it to say that if plaintiff wished to avail himself of § 863(a)(3)(C)(ii), he would have to show that his work was done for a foreign office, or an office in a United States possession, of a domestic business entity. He has not alleged this, and it is clear from the record that he performed his work in the State of Wisconsin for Wisconsin employers."

Id. at 55. The court could also have noted that even in those circumstances, §861(a)(3)(C)(ii) would have excluded the income from inclusion in United States gross income only if the recipient was also a nonresident alien temporarily in the United States for a period or periods not exceeding 90 days during the taxable year. Finding these and the other arguments advanced by the plaintiff to be without merit, the court imposed Rule 11 sanctions against the pro se taxpayer. Id. at 56-57.

The District Court's decision in Peth v. Breitzmann, supra, the Tax Court decision and 7<sup>th</sup> Circuit's summary affirmance in Solomon v. Commissioner, supra, and the Tax Court's decision in Aiello v. Commissioner, supra each preceded the dates of Respondent's conduct. Further, the dispatch with which Judge Vasquez dealt with petitioner's arguments in Williams v. Commissioner, supra, and the fact that he saw fit to impose a \$6673 penalty against a pro se taxpayer based on the same state of the law that existed on the dates of Respondent's conduct, support Judge Moran's conclusion that each of the actions undertaken by Respondent as alleged in the Initial Complaint involved the assertion of frivolous arguments in violation of the various sections of Treasury Circular 230 cited in the Initial Complaint. While I would have phrased the point differently, I agree with the spirit of the following statement by Judge Moran, appearing at page 6 of his Order on Complainant's Motion for Summary Judgment:

"Interestingly, the language of IRC Section 61 is the same as that used in the Sixteenth Amendment. Thus, the 861 argument and the non-ratified Sixteenth Amendment argument share a related lunacy in that, for differently concocted reasons, neither accomplishes the presumed goal of creating a Federal income tax on U.S. citizens."

Accordingly, I find that Respondent's arguments are now and were at the time of Respondent's conduct patently improper and therefore frivolous. See §10.34(a)(4)(ii) of Treasury Circular 230.

Having concluded that both Respondent's Sixteenth Amendment argument and his argument predicated on the §§861-865 "source" rules are now and were then frivolous, I next turn to the question of whether the conduct in question is an offense of the type justifying disbarment or suspension under §10.52 of Treasury Circular 230. For the reasons stated below, I find that the violations in question independently justify Judge Moran's decision to disbar Respondent.

Respondent's actions in preparing Taxpayer T's amended Federal income tax returns (Forms 1040X) for the years 1996 and 1998 are to be judged under the standards set forth in both §10.52(a) and §10.52(b) of Treasury Circular 230. As noted elsewhere in Section 2 of this Decision (see pp. 39 -- 58, infra), I also agree that Respondent's conduct was willful. Under §10.52(a) of Treasury Circular 230, a practitioner may be disbarred or suspended from practice before the Internal Revenue Service for willfully violating any of the regulations contained in Treasury Circular 230, while under §10.52(b) of Treasury Circular 230 a practitioner may be disbarred or suspended for recklessly or through gross incompetence (within the meaning of §10.51(j) of Treasury Circular 230) violating either §10.33 or §10.34 of the Circular.

Treasury Circular 230 does not itself contain a definition of "willfulness." §10.51(j) of Treasury Circular 230, however, quoted verbatim at p. 22, supra, defines and provides examples of conduct deemed either "reckless" or "grossly incompetent."

I agree with Judge Moran's finding that the preparation of Taxpayer T's amended individual income tax returns (Forms 1040X) for the years 1996 and 1998 constituted conduct both reckless and grossly incompetent within the meaning of §10.52(b) of Treasury Circular 230. I believe that Judge Moran's decision with respect to the conduct underlying these two charges is supported by the obviously frivolous nature of the argument. It is obvious that this argument would have the effect of largely gutting the individual income tax, or at least its

application to United States persons with respect to income sources within the United States. That alone would give even a layman pause, let alone an experienced tax practitioner. The fact that every Federal court that had considered the argument found it to be without merit, and that more than one court had characterized the argument as groundless, should have, and I believe did, provide Respondent with adequate notice that the argument was frivolous.

Respondent has argued that since the Internal Revenue Service itself did not publish guidance indicating that the §861 "source" of income argument until it published Notice 2001-40 in 2001 that the law was unsettled until that guidance appeared. Respondent's argument is without merit. The longstanding legislative history of the sourcing rules as well as the various cases alluded to above provided Respondent with ample notice of the frivolous nature of his argument and of the Internal Revenue Service's position on the issue.

The fact that the Internal Revenue Service has not published public guidance on any issue does not demonstrate the Service's acceptance of a position, nor does it indicate that the law on the issue is unsettled. As a general rule, when the Service publishes interpretive public guidance on an issue, it normally does so "retroactively," reflecting the fact that the law which the guidance interprets (a statutory enactment by the Congress or interpretative decisions by Federal Courts, for example) existed prior to the publication of the published guidance. In those instances where the guidance reflects either a change in the law (because of the enactment of new legislation) or an adverse change in prior published favorable guidance of the Internal Revenue Service that provided taxpayers with a basis for reliance, the Internal Revenue Service typically exercises the authority granted it by §7805(b) of the Internal Revenue Code of 1986 and gives that new published guidance prospective only application. When published guidance is intended to have prospective only application, the Service notes that fact in the guidance itself.

This rule accommodates the fact that the Internal Revenue Service and the IRS Chief Counsel are responsible for administering complex laws applying to literally hundreds of millions of taxpayers, yet are provided limited resources with which to address a myriad of technical issues. These resource constraints mean that at any given time, the Internal Revenue Service has literally hundreds of issues it hopes to address through published guidance. Because of its singular importance to the uniform administration of our tax laws, in allocating scarce technical resources, the Internal Revenue Service and the IRS Office of Chief Counsel accord published guidance priority over other forms of guidance, such as internal guidance to Internal Revenue Service personnel and guidance provided to individual taxpayers through private letter rulings. However, the Internal Revenue Service and the IRS Office of Chief Counsel recognize that private letter rulings (on which particular taxpayers requesting the rulings but not the general public may rely) also serve an important function in our tax system, particularly in areas where public guidance providing the general public with a basis for reliance is lacking. In most areas, by paying a "user's fee," taxpayers may generally request a private letter ruling on issues where they feel they need a basis for reliance in entering into transactions or before taking positions on their returns.

In the absence of published guidance applicable to the public as a whole or a private letter ruling issued to the taxpayer, taxpayer and practitioners cannot assume that the tax results anticipated from a transaction will follow or that the position he is considering taking on a return will be accepted. It is here where the advice provided by tax practitioners is critical to the proper functioning of our tax system. This is because the fact that the Internal Revenue Service has not yet issued guidance on an issue provides taxpayers or practitioners with neither any basis for "reliance" nor an indication that existing law on the issue is unsettled.

Over the years, the Internal Revenue Service has generally limited its published guidance to issues it considers be non-frivolous and of wide importance under our tax laws. In part, this decision reflects the resource considerations described above. In part, it reflects concerns similar to those expressed by Judge Vasquez in Williams v. Commissioner, *supra*. When the Internal Revenue Service has issued public guidance on matters it considers frivolous, it normally indicates in the guidance that it considers the issue to be frivolous and settled under existing law and that taxpayers risk exposure to civil and criminal tax penalties if they assert the position. The Internal Revenue Service did so with respect to the §861 "source of income" argument in both Notice 2001-40, 2001-1 C.B. 1355, and more recently in Rev. Rul. 2004-30, 2004-12 I.R.B. 622 (March 22, 2004).

It is worth noting that when Respondent prepared the Amended U.S. Individual Income Tax Returns (Forms 1040X) for Taxpayer T's 1996 and 1998 tax years, he did not in any way reference the adverse case precedents discussed above that clearly disclosed the frivolous nature of Respondent's argument. Given Respondent's education, training and experience, it taxes credulity to either assume or believe that these omissions were innocent in nature. Complainant did not charge that Respondent's failures to include a reference to and a discussion of these adverse precedents in Taxpayer T's amended returns called into question the adequacy of the disclosures prepared by Respondent for Taxpayer T, though I think he would have been justified had he done so. However, that issue is not before me and I see no need to remand this matter to Judge Moran to permit him to determine whether to allow Complainant to further amend his Initial Complaint given my agreement with Judge Moran that the position in question was frivolous and had no realistic possibility of success on the merits. However, as I will note below, I do find these omissions relevant to the question of whether Respondent was acting in good faith, not only in preparing the amended returns in question but in his overall

conduct, at least as it relates to Respondent's §861 "source of income" argument.

The next question is whether Respondent's violations as set forth in the Initial Complaint were "willful" within the meaning of §10.52(a) of Treasury Circular 230. As noted above, Treasury Circular 230 itself does not define the term "willful." Absent such a regulatory definition, it is appropriate to ascribe a meaning to the term that comports with that given the term in the case law interpreting the criminal provisions of the Internal Revenue Code of 1986, which in some respects punish like conduct. See, e.g., §§ 7201-7207 of the Internal Revenue Code of 1986, as amended and in effect during the years in issue. Likewise, in those instances where it is relevant to determine whether Respondent acted "knowingly" in violating the provisions of Treasury Circular 230 set forth in the Initial Complaint, I also find these precedents instructive.

The leading United States Supreme Court decisions defining "willful" conduct within the meaning of §§7201-7207 of the Internal Revenue Code of 1986 are United States v. Pomponio, 429 U.S. 10 (1976), and United States v. Bishop, 412 U.S. 346 (1973). In United States v. Pomponio, supra, the respondents were charged with willfully filing false tax returns in violation of §7206(1) of the Internal Revenue Code of 1954, as amended and in effect during the years in issue (a predecessor provision identical in all respects to §7206(1) of the Internal Revenue Code of 1986, as amended and in effect during the years here in issue). At issue were jury instructions issued by the District Court judge that the Court of Appeals found erroneous because the Court of Appeals believed that "the statute at hand requires a finding of a bad purpose or evil motive." United States v. Pomponio, 528 F.2d 247, 249 (4th Cir. 1975). The Fourth Circuit's opinion was based on its reading of United States v. Bishop, supra. Finding that reading of Bishop incorrect, the Supreme Court reversed and remanded, stating:

"[T]he jury was instructed that 'good motive alone is never a defense where the act done or omitted is a crime,' and that consequently motive was irrelevant except as it bore on intent. The Court of Appeals held this final instruction improper because 'the statute at hand requires a finding of a bad purpose or evil motive.' 528 F.2d at 249. In so holding, the Court of Appeals incorrectly assumed that the reference to an 'evil motive' in *United States v. Bishop, supra*, and prior cases meant something more than the specific intent to violate the law described in the judge's instruction."

"In *Bishop*, we held that the term 'willfully' has the same meaning in the misdemeanor and felony sections of the Internal Revenue Code, and that it requires more than a showing of careless disregard of the truth. We did not, however, hold that the term requires proof of any motive other than an intentional violation of a known legal duty. We explained the meaning of willfulness in §7206 and related statutes:

"The Court, in fact, has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as 'bad faith or evil intent,' [*United States v.*] *Murdock*, 290 U.S. [389,] 398, or 'evil motive and want of justification in view of all the financial circumstances of the taxpayer,' *Spies [v. United States]*, 317 U.S. [492,] 498, or knowledge that the taxpayer 'should have reported more income than he did.' *Sansone [v. United States]*, 380 U.S. [343,] 353. See *James v. United States*, 366 U.S. 213, 221 (1961); *McCarthy v. United States*, 394 U.S. 459, 471 (1969).' 412 U.S., at 360.

"Our references to other formulations of the standard did not modify the standard set forth in the first sentence of the

quoted paragraph. On the contrary, as the other Courts of Appeals that have considered the question have recognized, willfulness in this context simply means a voluntary, intentional violation of a known legal duty. *United States v. Pohlman*, 522 F.2d 974, 977 (CA8 1975) (en banc), cert. denied, 423 U.S. 1049 (1976); *United States v. McCorkle*, 511 F.2d 482, 484-485 (CA7) (en banc), cert. denied, 423 U.S. 826 (1975); *United States v. Greenlee*, 517 F.2d 899, 904 (CA3), cert. denied, 423 U.S. 985 (1975); *United States v. Hawk*, 497 F.2d 365, 366-369 (CA9), cert. denied, 419 U.S. 838 (1974). The trial judge in the instant case adequately instructed the jury on willfulness. An additional instruction on good faith was unnecessary."

429 U.S. at 11-13.

Respondent has argued that the United States Supreme Court's decision in Cheek v. United States, 498 U.S. 192 (1991), supports his contention that he lacked "willfulness" in asserting the §861 "source of income" argument. Respondent also argues that Judge Moran's decision to decide the liability issues in these proceedings through Motion for Summary Judgment rather than a full evidentiary hearing on the liability issues, precluded Judge Moran from considering the evidence necessary to permit him to make a determination as to "willfulness" given the Supreme Court's holding and discussion in Cheek.

Cheek was an airline pilot charged with attempting to evade income taxes in violation of §7203 of the Internal Revenue Code of 1954, as amended and in effect during the years there in issue (a provision identical to §7203 of the Internal Revenue Code of 1986, as amended and in effect during the years here in issue). Cheek had been convicted by a jury that acted pursuant to jury instructions issued by a United States District Court judge, acting as the trial judge. That conviction had been affirmed by the United States Court of Appeals for the Seventh Circuit.

The issue considered by the United States Supreme Court, which proved the basis for the Supreme Court's decision vacating Cheek's conviction and remanding the case for further consideration by the Seventh Circuit, was the propriety of the jury instructions issued by the trial judge. Cheek had filed tax returns for all taxable years to and including 1979. During 1980, Cheek filed a Form W-4 with his employer increasing his claimed withholding allowances to 60. Cheek asserted that he did so, and that he failed to file tax returns for several subsequent years because he believed he owed no tax. Cheek asserted two bases for his belief – that the Sixteenth Amendment to the United States Constitution had not been duly ratified and that wages were not income subject to tax (the latter being a matter of statutory interpretation).

While both arguments were rejected, Cheek argued that he had not “willfully” violated the law because his beliefs were honestly held and entitled to be so treated even if not objectively reasonable. The trial judge initially issued one jury instruction during the first day of the jury deliberations, which the United States Supreme Court did not find objectionable. That instruction provided:

“[A] person's opinion that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the law. Furthermore, a person's disagreement with the government's tax collection systems and policies does not constitute a good faith misunderstanding of the law.”

At the end of the first day's deliberations, the jury indicated that it still had not reached agreement.

When the jury commenced its second day of deliberations, the trial judge issued a second jury instruction. That instruction, which was the subject of the United States Supreme Court's criticism, provided:

""[A]n honest but unreasonable belief is not a defense and does not negate willfulness."

After receiving that instruction, the previously deadlocked jury convicted Cheek on all counts.

In his decision for the Court, Justice White noted that "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." Id. at 199. "Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law." Id. Citing Bishop v. United States, supra, and Pomponio v. United States, supra, Justice White indicated that:

"Taken together, *Bishop* and *Pomponio* establish that the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.'" Cheek v. United States, supra, at 201.

Justice White went on to note that:

"Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." Id.

With regard to the second of the three required proofs (knowledge), Justice White noted that, with respect to knowledge of matters of statutory construction under the tax laws, when Congress imposed a "willfulness" standard it intended to depart from the common law rule presuming knowledge of the law (a rule of presumed general intent) to a rule requiring proof by the Government of knowledge of the law on the part of the defendant (a rule requiring the Government to prove a specific subjective intent). Cheek v. United States, supra, at 200-201. Justice White went on to note that:

"[C]arrying this burden requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good faith belief that he was not violating any of the provisions of the tax laws. This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist." Id. at 202.

Justice White then indicated that this same modification of the common law conclusive presumption of knowledge did not extend to issues involving the constitutionality of the tax laws, where the common law rule of conclusive presumption of knowledge continued to apply. Justice White explained the Court's reasons for not extending the specific intent standard to constitutional questions as follows:

"Such a submission is unsound, not because Cheek's constitutional arguments are not objectively sound or frivolous, which they surely are, but because the *Murdock-Pomponio* line of cases does not support such a position. Those cases construed the willfulness requirement in the criminal provisions of the Internal Revenue Code to require proof of knowledge of the law. This was because in 'our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law,' and '[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care.'" Id. at 204-205 (citing United States v. Bishop, supra, at 360-361 as quoting Spies v. United States, 317 U.S. 492, 496 (1943)).

With respect to issues involving matters of statutory construction under the Internal Revenue Code, Justice White next discussed the specific question posed for the Supreme Court's consideration: What factors should be considered in determining the defendant's knowledge, and specifically, should

such determinations be limited only to issues where a purported good faith belief was predicated on an objectively reasonable, as opposed to unreasonable or frivolous, argument? Justice White acknowledged that both of Cheek's asserted arguments were not objectively reasonable and were frivolous. Id. at 205. In construing the statutory "willfulness" requirement in the context of a criminal tax prosecution that raised Sixth Amendment considerations (" . . . this Court, where possible, interprets congressional enactments so as to avoid raising serious constitutional questions . . ." - Id. at 203), and in light of more generalized concerns about preserving for the factfinder (in Cheek, the jury) the role of considering what factors should and should not be considered in determining whether the defendant had an honest but mistaken belief that wages were not income ("{k}nowledge and belief are characteristically questions for the factfinder, in this case the jury . . ." - Id.), Justice White indicated that:

"Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it. It would of course be proper to exclude evidence having no relevance or probative value with respect to willfulness; but it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty, and forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." Id. at 203.

On this basis, the Court vacated the judgment of the Court of Appeals and remanded the case for further proceedings consistent with its opinion. In so doing, however, the Supreme Court was careful to note:

"Of course, the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple

disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.” Id. at 203-204.

Accordingly, while the Court found that the question of whether a belief was objectively reasonable was inappropriately inserted in the process to preclude consideration of the matter by the factfinder, Cheek does not stand for the proposition that the objective reasonableness of an argument is irrelevant to the determination of whether a good faith belief exists that the argument is proper. To the contrary, the Court’s opinion makes it clear that objective reasonableness may be a highly reliable indicator of whether an asserted belief is subjectively made in good faith.

Upon remand, the Seventh Circuit reiterated the same point, stating:

“Tax evaders that persist in their frivolous beliefs (such as that wages are not income or that Federal Reserve Notes do not constitute cash or income) should not be encouraged by the [Supreme] Court’s decision in *Cheek* or our decision today. While a defendant is now permitted to argue that his failure to file income tax returns and to pay income taxes was the result of his incredible misunderstanding of the tax law’s applicability, the government remains free to present evidence demonstrating that he knew what the law required but simply chose to disregard those duties. . . . And, as the {Supreme] Court noted, ‘the more unreasonable the asserted beliefs or misunderstandings, the more likely the jury will consider them to be nothing more than a simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.’”

United States v. Cheek, 931 F.2d 1206, 1208-1209 (7<sup>th</sup> Cir. 1991).

The United States Court of Appeals for the Tenth Circuit had its own way of characterizing the tasks left for the trial judge and the jury as factfinder after Cheek when the asserted argument is not objectively reasonable. In United States v. Willie, 941 F.2d 1384, 1392 (10<sup>th</sup> Cir. 1991), the Tenth Circuit stated:

“Thus, his belief must be descriptive – he must believe that the law *does not* apply to him. A normative belief that the law *should not* apply to him leaves Willie fully aware of his legal obligations and simply amounts to a disagreement with his known legal duty and a ‘studied conclusion . . . that [the law is] invalid and unenforceable.’ (Citing the Supreme Court’s decision in Cheek v. United States, *supra*, at 205-206).

“It is apparent that it is a delicate balance to differentiate between a belief that the law *should* be different and a belief that the law *is* different. The difficulty of discerning the often subtle distinctions is magnified by the fact that much of the same evidence can be used to prove both types of belief and because the word ‘belief’ itself is used loosely in describing both sides of the dichotomy. As a result, the precise purpose for which the evidence is offered becomes crucial to the trial court’s determination of admissibility, particularly in cases of this nature where the careless admission of evidence supporting both relevant and irrelevant types of belief could easily obfuscate the relevant issue and tempt the jury to speculate that the mere existence of documentary support for the defendant’s position negates his independent knowledge that he has a legal duty. . . . The defendant must, therefore, persuasively show the trial judge that the evidence is being offered for a permissible purpose by making a proffer of great specificity regarding the type of belief he seeks to prove.” United States v. Willie, *supra*, at 1392-1393.

These considerations become even more complex where the fervent nature of the taxpayer’s belief in what *should be*

colors the taxpayer's perception of what *is* and causes him to turn a blind eye to what plainly can be seen. Taxpayers (and practitioners) can be "blind" to questions of both fact and law. Courts have found that defendants cannot deny a finding that they acted with requisite knowledge through "willful blindness" (an unwillingness to examine and consider what is there to be seen). See, e.g., United States v. Jewell, 532 F.2d 697 (9<sup>th</sup> Cir. 1976), where (in a case involving the possession of controlled substances) the Ninth Circuit considered the following jury instruction:

"The Government can complete their burden of proof by proving, beyond a reasonable doubt, that if the defendant was not actually aware that there was marijuana in the vehicle he was driving when he entered the United States his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth."

Id. at 700. The Ninth Circuit went on to note:

"The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable. The textual justification is that in common understanding one 'knows' facts of which he is less than absolutely certain. To act 'knowingly,' therefore, is not to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, positive knowledge is not required."

Id. The "willful blindness" doctrine has also been applied in criminal tax prosecutions. See, e.g., United States v. Willis, 277 F.2d 1026, 1031-1032 (8<sup>th</sup> Cir. 2002).

Applying these precedents regarding "willfulness" and "knowledge" to these proceedings, It is appropriate to note at

the outset some significant differences between these proceedings and the proceedings in Cheek.

First, Cheek involved a criminal proceeding and this case does not. This becomes an important distinction both because these proceedings do not raise questions of rights secured by the Sixth Amendment and for the broader reason that the division of functions between the trial judge and the jury in Cheek do not exist here. In disciplinary proceedings under Treasury Circular 230, all such functions are performed by the Administrative Law Judge. See §10.70(b) of Treasury Circular 230. For this reason, these proceedings do not raise the issue of whether Respondent's belief is objectively reasonable in a manner that prevents the issue from being considered by the factfinder. Here, the determination of the objective reasonableness of Respondent's beliefs is only considered as the Supreme Court indicated in Cheek it should be considered – as relevant and probative evidence indicating whether Respondent is credible in asserting his subjective good faith but mistaken belief, and in assessing the nature of that belief.

Second, the Supreme Court's decision in Cheek v. United States, supra, involved an ordinary taxpayer, not an experienced tax professional. This factual distinction may be relevant for four reasons.

*Ordinary Taxpayers v. Tax Practitioners.* in light of the distinctions made in United States v. Boyle, supra, between the nature of responsibilities assumed in our tax system by ordinary taxpayers, on the one hand, and experienced tax practitioners, on the other, it is unclear whether the rationale underlying the Supreme Court's decision would apply at all to an experienced tax practitioner, even in a criminal tax prosecution. At the very least, the rationale would appear not to apply with equal force in the case of an experienced tax practitioner.

This distinction was suggested in the Sixth Circuit's decision in United States v. Alt, 996 F.2d 827 (6<sup>th</sup> Cir. 1993).

There, the issue under consideration was whether a jury instruction similar to the one in Cheek should be cause to overturn the conviction of a married couple. One of the issues before the Sixth Circuit was the determination of whether the error in giving the instruction constituted harmless error. In determining whether the error was harmless, the court examined the background and experience of each of the taxpayers.

In the case of the husband, there was no direct evidence in the record of his knowledge of Federal taxation. The court refused to infer that knowledge, and on that basis found that giving of the instruction was not harmless error as to the husband.

The court found that the question of whether the instruction was harmless error was as to the wife was a closer question. The Government had introduced evidence that the wife took financial management and federal income tax courses and operated a financial management business, which the court described as direct evidence of her knowledge of the tax laws. The evidence also showed that she managed all of her husband's financial affairs and prepared the returns that were the subject of the prosecution. But the defense offered what the court characterized as a "substantial amount" of evidence indicating that the wife was less than proficient in financial matters, especially matters dealing with taxation. The Sixth Circuit found that, in light of the conflicting evidence in the record as to the wife, the jury's presumption that she knew her legal duty may well have been critical to the jury's decision as to the wife. As a consequence, the Sixth Circuit found that it could not safely conclude that the jury instruction was harmless error as to the wife either.

Two aspects of the Sixth's Circuit's decision in Alt are noteworthy. The Sixth Circuit did not reflexively assume that Cheek compelled reversal of the convictions with respect to the husband and the wife. Rather, the court examined the education, background and work experience of each defendant to determine

the nature and extent of their familiarity with the tax laws. Moreover, neither the husband nor the wife in Alt had a familiarity with the tax laws that remotely approached that which Respondent possessed on the dates of his questioned conduct.

*No Denial of Consideration by the Factfinder.* Even if a court were to determine that Cheek's underlying rationale applied, albeit in modified form, in the case of a criminal tax proceeding against an experienced tax practitioner, it would appear clear from Cheek that a factfinder could consider both the absence of objective reasonableness of the argument advanced by the practitioner and the nature and extent of his familiarity with federal tax matters in assessing the practitioner's credibility in asserting a good faith mistake defense.

*Purpose of the Proceeding.* Unlike criminal tax prosecutions such as the one in Cheek, these proceedings have as their purpose determining Respondent's fitness to practice before the Internal Revenue Service. Even if one were to conclude that an objective reasonableness limitation placed on the scope of a factfinder's factual inquiry in a criminal tax prosecution was an unwarranted limitation on the factfinder, it would not necessarily follow that the same would or should be true in a disciplinary proceeding under Treasury Circular 230. Given the duties and responsibilities respectively assigned to taxpayers and tax practitioner in our tax system (see discussion of United States v. Boyle, supra), it is appropriate that the higher standards of competence required of experienced tax practitioners at the least be accompanied by a correspondingly greater skepticism in disciplinary proceedings under Treasury Circular 230 when such practitioners seek to establish good faith mistake defenses with respect to positions that are not objectively reasonable.

*Inapplicability to Respondent's Sixteenth Amendment Argument.* Under Cheek, the "honest mistake" defense, whether based on an objectively honest belief or not, is not available with

respect to mistakes involving the constitutionality of the income tax. Taxpayers and practitioners alike are conclusively presumed to have knowledge of the constitutional law. As a consequence, Cheek offers Respondent no comfort whatsoever with respect to his statements to Taxpayer C in the course of his representational activities that the Sixteenth Amendment had not been properly ratified.

Turning to the Decision of the Administrative Law Judge (including the Orders of the Administrative Law Judge incorporated by reference) and to the administrative record, I find that Judge Moran had ample reason for finding that Respondent's conduct was willful and knowing under the standards discussed above and that his conduct, as alleged in the Initial Complaint, had been proven by clear and convincing evidence and justified disbarment from practice before the Internal Revenue Service.

At page 2 of the Decision of the Administrative Law Judge in these proceedings, Judge Moran made the following statement with respect to the charges contained in the Initial Complaint:

"A fundamental purpose of a hearing or trial is to determine whether the allegations of fact, as set forth in the Complaint, occurred. But where there is no dispute as to the underlying facts, obviously there is no need for a court to resolve whether one party's version of the facts is more believable than the other side's version. That is what happened in this case. In fact, in Mr. Banister's answer to the original Complaint he *admitted* that the facts alleged in the Complaint occurred. Thus, Mr. Banister *admitted* that he so advised his client "C" that the Sixteenth Amendment to the United States Constitution was not ratified and he *admitted* that he advised client "C" that Internal Revenue Code sections 861 through 865 defined "source of income" so as to exclude C's earnings. Similarly, Banister *admitted* that he also advised client "T" that Internal Revenue Code sections 861 through 865 defined "source of income" so as

to exclude T's earnings. The very significant problem with Banister's advice is that it is absolutely wrong. Both of Banister's assertions have been long resolved by the Federal Courts as completely without merit. Thus, Banister was not presenting some new theory in support of the dream entertained by some United States citizens that somehow they don't have to pay their federal income taxes. In fact, Banister's assertions have been addressed by so many federal courts that they are no longer accorded the dignity of repeating the explanations as to why the claims are meritless. Accordingly, with no factual dispute as to the allegations in the original Complaint, and having determined as a matter of law that such advice to clients "T" and "C" constituted misconduct and disreputable conduct under the regulatory sections cited in the Complaint, the Court directed summary judgment in favor of the IRS."

While Judge Moran found it appropriate to decide the question of whether Respondent committed the acts alleged in the Initial Complaint, and the question of whether those acts constituted disreputable conduct, on the basis of Complaint's Motion for Summary Judgment, and found that such violations and their status as disreputable conduct had each been proved by clear and convincing evidence, the court held a hearing under §10.70 of Treasury Circular 230 to determine which of three potentially applicable sanctions – disbarment, suspension or censure – to impose against Respondent. In his Decision of the Administrative Law Judge, Judge Moran summarized what he took to be the testimony from that hearing most relevant to the sanctions determination.

From the testimony of Mr. Frinz, he discerned that the Director of the Office of Professional Responsibility made a determination of which sanction to seek against a practitioner based on the severity of the offense, whether it was repetitive, the nature of the signal that would be sent to the practitioner community if the IRS failed to discipline, or insufficiently

disciplined, a practitioner in light of the conduct charged, and other aggravating and mitigating factors. Mr. Frinz indicated that the Director considered the conduct: egregious because the contentions advanced by Respondent had consistently been rejected by the courts; and repetitive because the views had been advanced on behalf of more than one client. Mr. Frinz also indicated that Respondent's experience, including but not limited to that as a former IRS employee, his educational background, and the fact that he was a certified public accountant were aggravating factors in that a practitioner of his experience should have known better than to advance these long-rejected arguments. Judge Moran noted that there was also ample evidence to this effect in the administrative record "from [Respondent] himself." Judge Moran also noted that Mr. Frinz had indicated that the Director of the Office of Professional Responsibility has also determined that a sanction less than disbarment was inappropriate since Respondent had neither shown remorse nor repudiated the underlying, discredited views.

Judge Moran then went on to discuss at length various statements made by Respondent in the unsworn statement Respondent read during the hearing on sanctions held on December 1, 2003. The most salient portions of those materials (from page 6 of the Decision of the Administrative Law Judge) appear below:

"Along the way, he [Respondent] '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 him and contributed to a change in [his] perspective.' Tr. 73. Answering what he perceived to be a higher calling, he attempted to get answers to his doubts about the federal income tax system, but was ignored in this endeavor. [Respondent] continues to have strong convictions that the IRS does not have authority to collect income taxes from most United States citizens. He has pursued these convictions without success. 'For reasons I

do not understand, I have been unable to impress upon my IRS supervisors, the 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 is engaged in serious wrongdoing.' Tr. 75. He ties these views to his religious beliefs: '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.'"

Again, at pages 6-7 of the Decision of the Administrative Law Judge, Judge Moran noted:

"[Respondent] also asserted in his unsworn statement that he has '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.' This assertion is inaccurate. [Respondent] was permitted to offer any evidence he could muster to rebut the charges set forth in the [Initial] Complaint and the Amended Complaint. As this decision reflects, he was also given the opportunity to offer any factors for the Court to consider, in mitigation of the violations, in determining the appropriate sanction. Despite the opportunity to do so, [Respondent] offered nothing that the Court could consider in mitigation. Instead, he continued to assert his ardent belief that the IRS acts fraudulently and without authority to impose a federal tax: 'Once I resigned from the Internal Revenue Service, my

detailed knowledge of the IRS's wrongdoing increased at an exponential rate. . . . I believe that the IRS purposelessly and fraudulently manipulates its individual master file computer system to achieve desired results against an unsuspecting public, because I have witnessed it.' [Respondent] is entitled to whatever beliefs he chooses, but the question here is his fitness to continue to practice before the IRS. Espousing his long discredited views regarding the validity of the ratification of the Sixteenth Amendment, his equally discredited view that Section 861 of the Internal Revenue Code accomplished a result which was exactly opposite to the intent to tax the income of United States citizens, . . . are all completely inconsistent with such fitness."

Finally, Judge Moran noted with apparent approval and agreement the following statements from the closing argument of Complainant's counsel, Mr. Kessler:

"In his closing statement, Mr. Kessler, as counsel for the IRS, brought the proceedings back to the real world of facts, noting that [Respondent's] actions were about his 'blatant disregard for the regulations which govern his practice before the IRS that was the cause of this action.' The IRS noted that: '[A]s a certified public account[ant] 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 [and that] as a practitioner before the IRS, Respondent has a duty to exercise due diligence and further viable arguments in representing clients before the IRS. This utter disregard is evidenced by . . . his reliance on arguments that have been consistently rejected by the courts to the point where sanctions have been ordered and injunctions obtained against individuals making the same claims as the Respondent."

“Mr. Kessler noted, as has this court, that ‘a number of courts have clearly rejected the position taken by Respondent’ and that ‘not a single court has ruled in Respondent’s favor on these issues.’ Tr. 84. He correctly observed that 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 investigation 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.’ Tr. 85. In fact, the Court finds that it is not believable at all and that, if accepted that Banister did not know of all the cases rejecting his views, such unawareness would itself clearly evidence incompetence on Respondent’s part.”

Decision of the Administrative Law Judge, p. 8.

From the above, I conclude that there was clear and convincing evidence in the record to support Judge Moran’s determination that Respondent willfully and knowingly committed each of the violations with which he was charged in the Initial Complaint. It follows that it is even clearer than Judge Moran’s determination in this regard was not “clearly erroneous.” Judge Moran’s quotation of Respondent’s unsworn statement clearly evidences his awareness of the “willfulness” requirement of §10.52(a) of Treasury Circular 230 and his findings with respect to Respondent’s beliefs and his express holding that Respondent’s actions were willful are clearly consistent with the Supreme Court’s holding in Cheek as to the appropriate consideration of “objective unreasonableness” – determining the credibility of the party asserting a good faith but mistaken belief defense, and the nature of that belief. Judge Moran clearly found that credibility lacking. I agree. In addition, I find that Respondent’s own unsworn statement, to which Judge Moran referred at length, reflects that Respondent’s beliefs are not a good faith misunderstanding of a known legal duty but rather a

“studied conclusion . . . that [the law is] invalid and unenforceable.” United States v. Willie, *supra*, at p.1392 (citing the Supreme Court’s decision in Cheek v. United States, at 205-206). See also the decision of the United States Court of the Appeals for the 7<sup>th</sup> Circuit on remand from the Supreme Court, United States v. Cheek, 931 F.2d 1206, 1208-1209 (7<sup>th</sup> Cir. 1991). Such a belief does not indicate a lack of willfulness. Further, as noted above, I also would have found Respondent’s omission of any reference to and discussion of the adverse precedents relating to Respondent’s §861 “source of income” argument in the amended income tax returns (Forms 1040X) Respondent prepared for Taxpayer T for the 1996 and 1998 tax years to be further evidence of Respondent’s lack of good faith.

### 3. Allegations Raised in the Amended Complaint

The charges made for the first time in the Amended Complaint relate to Respondent’s purported failures to file individual income tax returns for the years 1999, 2000, 2001 and 2002, which Complainant charged constituted disreputable conduct punishable by disbarment or suspension under § 10.51(f) of Treasury Circular 230. As noted above, the provisions of Treasury Circular 230 in effect on the date of the alleged conduct govern whether a violation of Circular 230 occurred. See § 10.91 of Treasury Circular 230. The due dates for individual income tax returns for the years 1999, 2000, 2001 and 2002 were April 15, 2000, April 15, 2001, April 15, 2002 and April 15, 2003, respectively. While the first three of these dates preceded July 26, 2002, there was a provision contained in Treasury Circular 230 as amended and in effect on each of the dates in issue (§ 10.51(d)) identical in all material respects to §10.51(f) of Treasury Circular 230 as amended and in effect on and after July 26, 2002. In each instance, the relevant provision of Treasury Circular 230 provided that the following conduct constituted disreputable conduct for which an attorney, certified public accountant, enrolled agent or enrolled actuary could be disbarred or suspended from practice:

“Willfully failing . . . to make a Federal income tax return in violation of the revenue laws of the United States . . . .”<sup>2</sup>

Due to the clarity of the allegations contained in the Amended Complaint and the absence of any substantive difference between the provisions of Treasury Circular 230 in effect at the time of the alleged acts or omissions and the provision referred to in the Amended Complaint, I find no prejudice to Respondent in addressing the substance of each of the four charges raised in Complainant’s Amended Complaint.

The language of § 10.51(f) (formerly § 10.51(d)) of Treasury Circular 230, insofar as it relates to a failure to file a return, is similar to the language contained in Section 7203 of the Internal Revenue Code of 1986, as amended and in effect on each of the years and dates in issue:

“Any person . . . required by this title or regulations made under authority thereof to make a return . . . who willfully fails to . . . make such return . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor . . . .”

While the degree of proof required of the Government in a Section 7203 prosecution (proof beyond a reasonable doubt) and that required of the Complainant in a Treasury Circular 230 proceeding (proof by a preponderance of the evidence or by clear and convincing evidence, depending on the sanction sought) differ in degree, in each instance the burden is on the charging

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<sup>2</sup> As in effect prior to July 26, 2002, § 10.51(d) of Treasury Circular 230 provided “Willfully failing: to make a Federal tax return in violation of the revenue laws of the United States, or evading, attempting to evade, or participating in any way in attempting to evade any Federal tax or payment thereof, knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof, or concealing assets of himself or another to evade taxes or the payment thereof . . . .” From and after July 26, 2002, §10.51(f) of Treasury Circular 230 provides: “Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, willfully evading or attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal income taxes or the payment thereof.”

party to sustain its burden of proof with respect to each of three elements of the alleged violation. First, did Respondent have a legal duty to file an individual tax return for each of the four years in issue? Second, did Respondent fail to timely file an individual tax return for each of the four years in issue? Third, were Respondent's failures "willful?" Cf., e.g., United States v. Ostendorff, 371 F.2d 729, 730 (4<sup>th</sup> Cir.), cert. denied, 386 U.S. 982 (1967); United States v. Quimby, 636 F.2d 86, 90 (5<sup>th</sup> Cir. 1981); United States v. Buckley, 586 F.2d 498, 503-504 (5<sup>th</sup> Cir. 1978), cert. denied, 440 U.S. 982 (1979); United States v. Brodie, 858 F.2d 492, 497 (9<sup>th</sup> Cir. 1988); United States v. Poschwatta, 829 F.2d 1477, 1481 (9<sup>th</sup> Cir. 1987), cert. denied, 484 U.S. 1064 (1988); United States v. Buras, 633 F.2d 1356, 1359-1360 (9<sup>th</sup> Cir. 1980); United States v. Harting, 879 F.2d 765, 766-767 (10<sup>th</sup> Cir. 1989).

For the reasons set forth below and under the standards of review discussed in Section 1 above, I find that Complainant has failed to meet his burden with respect to the first element of his three elements of proof. While I would normally remand this case to Judge Moran to allow Complainant to introduce evidence to meet his burden with respect to this element of proof, as noted in Section 2 above, I agree with Judge Moran that the violations contained in the Initial Complaint, discussed in Section 2 of this Decision, alone provide ample support for Judge Moran's determination to disbar Respondent from practice before the Internal Revenue Service. Accordingly, I will not remand this case to allow the development of a more complete record on the first element of required proof on four allegations relating to Respondent's alleged failures to file individual tax returns for the years 1999 through 2002, inclusive.

Under §6012 of the Internal Revenue Code of 1986, as amended and in effect for each of the years in issue, the determination of whether an individual has an obligation to file a Federal income tax return for a taxable year can be made only after a determination is made that an individual had gross income for the taxable year which equaled or exceeded the sum of an amount equal to an "exemption amount" plus the amount of

the standard deduction to which the individual was entitled. Under §6012, both the “exemption amount” and the amount of the standard deduction to which a taxpayer is entitled differ depending on the taxpayer’s filing status [as either (i) an unmarried individual not filing as a surviving spouse or head of household, (ii) a head of household, (iii) a surviving spouse, or (iv) an individual entitled to file a joint return unless the taxpayer’s spouse filed a separate return for the year or the spouse was entitled to be claimed as an exemption on another taxpayer’s return].

The courts have held that the Government is not required to prove that a taxpayer had a tax liability for the taxable year in order to sustain a conviction for a willful failure to file a tax return under Section 7203. See, e.g., United States v. Hairston, 819 F.2d 971 (10<sup>th</sup> Cir. 1987). The same was found to be true with respect to a disbarment proceeding under Treasury Circular 230. Owrutsky v. Brady, 925 F.2d 1457 (4<sup>th</sup> Cir. 1991) (the fact that a tax practitioner owed no tax was irrelevant when the record showed the practitioner’s awareness of an obligation to file a return notwithstanding the absence of a tax liability). However, to support a conviction under Section 7203 for a willful failure to file a tax return, the Government must introduce evidence that the taxpayer had gross income for the taxable year sufficient in amount to require the taxpayer to file a tax return, and proof of gross receipts alone may not suffice. See, e.g., United States v. Brewer, 486 F.2d 507 (10<sup>th</sup> Cir. 1973), cert. denied, 415 U.S. 913 (1974); Clark v. United States, 211 F.2d 100, 102 (8<sup>th</sup> Cir. 1954), cert. denied, 348 U.S. 911 (1955). See also Comisky, Feld & Harris, Tax Fraud and Evasion, ¶ 2.09[1][a], p. 2-78, footnote 328 and accompanying text.

The record in these proceedings contains no evidence that supports a finding that Respondent had a sufficient amount of gross income for any of the four years in issue to require him to file a federal income tax return for any of the four years. While the Complainant’s pleadings in these proceedings and the referral to the Director of the Office of Professional

Responsibility indicate that Internal Revenue Service personnel heard Respondent indicate on a radio show that he did not file because of his beliefs respecting the Sixteenth Amendment and the §§861-865 "source of income" rules, there is no actual evidence in the record to that effect. Moreover, the record in these proceedings contains no indication that Respondent ever admitted that he had the requisite gross income in any of the four years (nor, for that matter, does the record reflect that Respondent was ever asked to admit that he had the requisite gross income for any of the four years, through focused and specific allegations in the Amended Complaint or otherwise).

Judge Moran, noting that the Complainant had introduced business records of the Internal Revenue Service to prove that Respondent had not filed individual income tax returns for any of the four years in issue, and surmising that the reason Respondent may have failed to file was that he followed the same advice he gave to Taxpayer C and Taxpayer T in determining his obligations for the years in issue, found that sufficient to satisfy Complainant's burden of proof with respect to both the first and second element of Complainant's burden of proof (though Judge Moran's Decision blends these two elements). However, the record of the proceedings contains no evidence indicating why Respondent failed to file individual tax returns for these years. Judge Moran found Respondent's general denial of the charges with respect to Respondent's alleged failures to file individual tax returns for the years in issue insufficient to impose any further burden of proof on Complainant, given that the facts necessary to disprove these charges, if such facts existed, were uniquely within the possession of Respondent.

Judge Moran may have been influenced in his holding by the cases cited by Complainant indicating that a party to a proceeding could not defeat a motion for summary judgment by relying on a general denial rather than introducing some proof of a material fact in dispute. See, e.g., Strong v. H.G. France, 474 F.2d 747, 749 (9<sup>th</sup> Cir. 1973). But relying on that line of reasoning

begs the question. The fact remains that Complainant failed to introduce any evidence of gross income in any of the four years in issue for Respondent to deny or controvert, and Respondent never admitted that he had the requisite income in any of the four years. In effect, Judge Moran's decision would require Respondent to raise his lack of a legal obligation to file an individual tax return for the years in issue by affirmative defense, and would find Respondent's general denial of an obligation to file unavailing for that purpose.

Under the provisions of Treasury Circular 230 in effect on the dates of Respondent's conduct relating to these charges, I find it inappropriate to remove from Complainant one of the key elements of his burden of proof. Even without Respondent's cooperation, Complainant could have used indirect methods of proof (such as an examination of bank accounts and other financial records, or net worth audits) to produce some evidence that proved Respondent had sufficient gross income during each of the taxable years in issue to require Respondent to file a tax return. Complainant has not done so and accordingly has not met his burden of proof on the first of his three elements of proof on these four charges.

With respect to the second element of proof, I find that Complainant has met his burden of proving that Respondent failed to timely file an individual income tax return for each of the years in issue, if such a return was required to be filed, through the introduction certified records of accounts relating to Respondent for each of the years in issue. Courts have long recognized that such business records of the Internal Revenue Service are sufficient to support the Government's burden on the second element of its proof in prosecutions under Section 7203. See, e.g., United States v. Farris, 517 F.2d 226, 227-229 (7<sup>th</sup> Cir.), cert. denied, 423 U.S. 892 (1975); and United States v. Neff, 615 F.2d 1235, 1241-1242 (9<sup>th</sup> Cir.), cert. denied, 447 U.S. 925 (1980). It follows that the same is true of the lesser burden of proof Complainant must satisfy in these proceedings. I also note that

reliance on such records is clearly countenanced by §10.72(c) of Treasury Circular 230.

The third element Complainant must prove is that Respondent's failures to file tax returns were "willful." As noted in Section 2 above, in the context of criminal prosecutions under Section 7203, the courts have found that "willfulness" requires proof of a willful violation of a known legal duty (the duty to timely file a return). United States v. Pomponio, supra. The record in these proceedings clearly reflects that: (1) Respondent has a bachelor's degree in accounting and is a certified public accountant licensed to practice by the State of California; (2) before entering Federal Government service, Respondent was employed for several years doing tax work as a manager in a national accounting firm; (3) Respondent was employed for several years as a Special Agent by the Criminal Investigation Division of the Internal Revenue Service; and (4) Respondent for many years following his Federal government service has made his living representing taxpayers before the Internal Revenue Service and by providing tax advice. Moreover, as noted in Section 1 above, in United States v. Boyle, supra, the duty of timely filing federal tax returns is one that the courts have long recognized as one so easy to comprehend that it is normally a non-delegable duty placed upon every citizen. It follows a fortiori that the same duty to timely file an income tax return would be a known legal duty for an experienced tax practitioner if that person had the requisite gross income to require a return to be filed. In fact, in Owrutsky v. Brady, 925 F.2d 1457 (4<sup>th</sup> Cir. 1991), the United States Court of Appeals for the Fourth Circuit reversed a holding of the United States District Court for the District of Maryland at Baltimore, and upheld the Secretary of the Treasury's disbarment of Owrutsky for disreputable conduct under §10.51 (d) of Treasury Circular 230 (specifically, "willfully failing to make Federal tax return[s] in violation of the revenue laws of the United States"). In so holding, the Fourth Circuit applied the standard of "willfulness" set forth in United States v. Pomponio, supra (discussed at length in Section 2, above), finding that Owrutsky had engaged in a "voluntary, intentional

violation of a known legal duty," and that willfulness may be found when "the obligation to act is fully known and consciously disregarded." The District Court below had found that Owrutsky's eligibility for refunds and his lack of tax liability precluded the finding of a willful motive. Reversing, the Fourth Circuit noted:

"The [District] [C]ourt held that Owrutsky's eligibility for refunds and his lack of tax liability precluded a willful motive. The court overlooked the important finding by the ALJ that Owrutsky, an experienced practicing attorney, was fully aware that he had a legal duty to timely file returns regardless of his tax liability. See, Spies v. United States, 317 U.S. 492 (1943). Under the *Pomponio* standard, willfulness does not require proof of any motive other than an intentional violation of a known legal duty."

That established, had Complainant met his burden with respect to the first element of his proof, the only question that would have remained would have been whether Respondent had a good faith but mistaken belief that he had no obligation to file a tax return for any of the four years in issue. For the reasons stated in Section 2, above, if Respondent had asserted that his reasons for failing to file his individual income tax returns were his belief that the Sixteenth Amendment to the United States Constitution had not been ratified, and/or his belief that §§ 861-865 of the Internal Revenue Code of 1986, as amended and in effect during the years in issue, established that his income was not subject to tax, I would agree with the Administrative Law Judge that Respondent had failed to establish a good faith but mistaken belief defense with respect to those failures for the same reasons I affirmed Judge Moran's decision with respect to the charges contained in the Initial Complaint. See discussion in Section 2, above. I would also note that Respondent's failures to file for the year 2000 also occurred after the decision of the Tax Court in Williams v. Commissioner, supra, and that his failures to file for the years 2001 and 2002 occurred after the Tax Court's decisions in both Williams v. Commissioner, supra and Furniss v. Commissioner, supra.

Had Complainant met his burden with respect to the first element of his proof, there is an additional reason why I would have found that Complainant had met his burden with respect to "willfulness." Unlike the burden of proof concerning whether Respondent in fact had sufficient gross income in each of the four years in issue to impose upon Respondent a duty to file a tax return for each of those years, it is Respondent who must establish his "good faith misunderstanding" of a known legal obligation through an affirmative defense. The record in these proceedings is devoid of any explanation of Respondent's failures to file individual income tax returns for the four years in issue. Accordingly, Respondent failed to meet his burden of proof with respect to the availability of any affirmative defense of a good faith but mistaken belief that he did not have an obligation to file tax returns for the years in issue.

#### 4. Respondent's Constitutional and Procedural Objections

In his Appeal, Respondent raises a number of constitutional and/or procedural objections with respect to the actions of the Director of the Office of Professional Responsibility and/or the Administrative Law Judge in these proceedings. Each objection is discussed below.

First, Respondent claims that Judge Moran erred in allowing these proceedings to go forward in light of what Respondent characterized as "egregious agency misconduct." The conduct alleged includes: (i) the existence of what Respondent characterized as a "secret" parallel criminal investigation and the alleged use of these proceedings to develop evidence for that proceeding and alleged Fifth Amendment violations arising from the parallel proceedings; (ii) alleged retaliation against Respondent for exercise by Respondent of his free speech and free assembly rights guaranteed by the First Amendment and for Respondent's actions as a "whistleblower;" (iii) alleged retaliation against Respondent because he is a former employee of the Internal Revenue

Service; and (iv) the alleged "publication" of a ruling in these proceedings before the issuance of final agency action in these proceedings.

With regard to the existence of an allegedly "secret" parallel criminal proceeding, this claim was the subject of Judge Moran's November 19, 2003 Order Regarding Respondent's Motion to Abate the Case. In his Motion, Respondent alleged (1) that "the government is conducting a criminal investigation into the Respondent" and (2) "upon information and belief of the Respondent, Complainant will utilize these proceedings as a tool of a pending criminal investigation. . .," which Respondent asserted involved "related or the same allegations" (Respondent's Motion to Abate the Case, p.2). At p. 1 of his Motion to Abate the Case, Respondent alleged that in United States v. Kordel, 397 U.S. 1 (1970), the Court "circumscribed the ability of the government to conduct criminal investigations under the cloak of administrative process" and noted that "civil process should not be utilized to obtain evidence for a criminal process." From this Respondent concluded that "the proper process is to abate the[se] proceedings" (Respondent's Motion to Abate the Case, p.1) since doing otherwise would force the Respondent "to choose between the assertion of his Fifth Amendment rights against self incrimination and his livelihood in representing clients . . .[,] the very kind of 'unfair injury' the [C]ourt [in Kordel] intended to protect against." (Respondent's Motion to Abate the Case, p. 3).

In his Opposition to Respondent's Motion to Abate the Case, Complainant admitted that there was a pending criminal case involving Respondent, but indicated:

"The sole purpose of the Director of Professional Responsibility's issuance of a complaint and amended complaint seeking the disbarment of the Respondent is to take action against a tax practitioner who practices before the Internal Revenue Service who has engaged in disreputable conduct, incompetent representation of

clients, and who has failed to comply with the regulations set forth in Circular 230. In addition, the instant proceedings before the Administrative Law Judge are being conducted for the sole purpose of providing the Respondent with an opportunity to defend against the disbarment action before an impartial presiding official. Neither the Director of Professional Responsibility's issuance of a complaint or amended complaint or the instant administrative proceedings has the purpose of obtaining evidence for a criminal proceeding."

"Although there are grand jury proceedings concerning the Respondent, those proceedings are separate and apart from this administrative action. . . ."

Complainant's Opposition to Respondent's Motion to Abate the Case, p. 5. Judge Moran agreed, noting at p. 4 of his Order on Respondent's Motion to Abate the Case:

"This case is about whether the matters raised in the Complaint and the Amendments to it, constitute incompetent or disreputable conduct. Clearly, on this record, this administrative proceeding is not a subterfuge to acquire information for use in any potential criminal action. This administrative proceeding has independent legitimacy in carrying out the IRS's important responsibility to protect the public from practitioners who engage in disreputable or incompetent behavior. Where a legitimate disbarment proceeding is in process, it would be [an] odd situation to allow alleged offenders to continue to practice before the IRS where a grand jury is also conducting an investigation, while no such delay would be faced for those practitioners who were only dealing with disbarment. The public would be ill served by such a result. Further, it would appear that *if* any problems of admissibility of evidence developed in this administrative proceeding, the question of the use of such evidence should properly be resolved at the time such a matter ever comes before a criminal tribunal."

I agree with Judge Moran.

With regard to Respondent's Fifth Amendment claim, Complainant correctly noted at p. 6 of his Opposition to Respondent's Motion to Abate the Case the Constitution does not always require a stay of a civil proceeding pending the outcome of a criminal proceeding. Keating v. Office of Thrift Supervision, 45 F.3d 322 (9<sup>th</sup> Cir.), cert. denied, 516 U.S. 827 (1995); Federal Savings & Loan Insurance Corp. v. Molinaro, 889 F.2d 899, 902 (9<sup>th</sup> Cir. 1989); Securities & Exchange Commission v. Dresser Industries, 628 F.2d 1368 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980). Rather, the decision of whether or not to stay the civil proceedings should be made "in light of the particular circumstances and competing interests involved in the case." Federal Savings & Loan Insurance Corp. v. Molinaro, supra at 902. In the context of these proceedings, the five factors weighed by the 9<sup>th</sup> Circuit in Molinaro were: (1) the interests of the Complainant in proceeding expeditiously with these proceedings or any aspect of it, and the potential prejudice to Complainant of any delays; (2) the burden which any particular aspect of the proceedings places upon Respondent; (3) the convenience of the Court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not party to these proceedings; and (5) the interests of the public in the pending civil and criminal proceedings.

Judge Moran assessed each of the Molinaro factors in determining that, in light of all the circumstances and the competing interests of the parties, these proceedings should continue notwithstanding the existence of the separate criminal proceedings. First, Judge Moran noted that Complainant has a substantial interest in stopping those who make frivolous contentions in representing clients before the Internal Revenue Service. I concur in Judge Moran's finding in this respect. There are several reasons why the Internal Revenue Service has an interest in preventing practitioners from asserting frivolous and meritless arguments on behalf of taxpayers. The first is fairness

to the represented taxpayers themselves. If taxpayers assert these positions, they will likely be subject to civil and/or criminal tax penalties, as well as interest on both the tax deficiencies and penalties. The cumulative effect of these liabilities, particularly if resolution of the issue is prolonged, can be ruinous. Second, if taxpayers take frivolous positions that are not detected on audit, the Federal government is deprived of needed tax revenues lawfully owed. This results in one of several forms of unfair burden being placed upon other taxpayers, and upon citizens as a whole. Depending on the public policy choices made, the burden to others may take the form of increased taxes, growing deficits (and with them growing costs of Federal government borrowings), increased interest rates for both governmental and private sector borrowing, a decrease in the availability of funds available for private sector borrowing, inflation and the overall drag on economic performance that can result from one or a combination of the above. Complainant also has an interest in avoiding delays in dealing with practitioners urging taxpayers to take unreasonable positions because of the extreme administrative burdens such practitioners place on our tax system. Each of these factors was recognized by the Supreme Court in United States v. Boyle, *supra*.

With regard to the burdens placed on Respondent, I agree with Judge Moran that whatever harm may exist with regard to Respondent's Fifth Amendment rights has been ameliorated by the fact that Respondent has admitted the facts that form the basis of the charges contained in the Initial Complaint. I agree with Judge Moran on this point, at least insofar as it relates to the charges contained in the Initial Complaint.

In his Opposition to Respondent's Motion to Abate the Case, Complainant had argued that any such harm could be further ameliorated by Respondent selecting invoking his Fifth Amendment privileges with respect to specific troublesome areas of possible testimony as to both the charges contained in the Initial Complaint and those raised for the first time in the Amended Complaint, and that in any event, with respect to the

charges raised for the first time in the Amended Complaint regarding his failure to file tax returns for 1999, 2000, 2001 and 2002, there would seem to be no need to protect a privilege since Respondent had denied each of the charges, a fact Complainant equated with a statement that Respondent denied all facts associated with those charges.

I disagree with both these assertions. The Fifth Amendment privilege is a subject matter privilege. It cannot be selectively invoked. Accordingly, once any testimony is given with respect to a given subject matter, no privilege exists with respect to other testimony within the subject matter area. Further, I do not view Respondent's general denial of the charges first raised in the Amended Complaint to be an indication that Respondent denies each fact alleged in these charges. Rather, I see Respondent's general denial as an attempt to leave Complainant with his burden of proof with respect to each element of these charges.

Having said that there is some merit in Respondent's position that these proceedings leave him with a Hobson's choice with respect to the assertion herein of his Fifth Amendment rights does not mean that he is entitled to prevail on this issue. I see no substantial prejudice to Respondent's Fifth Amendment rights as to the charges contained in the Initial Complaint given that Respondent has *admitted* the facts underlying the charges. Given my conclusions with respect to the charges first made in the Amended Complaint (see Section 3, supra), I see no need to address in these those charges in these proceedings, other than to note that, if Respondent's reason for failing to file his tax returns for the four years in issue was an asserted good faith belief that he had no legal obligation to file those returns because the Sixteenth Amendment was not duly "ratified" or because the §§861-865 "source of income" rules excluded his income from tax, Respondent in any event would have been required to take the stand to asserted his good faith but mistaken beliefs through an affirmative defense to the charges brought, whether in these proceedings or in any criminal

proceedings involving an alleged criminal failure to file under §7203 of the Internal Revenue Code of 1986, as amended. I also note, as to all the charges against Respondent, that Judge Moran showed extraordinary sensitivity to Respondent's Fifth Amendment concerns, in effect taking "judicial notice" of Respondent's unsworn statement, thereby allowing Respondent to avoid a testimonial act as well as protecting him from cross-examination with respect to both his statement and any other aspect of these proceedings.

With regard to the third factor in Molinaro, Complainant noted that the hearing in these proceedings had already been scheduled at the time Respondent filed his Motion to Abate the Case, and that therefore judicial economy weighed in favor of denying Respondent's Motion to Abate the Case. While I do not believe this factor weighs as heavily in the balance as the other factors mentioned, I agree that this factor weighs in favor of allowing these proceedings to continue.

With regard to the fourth factor in Molinaro, Complainant indicated that there were no persons who were not parties to the case whose interests would be affected by abating these proceedings or letting them go forward. Judge Moran likewise did not consider this factor "pertinent" to these proceedings. With the exception of the interests identified in the discussion of the first and fifth Molinaro factors, I agree.

With regard to the fifth Molinaro factor, Complainant argued that the public had a strong interest in protecting the public from practitioners who assert frivolous and non-meritorious theories in tax matters. Judge Moran agreed. See p. 4 of Order Regarding Respondent's Motion to Abate the Case. For the reasons stated in my discussion of the first Molinaro factor (see pp. 70-71, supra), I agree.

Considering all of the above in the manner required by Molinaro, I find that Judge Moran was correct in denying

Respondent's Motion to Abate the Case, and further find that Respondent's Fifth Amendment claim is without merit.

With respect to Respondent's claims that these proceedings constitute retaliation for Respondent's exercise of free speech rights, Respondent makes two distinct claims. First, Respondent claims that the conduct forming the basis for the charges contained in the Initial Complaint constituted protected speech under the First Amendment. Second, Respondent claims that both the Initial Complaint and the Amended Complaint violate the First Amendment because they constitute "selective enforcement" predicated on Respondent's exercise of "free speech" and "free association" rights guaranteed by the First Amendment. Respondent also asserts that these proceedings are retaliation for his actions as a "whistleblower" while he was a Special Agent employed by the Criminal Investigation Division of the Internal Revenue Service. Each of these claims is discussed in turn below.

Respondent's first First Amendment claim is based on Brandenburg v. Ohio, 395 U.S. 444 (1969), a United States Supreme Court decision involving Ohio's criminal syndicalism statute and its application to the Ku Klux Klan. The case dealt with the Klan's right to assemble and show certain films at its meetings. Respondent cites Brandenburg for the proposition that speech constituting mere advocacy cannot be constrained through governmental action unless the speech in question will, under the circumstance of its utterance, cause "imminent lawless action." Id. at 449. Respondent claims that the conduct forming the basis of the charges contained in the Initial Complaint constituted "mere advocacy" and that the circumstances of his utterances did not cause or incite "imminent lawless action."

In response, Complainant first argues that these proceedings are not about Respondent's public expressions about his political views but rather are about statements made orally or in writing to Taxpayer C, Taxpayer T, or employees of

the Internal Revenue Service in the course of his representation of Taxpayer C and Taxpayer T before the Internal Revenue Service or in the course of providing tax advice to the same clients. As a consequence, Complainant argues that Respondent's written and oral statements constitute commercial speech that, if used in furtherance of an illegal activity, is not constitutionally protected speech (citing United States v. Kaun, 827 F.2d 1144, 1152 (7<sup>th</sup> Cir. 1987). Complainant further argues that commercial speech is protected only if it concerns lawful activities and is not misleading, citing Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) and Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980). In the alternative, Complainant argues that, even if Respondent's speech is not commercial speech, it is not constitutionally protected speech because the speech has as its objective advocating frivolous schemes to avoid the tax laws, which courts have likewise held not to constitute protected speech. United States v. Rowlee, 899 F.2d 1275, 1279 (2d Cir.), cert denied, 498 U.S. 828 (1990); United States v. May, 555 F. Supp. 1008 (E.D. Mich. 1983).

Judge Moran reached the conclusion that Complainant's conduct involved "commercial speech." Order on Complainant's Motion for Summary Judgment, p. 8. Judge Moran also indicated that, even if the conduct had been determined to be non-commercial speech, it would still not be constitutionally protected. Id. Judge Moran so found because Respondent's "admitted actions, in connection with . . . [Taxpayer C] and [Taxpayer T], constitutes "speech brigaded with action." Id. pp. 8-9, footnote 16.

I generally agree with Judge Moran's holding on these points, and would add that, given the content, timing and circumstances of Respondent's utterances (i.e., statements made to taxpayers in the course of Respondent providing representational or tax advisory services to those taxpayers, and particularly that statements contained in the Amended U.S. Individual Income Tax Returns for 1996 and 1998 prepared for

Taxpayer T by Respondent), Respondent's utterances could well be viewed as having caused or incited "imminent lawless action." At a minimum, Respondent's conduct has caused the Government to unnecessarily assume the burden of making unnecessary ad hoc determinations with respect to these taxpayers. See quoted language from United States v. Boyle, supra, at pp. 15-16, supra.

Those who seek to practice before administrative agencies and the courts are subject to certain constraints on the nature and extent of their discourse within the scope of their practitioner functions that might constitute protected speech in other contexts. For example, attorneys who learn facts from their clients in the course of an attorney-client relationship are prohibited by bar disciplinary rules from divulging those confidences and can be disbarred by state bars, including so-called "unified state bars" acting under color of law, for such disclosures. Likewise, in the case of tax practitioners subject to Treasury Circular 230, tax practitioners are subject to certain constraints on their free speech rights appropriate to and within the confines of the functions they perform as tax practitioners.

Respondent's other First Amendment claim is that he is the victim of impermissible "selective enforcement" based on his exercise of free speech and free association rights protected under the First Amendment. In support of this assertion, Respondent claims that his attendance at certain "political meetings" at which he espoused his views concerning the Federal income tax became the subject of "unauthorized surveillance" by Mr. Canfield, and that his appearances on "talk radio" and "Sixty Minutes II" preceded and caused Mr. Canfield's referral to the Director.

In his Reply Brief to Respondent's Appeal in these proceedings, Complainant notes, as the United States Court of Appeals did in Teague v. Alexander, 662 F.2d 79, 83 (D.C. Cir. 1981), that in Oyler v. Boles, 368 U.S. 448, 456 (1962), the Supreme Court indicated that some the exercise of some

selectivity in enforcement of the laws is not, in and of itself, always a constitutional violation. Only when the selection is based on an arbitrary and impermissible selection on the basis of a protected class does the classification raise concerns of a constitutional dimension. In Teague, the United States Court of Appeals for the District of Columbia found that Teague's failure to file, and not any suspect classification, was the cause of the enforcement action against him. To borrow a term from tort law, when an event intervenes and becomes the "proximate cause" of an enforcement action, the fact that a suspect classification may have been involved at some point in the decision to focus examination or investigative resources on a person does not make a subsequent enforcement against the individual constitutionally suspect when the acts that form the basis of the enforcement action are not themselves constitutionally suspect. In these proceedings, for the reasons mentioned above, neither the charges relating to Respondent's representational and advisory conduct (contained in the Initial Complaint) nor the charges relating to Respondent's alleged failures to file (raised for the first time in the Amended Complaint) are constitutionally suspect. Accordingly, I find Respondent's second First Amendment argument to be without merit.

Respondent also claims the actions brought against him have been brought in retaliation for his actions as a "whistleblower." Judge Moran found, and I agree, that Respondent has shown neither that he was a "whistleblower" nor that the charges brought against him were brought in retaliation for actions he took as a "whistleblower." Respondent merely seeks to cloak his frivolous arguments with a veneer of respectability by suggesting that he was acting as a "whistleblower" by making these assertions. Saying it does not make it so. I find Respondent's "whistleblower retaliation" claim without merit.

In addition to his "whistleblower" claim, Respondent claims that he is being discriminated against because he is a former Internal Revenue Service employee. I find no merit to this claim.

The fact that Respondent is an experienced tax practitioner is a factor that was appropriately considered by Judge Moran in determining to disbar Respondent. However, Respondent has failed to show that a practitioner with similar experience gained solely in private practice would have been treated any differently. Mr. Finz did indicate that the fact that Respondent advertised his prior Government service in statements he made to his clients, prospective clients, and Internal Revenue Service personnel was considered an aggravating factor for purpose of determining the appropriate sanction to impose with respect to his conduct given the fact that Respondent referred to that prior service in a way that could have given an aura of credibility to the frivolous positions he espoused, but Mr. Finz also stated that the Director would have sought the same sanction against a practitioner espousing such positions even absent this aggravating factor. For these reasons, I find Respondent's claim with respect to his "former employee" status without merit.

With regard to Respondent's claim that Complainant somehow "published" a ruling in these proceedings prior to the final agency action in these proceedings, I find no merit to this claim. Presumably, this claim is an indirect way of challenging Judge Moran's determination to resolve the liability issues in these proceedings on the basis of Complainant's Motion for Summary Judgment. My response to Respondent's direct claim on this subject appears elsewhere in Section 4 of this Decision on Appeal (see pp. 81-82, infra). Judge Moran in no sense "published" his Order on Complainant's Motion for Summary Judgment. Whatever publications occurred with respect to these proceedings occurred at the instance of Respondent, and as required by §10.71(b) of Treasury Circular 230, only by agreement of the parties. Further, as noted elsewhere, orders on motions in Treasury Circular 230 proceedings are respectively contemplated and countenanced by §§10.71(a) and 10.70(b)(9) of Treasury Circular 230.

Second, Respondent claims that he was not given adequate or meaningful notice of these proceedings. Judge

Moran found this claim to be without merit. I agree. The allegations contained in the Initial Complaint and in the Amended Complaint were more than adequately specific to provide Respondent fair notice of the charges against him and the opportunity to prepare a defense. As the specificity of Respondent's Answer reflects, Respondent had an adequate opportunity to prepare his defense to the charges contained in the Initial Complaint. Moreover, I agree with Judge Moran that, given the nature of the charges added in the Amended Complaint, Respondent was also accorded both adequate notice and the time necessary to prepare a defense to the charges first raised in the Amended Complaint. Cf., §10.65 of Treasury Circular 230.

Third, Respondent claims that his rights of discovery with respect to documents and witnesses have been abridged. Respondent has not indicated all that he seeks to include within this sweeping claim, other than the specific claims that are addressed elsewhere in Section 4 of this Decision on Appeal. However, to the extent that Respondent seeks to resurrect his claims that became the subject of Judge Moran's Orders on Respondent's Motion for Discovery and Complainant's Motion in Limine, I concur in Judge Moran's holdings as expressed in his Orders. Respondent's requests to present witness testimony, introduce documents, or gain discovery were often untimely (prejudicially so with respect to both Complainant and Judge Moran's efforts to conduct orderly proceedings) and often made on the basis of not even the most minimal showings of relevance or materiality, let alone with the type of particularity required by the court in United States v. Willie, supra. Further, Respondent made requests for discovery not allowed at all in disciplinary proceedings under Treasury Circular 230, or only available at the discretion of the Trial Judge for good cause shown. §10.73(a) of Treasury Circular 230. Judge Moran frequently found Respondent's requests to be irrelevant and/or immaterial to the central issues in these proceedings, at least on the basis of the record before him at the time he made his determinations. I see no error in Judge Moran's determinations, let alone the clear error I would have to find to reverse his determinations under the

authority granted me by §10.78 of Treasury Circular 230. I find Respondent's claims on these questions to be without merit.

Fourth, Respondent claims that he was denied his right to testify. Judge Moran, in no uncertain terms, at p. 6 of the Decision of the Administrative Law Judge, has flatly denied this claim:

"[Respondent was permitted to offer any evidence he could muster to rebut the charges set forth in the Complaint and the Amended Complaint. As this decision reflects, he was also given the opportunity to offer any factors for the Court to consider, in mitigation of the violations, in determining the appropriate sanction."

While Respondent has again failed to provide any specifics in support of another broad claim, it would seem that his assertion is premised on what he believes to be the unfairness embodied in his possible loss of the Fifth Amendment privilege against self incrimination if he testifies in these proceedings and in certain of the evidentiary exclusions arising from Judge Moran's determinations of irrelevance and immateriality. The former complaint is addressed elsewhere (see pp. 70-73, supra). I would also note that Judge Moran did everything he could to address even these concerns by allowing Respondent to submit his unsworn statement at the December 1, 2003 hearing and refusing to allow Complainant's counsel to cross-examine him with respect to that statement or any other matters relevant to these proceedings. As to Judge Moran's evidentiary rulings, as I have stated above, I find Judge Moran's rulings with respect to the evidentiary issues in these proceedings appropriate. Again, Respondent's claim is without merit.

Fifth, Respondent claims that he was denied his right to cross-examine his "accusers." Presumably, Respondent refers to the fact that he was not allowed to call Patrick McDonough, the former Director of Practice, and Kenneth Canfield, the Revenue Officer who made the referral respecting Respondent to the

Office of the Director of Practice. These claims are addressed elsewhere in Section 4 of this Decision on Appeal (see pp. 80--86 and 89--90, infra).

Sixth, Respondent claims that he was denied his right to a hearing on the merits with regard to the charges made against him in the Initial Complaint and the Amended Complaint. It is unclear all that Respondent intends to include within this sweeping claim. As stated elsewhere in Section 4 of this decision (see pp. 99-100, infra), Treasury Circular 230 accords Respondent no absolute right to an evidentiary hearing on the merits in these proceedings. Moreover, no constitutional right to procedural due process precluded the resolution of the liability issues in these proceedings through motion for summary judgment if the charges before Judge Moran did not involve disagreements with respect to relevant and material facts. The propriety of resolving the liability matters in these proceedings by motion for summary judgment is addressed elsewhere in Section 4 of this Decision (see pp. 81-82, infra).

Seventh, Respondent claims that Judge Moran erred by applying the wrong standards in allowing the liability issues in these proceedings, respecting both the charges contained in the Initial Complaint and the charges first raised in the Amended Complaint, to be resolved through Complainant's Motion for Summary Judgment. For the reasons set forth below, I find that the charges raised in the Initial Complaint were appropriately resolved through Complainant's Motion for Summary Judgment. For the reasons already described in Section 3 of this Decision on Appeal, I find that the charges raised for the first time in the Amended Complaint were not appropriately resolved on the basis of Complainant's Motion for Summary Judgment, or on the basis of the record in these proceedings developed to date.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate where there are no genuine issues as to any material fact and when the moving party is entitled to judgment as a matter of law. Similar standards apply

in the context of disciplinary proceedings under Treasury Circular 230. Washburn v. Shapiro, *supra*. These standards are in accord with decisions such as Puerto Rico Aqueduct and Sewer Authority v. United States Environmental Protection Agency, 35 F.3d 600, 606 (1<sup>st</sup> Cir. 1994), cert. denied, 513 U.S. 1148 (1995), which find that there is no constitutional due process right to an evidentiary hearing absent an actual dispute as to a material fact.

As to the fundamental underlying facts pertaining to the charges contained in the Initial Complaint, Judge Moran has found that Respondent has admitted the underlying facts with respect to liability and has been accorded a hearing on all matters pertaining to the sanction to be imposed with respect to that conduct. I agree. Accordingly, I find Respondent's claim, insofar as it relates to the charges contained in the Initial Complaint, to be without merit.

Eighth, Respondent claims that Judge Moran erred by excluding exculpatory testimony from IRS witnesses from consideration in the proceedings. Specifically, Respondent claims that Judge Moran erred by excluding the testimony of Kenneth Canfield, Priscilla Ousley, Sue Erwin, Patrick McDonough and Charles Rossotti. Each of these claims is considered separately below. As a preliminary matter, however, I note that Complainant's counsel has alleged (at p. 77, footnote 56 of Complainant's Response to Respondent's Appeal) that the excluded witnesses would not have provided supportive testimony if they were allowed to testify. While that may have been true, this case was decided by Judge Moran on the basis of Complainant's Motion for Summary Judgment. When matters are before a tribunal on a motion for summary judgment, all relevant and material matters as to which there is a factual disagreement between the parties are, for purposes of considering that motion, considered in the light most favorable to the non-moving party (here, Respondent). Thus, without regard to the actual truth, the version of the truth alleged by the non-moving party is accepted for purposes of the motion. That does not mean that the

inferences and conclusions Respondent seeks to draw from the facts are accepted. Only the facts themselves are accepted as true for purpose of the motion for the summary judgment.

The issues remaining for the tribunal are whether the facts alleged are relevant and probative of a material fact relating to the issues being considered. If the facts are irrelevant or immaterial to the tribunal's determination, the exclusion of the witness' testimony is either not error at all or constitutes harmless error. It is appropriate for an appellate authority to consider the same matters, as well as the issue of whether the testimony was ever requested, whether any request for testimony was timely made and whether the proffers made with respect to the testimony were sufficiently specific to allow the tribunal to determine whether the testimony requested would provide relevant and credible evidence with respect to a material fact. With that framework, I consider each of the purported erroneous exclusions.

Kenneth Canfield is employed by the Internal Revenue Service as a Revenue Officer. In his Appeal, Respondent notes his reasons for believing that it was inappropriate to "exclude" Canfield's testimony. First, Respondent alleges that Canfield was the only person to make a written referral respecting Respondent to the Director of the Office of Professional Responsibility. Second, without specifying the nature of the testimony he alleges Canfield would supply, Respondent broadly alleges that Canfield would testify as to the "impermissible" and "illicit" motives of the Internal Revenue Service in bringing these proceedings. Again without specificity, Respondent alleges that Canfield would provide "exculpatory" and "mitigating" information with respect to Respondent's conduct. Respondent also alleged that Canfield would testify that: (1) Canfield commenced his "investigation" of Respondent before Respondent spoke to Canfield about his client and his desires to be accorded a collection due process hearing; (2) Canfield "surveilled" Respondent's "political appearances" and decided to start an "investigation" based on those appearances; (3) Canfield spoke

to the Office of Professional Responsibility about investigating Respondent "based on" his political speech on talk radio; (4) Canfield contacted Respondent's former supervisors from the Criminal Investigation Division of the Internal Revenue Service who informed him that Respondent had an entirely honorable work record while an employee of the Internal Revenue Service under their supervision; (5) Canfield knew that Respondent was not challenging the constitutionality of the tax system in his representation of clients before the Internal Revenue Service but merely informing his clients of Respondent's "political opinions;" (6) Canfield had no knowledge of what Respondent would argue before the Internal Revenue Service because he never granted Respondent a collection due process hearing; (7) the Internal Revenue Service personnel had granted taxpayers reduced tax liabilities on the basis of those being asserted by Respondent (while unspecified, this is presumably a reference to Respondent's reliance on the §§861-865 "source" rules) and that Respondent was aware of these facts; and (8) Canfield was conducting a "private investigation" of Respondent and "attempting to entrap" Respondent "after the fact," which would have been reflected both in Canfield's written notes and in Canfield's written referral to the Office of Professional Responsibility.

There are several problems with Respondent's assertions with respect to the purported "exclusion" of Mr. Canfield's testimony. First, as noted at p. 76 of Complainant's Response to Respondent's Notice of Appeal, Mr. Canfield's testimony was never excluded for the simple reason that Respondent never requested his testimony, at least until Respondent filed his Offer of Proffers of Proof on November 25, 2003, in response to a request Respondent made of Judge Moran during a telephone conference with the parties on November 24, 2003. As noted at pp. 4-5, supra, Judge Moran issued his Prehearing Order in these proceedings on June 9, 2003, requiring, inter alia, that the parties exchange the names of their witnesses in these proceedings. After granting Respondent's request for an extension of the date for complying with the Prehearing Order, to

and including July 31, 2003, Respondent provided Complainant and Judge Moran with a copy of his Prehearing Exchange on July 31, 2003. Those materials did not list Mr. Canfield as a witness.

As noted by Complainant at p. 76 of his Response to Respondent's Appeal, Respondent may have been confusing his requests for witness testimony, which Judge Moran required to be filed by July 31, 2003, with either the list of persons to which he wished to propound interrogatories under his October 29, 2003 Motion for Discovery, and/or with Respondent's Proffer of Offers of Proof submitted on November 25, 2003. In his June 9, 2003 Prehearing Order, Judge Moran indicated: "The parties are hereby advised that testimony of witnesses which have not been identified . . . as required above may not be introduced into evidence at the hearing." Thus the deadline for identifying witnesses who could present evidence at the hearing had long passed when Respondent filed his Motion for Discovery, and had even longer passed when Respondent filed his Proffer of Offers of Proof. Moreover, because Mr. Canfield was not included on Respondent's list of witnesses in his Prehearing Exchange, Complainant and Judge Moran were not allowed to consider whether Mr. Canfield could provide any relevant testimony and the proper scope of any such testimony when Complainant filed (on October 30, 2003) and Judge Moran acted upon (on November 21, 2003) Complainant's Motion in Limine.

Moreover, an examination of Respondent's Motion for Discovery shows that Respondent failed to provide specifics that would have permitted Judge Moran to determine whether and in what respect the testimony of Mr. Canfield would have been relevant to the evidence Respondent wanted to introduce in these proceedings. Indeed, Respondent's Motion for Discovery did not indicate that Respondent intended to call Respondent as a witness. It merely noted that Respondent sought unspecified discovery from Mr. Canfield which would be relevant because Mr. Canfield, one of the persons listed as a witness by Complainant in his Prehearing Exchange, "had information concerning [Respondent's] representation of [Taxpayer C], and made the

referral to the Director of [OPR], which precipitated this complaint.”

Mr. Canfield’s name did appear on Complainant’s initial witness list provided to Judge Moran and Respondent pursuant to the Pretrial Order. When Judge Moran denied Respondent’s request for discovery with respect to Mr. Canfield, he indicated, inter alia, that the discovery was not necessary because Respondent’s counsel could cross examine Mr. Canfield when he appeared as one of Complainant’s witnesses at trial. On November 24, 2003, Judge Moran granted Complainant’s Motion for Summary Judgment with respect to the liability issues in this case. On November 25, 2003, Complainant filed an Amended Witness list, indicating that in view of Judge Moran’s Order granting Complainant’s Motion for Summary Judgment, Complainant intend to call only Mr. Finz as a witness at the hearing.

Not until Respondent filed his Proffer of Offers of Proof on November 25, 2003, a scant week before the December 1, 2003 hearing and a day after Judge Moran’s November 24, 2003 Order on Complainant’s Motion for Summary Judgment (which granted Complainant’s Motion as to all issues of liability) did Respondent either indicate that he intended to call Mr. Canfield as a witness or provide anything even remotely approaching the specificity of his Notice of Appeal as to the reasons Respondent sought Mr. Canfield testimony. Previously, Judge Moran knew only that Respondent sought discovery with respect to an individual that Complainant had indicated he might call in support of his proof. In these circumstances, the propriety of Judge Moran’s actions should be judged on the basis of the record before him on the dates of those actions. So viewed, I find no basis for finding error on the part of Judge Moran.

In addition, for the reasons stated elsewhere in Section 4 of this Decision on Appeal, the testimony of Mr. Canfield with respect to the matters as to which Respondent sought to have him testify (and specifically, as to Respondent’s “good faith” and

"reliance" defenses) either (1) are not relevant to either the liability and sanction determinations, or (2) even if specificity concerning the need for Mr. Canfield's testimony had been timely asserted, would have constituted, if error at all, harmless error. As noted elsewhere, even if the facts Respondent sought to introduce through Mr. Canfield's testimony were accepted as true, they would not alter any of the conclusions reached by Judge Moran.

According to page 77, footnote 55 of Complainant's Response to Respondent's Appeal, Priscilla Ously "appears to be" a Tax Examining Assistant employed by the Internal Revenue Service in the Chamblee, Georgia post of duty. As was the case with Mr. Canfield, Ms. Ously was not among the individuals included on Respondent's witness list submitted as part of Respondent's Prehearing Exchange on July 31, 2003. Nor was Ms. Ously among the individuals listed by Complainant as a witness on the witness list submitted by Complainant in response to Judge Moran's Pretrial Order.

Ms Ously was among the individuals listed by Respondent in the Motion for Discovery filed on October 29, 2003, where the relevance of information sought to have been obtained from Ms. Ously was stated to be "information related to the IRS treatment of the respondent's opinions and advice, including the acceptance by the IRS of these positions in reducing the tax liability of other similarly situated individuals."

In Respondent's Proffer of Offers of Proof dated November 25, 2003, Respondent described the relevance of Ms. Ously's testimony as follows: "Priscilla Ously, another IRS employee, would testify that the IRS reduced the tax debts of taxpayers who made identical arguments to the ones [Respondent] allegedly made around the time [Respondent] made them involving similar taxpayers to [Respondent's] clients. In Complainant's Response to Respondent's Motion for Discovery, at p.3, Complainant objected to the taking of Ms. Ously's deposition, inter alia, on vagueness grounds, indicating that

Respondent had not indicated Ms. Ously's individual authority and/or role in the IRS's alleged acceptance of Respondent's position on the merits in other cases, whether it concerned the exact positions taken by Taxpayer C and Taxpayer T, and whether Ms. Ously was authorized to speak for the IRS on these matters generally. Nor had Respondent submitted exhibits as part of his Prehearing Exchange relevant to his assertions regarding Ms. Ously and the information she allegedly possessed. While Complainant acknowledged that some low-level employees of the Internal Revenue Service may have accepted these frivolous arguments, Complainant argued that this was irrelevant to the issues in these proceedings. Judge Moran agreed, as I do. This testimony is irrelevant to the issues presented in these proceedings. Further, the other reasons cited for not finding error with respect to the claimed "exclusion" of Mr. Canfield's testimony apply to Ms. Ously's testimony as well.

As was the case with Mr. Canfield and Ms. Ously, Sue Erwin was not included on the witness list submitted to Judge Moran and Complainant as part of Respondent's Prehearing Exchange on July 31, 2003. However, Ms. Erwin was among the potential witnesses listed by Complainant in his witness list submitted as part of his Prehearing Exchange in response to Judge Moran's Prehearing Order. Respondent included Ms. Erwin among the individuals from whom he sought discovery in his Motion for Discovery filed on October 29, 2003, indicating the following as to the relevance of the discovery sought: "[Ms. Erwin] has information related to the [R]espondent's representation of Respondent's clients, including [Taxpayer T] and [Taxpayer C]."

Again, Respondent's Motion for Discovery provided no indication that the discovery sought was for any purpose other than to prepare for the cross examination of one of Complainant's witnesses. As with Mr. Canfield, Judge Moran denied the requested discovery, noting that Respondent could cross examine Ms. Erwin when she testified at the hearing. Again as with Mr. Canfield, after Judge Moran entered his Order on Complainant's Motion for Summary Judgment granting the Motion

as to the liability issues in these proceedings, Complainant on November 25, 2003 filed his Amended Witness List, indicating that Complainant intended to call only Mr. Finz as a witness at the hearing.

In Respondent's Offer of Proffers of Proof filed on November 25, 2003, Respondent indicated for the first time what he would seek to prove through the testimony of Ms. Erwin and that of Patrick McDonough. With respect to Ms. Erwin, Respondent alleged:

"These two witnesses all [sic] know one critical fact - that the IRS chose to bring this complaint against [Respondent] after he appeared on Sixty Minutes II. In fact, their own written notes will reflect that Sue Erwin, an IRS employee, contacted the Director's office and inform[ed] them that her contacts told her [Respondent] would be appearing on Sixty Minutes II. The private notes also reflect that the Director of Practice decided to bring charges if and after [Respondent] appeared on the show. . . ."

If it is assumed for purposes of Complainant's Motion for Summary Judgment that it is true that (1) Ms. Erwin contacted the Office of Professional Responsibility and informed OPR personnel that Respondent would be appearing on Sixty Minutes II, and (2) Complainant chose to bring this complaint against Respondent after Respondent appeared on Sixty Minutes II, those facts would not constitute relevant and probative evidence of material facts relating to the determinations of liability in these proceedings. The same would be true if it is assumed that Ms. Erwin's testimony would have shown that Respondent's Sixty Minutes II appearance was among the factors OPR personnel considered in determining to devote resources to the investigation of Mr. Canfield's referral. Given the fact that the proximate causes of the liability determinations against Respondent in these proceedings are the conduct alleged in the Initial Complaint and the Amended Complaint, the facts alleged

by Respondent in seeking the testimony of Ms. Erwin are irrelevant and immaterial to the issues in these proceedings.

A statement made by Judge Moran in the context of Respondent's request for discovery with respect to another IRS employee has equal application to Respondent's request with respect to Ms. Erwin:

"The Court reminds Respondent that this case is not about a broad inquiry into the IRS practices regarding the referral and investigation into [Respondent]. Rather . . . the case is about the consequences of that referral and investigation, which translated into the Complaint brought against [Respondent]. It is those alleged actions in the Complaint which are at issue and whether, if proven, those actions constitute disreputable conduct. Should those determinations be made in favor of the IRS [sic], it is then up to the Court to determine an appropriate sanction, after hearing the [parties'] arguments and considering any post-hearing briefs on the issue."

Order on Respondent's Motion for Discovery (filed November 17, 2003), p. 4. See also discussion at pp. 74--77, supra, regarding Respondent's First Amendment assertions regarding impermissible "selective enforcement." For these reasons, I find that Judge Moran did not commit error with respect to any testimony Respondent may have wanted Ms. Erwin to present at an evidentiary hearing in these proceedings.

With respect to the testimony of Patrick McDonough, the former Director of the Office of Professional Responsibility, Respondent had included Mr. McDonough among the individuals on his witness list in submitting his Pretrial Submission to Judge Moran and Complainant on July 31, 2003. Respondent sought Mr. McDonough's testimony with respect to an asserted "policy" of not filing or pursuing complaints in Treasury Circular 230 disciplinary proceedings against practitioners that were the subject of on-going grand jury proceedings involving similar

matters. In his Motion in Limine, Complainant asserted that Mr. McDonough's testimony on this subject was not needed because the issue could be fully addressed in the testimony of Mr. Frinz, who served as the legal adviser to Mr. McDonough at the time the Complaint against Respondent was filed and pursued. In his Order Regarding Complainant's Motion in Limine (filed November 21, 2003), at p. 9, Judge Moran noted his agreement with Complainant. Judge Moran noted, "Further, independently of this ruling, the Court has reservations whether testimony regarding such asserted policy would be admissible in any event." In his testimony at the December 1, 2003 hearing, neither Complainant's counsel nor Respondent's counsel asked Mr. Frinz anything about this alleged policy. Given the fact that Respondent failed to avail himself of this opportunity, he cannot now be heard to complain about the "exclusion" of Mr. McDonough's testimony.

At various points in these proceedings, Respondent has suggested two reasons for seeking to introduce the testimony of Charles Rossotti, the former Commissioner of the Internal Revenue Service. First, Respondent indicated that Mr. Rossotti could testify to Respondent's history of honorable service while employed by the Criminal Investigative Division of the Internal Revenue Service. Judge Moran found such testimony irrelevant to the liability determinations in these proceedings. While Mr. Frinz testified that Respondent's mention of his prior employ in communications with both Internal Revenue Service personnel and his client was viewed as an aggravating circumstance because the Director of the Office of Professional Responsibility believed his reference to his prior employ made him appear more credible in asserting frivolous arguments, Mr. Frinz indicated that the absence of that aggravating factor would not have changed the Office of Professional Responsibility's determination concerning the sanction to be sought in these proceedings. Further, Mr. Frinz noted that the absence of any prior complaints against Respondent had been considered a mitigating factor. Further, Respondent spoke at length on the honorable nature of his Federal service in presenting his unsworn statement during

the December 1, 2003 hearing. Given these facts, I find no prejudice to Respondent arising from any "exclusion" of Mr. Rossotti's testimony for these purposes.

Respondent also sought Mr. Rossotti's testimony to prove that (1) Respondent had written to Mr. Rossotti asserting his general §861 "source of income" argument inviting the then Commissioner to write him a letter refuting the argument, and (2) Mr. Rossotti had never responded. In his Motion in Limine, Complainant objected to Respondent's attempted inclusion of Respondent's Exhibit 18, purporting to be a copy of the letter sent Mr. Rossotti. Complainant objected on two grounds, the second relevant to the issue of Mr. Rossotti's testimony. First, Complainant objected because the letter did not contain a date and is an incomplete version. Second, Complainant objected on the grounds that the letter was irrelevant. Judge Moran found that the letter was "not material to the issue of whether the Respondent's conduct violated the cited sections of the Code of Federal Regulations for IRS practitioners or for any other purpose of these proceedings." Order Regarding Complainant's Motion in Limine, p.8.

Presumably, Respondent would seek to use Mr. Rossotti's testimony to bolster his reliance and good faith defenses. I find this area irrelevant to the former and immaterial to the latter. As noted in the discussion of the Internal Revenue Service's guidance programs in Section 2 of this Decision, the fact that that at any point in time the Service has not provided guidance on an issue provides neither taxpayers nor tax practitioners with any basis for "reliance." As to Respondent's "good faith" defense, I take "judicial notice" of that any experienced tax practitioner knows that the appropriate way to determine the answer to any non-frivolous question under the tax laws is to submit a request for a private letter ruling on behalf of the taxpayer. If the Service is unwilling to rule on the question, the taxpayer's "user fee" is refunded and a general letter of explanation as to the Service's unwillingness to rule generally is sent to the taxpayer, or at least discussed orally with the practitioner. Respondent saw fit not to

follow this normal and well known procedure. Under these circumstances, Judge Moran's decision to deny Respondent's request for Mr. Rossotti's testimony for these purposes was not error.

Ninth, Respondent claims that Judge Moran erred by predicating his decision on the "perjured testimony" of Mr. Finz. The alleged "perjury" relates solely to the question of whether Mr. Finz was himself the official who make the final determination of the Office of the Director of Practice as to whether Respondent had committed the various violations of Circular 230 outlined in the Initial Complaint and the Amended Complaint, and was the person who personally decided to request the sanction of disbarment, or whether he was the person who acted as the Director's principal adviser in making those determinations and then worked with the IRS Chief Counsel's General Legal Services Division in pursuing those matters. These facts were fully disclosed to Judge Moran during the December 1, 2003 hearing and had absolutely no effect on Judge Moran's determinations, nor should they have. Judge Moran's reliance on Mr. Finz' testimony was not misplaced and did not constitute error.

Tenth, Respondent claims that he was denied a property interest without being provided due process of law. Again, it is unclear all that Respondent attempts to sweep in through this assertion. Elsewhere in Section 4 of this Decision on Appeal, I have addressed specific aspects of Respondent's claims regarding the shortcomings of these proceedings, such as his claim that he had an unqualified right to a full evidentiary hearing with respect to the liability issues in these proceedings and his claim that he was denied various procedural rights during the proceedings, including the right to present witness testimony (including his own), the right to introduce various pieces of documentary evidence, and the right to cross-examine certain witnesses included on Complainant's initial witness list.

Respondent also argues that his authorization to practice before the Internal Revenue Service is a right akin to a license right accorded by a state or federal agency. He asserts that he is a "Congressionally licensed" tax practitioner, and as such has rights akin to those of the driver licensed by the State of Georgia whose license suspension was the subject of the United States Supreme Court's decision in Bell v. Burson, 402 U.S. 535 (1971).

Bell v. Burson, supra, did not establish the right to an evidentiary hearing as a broad constitutional right. The statutory scheme in Georgia did not automatically terminate drivers' licenses for a failure to keep in force liability insurance. Rather, the Georgia statute provided that, if a Georgia driver was uninsured at the time of any reported accident and it was discovered that he or she was uninsured at the time of the accident, the driver was required to post a \$5,000 bond or present a notarized release from liability, together with proof of future responsibility, or suffer the suspension of his driver's license and vehicle registration. Bell sought to introduce evidence at an administrative hearing that he was not at fault in the accident (his car had been hit on the side by a child riding a bicycle). Finding that he had no insurance at the time of the accident, and finding that he had not met the other requirements of the statute, the motor vehicle administration suspended his driver's license.

As was his right, Bell appealed this determination to the Georgia Superior Court, which ordered that Bell's license not be suspended until suit was filed against Bell for the injuries sustained by the child. The Georgia Court of Appeals reversed this order, reinstating Bell's license suspension.

Before the Supreme Court, Bell claimed that the Georgia statutory scheme violated his rights to procedural due process under the Fourteenth Amendment to the United States Constitution. The Supreme Court noted that, had the Georgia statute provided for the automatic suspension of a Georgia driver's license for failing to carry insurance, or for a failure to

post a bond, in neither instance would Bell have a constitutional claim. Id. at 539. However, the Court indicated that it did not follow that in a statutory scheme where not all motorists, but only motorists who had been involved in accidents, were required to post security, that a driver could lose his license without being accorded due process. Id. Indeed, the Court went on to note that relevant constitutional constraints limit state power to terminate an "entitlement whether the entitlement is denominated a 'right' or a 'privilege'". Id.

Claimant notes that Respondent is not "licensed" by Congress or the Department of Treasury. Rather, he is licensed as a certified public accountant by the State of California, a status that will not change on the basis of any action taken in these proceedings. Any action taken as a result of these proceedings at most will act as a restriction upon the scope of Respondent's practice, not a revocation of the right to practice accorded him by the State of California. Cf. Lopez v. United States, 129 F. Supp. 2d 1284 (S.D. Tex. 2000). 31 U.S.C. §330 does not license practitioners, nor does it authorize the Department of the Treasury to do so. Rather, it authorizes the Secretary of the Treasury to regulate the practice of representatives, require certain demonstrations of representatives before admitting them to practice, and to suspend or disbar representatives from practice who, on the basis of their conduct, prove themselves to be incompetent or disreputable, violate regulations prescribed under the statutory grant, or with intent to defraud, willfully and knowingly mislead or threaten the person being represented or a prospective person to be represented. Accordingly, neither 31 U.S.C. §330 nor Treasury Circular 230 creates a Federal "entitlement" akin to a property interest.

Moreover, as the Supreme Court noted in Bell v. Burson, supra:

"A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process

in every case. Thus, procedures adequate to determine a welfare claim may not suffice to try a felony charge. . . . Clearly, however, the inquiry into fault or liability requisite to afford the licensee due process need not take the form of a full adjudication of the question of liability. . . ."

"The hearing required by the Due Process Clause must be 'meaningful,' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, [339 U.S. 306, 313 (1963)]."

Courts have examined the question of what rights to procedural due process must be accorded in disciplinary proceedings under Treasury Circular 230. See, e.g., Washburn v. Shapiro, supra (finding that neither §§556 and 557 of the Administrative Procedure Act, 5 U.S.C. §§556 and 557, nor the Fifth Amendment's procedural due process requirement entitled respondents to "full-blown" hearings, and that the procedural protections accorded by Treasury Circular 230 were not constitutionally infirmed). I find that these proceedings have accorded Respondent the due notice, fundamental fairness and opportunity to be heard to which he was entitled. With the exception noted in Section 3 of this Decision respecting Complainant's first element of proof on the four charges relating to Respondent's alleged failures to file individual income tax returns for the years 1999, 2000, 2001 and 2002, Respondent's claims to the contrary are without merit.

Eleventh, Respondent claims that Judge Moran erred by considering matters that had nothing to do with Respondent's actual conduct in representing clients before the Internal Revenue Service (specifically, Respondent's advice to his clients and Respondent's own failures to file tax returns). The merits of this claim have been fully addressed in Section 1 of this Decision on Appeal. Respondent misconstrues both the scope and purpose of Treasury Circular 230 and the reach of its provisions.

After a threshold determination is made that a practitioner both has the right to practice before the Internal Revenue Service and in fact has practiced before the Internal Revenue Service, Treasury Circular 230 sets forth rules and regulations governing not only a practitioner's activities as a representative of taxpayers before the Internal Revenue Service but also rules respecting his or her functions as an adviser to taxpayers and relating to the practitioner's conduct in his own tax and other relevant business and professional affairs. The courts that have reviewed these rules and regulations have consistently approved the appropriateness of their scope and purpose.

Twelfth, Respondent claims that Complainant failed to accord Respondent the "right to comply" with Treasury Circular 230, as required by "§10.54" of Treasury Circular 230 and by Section 558 of the Administrative Procedure Act, 5 U.S.C. §558. Treasury Circular 230 does not now and did not at any time relevant to these proceedings contain a §10.54. §558(c) of the Administrative Procedure Act, 5 U.S.C. §558(c), provides:

"When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given -

- "(1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements. . . ."

Respondent's claim is that these proceedings were unlawful because the Director failed to provide Respondent with the opportunity to demonstrate or achieve compliance with all lawful requirements. In support of this proposition Respondent cites Anchustegui v. Department of Agriculture, 257 F.3d 1124, 1129 (9<sup>th</sup> Cir. 2001) (involving the revocation of sheep grazing permits) and Air North America v. Department of Transportation, 937 F.2d 1427, 1428 (9<sup>th</sup> Cir. 1991) (involving the revocation of airline certificates of authority). §558(c) of the Administrative Procedure Act involves not only Federal license rights but Federal license rights initially obtained following adjudicatory proceedings before the agency that later seeks to withdraw, suspend, revoke or annul that grant. For reasons noted elsewhere in Section 4 of this Decision on Appeal (see p. 95, supra), disciplinary proceedings against attorneys and certified public accountants under Treasury Circular 230 are not such proceedings and hence are not subject to the requirements of §558(c) of the Administrative Procedure Act. Moreover, even if I had found that §558(c) of the APA applied to disciplinary proceedings, I would have found that the Director was in substantial compliance with each of §558(c)'s requirements.

Respondent was sent a letter by the Director of Practice (now the Director of the Office of Professional Responsibility) outlining the allegations concerning the conduct which formed the basis of the Initial Complaint. I find that this letter met the "written notice" requirement of §558(c)(1). Moreover, Respondent was accorded a conference with respect to those allegations. Under §10.61(a) of Treasury Circular 230, such conferences are permitted in the discretion of the Director, not mandatory. When such conferences occur, practitioners may offer to accept their proposed punishment or suggest that he or she would accept a sanction accepting a sanction containing revised terms, which the Director can either accept or reject. The pleadings reflect that such discussions occurred during the conference accorded Respondent by the Director, but that the parties could not reach agreement. The proceedings were initiated and the hearing was held on December 1, 2003. During

his testimony at the hearing, the following exchange occurred between Respondent's counsel and Mr. Finz:

"A [Mr. Finz] . . . [T]he [D]irector 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 [Mr. Bernhoft] In that letter, was any opportunity to achieve compliance expressly given to Respondent?"

"A [Mr. Finz] During the 30-day period that was extended to the Respondent to make a response to the allegation letter, the Respondent could have repudiated or disavowed any positions . . ."

"[Mr. Bernhoft] Move to strike as unresponsive, Your Honor."

"[Judge Moran] No, overruled." (Tr. 34-35)

In his closing argument, Complainant's counsel noted that Respondent had refused to abandon arguments long since declared both incorrect and frivolous by numerous Federal courts. Respondent has clearly been given repeated opportunities to "demonstrate compliance," both before and after the commencement of these proceedings with the filing of the Initial Complaint, and he has repeatedly failed to avail himself of every opportunity to do so. Accordingly, if §558(c) of the Administrative Procedure Act had any application to these proceedings, I would find that Complainant had met its requirements in his dealings with Respondent. Respondent's claim to the contrary is without merit.

Thirteenth, Respondent claims that Judge Moran failed to accord him a hearing on the merits as required by §10.70 of Treasury Circular 230. Complainant appropriately notes that

§10.70 of Treasury Circular 230 should not be so construed given that §10.71(a) of Treasury Circular 230, in pertinent part, expressly provides that:

“An evidentiary hearing must be held in all proceedings prior to the issuance of a decision by the Administrative Law Judge unless: . . . the Administrative Law Judge issues a decision on a motion that disposes of the case prior to the hearing.”

Also, §10.70(b)(9) of Treasury Circular 230, in discussing the powers of the Administrative Law Judge, provides general authority to the Administrative Law Judge to “[p]erform such acts and take such measures as are necessary or appropriate to the efficient conduct of any proceedings.” Accordingly, Treasury Circular 230 accords no absolute right to an evidentiary hearing prior to the issuance of an Administrative Law Judge’s decision in a Treasury Circular 230 disciplinary proceeding. The propriety of entertaining a motion for summary judgment in these proceedings is discussed elsewhere. See pp. 81-82, supra.

Fourteenth, Respondent claims that Complainant erred by allowing the Complaint in these proceedings to be initiated without having received a written report allegedly required by §10.53 of Treasury Circular 230, which provides:

“If an officer or employee of the Internal Revenue Service has reason to believe that an attorney, certified public accountant, enrolled agent, or enrolled actuary has violated any provision of this part, or if any such officer or employee receives information to that effect, he shall promptly make a written report thereof, which report or a copy thereof shall be forwarded to the Director of Practice. If any other person has information of such violations, he may make a report thereof to the Director of Practice or to any officer or employee of the Internal Revenue Service.”

Respondent seeks to construe the “written report” statement contained in the first sentence of §10.53 as a procedural right of the Respondent, any violation of which would call into question the validity of the proceedings to follow. Such an interpretation ignores the fact that no such “written report” language appears in the second sentence of §10.53, dealing with information obtained from other sources (including the public). A contrary interpretation of the “written report” language with respect to information provided to the Director of Practice by other Service personnel is that the language allocates administrative burdens between other offices of the IRS and the staff of the Director of the Office of Professional Liability, requiring the former and not the latter to take the time to create the written record of the information. This interpretation is far more plausible, given the absence of similar language in the second sentence. I find no violation of Respondent’s rights under Treasury Circular 230 arising from any alleged deficiencies in the referral to the Director of the Office of Professional Responsibility.

Fifteenth, Respondent claims that the Initial Complaint and Amended Complaint in these proceedings did not fairly inform Respondent of the charges against him, which prevented him from preparing an adequate defense. I agree with Judge Moran that the Initial Complaint and Amended Complaint fairly and timely informed Respondent of the charges against him and provided Respondent with an adequate basis for preparing an adequate defense to the charges against him. The charges were quite specific, and Judge Moran is correct that Respondent’s Answer and Amended Answer in these proceedings are the best evidence of that fact. Respondent has suffered no impairment of his rights as a consequence of any such alleged deficiencies in the Initial Complaint or Amended Complaint, and was given ample time to prepare a defense with respect to the charges raised for the first time in the Amended Complaint.

Sixteenth, Respondent claimed that Judge Moran erred by allowing Complainant to amend the Initial Complaint, allegedly in violation of §10.59 of Treasury Circular 230. In his Response to

Respondent's Notice of Appeal, Complainant notes that the provision to which Respondent refers now appears in §10.65 of Treasury Circular 230, which provides:

"Supplemental charges.

If it appears that the respondent, in his or her answer, falsely and in bad faith, denies a material allegation of fact in the complaint or states that the respondent has insufficient knowledge to form a belief, when in fact the respondent in fact possesses such information, or if it appears that the respondent has knowingly introduced false testimony during proceedings for his or her censure, suspension, disbarment, or disqualification, the Director of Practice may file supplemental charges against the respondent. The supplemental charges may be heard with other charges in the case, provided the respondent is given due notice of the charges and is afforded an opportunity to prepare a defense to such charges."

Respondent argues that the grant of authority contained in §10.65 should also be read as an indication that the addition of supplemental charges in the same disciplinary proceeding is precluded in any other circumstance. In essence, Respondent suggests *inclusio unius est exclusio alterius*.

Whatever the persuasiveness such a rule of construction might have in other contexts, it merits no consideration here. It stands unquestioned that the Director of the Office of Professional Responsibility would not have been precluded from initiating another proceeding against Respondent for conduct not charged in the Initial Complaint, whether that conduct occurred before, contemporaneously with or after the conduct charged in the Initial Complaint, and that such a separate proceeding would not in any way implicate §10.65 of Treasury Circular 230. Further, it also seems evident that, absent prejudice to Respondent of the type identified in the closing sentence of §10.65 (absence of due notice and interference with a right to defend), Judge Moran

could have exercised his authority under §10.70(b)(9) of Treasury Circular 230 to join the two proceedings. Judge Moran has found, and I agree, that no such prejudice occurred in these proceedings. In light of these facts, I see no basis for adopting the rule of construction urged by Respondent. I should also note that this issue is rendered moot in the instant proceedings by the conclusions reached with respect to the charges first raised by the Amended Complaint in Section 3, above.

Seventeenth, Respondent claims that Judge Moran erred by sustaining the charges first introduced in the Amended Complaint relating to Respondent's failures to file tax returns for the years 1999, 2000, 2001 and 2002 by failing to distinguish between "making" and "filing" a return. This claim is wholly without merit. There is no distinction between the "making" and "filing" of a return for these purposes. Spies v. United States, *supra*; Owrutsky v. Brady, *supra*.

Eighteenth, Respondent claims that Judge Moran erred by determining that Respondent had failed to file tax returns for the years 1999, 2000, 2001, and 2002 because such conduct would constitute a violation of Treasury Circular 230 only once Respondent had been convicted of such failures to file in a criminal proceeding.

Respondent is incorrect. The fact that §10.51(a) of Treasury Circular 230 makes it disreputable conduct to be convicted on any criminal offense under the revenue laws of the United States, or of any offense involving dishonesty, or breach of trust, does not preclude the Director of the Office of Professional Responsibility from charging a practitioner with respect to acts of disreputable conduct such as willful failures and knowing conduct under §10.51(d) for failing to file a tax return or counseling or suggesting to a client a plan to evade Federal taxes or the payment thereof as a consequence of taking that action, without regard to if and when the practitioner is charged and convicted criminally with respect to the same conduct.

## 5. Final Agency Action

For the reasons set forth above, I:

AFFIRM Judge Moran's findings with respect to the charges made in the Initial Complaint;

VACATE, WITHOUT REMAND AND WITHOUT PREJUDICE, Judge Moran's findings with respect to the charges first made in the Amended Complaint; and

AFFIRM, on the basis of charges contained in the Initial Complaint, and ADOPT as FINAL AGENCY ACTION Judge Moran's Decision DISBARRING Respondent from practice before the Internal Revenue Service.

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David F. P. O'Connor  
Special Counsel to the  
Senior Counsel  
Office of Chief Counsel  
Internal Revenue Service  
(As Authorized Delegate  
of John W. Snow,  
Secretary of the Treasury)

June 25, 2004  
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that the Decision on Appeal, dated June 25, 2004, was sent this day in the following manner to the addresses listed below:

Copy by Facsimile and Regular Mail to:

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(Certification Signature on Following Page)

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David F. P. O'Connor  
Special Counsel to the Senior Counsel  
Office of Chief Counsel  
Internal Revenue Service  
(As Authorized Delegate  
of John W. Snow,  
Secretary of the Treasury)