

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

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

Monday
December 1, 2003

Courtroom 2-1350
450 Golden Gate
San Francisco, California

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

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

APPEARANCES:

For the Complainant:

JAY J. KESSLER, ESQ.
BRIDGETTE M. GIBSON, ESQ.
IRS, General Legal Services
333 Market, Suite 1200
San Francisco, California 94105
415/848-4850

For the Respondent:

ROBERT G. BERNHOFT, ESQ.
ROBERT E. BARNES, ESQ.

207 East Buffalo, Suite 600
Milwaukee, Wisconsin 53202
414/276-3333

I N D E X

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

MS. GIBSON: And I have one final question.

BY MS. GIBSON:

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

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

MS. GIBSON: I've nothing further.

MR. BARNES: Mr. Finz --

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

MR. BARNES: Yes, Your Honor.

JUDGE MORAN: All right.

CROSS-EXAMINATION

BY MR. BARNES:

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

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

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

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

A In consultation with the director.

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

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

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

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

Q Okay --

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

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

A That's correct.

Q Do you remember signing an affidavit in this case?

A Yes.

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

A To determine the penalty to seek, yes.

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

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

Q Is that authority in writing?

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

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

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

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

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

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

JUDGE MORAN: No, overruled.

BY MR. BARNES:

AFFIDAVIT

STATE OF NEW YORK)
)
COUNTY OF NASSAU) s.s.:

DAVID M. FINZ, being duly sworn, deposes and says:

1. I am a Senior Attorney in the Enforcement Unit of the Office of Professional Responsibility, formerly known as the Office of the Director of Practice (hereinafter collectively, "the Office").
2. I have been an employee of the Office since December 4, 2000, and an employee of the Department of the Treasury since October 26, 1998.
3. I have been practicing law since November 3, 1995, and I am admitted to practice in the District of Columbia and the State of Georgia.
4. I am familiar with the disciplinary process set forth in Treasury Department Circular No. 230. During my employment with the Office I have participated in the investigation, litigation and settlement of over one hundred twenty cases involving allegations of disreputable conduct by tax practitioners. The Director has given me express authority in such cases to determine the appropriate penalty to seek at hearings before Administrative Law Judges, and to accept or reject offers of settlement from tax practitioners.
5. I was the individual in the Office responsible for preparing the case of Joseph Banister (hereinafter, "Respondent"), Complaint No. 2003-2, for litigation by the Office of Chief Counsel – General Legal Services. The case was transferred to me after the Director of Practice issued Respondent an allegation letter on April 18, 2001, and after another member of our staff replied to Respondent's May 14, 2001 request for documents under the Freedom of Information Act.
6. Records in the case file indicate that allegations of disreputable conduct by Respondent were initially brought to the attention of the Office as a result of a referral by Mr. Kenneth Canfield, a Revenue Officer in San Rafael, California. Referrals from employees of the Internal Revenue Service such as Revenue Officer Canfield constitute the single most common manner in which allegations of disreputable conduct are referred to the Office.
7. Mr. Canfield's referral alleged that, on May 17, 2000, Respondent submitted a Form 1215 "Request for a Collection Due Process Hearing" on behalf of taxpayer Frank Coleman, for whom Respondent was the designated representative. In an attachment to the form, Respondent argued, *inter alia*, that Mr. Coleman was not liable for taxes for the years 1989-1998 because the Sixteenth Amendment was "not ratified," and because, according to Respondent, 26 U.S.C. s. 861 and the regulations thereunder define "source" of income in such a way as to exclude Mr. Coleman's income from taxation.

8. An investigation by the Office subsequently revealed that Respondent had also advised taxpayer Walter A. Thompson that he was not liable for income taxes for 1996 and 1998 because his income for the stated tax years was not taxable income, ostensibly due to the fact that 26 U.S.C. s. 861 and the regulations thereunder defined "source" of income in such a way as to exclude Mr. Thompson's income from taxation. The investigation further revealed that, on January 31, 2000 and again on February 29, 2000, Respondent signed as the preparer for taxpayer Walter A. Thompson's Amended U.S. Tax Returns (Forms 1040X) for tax years 1998 and 1996, respectively. The aforementioned amended returns, which were filed with the Internal Revenue Service, stated that Mr. Thompson's income for the stated tax years was not taxable income, as per 26 U.S.C. s. 861-865.
9. In the view of the Office, Respondent knew or should have known that courts have rejected his arguments regarding the Sixteenth Amendment to the Constitution. In addition, he knew or should have known that a plain language reading of 28 U.S.C. s. 861 and the regulations thereunder do not state that wages or income from sources in the United States are exempt from taxation. Consequently, it is the position of the Office that Respondent counseled or suggested to clients or prospective clients that they engage in an illegal plan to evade Federal taxes or prospective payment thereof.
10. The manner in which this case was referred to the Office was consistent with numerous other referrals to the Office, and the case was handled in accordance with all standard procedures. Although the Director of Practice was concerned about Respondent's use of his former status as an IRS Criminal Investigation Special Agent to potentially bolster his credibility with clients or prospective clients, his former status as a Special Agent was not the reason a complaint was issued in this case seeking disbarment. The initial reason for the issuance of the complaint was Respondent's representation of a taxpayer in which he took a position that was abased on clearly frivolous assertions, and his preparation of amended tax returns for another taxpayer in which he made similar frivolous assertions. The Office regularly initiates actions to disbar practitioners under similar circumstances.
11. Respondent has alleged that the former Director of Practice, Patrick McDonough, had a "policy" of not instituting actions under Treasury Department Circular No. 230 against tax practitioners who had criminal proceedings pending against them arising from matters related to the substance of the potential Circular No. 230 complaint. At the time of the Office's investigation into Respondent's alleged misconduct, I was a direct report to Mr. McDonough. The actual policy of the former Director of Practice in such instances was to confer with the employee within the Criminal Investigation Division ("CID") of the Internal Revenue Service assigned to the related criminal matter. If the CID expressed no objection to a simultaneous action by the Office, then the Director of Practice would proceed with the filing of a complaint under Circular No. 230. However, if the CID preferred that the Circular No. 230 action not proceed until the related criminal matter was resolved, then the Director of Practice would hold the Circular No. 230 case in abeyance pending resolution of the related criminal matter.

12. In the instant case, the file indicates that on or about February 1, 2001, Ernest Barone, an Appeals Officer on temporary detail to the Office, conferred with Chris Gerhart, the Special Agent within the CID assigned to the related criminal matter, and that Special Agent Gerhart expressed no objection to the Director of Practice proceeding immediately with a complaint for Respondent's disbarment from practice before the Internal Revenue Service. Additionally, on or about July 29, 2002, Complainant's counsel verified, at the Director of Practice's request, that the Assistant United States Attorney assigned to the related criminal matter also had no objection to the Office moving forward with the Circular No. 230 complaint for Respondent's disbarment from practice before the Internal Revenue Service.
13. After the complaint in the instant matter had been filed, Complainant's counsel became aware that Respondent had stated during a radio broadcast that he had not filed his individual income tax returns (Form 1040) for several tax years. Complainant's counsel informed me that he had listened to a replay of this radio broadcast over the Internet, and believed Respondent's statements constituted an admission that he had violated Section 10.51(f) (formerly known as Section 10.51(d)) of Treasury Department Circular No. 230 by willfully failing to make a Federal tax return in violation of the revenue laws of the United States.
14. At the request of Complainant's counsel, I caused a transcript of Respondent's individual income tax account to be produced, under blue cover seal, by the Brookhaven Service Center in Holtsville, New York. The transcript indicates, consistent with Respondent's statements during the radio broadcast, that Respondent has failed to file his individual income tax returns for several tax years.
15. It is the position of the Office that the filing of income tax returns is not voluntary; it is required collectively by 26 U.S.C. Sections 1.6011(a), 6012(a), 6013(a) (in the case of married couples filing jointly), 6072(a) and 6153. See also, 26 C.F.R. 1.6011-1(a). The Internal Revenue Code (at 26 U.S.C. Section 7203) imposes criminal penalties for the failure to "make" a return of up to \$25,000 in fines and up to one year imprisonment upon conviction.
16. The standard of willfulness employed by the Office in seeking disciplinary sanctions against tax practitioners who fail to timely file their own income tax returns is one of a "voluntary, intentional violation of a known legal duty." See United States v. Pomponio, 429 U.S. 10, 12 (1976). In Owrutsky v. Brady, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir. 1991), the court reversed a lower court's finding of a lack of willful motive, and upheld the Office's disbarment of an attorney from practice before the Internal Revenue Service on grounds that the attorney had failed to timely file his individual income tax returns for six consecutive years. Rejecting the practitioner's argument that his eligibility for refunds precluded a finding of willfulness, the court cited Pomponio, and noted that as an experienced practicing attorney, the practitioner knew or should have known that he had a legal duty to timely file returns, regardless of his ultimate tax liability.



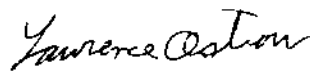
17. Additionally, in Joseph Poole v. United States, No. 84-0300, 1984 U.S. Dist. LEXIS 15351 (D.D.C. 1984), the court affirmed the disbarment of a Certified Public Accountant who failed to timely file his individual income tax returns for three consecutive years, holding that "willful failure to file tax returns, in violation of the Federal Revenue laws, is dishonorable, unprofessional, and adversely reflects on the practitioner's fitness to practice. This is particularly true in a tax system whose very effectiveness depends upon voluntary compliance."
18. The Office has successfully argued for the application of the Pomponio standard of willfulness in several disciplinary cases involving the failure of tax practitioners to timely file individual income tax returns.
19. In the present case, Respondent's tax filing history evinces the type of disreputable conduct the Office seeks to sanction through the disciplinary process set forth in Treasury Department Circular No. 230. The fact that Respondent may have made estimated tax payments for some of the years at issue does not, in the view of the Office, mitigate the offense in question for two reasons. First, the plain language of Section 10.51(f) (formerly known as Section 10.51(d)) of Treasury Department Circular No. 230 speaks of "willfully failing to make a Federal tax return in violation of the revenue laws of the United States," which is not dependent upon payment or non-payment of tax. Second, even in cases such as Owrutsky in which no tax is owed and a refund is due the practitioner, courts have nevertheless held that the tax practitioner's willful failure to file an income tax return provides a basis for disciplinary action.

Under penalty of perjury, I declare the statements contained in the above Affidavit, consisting of four (4) pages, to be true and correct, to the best of my information, knowledge and belief.

Date: Oct. 28, 2003


David M. Finz

Sworn to before me this 28TH day of October, 2003


LAWRENCE OSTROW
Notary Public, State of New York
No. 98-4989447
Qualified in Nassau County
Commission Expires Dec 2, 2005