UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY

KAREN HAWKINS,	)	
ACTING DIRECTOR,	)	
OFFICE OF PROFESSIONAL	)	
RESPONSIBILITY,	)	
	)	
Complainant,	)	
v.	)	**Complaint No. 2009-27**
	)	
JAMES J. EVERETT	)	
	)	
Respondent.	)	

ORDER ON COMPLAINANT'S RENEWED MOTION FOR SUMMARY ADJUDICATION REGARDING SANCTIONS

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 17, 2009, Complainant Karen L. Hawkins, acting in her official capacity as Director of the Office of Professional Responsibility ("OPR"), United States Department of the Treasury, Internal Revenue Service ("IRS"), initiated this proceeding by filing a Complaint against Respondent James J. Everett pursuant to 31 U.S.C. § 330 and Sections 10.60, 10.82, and 10.91 of the regulations codified at 31 C.F.R. Part 10 ("Rules") governing the practice of attorneys, certified public accountants, enrolled agents and other practitioners before the IRS.[1] The Complaint alleges that Respondent has engaged in practice before the IRS and was convicted in federal district court of the felony crimes of making a false declaration in bankruptcy proceedings, bankruptcy fraud, and money laundering and concealment and that, as a result, Respondent was disbarred from the practice of law in Arizona. The Complaint states that Complainant subsequently suspended Respondent from practice before the IRS pursuant to the expedited suspension provisions of 31 C.F.R. § 10.82. The Complaint further alleges that Respondent's criminal convictions constitute incompetence or disreputable conduct, as defined by 31 C.F.R. § 10.51, and render him unfit to practice before the IRS. As a sanction, the Complaint seeks to have Respondent disbarred from practice before the IRS pursuant to 31 C.F.R. §§ 10.50 and 10.70, with reinstatement thereafter being at the sole discretion of OPR.

[1] All citations to the regulations codified at 31 C.F.R. Part 10 (§§ 10.0-10.93), Practice Before the Internal Revenue Service, can also be found in corresponding sections of Treasury Department Circular No. 230, entitled "Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, Enrolled Retirement Plan Agents, and Appraisers before the Internal Revenue Service" (Rev. 4-2008), issued pursuant to the provisions of 31 U.S.C. § 330.

Appearing *pro se,* Respondent filed an Answer to the Complaint admitting that he was criminally convicted but asserting that he has appealed those convictions. The Answer further alleged that Respondent voluntarily consented to his disbarment in Arizona. Based on these alleged facts, the Answer requested that this Tribunal stay the proceeding pending Respondent's appeal and lift the interim suspension imposed by the IRS.

The parties subsequently filed prehearing memoranda and cross motions for summary adjudication. In his Motion for Summary Adjudication, Respondent argued that, because his criminal convictions were still being considered on appeal and thus were not "final," Complainant could not establish that Respondent had engaged in disreputable conduct as defined by 31 C.F.R. § 10.51(a) and his criminal convictions could not serve as a basis for his disbarment. Accordingly, Respondent requested that this Tribunal either dismiss the Complaint or hold the proceeding in abeyance. Alternatively, Respondent requested that this Tribunal exercise its "equitable discretion" to rule in Respondent's favor, asserting that disbarment was inappropriate under the circumstances of the case. Respondent offered several alleged facts to support this argument, including that he had never been the subject of disciplinary proceedings before in the many years he had practiced before the IRS and that the allegations underlying his criminal convictions emanated from his personal affairs and not his conduct as a practitioner before the IRS.

In its Motion for Summary Judgment and Opposition to Respondent's Summary Judgment Motion, Complainant pointed out that the record contains undisputed proof that Respondent was convicted of three felonies and was consequently disbarred from the practice of law in Arizona. Contrary to Respondent's contention that his criminal convictions are not final and therefore not presently actionable, Complainant argued that the Secretary of the Treasury has the authority to sanction a practitioner for conduct prohibited by the regulations governing practice before the IRS, regardless of any pending appeals. Complainant further argued that, even if any doubt existed as to whether a criminal conviction must be final before warranting a sanction pursuant to 40 C.F.R. § 10.51(a)(2), no doubt existed that Respondent was disbarred from the practice of law in Arizona, which alone is grounds for sanction pursuant to 40 C.F.R. § 10.51(a)(10). Accordingly, Complainant requested that Respondent continue to be suspended until such time as his criminal conviction is overturned and he is readmitted to practice law or, in the alternative, that Respondent be disbarred with reinstatement thereafter at Complainant's sole discretion.

By Order dated October 1, 2010, this Tribunal denied Respondent's motion and granted Complainant's motion as to Respondent's liability, concluding that Complainant had sufficiently established that Respondent had engaged in "incompetence and disreputable conduct," as defined by 31 C.F.R. §§ 10.51(a)(2) and 10.51(a)(10), for which Respondent is subject to discipline under 31 C.F.R. § 10.50. This Tribunal denied Complainant's request for the imposition of a sanction, however, and scheduled a hearing to commence on December 15, 2009, to address the remaining issue of the appropriate sanction to impose against Respondent. This Tribunal subsequently stayed the proceeding pending a decision on Respondent's appeal of his criminal convictions.

The United States Court of Appeals for the Ninth Circuit affirmed Respondent's criminal convictions on April 14, 2010. Consequently, by Order dated April 15, 2010, this Tribunal lifted the stay; scheduled the hearing in this matter to commence on June 8, 2010; and ordered the parties to submit on or before May 27, 2010, a list of the names of

all persons expected to attend the hearing. While Complainant submitted a hearing attendee list, Respondent failed to do so. Several attempts by this Tribunal's staff attorney to contact Respondent by email and telephone were unsuccessful. Counsel for Complainant indicated that his efforts to contact Respondent also were unsuccessful.

On June 2, 2010, Complainant submitted a Renewed Motion for Summary Adjudication Regarding Sanctions ("Motion" or "Mot."), asserting that Respondent should be disbarred from practice before the IRS as a matter of law, and that the interests of judicial economy support addressing the issue of sanctions in a summary proceeding rather than a protracted administrative proceeding. Mot. at 5. Complainant simultaneously submitted a Motion to Continue the Hearing, in which Complainant requested that the hearing be continued to a date that would allow sufficient time for Respondent to respond to, and this Tribunal to issue a decision on, Complainant's Motion for Summary Adjudication on sanctions. On June 3, 2010, Respondent notified this Tribunal's staff attorney and counsel for Complainant that he did not object to such a continuance.

By Order dated June 4, 2010, this Tribunal granted Complainant's Motion to Continue the Hearing and stayed the hearing until further notice. The Order also directed Respondent to file any response to Complainant's Motion for Summary Adjudication on sanctions by June 25, 2010. To date, Respondent has not filed a response, nor has Respondent requested an extension of time to file a response.

II. STANDARDS FOR SUMMARY ADJUDICATION

The Rules provide that "[e]ither party may move for a summary adjudication upon all or any part of the legal issues in controversy," and that if the non-moving party files no response to a motion, "the non-moving party is deemed to oppose the motion" and therefore the Motion must be determined on its merits. 31 C.F.R. §§ 10.68(a)(2), 10.68(b). The Rules provide further that summary judgment shall be rendered "if the pleadings, depositions, admissions, and any other admissible evidence show that there is no genuine issue of material fact and that a decision may be rendered as a matter of law." 31 C.F.R. § 10.76(a)(2).

A motion for summary adjudication is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). Therefore, federal court rulings on motions under Rule 56 of the FRCP provide guidance for ruling on a motion for summary adjudication in an administrative proceeding. *See Puerto Rico Sewer and Aqueduct Authority v. EPA,* 35 F.3d 600,607 (lst Cir. 1994) (holding that Rule 56 of the FRCP "is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment."), *cert. denied,* 513 U.S. 1148 (1995).

The party moving for summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp.* v. *Catrett,* 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, the non-moving party "may not rely merely on allegations or denials" in its pleadings but "must set out specific facts showing a genuine issue for trial." FRCP 56(e)(2). If the non-moving party "does not so respond, summary judgment should, if appropriate, be entered against [him]." *Id.*

In evaluating a motion for summary judgment, the tribunal must view the record in a light most favorable to the non-moving party, indulging all reasonable inferences in that party's favor. *Griggs-Ryan* v. *Smith,* 904 F.2d 112, 115 (1st Cir. 1990). The record to be considered by the tribunal includes any material that would be admissible or usable at trial. *Horta* v. *Sullivan, 4* F.3d 2, 8 (lst Cir. 1993), *citing* 10A Charles A. Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 2721, at 40 (2d ed. 1983). However, the burden of coming forward with evidence in support of their respective positions remains squarely upon the litigants. *See Northwestern Nat'l Ins. Co. v. Baltes,* 15 F.3d 660, 662-63 (7th Cir. 1994) ("[J]udges are not archaeologists. They need not excavate masses of papers in search of revealing tidbits - not only because the rules of procedure place the burden on the litigants, but also because their time is scarce.").

III. ARGUMENTS OF COMPLAINANT

Complainant represents that "[t]he material facts of Respondent's conviction[s] and subsequent disbarment are undisputed" and that, as a matter of law, disbarment of Respondent from practice before the IRS "is the appropriate remedy in this case." Mot. at 4-5. In support, Complainant presents attached documents from websites of the State Bar of Texas and Arizona State Bar reflecting that Respondent is suspended and ineligible to practice law in Texas and is disbarred from practice of law in Arizona, and a copy of the April 14, 2010 decision of the United States Court of Appeals for the Ninth Circuit affirming Respondent's conviction for bankruptcy fraud. Mot. Exhs. A, B.

In support of its argument that disbarment is the appropriate sanction in this case as a matter of law, Complainant asserts that "[a] prerequisite for practice before the Internal Revenue Service is that an attorney be a member in good standing of a state bar," or in other words "not disbarred and currently eligible to practice." Mot. at 6. Complainant contends that, because Respondent has been disbarred from practice in Arizona and is likely to remain disbarred now that his criminal convictions have been upheld on appeal, Respondent is precluded by law from practicing before the IRS. *Id.* at 6-7. Complainant also argues that a sanction of disbarment in the present case would be consistent with prior decisions ordering disbarment as the appropriate sanction for incompetent or disreputable conduct as defined by 31 C.F.R. § 10.51. *Id.* at 6, and Exh. C. While Complainant acknowledges that no decisions have been issued ordering disbarment from practice before the IRS on the basis of a criminal conviction and disbarment from the practice of law, Complainant identifies multiple decisions in which practitioners were disbarred for failure to file federal tax returns, which also constitutes "incompetence or disreputable conduct" under 31 C.F.R. § 10.51 (a). *Id.* at 6-7 and Exh. C. Complainant argues that Respondent's actions "demonstrate a lack of regard for the law[] and contempt for the system" and are far more serious and egregious than the failure to file federal tax returns. Mot. at 6-7. Accordingly, Complainant argues, "a sanction of less than disbarment ... in the present case could not be reconciled with the previous decisions finding disbarment appropriate for less egregious conduct such as failure to file tax returns." *Id.* at 8.

IV. DISCUSSION

Section 330(b) of Title 31 of the United States Code provides that:

After notice and opportunity for a proceeding, the Secretary may suspend or

disbar from practice before the Department, or censure, a representative who- -

(1) is incompetent [or]

(2) is disreputable....

31 U.S.C. § 330(b).

The Rules set forth the duties and restrictions relating to practice before the IRS, the sanctions for violations of the regulations and basis therefor, and the procedures applicable to disciplinary proceedings for violations. Section 10.50 .of the Rules provides in relevant part that:

> The Secretary of the Treasury, or delegate, after notice and an opportunity for a proceeding, may censure, suspend, or disbar any practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable (within the meaning of § 10.51) ....

31 C.F.R. § 10.50(a). Section 10.51 (a), in turn, provides in pertinent part that -

> Incompetence and disreputable conduct for which a practitioner may be sanctioned under § 10.50 includes, but is not limited to –
>
> * * * *
>
> (2) Conviction of any criminal offense involving dishonesty or breach of trust.
>
> * * * *
>
> (10) Disbarment or suspension from practice as an attorney ... by any duly constituted authority of any State....

31 C.F.R. §§ 10.51 (a)(2), (a)(10).

As noted above, this Tribunal concluded in the Order on Parties' Cross Motions for Summary Adjudication, dated October 1, 2009, that Complainant adequately established that Respondent had engaged in "incompetence and disreputable conduct" within the meaning of 31 C.F.R. §§ 10.51(a)(2) and 10.51(a)(10), for which Respondent is subject to sanction under 31 C.F.R. § 10.50(a). Thus, the only remaining issue to be resolved is the appropriate sanction to be imposed against Respondent pursuant to that provision.

In determining which sanction is appropriate, Section 10.50 provides as guidance only that "[t]he sanctions imposed ... shall take into account *all relevant facts and circumstances."* 31 C.F.R. § 10.50(d) (emphasis added). Thus, the regulations do not provide any standards for determining when it is appropriate to order disbarment, suspension, or a reprimand. However, the American Bar Association ("ABA") Standards For Imposing Lawyer Sanctions (1991 Ed.) provide that "disbarment is generally appropriate when: (a) a lawyer engages in serious criminal conduct a necessary element

of which includes intentional interferences with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." ABA Standard 5.11. Suspension, on the other hand, "is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice." ABA Standard 5.12. Section 9.1 of the ABA Standards states that, "[a]fter misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose." Aggravating factors, set forth at Section 9.22 of the ABA Standards, include (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience in the practice of law; (j) indifference to making restitution; and (k) illegal conduct, including that involving the use of controlled substances. Mitigating factors, set forth at Section 9.32 of the ABA Standards, include: (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical disability; (i) mental disability or chemical dependency including alcoholism or drug abuse ... ; (j) delay in disciplinary proceedings; (k) imposition of other penalties or sanctions; (l) remorse; and (m) remoteness of prior offenses.

Upon review of the case file, it is found that Respondent has not raised any genuine issue of material fact with respect to the sanction requested. The undisputed evidence in the case file establishes that Respondent's criminal convictions were upheld on appeal to the United States Court of Appeals for the Ninth Circuit. The decision of the Ninth Circuit states that in September 9, 2002, Respondent filed for bankruptcy under Chapter 7, seeking to discharge over $450,000 in debt, and thereafter, in January 2003, his bankruptcy was discharged. However, on July 1, 2002, Respondent had arranged a lease-purchase agreement for a house in Paradise Valley, Arizona, paying $5,500 in rent monthly, and purchasing it in August 2004 for $1,100,000. Complainant was charged in a 34 count indictment with making false declarations in his bankruptcy proceeding by concealing his interest in a corporation, his lease, two bank accounts, and interest in his deceased mother's estate, and was charged with devising a scheme to defraud the bankruptcy court by concealing property. Mot. Exh. B. He was found guilty on all but one count. The Ninth Circuit affirmed the conviction and specifically affirmed the jury's finding that Respondent created a corporation to conceal assets from the bankruptcy court and to facilitate the lease and purchase of the house. These actions reflect "serious criminal conduct a necessary element of which includes intentional interferences with the administration of justice, false swearing, misrepresentation, [or] fraud," or "intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice," which suggest that the proper sanction is disbarment. ABA Standard 5.11. Furthermore, Respondent's conduct also reflects aggravating factors of dishonest or selfish motive, and multiple offenses, and the case file

indicates that he had substantial experience in the practice of law. Even considering arguments Respondent set forth in response to Complainant's previous motion for summary judgment -- that he had never been the subject of disciplinary proceedings before in the many years he had practiced before the IRS, and that the allegations underlying his criminal convictions emanated from his personal affairs and not his conduct as a practitioner before the IRS - such arguments do not weigh against disbarment in the circumstances of this case.

As pointed out by Complainant, failure to file federal tax returns has been held to constitute grounds sufficient for disbarment. *See, e.g.*, *Poole v. United States*, Civ. No. 84-0300, 1984 U.S. Dist. LEXIS 15351, *1-2 (D.D.C. June 29, 1984) (upholding the disbarment of a certified public accountant who had failed to file his individual tax returns for three consecutive tax years); *Director of OPR v.* (b)(3)/26 USC 6103, Complaint No. 2007-08 (disbarment for (b)(3)/26 USC 6103, upheld on appeal). The issue in an IRS disciplinary proceeding is essentially whether the practitioner in question is fit to practice. *Harary v. Blumenthal*, 555 F. 2d 1113, 1116 (2d Cir. 1977). Practice before the IRS is a privilege, and one cannot partake of that privilege without also taking on the responsibilities of complying with the regulations that govern such practice. Suspension and disbarment are imposed in furtherance of the IRS's regulatory duty to protect the public interest and the Department by conducting business with responsible persons only.

The undisputed evidence in the case file shows that Respondent is suspended and ineligible to practice law in Texas and disbarred from the practice of law in Arizona. An attorney is required by statute and the regulations governing practice before the IRS to be a member in good standing of a state bar in order to practice as an attorney before the IRS. Section 500(b) of Title 5 of the United States Code provides that "[a]n individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts." 5 U.S.C. § 500(b). Likewise, the regulations define an attorney as "any person who is a member in good standing of the bar of the highest court of any state ... " and provide that "[a]ny attorney who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service by filing ... a written declaration that the attorney is currently qualified as an attorney .... " 31 C.F.R. §§ 10.2(a)(l), 10.3(a). Therefore, Respondent cannot meet the requirements to practice before the IRS as an attorney unless and until he is reinstated to practice law.

It is concluded that Respondent's criminal convictions and subsequent disbarment from the practice of law in Arizona warrant disbarment of Respondent from practice before the IRS, which is commensurate with the seriousness of his disreputable conduct, and which allows the Director of the Office of Professional Responsibility complete discretion to determine when Respondent may be reinstated. This conclusion is supported by Respondent's failure to file a response to Complainant's Motion, in which Respondent could have offered evidence of any mitigating circumstances or could have raised a genuine issue of fact material to the sanction to impose.

ORDER

It is hereby **ORDERED** that:

1. Complainant's Renewed Motion for Summary Adjudication Regarding Sanctions is **GRANTED**; and

2. Respondent **JAMES J. EVERETT,** is hereby **DISBARRED** from practice before the Internal Revenue Service, with reinstatement to practice thereafter at the sole discretion of the Director of the Office of Professional Responsibility.

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Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[2]

Dated: July 22, 2010
Washington, D.C

[2] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the United States Department of Treasury, pursuant to an Interagency Agreement effective for a period beginning October 1, 2008.