

UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY

DIRECTOR,¹ OFFICE OF)
PROFESSIONAL RESPONSIBILITY,)
)
Complainant,)
)
v.)
)
JOSEPH R. BANISTER,)
)
Respondent.)

Complaint No. 2003-2

DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. Introduction

This is an action brought pursuant to 31 C.F.R. §§ 10.60² and 10.91³ and under the authority of 31 U.S.C. § 330.⁴ The Complainant, The Director, Office of Professional Responsibility seeks to have Joseph R. Banister, Respondent, disbarred because, in the course of

¹The Director, Office of Professional Responsibility, Internal Revenue Service, Department of the Treasury was formerly known as The Director of Practice. For convenience and as a practical frame of reference, the Court will refer to the Complainant as the "IRS."

²This section authorizes the Director to institute a proceeding seeking censure, suspension, or disbarment of a practitioner before the IRS when the Director determines that such practitioner has violated any of the laws governing practice before the IRS.

³The IRS Regulations, governing practice before it, were revised, effective July 26, 2002. Under the revised rules, these proceedings apply the revised rules' Subparts D and E, which are procedural in nature, for proceedings instituted as of July 26, 2002 but, substantively, where the *conduct* occurred prior to that date, such conduct is measured under the prior rules. Accordingly, as applied in this case, all of the charges, except for Banister's failure to file his 2002 tax return, were evaluated, substantively, under the prior rules.

⁴31 U.S.C. § 330 provides that the Secretary of the Treasury may regulate the practice of representatives before that Department and may suspend or disbar such representatives who, among other things, are incompetent, or act disreputably, or violate the prescribed regulations.

his representation of taxpayers "T" and "C,"⁵ he advised them that they were not required to file federal income tax returns on the grounds that the Sixteenth Amendment to the United States Constitution was not properly ratified and because Sections 861 through 865 of the Internal Revenue Code defines "income" in a manner which excluded their earnings. Subsequently, the IRS amended the Complaint, adding as grounds for disbarment Banister's failure to file his own federal income tax returns for the years 1999 through 2002.

On November 24, 2003, the Court issued its Order on the Complainant's Motion for Summary Judgment. That Order concluded that the IRS "demonstrated through clear and convincing evidence, that ... Joseph R. Banister committed the violations set forth in the original Complaint, as well as those charges added by the Amended Complaint." Order at 10. Because the public has shown interest in this proceeding, the Court will explain the effect of that Order.

A fundamental purpose of conducting a hearing or a trial is to determine whether the allegations of fact, as set forth in a 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 to his clients 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 federal income taxes.⁶ In fact, Banister's assertions have been addressed by so many federal

⁵Because Banister insisted, albeit at the last moment, through his counsel, that the hearing in this proceeding be held in public, pursuant to 31 C.F.R. § 10.71, this decision should also be made available to the public. To protect the identity of the taxpayers Banister advised, as set forth in the Complaint, they are identified only as "T" and "C."

⁶Were the effect of this advice, misleading taxpayers about their federal tax obligations, not so serious, Banister's worn out theories would be in the laughable category. As noted by the Tax Court: "Some people believe with great fervor preposterous things that just happen to coincide with their self-interest. "Tax protesters" have convinced themselves that wages are not income, that only gold is money, that the Sixteenth Amendment is unconstitutional, and so on. These beliefs all lead - - so tax protesters think - - to the elimination of their obligation to pay taxes. *United States v. Bell*, 238 F.Supp.2d 696, 700 (M.D. Pa. 2003), quoting *Christopher v. C.I.R.*, 2002 WL 71029 *3 (U.S. Tax Ct. 2002), which in turn quoted from *Coleman v.*

courts that they are no longer afforded 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.

With a slightly different twist, the same conclusion was reached with regard to the new claims of Banister’s misconduct, as set forth in the Amended Complaint. The Amended Complaint, as noted above, reflected that Banister was apparently following the same advice he was selling to his clients because it charged that Banister himself failed to file his own federal income tax returns for the tax years 1999 through 2002. The twist was that, unlike the original Complaint where Banister admitted to the facts alleged, for the Amended Complaint he *denied* those factual allegations. Thus, although it would seem to appear that the Court would have to resolve, as a factual dispute at a hearing, whether Banister did or did not file his federal returns for those years, the matter is not quite that simple. This is because one does not get a right to a hearing to resolve facts simply by denying the allegations. Once the Complainant has put on some credible evidence to support its claim, a Respondent has a duty to either challenge that evidence itself or to bring forth some conflicting evidence to challenge it.

Here, the IRS did indeed put forward such credible evidence, by submitting official copies of its business records, which records showed that no federal returns had ever been received from Banister for the years in question. At that point, it was Banister’s responsibility to come forward with contradicting evidence. In such a circumstance, if one had contradictory facts, they would not be hard to produce. For example, Banister could have produced copies of the tax returns, and sworn that they had been filed. Such evidence would have suggested that the allegations in the Amended Complaint were all a huge mistake, the result perhaps of some misfiling of documents by the IRS. Or, Banister could have offered evidence to show that his earnings were so minimal during the years in question that he fell below the income threshold for the requirement to file returns for those years. Under either example such conflicting facts would have required the Court to determine, through the evidence produced at the hearing, which version of the facts occurred. The problem for Banister was that *he never offered any contradictory facts* to rebut the official IRS records which showed that Banister never filed returns for the years alleged. Under such circumstances, that is there being no genuine factual dispute, the Court then determined that Banister’s failure to file his federal tax returns for those years also constituted misconduct under the practice regulations. With summary judgment also fully warranted as to the allegations in the Amended Complaint, the Court acted accordingly.

Having found that the IRS had established that Banister committed the acts alleged in the Complaint and the Amended Complaint and that those acts constituted disreputable conduct, it

Commissioner, 791 F.2d 68, 69 (7th Cir. 1986).

remained for the Court to determine the appropriate sanction to be imposed, in light of those acts. Under 31 C.F.R. §10.70, the Court is authorized to order disbarment, suspension, or a reprimand when a practitioner has been shown to be incompetent or disreputable. In order to determine the appropriate sanction to be applied here, a hearing was held to afford the IRS and Banister to present their respective views on that subject. A brief summary⁷ of that hearing on the penalty phase along with comments from the Court follows.

The December 1, 2003 Penalty Phase Hearing.

Mr. David M. Finz, senior attorney for the IRS Office of Professional Responsibility, (“OPR”) testified for the Complainant, expressing the views of that office regarding the appropriate sanction to be imposed. Finz serves as the liaison between OPR and the Office of Chief Counsel for General Legal Services (“GLS”). Tr. 13. In that role, upon consultation with the OPR Director, Finz recommends that Office’s view of the appropriate penalty to be imposed.

Finz testified that the sanction sought by the Complainant is based upon the nature and severity of the offense, along with any repetitiveness of the offense and, if applicable, whether a Respondent had any prior disciplinary history as a practitioner before the IRS. Tr. 25. Also considered are any aggravating or mitigating factors, and the signal that could be sent to the practitioner community if the IRS failed to discipline or insufficiently disciplined, those who violate the rules of practice. *Id.* Applying those factors, Finz expressed the IRS view that Banister’s actions regarding taxpayers “T” and “C” were egregious, because the contentions Banister raised have been consistently rejected by the courts. That being the case, it viewed the assertion of those contentions as frivolous. Finz noted that repetitiveness was also present, as Banister advanced these long rejected views for more than one taxpayer client.⁸ Tr. 26. On top of that, as noted in the Amended Complaint, Banister had failed to file his own federal tax returns for several consecutive years. Tr. 27

⁷The Court read and considered the entire transcript. To the extent that some aspects of that hearing transcript are not discussed, such absence reflects the Court’s view that it was unnecessary to note them in this decision. The Court has determined that much of the cross-examination of Mr. Finz does not warrant discussion in this decision.

⁸Finz distinguished that aspect of repetitiveness from the situation where a practitioner has been the subject of an earlier disciplinary action. The IRS acknowledged that this latter sense of repetitiveness was not present in this case.

Finz also expressed that Respondent's experience, as a former IRS employee⁹ and his educational background, which includes being a certified public accountant ("CPA"), were aggravating factors. In short, Banister should have known better than to advance these long-rejected arguments. *Id.* In advocating disbarment,¹⁰ as opposed to some lesser sanction, Finz noted that Banister had shown no remorse for his transgressions nor had he repudiated the underlying, discredited, views.

By agreement between the parties, Mr. Banister elected only to make a statement to the Court. This statement was not made under oath, nor was it subject to cross-examination. Tr. 66. Banister began by objecting to the Court's Order regarding admissible evidence at the sanction phase of proceeding.¹¹ Banister then reviewed his working life, beginning with a newspaper delivery route at age twelve, and his acquiescence to the idea that one had to pay federal taxes on income, an acquiescence that continued through adulthood. When referring to the time he was employed by the IRS, he asserted that he was wrongly accused that he owed thousands of dollars in back taxes. The upshot of this story, was that, not only was the allegation incorrect, but also that he was entitled to a refund for the questioned taxes.¹²

⁹Banister was an IRS Special Agent with the criminal investigation division. Banister touted this background in promoting his IRS practice. *There was certainly ample evidence of this from Banister himself.* For example the website "Joseph Banister.com" refers to his experience as an IRS special agent with the criminal investigation division. IRS exhibit 2. Tr. 56. So too, Banister's book, *Investigating the Federal Income Tax*, also refers to his former IRS employment. IRS exhibit 8, Tr. 57. These were not the only exhibits where Banister used his background with the IRS in promoting himself. Tr. 59 - 61. Finz believed this promotion of his background operated to give weight to his views before clients. Tr. 28. Finz also expressed that, even if the touting of his work experience with IRS had not occurred, IRS would still be seeking disbarment for the transgressions identified in the Complaint. Tr. 62.

¹⁰When the case was originally referred, the Director of Practice concurred that disbarment was appropriate. When renamed as the Office of Professional Responsibility, the new Director also agreed with that recommendation.

¹¹That Order, issued November 26, 2003, limited the sanction phase to the issue of the appropriate sanction to be applied, in light of the Court's earlier Order granting summary judgment for the IRS. The Court made it clear that the sanction phase would not be a vehicle for Mr. Banister to reargue the violations found to have occurred in the summary judgment order.

¹²Every sentence from Banister's statement must be considered in the context it was given. Hence, it must be remembered his story was not under oath, nor was it subject to cross-examination. And these observations do not take into account that his stories, such as the asserted wrongful claim of back taxes, are not relevant at all to the violations which have been found or to the appropriate sanction to be applied for those violations.

Banister's statement then continued with a recounting of awards he received while an IRS employee. Along the way he "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. Banister continues to have strong convictions that the IRS does not have the 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, IRS collection personnel, IRS appeals personnel, IRS management, the IRS Assistant Commissioner, the IRS Commissioner, the Treasury Inspector General's office, the Treasury Department, the US House of Representatives, the US Senate, the Supreme Court, the Clinton administration, the Bush administration and even an Administrative Law Judge from the Environmental Protection Agency that the IRS as an agency is engaged in serious wrongdoing." Tr. 75. He also 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."

Banister 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."¹³ This assertion is inaccurate. Banister 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. Despite the opportunity to do so, Banister offered nothing that the Court could consider as mitigation. Instead, he continued to assert his ardent belief that the IRS acts fraudulently and without authority to impose a federal income tax: "Once I resigned from the Internal Revenue Service, my detailed knowledge of the IRS's wrongdoing increased at a seemingly exponential rate ... I believe that the IRS purposely and fraudulently manipulates its individual master file computer system to achieve desired results against the unsuspecting public, because I have witnessed it." Banister is entitled to whatever beliefs he chooses, but the question

¹³Banister also claimed to have "been forbidden from presenting evidence of the number of time [he has] petitioned government officials in good faith for a redress of grievances in connection with the income tax and IRS injustices that [he has] encountered." It must be noted that this claim is not relevant to the charges in the Complaint, charges which, as described above, were either admitted by Banister regarding the original complaint or effectively admitted with regard to the amended complaint, by virtue of Banister's failure to come forward with any evidence to rebut the prima facie showing that he failed to file his federal income tax returns for the tax years 1999 through 2002.

here is his fitness to continue 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, and his personal failure to file his own income tax returns for several consecutive years, are all completely inconsistent with such fitness.

The Court does agree with one assertion made by Banister in his unsworn statement. In the context of referring to the reactivation of his CPA certificate, he stated that the preparation materials for his ethics examination noted that: “[e]very person is an independent moral agent capable of making choices and accountable for the consequences of those choices.” Tr. 78. In this case Mr. Banister is being held accountable for the consequences of his choices upon his fitness to continue practice before the IRS.

Mr. Robert G. Bernhoft,¹⁴ one of Banister’s counsel, made the closing argument on Banister’s behalf.¹⁵ Mr. Bernhoft asserted that disbarment would be “draconian.” Tr. 90. Mr. Bernhoft echoed the claims made by Banister in his statement, asserting that “many times the IRS agenda directly conflicts with important Constitutional rights and the concerns of ordinary Americans” and that the historical record of this reflects “a fairly longstanding history of fraud, waste and mismanagement.” Tr. 90-91. Mr. Bernhoft claimed that this disciplinary hearing was “not in public interest at all” and that attempting to stop Banister from his “zealous advoca[cy]” interferes with Americans “paramount right to petition the government for redress of grievance,

¹⁴The Court notes that Mr. Bernhoft does not exactly come to this proceeding as purely a detached advocate for the Respondent. In *United States v. Robert R. Raymond and Robert G. Bernhoft*, the United States Court of Appeals for the Seventh Circuit upheld the federal district court’s granting of a permanent injunction “preventing [Raymond and Bernhoft] from engaging in ... activities related to the sale of ... materials known as the ‘De-Taxing America Program’ ... and the incitement to violate federal tax laws.” 228 F.3d.804, 806, 816. (7th Cir. 2000). (emphasis added). Like Banister, the Court of Appeals noted that Bernhoft “expressed no remorse concerning [his] participation in the unlawful activities at issue here.” Further, like Banister, Bernhoft “refused to acknowledge that [his] conduct in [the] matter was anything other than perfectly lawful.” *Id.* at 814. Not unlike Banister, in the Respondents’ advertising for their “De-Taxing” Program, they represented that “payment of income tax is a voluntary activity and that individuals cannot be legally compelled to file tax returns or submit to tax investigations or penalties.” *Id.* at 812. As this Court also has observed, the Seventh Circuit has quoted with approval that “the argument that an individual is a sovereign citizen of a state who is not subject to the jurisdiction of the United States and not subject to federal taxing authority is ‘shop worn’ and frivolous.” *Id.* at 812 (emphasis added).

¹⁵Banister’s other counsel in this proceeding was Mr. Robert Barnes, who also is a member of the Wisconsin State Bar.

including tax grievances.” Tr. 91-92.

The balance of Mr. Bernhoft’s closing attempted to cloak Banister’s actions as an expression of the “fundamental right to unfettered exchange of information and ideas” and that the imposition of a sanction “would chill effective advocacy before the IRS.” Tr. 92. According to Mr. Bernhoft, the foundation of this disbarment proceeding arose from Banister’s “assert[ing] a legal position that some obscure Tax Court memo apparently hadn’t approved of.”¹⁶ Tr. 93 -94. Likening his client to Thomas Payne, Mr. Bernhoft argued that this proceeding was an attempt by the government to stifle enlightenment and “the liberty of opinion.” Tr. 95-96.

In his closing statement, Mr. Kessler, as counsel for the IRS¹⁷, brought the proceeding back to real world of facts, noting that Banister actions were about his “blatant disregard for the regulations which govern his practice before the IRS that was the cause of the action.” The IRS noted that: “[A]s a certified public accountant who is authorized to practice before the IRS, and as a former IRS special agent, Respondent clearly has a more heightened awareness of the legal requirements related to the filing of returns and the payment of taxes [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. Instead, the Respondent has shown an utter disregard for the rule of law he must comply with as a tax practitioner before the IRS. This utter disregard is evidenced by his failure to file his own income tax returns for a number of years and his reliance on arguments that have been consistently rejected by the courts to the point where sanctions are ordered and injunctions obtained against individuals making the very same claims as the Respondent.” Tr. 83-84.

Mr. Kessler noted, as has this Court, that “a number of courts have clearly rejected the positions 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 investigative division, and then served in that capacity honorably for five years, approximately, failed to be aware of or discover the numerous cases that have refuted the frivolous positions he has taken.” 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 the Respondent’s part.” *Id.*

¹⁶This is a gross misstatement of the basis for this proceeding, as the numerous orders issued by the Court in this case have pointed out.

¹⁷Ms. Bridgette M. Gibson, Esq., also appeared as co-counsel for the IRS. Ms. Gibson conducted the direct and redirect examination of IRS witness Mr. Finz.

The Court notes that, contrary to the assertions of Banister and his counsel, this case is not about restricting Mr. Banister's beliefs. As expressed by the IRS, "Respondent can have the belief he wants to have. He can advocate that the Internal Revenue Code be changed. He can advocate that there be a flat tax in this country to make it simple. But if he wants to practice before the IRS, he must comply with the regulations which govern such practice based on the laws as they are today, whether he personally disagrees with those laws or not." Tr. 86. The Court agrees with the IRS that Mr. Banister's actions are "about a tax practitioner who demands that the government follow his interpretation of the law when so many courts have already taken the time to consider these arguments and shown him and others the error of their ways."¹⁸ Tr. 87.

Having considered the arguments, statement, and testimony presented at the hearing for the sanctions phase of this proceeding, the Court concludes that nothing less than disbarment is appropriate for Mr. Banister. As reflected in the Orders previously issued, this Court has found that the Respondent committed a number of violations of 31 CFR Part 10, and that these violations demonstrate incompetent and/or disreputable conduct. These violations amply warrant Mr. Banister's disbarment. In the Court's view, either the violations found to have been committed in the original Complaint or the additional violations, which were also found to have occurred, independently warrant nothing short of disbarment.¹⁹ It should be obvious that the combination of both of these grounds for disbarment only serve to make matters worse.


It is clear that Mr. Banister had an obligation to follow the federal tax laws and to comply with the Circular 230 regulations and that he failed to do so. These violations were willful. The provisions of 31 CFR section 10.50 expressly permit suspension or disbarment of a practitioner who is shown to be incompetent or disreputable or who refuses to comply with any of the regulations in 31 CFR Part 10. The Court also finds that Mr. Banister's actions were detrimental to the effectiveness of the Internal Revenue system. No mitigating factors were presented at the hearing. Indeed, Banister was anything but contrite or remorseful for his actions, and thus the Court agrees with the IRS that there is "no reason to believe that he would engage in any different conduct in his future dealings with clients and with the IRS." Tr. 89.

¹⁸Appropriately, the IRS notes this case is also "about a tax practitioner who quickly alleges that this action is being taken in retaliation for his having been a former IRS criminal special agent when he uses that very fact in his advertisements and in his letters to the IRS on behalf of his clients [and that Banister traded upon] his former position well when it suit[ed] him, [by] attempt[ing] to rely on his former position to bolster his credibility with gullible members of the public and in his communication with IRS employees. Tr. 87-88. Although the established violations in the Complaint by themselves amply warrant disbarment, the Court notes that this is certainly an aggravating factor.

¹⁹While this Court entertains no doubt that its findings of the violations in the Complaint and the Amended Complaint will be upheld, it wants to make it expressly clear that, *either* of the demonstrated violations in the Complaint warrant disbarment.

ORDER

For the reasons set forth in this decision, the Respondent, JOSEPH R. BANISTER, is hereby **ORDERED DISBARRED** from practice before the Internal Revenue Service.



William B. Moran
United States Administrative Law Judge

Dated: December 24, 2003
Washington, D.C.

In the Matter of *Joseph R. Banister*, Respondent
Complaint No. 2003-2

CERTIFICATE OF SERVICE

I hereby certify that the **Decision of the Administrative Law Judge**, dated December 29, 2003 was sent this day in the following manner to the addressees listed below:

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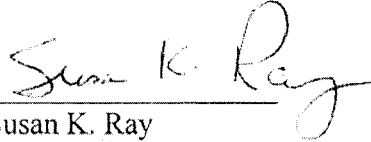
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Dated: December 29, 2003