

**CALIFORNIA BOARD OF ACCOUNTANCY**

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December 28, 2006

Joseph R. Banister
1528 County Rd. #3
Minden, NV 89423

Re: Case Number AC-2005-22

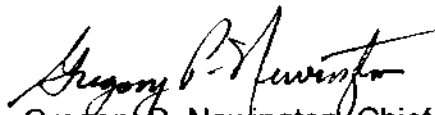
Dear Mr. Banister:

Enclosed is a copy of the Proposed Decision of Administrative Law Judge Steven C. Owyang in the matter of Accusation No. AC-2005-22. The Proposed Decision became public information on December 22, 2006.

The Proposed Decision is scheduled to be considered by the California Board of Accountancy at its meetings to be held on January 18-19, 2007. Although your attendance at the Board meeting is allowed for public session matters, this particular matter is required to be considered by the Board in a closed session which does not permit your attendance.

You will be notified in writing of the Board's decision in this matter.

Sincerely,


Gregory P. Newington, Chief
Enforcement Division

GPN:jeo

Enclosure

c: Robert E. Barnes, Esq., Law Office of Robert G. Bernhoft
Jeanne C. Werner, Deputy Attorney General

BEFORE THE
CALIFORNIA BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JOSEPH R. BANISTER

Certified Public Accountant No. CPA 57875

Respondent.

Case No. AC-2005-22

OAH No. N2006050891

PROPOSED DECISION

Administrative Law Judge Steven C. Owyang, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on July 6, 2006.

Deputy Attorney General Jeanne C. Werner represented complainant Carol Sigmann, Executive Officer, California Board of Accountancy, Department of Consumer Affairs.

Respondent Joseph R. Banister was present and represented by Robert E. Barnes, Law Office of Robert G. Bernhoft, Milwaukee, Wisconsin.

Simultaneous opening and reply briefs were timely filed. The matter was submitted on October 11, 2006.

FACTUAL FINDINGS

1. Complainant Carol Sigmann, Executive Officer, California Board of Accountancy, Department of Consumer Affairs, issued the accusation in her official capacity. At hearing, complainant withdrew paragraphs 11 and 12 of the accusation, which had alleged cause for discipline under Business and Professions Code section 5100, subdivision (g). The remaining alleged cause for discipline was pursuant to Business and Professions Code section 5100, subdivision (h).

2. On February 1, 1991, the California Board of Accountancy issued Certified Public Accountant Number CPA 57875 to respondent Joseph R. Banister. During the period March 1, 1997, through June 17, 1999, respondent's certified public accountant certificate was renewed in an "inactive" status. Otherwise, the certificate was in full force and effect and was renewed through February 28, 2005.

3. The United States Department of Treasury and the Internal Revenue Service are governmental bodies or agencies within the meaning of Business and Professions Code section 5100, subdivision (h).

4. On December 24, 2003, a decision in United States Department of Treasury Complaint No. 2003-2, *Director, Office of Professional Responsibility v. Joseph R. Banister*, ordered respondent disbarred from practice before the Internal Revenue Service. Respondent appealed the decision. In a June 25, 2004 decision, the Department of Treasury denied respondent's appeal and adopted as its final agency action the underlying decision disbarring respondent from practice before the Internal Revenue Service.

5. The Department of Treasury found that respondent provided erroneous advice to taxpayers, including improperly advising them that tax returns were not required because Internal Revenue Code sections 861 through 865 define "source of income" in a manner that excluded the income of United States citizens residing in the United States from United States tax.

6. The Department of Treasury decision, quoting the underlying decision, states:

In fact, in [respondent's] answer to the original Complaint he *admitted* that the facts alleged in the Complaint occurred. Thus, [respondent] *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, [respondent] *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 [respondent's] advice is that it is absolutely wrong. Both of [respondent's] assertions have been long resolved by the Federal Courts as completely without merit. Thus, [respondent] 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, [respondent'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. [Emphasis in original.]

7. Respondent's disbarment from practice before the Internal Revenue Service was pursuant to Part 10 of Title 31, Code of Federal Regulations (sometimes known as "Treasury Circular 230"). Respondent's practice before the Internal Revenue Service constituted the practice of public accountancy within the meaning of Business and Professions Code section 5051.

8. Respondent made no showing of rehabilitation or mitigation, demonstrated no remorse, and acknowledged no wrongdoing.

9. Respondent has resided in Minden, Nevada, since January 2006. Respondent practices "reconstructive accounting" working with individuals who have not kept records over a period of time. Respondent has clients all over the country.

10. Respondent's California license has not been the subject of prior discipline and complainant has not shown evidence of other professional misconduct by respondent.

11. Complainant seeks reimbursement of its costs of investigation and prosecution of this matter. Complainant has certified \$1,656.52 in investigative costs and \$4,972.25 in Attorney General costs, for a total of \$6,628.77. These costs are reasonable.

LEGAL CONCLUSIONS

1. In its June 25, 2004 decision, the Department of Treasury disbarred respondent from practice before the Internal Revenue Service. (Factual Finding 4.) Complainant asserts that, by reason of the Department of Treasury decision, respondent's certified public accountant certificate may be suspended or revoked pursuant to Business and Professions Code section 5100, subdivision (h), which provides as a cause for discipline:

Suspension or revocation of the right to practice before any governmental body or agency.

Respondent's disbarment from practice before the Internal Revenue Service was pursuant to Part 10 of Title 31, Code of Federal Regulations (sometimes known as "Treasury Circular 230") which provides, in pertinent part:

This part contains rules governing the recognition of attorneys, **certified public accountants**, enrolled agents, and other persons **representing clients before the Internal Revenue Service**. Subpart A of this part sets forth rules relating to the **authority to practice** before the Internal Revenue Service; subpart B of this part prescribes the duties and restrictions relating to such practice; subpart C of this part contains rules relating to disciplinary proceedings. [Emphasis added.]

Respondent's practice before the Internal Revenue Service constituted the practice of public accountancy within the meaning of Business and Professions Code section 5051. There is a substantial relationship between respondent's practice before the Internal Revenue Service and his qualifications, functions and duties as a California certified public accountant. (*Clare v. State Bd. of Accountancy* (1992) 10 Cal.App.4th 294.) Respondent's disbarment from practice before the Internal Revenue Service constitutes the "[s]uspension or revocation of the right to practice" before a governmental body or agency

and provides cause for discipline under Business and Professions Code section 5100, subdivision (h).

2. Respondent asserts that the Legislature “noticeably distinguished” the suspension of the “*right to practice* before any governmental body or agency” (Bus. & Prof. Code, § 5100, subd. (h), emphasis added) from the suspension of the “*authority to practice* as a certified public accountant . . . by a state or foreign country” (Bus. & Prof. Code, § 5100, subd. (d), emphasis added). Respondent argues:

As important, the state legislature chose not to authorize discipline merely for a governmental body prohibiting someone from practicing before them unless that governmental body was either an accounting licensing entity (such as a state or foreign nation), or, if neither, then suspension only constituted grounds for discipline if the governmental agency provided a “right to practice” to the person disciplined. The “right to practice” has always been defined in California as when a government agency gives someone a *property interest* in practicing a particular profession. [Emphasis in original.]

Complainant agrees that the right to practice accountancy in California concerns a vested property right. Respondent has not shown, however, that section 5100, subdivision (h), has the restricted application that respondent posits, notwithstanding the distinction between “right to practice” and “authority to practice.” The plain language of subdivision (h) contradicts respondent’s assertion. Nor has respondent cited legislative history or case law to the contrary.

3. Respondent raises various constitutional law concerns, including the due process provisions of the United States and California constitutions. He asserts there was a “manifest lack of due process” in the federal proceedings against him. This decision determines no issues of constitutional law. (Cal. Const., art. III, § 3.5.)

4. Complainant urges that respondent’s certified public accountant certificate should be revoked. Respondent counters, “Given the respondent’s well-founded belief the IRS action was rooted in his whistle-blowing activities from his former employment with the IRS, vindicated by his complete acquittal at a real trial on the facts, discipline, even if appropriate at all, should not be severe.” Respondent made no showing of his asserted “whistle-blowing activities” or “complete acquittal.”

“Protection of the public shall be the highest priority for the California Board of Accountancy in exercising its licensing, regulatory, and disciplinary functions.” (Bus. & Prof. Code, § 5000.1.) The board’s disciplinary guidelines (Cal. Code Regs., tit. 16, § 98) list several aggravating factors to be considered regarding the nature of discipline that should be imposed, including: evidence that the violation was knowingly committed and/or was premeditated; licensee’s actions resulted in financial damage to his or her clients or other

consumers; duration of violations; and, evidence that the licensee knew or should have known that his or her actions could harm his or her clients or other consumers. Respondent's disbarment from practice before the Internal Revenue Service (Factual Findings 4, 5, 6, 7) demonstrated that he knowingly provided incorrect advice, that he did so on more than one occasion, and that he knew or should have known that his actions could harm his clients.

The disciplinary guidelines also recognize a number of mitigating factors, including: that the licensee has cooperated with the board's investigation and other law enforcement or regulatory agencies; the passage of considerable time since an act of professional misconduct occurred with no evidence of recurrence or evidence of any other professional misconduct; convincing proof of rehabilitation; demonstration of remorse by the licensee; recognition by licensee of his or her wrongdoing and demonstration of corrective action to prevent recurrence; and correction of the violation without monetary losses to consumers and/or restitution was made in full. Respondent protests that he had no notice that mitigation was at issue until complainant raised it in closing argument; mitigation is always at issue in disciplinary proceedings before the board. Respondent asserts, and complainant acknowledges, that he self-reported his disbarment from practice before the IRS. It is noted, further, that there is no evidence of other professional misconduct by respondent. Other than this, respondent made no showing of rehabilitation or mitigation, demonstrated no remorse, and acknowledged no wrongdoing.

Taking into account the board's duty to protect the public, the disciplinary guidelines, the conduct that led to his disbarment from practice before the Internal Revenue Service, and his lack of mitigation, revocation of respondent's certified public accountant certificate is appropriate.


5. Complainant shall recover her costs of investigation and prosecution in this matter, in the amount of \$6,628.77. (Bus. & Prof. Code, § 5107.)

ORDER

1. Certified Public Accountant Number CPA 57875, issued to respondent Joseph R. Banister, is revoked.

2. Respondent shall reimburse the board its costs of investigation and prosecution in this matter, in the amount of \$6,628.77.

DATED: November 21, 2006


STEVEN C. OWYANG
Administrative Law Judge
Office of Administrative Hearings