UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY

CAROLYN H. GRAY **ACTING DIRECTOR,** **OFFICE OF PROFESSIONAL** **RESPONSIBILITY,** **Complainant,** **v.** (b)(3)/26 USC 6103**, CPA** **Respondent.**	)	**Complaint No. 2009-16**

INITIAL DECISION AND ORDER

DATED: April 15.2010

JUDGE: The Honorable Susan L. Biro[1]
Chief Administrative Law Judge
U.S. Environmental Protection Agency

APPEARANCES:

For Complainant:
Robert M. Finer.
Senior Counsel
Office of Professional Responsibility
Internal Revenue Service
General Legal Services.
Atlanta 401 W. Peachtree Street. NW
Suite 640
Atlanta, GA 30308

Respondent (*Pro se*):
(b)(3)/26 USC 6103, C.P.A.
Redacted
(b)(3)/26 USC 6103

[1] This decision is issued by the Chief Administrative Law Judge of the United States Environmental Protection Agency. The Administrative Law Judges of the Environmental Protection Agency are authorized to hear cases pending before the United States Department of the Treasury, pursuant to an Interagency Agreement effective October 1, 2008.

I. PROCEDURAL HISTORY

On November 13, 2008, the Director of the Office of Professional Responsibility ("OPR" or "Complainant") of the Internal Revenue Service ("IRS"') issued an Expedited Proceeding Complaint, No. XP-2009-46208, under 31 C.F.R. § 10.82(b)(2),[2] against Respondent (b)(3)/26 USC 6103 a Certified Public Accountant. The Expedited Proceeding Complaint sought to have Respondent suspended on an expedited basis from practice before the IRS based upon his September 29, 2008 conviction for aiding and abetting in the failure to pay income tax, in violation of 26 U.S.C. § 7203.

On December 10, 2008, Respondent, *pro se*, submitted an answer to the Expedited Proceeding Complaint requesting that the complaint be dismissed or that in the alternative he be granted 30 days to prepare a defense and brief in support, and further requesting that the complaint be referred to an Administrative Law Judge, or in the alternative that he be granted a conference with the Director of OPR. On January 13, 2009, OPR staff held a telephone conference with Respondent. Thereafter, the Acting Director of OPR issued a Decision which stated that effective January 13, 2009. Respondent was indefinitely suspended from practice before the IRS due to his conviction under Title 26 of the United States Code which placed him in "violation of section 10.82 of Circular 230." The Decision further advised Respondent that if he wished to contest the Decision, he could request issuance of a complaint under Section 10.60 of the Regulations. Complaint and Answer ¶8; Complaint, Exhibit 4.

By letter dated February 4, 2009, Respondent advised OPR that he wished to contest the Decision and requested issuance of a complaint under 31 C.F.R. Section 10.60 and a hearing before an Administrative Law Judge. Complaint and Answer ¶10; Complaint Exhibit 5.

On March 20, 2009, Carolyn H. Gray, Acting Director OPR, issued the Complaint initiating the instant action (No. 2009-16) under 31 C.F.R. § 10.60 before the undersigned Administrative Law Judge, alleging in one count that Respondent's prior criminal conviction evidences his engagement in disreputable conduct warranting his indefinite suspension from practice before the IRS pursuant to 31 C.F.R. §§ 10.50, 10.51, 10.52, 10.76 and 10.82.

Respondent, appearing *pro se*, filed a lengthy narrative Answer, admitting his misdemeanor conviction, but asserting that no evidence supported his commission of that crime, and that the conviction resulted from a plea bargain that he accepted on "strong advice" of counsel who represented to him that such plea "would not in any way effect [his] CPA practice or license," and to avoid the "dire consequences" of being convicted on a "'false" felony conspiracy charge with a potential of a five year prison term. Answer at 2 ¶ 12, at 5 ¶¶ 11, 12, at 7 ¶ 17. Furthermore, (b)(3)/26 USC 6103 emphatically denied having engaged in disreputable conduct, and requested that the Complaint be dismissed "for lack of evidence" or in the alternative "to stay the suspension until subsequent to due process of law." Answer at 3 ¶¶12, 8. The Answer also raised a litany of other issues in defense including prosecutorial misconduct, abuse of discretion, perjury, and denial of

[2] 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.

due process in the prior criminal proceeding and, in regard to the instant proceeding, allegations that IRS regulation 31 C.F.R. § 10.82 is "'unconstitutional," "violates due process," is "ex post facto," and that this proceeding constitutes "double jeopardy." Answer at 3-4, 7.

Thereafter the parties submitted prehearing memoranda along with proposed evidence. On April 23, 2009, Complainant submitted a Motion for Summary Adjudication on the basis that there are no genuine issues of material fact in dispute as to whether Respondent engaged in disreputable conduct. The Motion requested that a sanction be imposed suspending Respondent from further practice before the IRS for an indefinite period of time and that Respondent's Answer be stricken to the extent that Respondent seeks to present evidence on the facts underlying his conviction for violating 26 U.S.C. § 7203. Respondent vigorously opposed the Motion. By Order dated July 21, 2009 ("July 21 Order'"), the Motion was granted in part, finding Respondent liable for engaging in disreputable conduct within the meaning of 31 C.F.R. § 10.51, but denied with respect to assessment of a sanction. On September 29, 2009, another Order was issued which, *inter alia*, denied Respondent's Motion for Summary Judgment seeking to immediately lift the suspension, on the basis that genuine issues of material fact existed with regard to assessment of an appropriate sanction in this matter.

On October 27 and 28, 2009, a hearing was held in this matter in Delray Beach, Florida. At hearing, Complainant presented the testimony of one witness. Aliza Schechet, and Respondent offered his own testimony as well as that of nine other witnesses: Joseph Salina, Stanford Kossowsky, Arthur Kossowsky, Leopold Spitzkopf, Mauro Hipol, Franklin Stuck, Gary Knadle, (b)(3)/26 USC 6103, and Edward Phillips, Esquire. Complainant's Exhibits 1 through 6, 8, 13, 14, 16, 17, 19 through 24, and 26, and Respondent's Exhibits 1, 2, 4, 9, 20, 24, and 25 were all admitted into evidence at the hearing. In addition, three documents, consisting of Respondent's Opening Remarks dated October 27, 2009 (previously identified as Respondent's Ex. 22) and certain IRS regulations (Sections 10.50-10.52; Section 10.82) were identified and admitted into the record as the Court's Exhibits 1-3, respectively.

The Transcript of the hearing was received by the undersigned on November 19, 2009.[3] Shortly thereafter, on November 23, 2009, Respondent submitted a Motion for Leave of Court to have this Tribunal Accept Reference Letter as Post-Hearing Exhibit. Complainant filed an Objection to the Motion on December 7, 2009, and Respondent submitted a Response thereto on December 10, 2009. Complainant then filed its Post-Hearing Brief on December 11, 2009 and Respondent submitted his Brief on December 31, 2009. On January 14, 2010, Complainant advised this Tribunal that it would not be filing a post-hearing reply brief, and thus, the record closed with the filing of the Respondent's Post-Hearing Brief on December 31, 2009.

II. FACTUALBACKGROUND

On August 4, 2008, before the United States District Court for the Southern District of Florida, Respondent pled guilty to the misdemeanor charge of aiding and abetting in the failure to pay income tax in violation of 26 U.S.C. § 7203. Complainant's Exhibits ("C's Exs.") 1. 3, 4 (at p. 3), 6. This charge against Respondent was set forth in a Superseding Information ("Information")

[3] Citation to the transcript of the hearing will be in the following form: "Tr."

which alleged that Respondent "did knowingly and willfully aid and assist one Earl Wolfe in the failure to pay personal income taxes for the tax year 2004, in that Earl Wolfe …who had taxable income of at least $80,000, on which taxable income was owed to the United States of America, and who was required by law on or before April 15, 2005 to pay said income tax to the Internal Revenue Service, failed to do so." C's Exs. 3, 4. This Information superseded a previously issued indictment charging Respondent, as well as Earl Wolfe and Wolfe's significant other, Linda C. Edell, with one count of felony conspiracy to defraud the IRS by concealing and failing to report Wolfe's taxable income in violation of 18 USC. § 371. Tr. 282: C's Exs. 6, 8; Respondent's Exhibit ("R's Ex.") 2.

A Plea Colloquy was held prior to the Court's acceptance of Respondent's guilty plea. C's Ex. 4. During the colloquy, held in open court, Respondent testified under oath that he had read the Superseding Information in its entirety. that he had had enough time to discuss the case fully with his lawyer, that he was satisfied with both of his lawyers and the way they had represented him throughout the entire matter, that he fully understood the charge against him, and that he had no questions about it. C's Ex. 4 pp. 4-8. He also denied that any person had used any force, pressure, coercion or intimidation to cause him to plead guilty. *Id.* p. 18.

During the Plea Colloquy, it was noted that Respondent was entering his guilty plea pursuant to a written Plea Agreement he had entered into with the government wherein in exchange for his guilty plea, the government had agreed to support Respondent's sentencing request for probation rather than incarceration. C's Ex. 4 p. 17, 20, 24. The Plea Agreement Respondent executed included the following stipulations:

> The defendant, (b)(3)/26 USC 6103, aided and assisted by willful blindness Earl Wolfe in failing to pay his 2004 income tax liability. On November 20, 2003, defendant (b)(3)/26 USC 6103 caused the creation of Sun Blest Design, LLCs [sic], an entity used to conceal income earned by Earl Wolfe as a draftsman. In 2004, in exchange for services provide by Wolfe, clients were directed to make payment via check to Sun Blest Designs. Wolfe would then cash these checks at a check cashing store. When the check cashing store realized Earl Wolfe was not a member of Sun Blest Designs, LLC, the owner of the check cashing store required a letter from the defendant authorizing Wolfe to cash checks payable to Sun Blest Designs. The defendant provided such letter.
>
> (b)(3)/26 USC 6103 arranged a private financing deal between Wolfe, Edell, and a third party for their home. At the time of the real estate closing, (b)(3)/26 USC 6103 became aware that Wolfe and Edell's personal residence was in the name of the Office of the Presiding Overseer of the Domicile Creators Services Ministry and His Successors.
>
> Additionally, (b)(3)/26 USC 6103 opened a bank account in the name of Sun Blest Design [sic] using the Employee [sic] Identification Number of Sun Blest. Wolfe and (b)(3)/26 USC 6103 were the signatories on the account. (b)(3)/26 USC 6103 used the account to pay for construction expenses associated with the home of Wolfe and Edell. When questioned by investigators about the existence of the account, (b)(3)/26 USC 6103 transferred much of the remaining balance to additional bank accounts under his control and continued to pay Wolfe and Edell's expenses.

> As a Certified Public Accountant, (b)(3)/26 USC 6103 is aware of collection actions which can be used by the Internal Revenue Service, including liens and levies. He also understands that if Wolfe's name and social security number are not associated with assets he controls, it is more difficult for the Internal Revenue Service to take such collection action.
>
> (b)(3)/26 USC 6103, in his capacity as a Certified Public Accountant with extensive experience, knew or should have known that his actions would allow Wolfe to conceal his income from third parties, including the Internal Revenue Service, and therefore would allow Wolf to not pay his income tax liability for tax year 2004. The defendant deliberately and consciously closed his eyes to what he had every reason to believe was a fact. The tax loss to the United States for tax year 2004 was between $12,500 but less than $30,000.

C's Ex. 6 pp. 5-6.

These stipulations were read aloud to Respondent during the August 4, 2008 Plea Colloquy, after which Respondent testified that he heard, understood and agreed with the stipulations, and that he read, understood and had no questions about the Plea Agreement. Cs Ex. 4 p. 15. After making such admissions, the Florida District Court accepted Respondent's guilty plea.

On September 29, 2008, for his violation of 26 U.S.C. § 7203, the Court imposed upon Respondent a sentence of three years probation including 90 days of home detention, 250 hours of community service, a $3,000 fine, and a $25 assessment. Cs Ex.1, 5.

III. RELEVANT STATUTES, REGULATIONS AND STANDARDS

Title 31 of the United States Code, Section 330(b) (2), provides that -

> (b) After notice and opportunity for a proceeding, the Secretary [of the Treasury] may suspend or disbar from practice before the Department, or censure a representative who -
>
> * * *
>
> (2) is disreputable[.]

31 U.S.C. § 330(b) (2).

The regulations implementing Section 330(b)(2), codified at 31 C.F.R. Part 10 (§§ 10.0-10.93), provide in pertinent part as follows:

> 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, defines the incompetence and disreputable conduct for which a practitioner may be sanctioned under § 10.50 as including

> (1) Conviction of any criminal offense under the Federal tax laws.

(2) Conviction of any criminal offense involving dishonesty or breach of trust.

* * *

(6) Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax.

(7) Willfully assisting, counseling, encouraging a client or prospective client in violating, or suggesting to a client or prospective client to violate, any Federal tax law, or knowingly counseling or suggesting to a client or a prospective client an illegal plan to evade Federal taxes or payment thereof.

31 C.F.R. §§ 10.51 (a)(1), (a)(2), (a)(6), (a)(7).

Respondent was convicted of “aiding and abetting” in the commission of the following criminal offense:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under such authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000…or imprisoned not more than one year, or both, together with costs of the prosecution….

26 U.S.C. § 7203 (entitled "Willful failure to file return, supply information, or pay tax,"), See, 18 U.S.C. § 2 ("(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal" and "(b) Whoever willfully causes an act to be done which if directly performed by him for another would be an offense against the United States, is punishable as a principal.”).

As concluded in this Tribunal's Order of July 21, 2009, in that, Title 26 of the United States Code is the Internal Revenue Code, Respondent's criminal offense falls under “the Federal tax laws” as that term is used in 31 C.F.R. § 10.51(a)(1), and thus is within the meaning of "disreputable conduct" as that term is defined by the applicable regulations,

Thus, the remaining issue to be addressed here is the determination of the appropriate sanction to be imposed upon Respondent for such conduct. In regard to such determination, the IRS regulations provide that "[t]he sanction imposed…shall take into account *all relevant facts and circumstances*," 31 C.F.R. § 10.50(d) (italics added). The regulations, however, do not provide any guidance as to what facts and circumstances are relevant or any standards for determining when it would be appropriate to impose one particular sanction (censure, suspension or disbarment) rather than another.

As such, it is appropriate to seek guidance on such matters from the standards applicable to sanctions imposed elsewhere upon accounting or comparable licensed professionals. *See e.g.*,

Gurry v. Board of Public Accountancy, 474 N.E.2d 1085, 1088 (Mass. 1985) (noting court decisions involving the medical board can provide guidance as to disciplinary cases involving accountants). Some states and/or state boards have promulgated standards to be considered in regard to sanctioning accounting professionals. For example, Maryland's statutes provide that:

> The [State] Board [of Public Accountancy] shall consider the following facts in the granting, denial, renewal, suspension, or revocation of a license or the reprimand of a licensee when an applicant or licensee is convicted of a felony or misdemeanor described in subsection (a)(1)(iii) of this section:
>
> (1) the nature of the crime:
> (2) the relationship of the crime to the activities authorized by the license;
> (3) with respect to a felony, the relevance of the conviction to the fitness and qualification of the applicant or licensee to practice certified public accountancy;
> (4) the length of time since the conviction; and
> (5) the behavior and activities of the applicant or licensee before and alter the conviction.

See, Md. Bus. Code Ann. 2-315. Similarly, Ohio's Accountancy Board's Manual provides that conviction of a crime substantially related to the duties of a CPA, carries a maximum penalty of revocation and a minimum penalty of a stay thereof, plus a minimum $1,000 fine and a professional standards course, and in determining the penalty to be imposed the Board shall consider as aggravating circumstances: that the violation was knowingly committed and/or was premeditated; history of prior discipline; financial damage caused; failure to comply with a final adjudication order; failure to comply with a notice to appear; failure to comply with continuing education requirements; lack of cooperation with the Board's investigation; misappropriation of entrusted funds or other breach of fiduciary responsibility: duration of violation; that the licensee knew or should have known that his or her actions could harm his or her clients or others; and personal gain. And, as mitigating circumstances: cooperation with Accountancy Board investigation, other law enforcement or regulatory agencies, and/or the injured parties: passage or time since misconduct occurred with no recurrence; convincing proof of rehabilitation as well as other relevant considerations; recognition of wrongdoing and corrective action to prevent recurrence; restitution; the relative degree of culpability of the licensees considered. *See*, Accountancy Board of Ohio Enforcement & Disciplinary Policy Manual, December 2009. pp. 64, 76-77, publicly accessible at: http://www.acc.ohio.gov/aboem.pdf.

In addition, some federal regulatory agencies, such as the Securities and Exchange Commission, have also established standards for revoking the permission of accounting professionals to appear before them. *See, SEC v. Pros Int'l. Inc*., 994 F.2d 767, 769 (10th Cir. 1993) (enjoining CPA from appearing before the SEC based upon a violation of security laws is appropriate if there is "a reasonable and substantial likelihood" that if not enjoined. the CPA will violate securities laws in the future. which requires "analysis of several factors, such as the seriousness of the violation, the degree of scienter, whether defendant's occupation will present opportunities for future violations and whether defendant has recognized his wrongful conduct and gives sincere assurances against future violations."). *See also, SEC v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984) ("The following factors are relevant in determining the likelihood of future violations: l. the egregiousness of the violations, 2. the isolated or repeated nature of the violations, 3. the degree of scienter involved, 4. the sincerity of the defendant's assurances, if any, against future violations, 5. the defendant's recognition of the wrongful nature of his conduct, 6. the

likelihood that the defendant's occupation will present opportunities (or lack thereof) for future violations, and 7. the defendant's age and health.").

However, the most comprehensive set of comparable standards appears to be those of the American Bar Association entitled Standards For Imposing Lawyer Sanctions ("ABA Standards" *See*, ABA Standards (as approved February 1986 and as amended February 1992). publicly accessible at: http://www.abanet.org/cpr/regulation/standards_sanctions.pdf. Various states have adopted the ABA Standards and courts frequently rely upon such standards in determining the appropriate sanction to be imposed in disciplinary cases. *See e.g. In re Lemmons*, 522 S.E.2d 650. 651 (Ga. 1999) (citing ABA Standards (1991 ed.) in disciplinary case involving lawyer/CPA).

Section 3.0 of the ABA Standards provide that in imposing a sanction, a court should generally consider the factors of: the duty violated, the lawyer's mental state, the potential or actual injury caused by the misconduct, and the existence of aggravating and mitigating factors. ABA Standard Section 3.0(a)-(d). Further. Section 9.22 of the ABA Standards identify as aggravating factors to be considered: (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. The mitigating factors, set forth in 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.

Additionally, the ABA standards advise 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. Reprimand "is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law," ABA Standard 5.13.

Therefore, to the extent relevant, this Tribunal will take such "facts and circumstances" into account here. Regarding the standard of proof applicable in the instant case, the IRS regulations provide in pertinent part, that:

> If the sanction is censure or a suspension of less than six months' duration, the Administrative Law Judge, in rendering findings and conclusions, will consider an allegation of fact to be proven if it is established by the party who is alleging the fact by a preponderance of the evidence in the record. If the sanction is…disbarment or a suspension of six months or longer duration, an allegation of fact that is necessary for a finding against a practitioner must be proven by clear and convincing evidence in the record.

31 C.F.R. § 10.76(b). Given Complainant's request for an indefinite suspension, and that Respondent has been suspended under the expedited suspension procedures for longer than six months, the standard of proof in this proceeding is "clear and convincing evidence."

IV. TESTIMONY ON BEHALF OF COMPLAINANT

At the hearing, Complainant's sole witness was OPR Senior Enforcement Attorney Eliza Schechet whose testimony was offered in support of its position that the appropriate sanction to be imposed here would be continuation of the existing indefinite suspension imposed upon Respondent in the prior expedited proceeding. In regard thereto, Ms. Schechet explained that generally OPR initiates expedited suspension proceedings under 31 C.F.R. § 10.82 where it determines that the situation is serious enough to require a practitioner's immediate removal from practice before the IRS. Tr. 21. In making such a determination, OPR considers the *fact* of a conviction of a crime under Title 26, but not the character of the offense. Tr. 29, 36. In fact, expedited suspensions do not take into account any mitigating factors, as there is no range of sanctions to impose. Tr. 23. The effect of a suspension before the IRS, whether imposed in an expedited proceeding or otherwise, Ms. Schechet explained, is that it precludes a practitioner from communicating with the IRS on behalf of a taxpayer or third party, but does not preclude the practitioner from preparing tax returns or sitting in on an audit to answer questions. Tr. 19.

In this case, Ms. Schechet testified, OPR imposed an indefinite suspension on Respondent under the expedited proceeding provided for in 31 C.F.R. § 10.82 based upon his prior conviction. The Rules provide that OPR can lift the indefinite suspension whenever it determines that [redacted] (b)(3)/26 USC 6103 no longer meets the criteria for suspension set out in Section 10.82(b), or "for any other reason." 31 C.F.R. § 10.82(f)(l). In that Respondent will always be technically convicted and thus meet the criteria for suspension under Section 10.82(b), there would have to be another reason shown for OPR to lift the suspension, she explained. Tr. 16. In regard thereto, Ms. Schechet averred that "generally, when we're dealing with indefinite suspensions, when a practitioner applies for reinstatement, [OPR] looks at all of the facts and circumstances surrounding the particular case ... determining fitness of [sic] practice" which includes the actual facts surrounding the initial suspension, tax compliance issues, subsequent referrals to OPR, and whether the practitioner has exercised contrition for his acts. Tr. 16-17. In this case, because Respondent appears not to be contrite, continuing to attribute his conviction to prosecutorial misconduct, she suggested that the best indicator of whether he has taken sufficient responsibility for this conviction is the length of his probation and whether he has fully complied with the terms thereof. Tr. 17-18. That being said, she later clarified that OPR would nevertheless give due consideration to any request for reinstatement (b)(3)/26 USC 6103 filed prior to the end of the probation period. Tr. 45-48. As of the moment of the hearing, however, Ms. Schechet opined. it would be futile for Respondent to file such a request because although he has had no subsequent referrals, (b)(3)/26 USC 6103 [redacted], and thus he would not be reinstated by OPR. Tr. 18.

V. TESTIMONY ON BEHALF Of RESPONDENT[4]

In support of his position that immediate lifting of the suspension and reinstatement would be the appropriate sanction in this case. Respondent presented the testimony of numerous friends and/or clients. The first such witness was Joseph Safina, an investment banking consultant and one of Respondent's clients, for whose companies Respondent has served as president, director, and bank account signatory. Tr. 52-54. Mr. Safina testified as to Respondent's general trustworthiness, that Respondent is a trusted friend, that he has referred his family and others to Respondent for CPA services, and that Respondent has not lied or made misrepresentations to him. Tr. 54-58. 61. The next witnesses Respondent offered were brothers Stanford Kossowsky and Arthur Kossowsky, long-time bowling teammates and friends of both Respondent and Earl Wolfe. Tr. 66-68, 80-82. The Kossowskys testified that Earl Wolfe never talked about tax matters with them and that they were unaware of the fact that Earl Wolfe did not file taxes until his arrest was announced in the newspaper. Tr. 68-69, 70-71, 82-83. Next up was Leopold Spitzkopf, retired from the Florida Department of Transportation, a client and also a bowling teammate of Respondent, who testified that the bowling team was a friendly, close, tight group. Tr. 93·96, 101. Mr. Spitzkopf also testified that, although he and Earl Wolfe had been close friends since 1994 or 1995, he never knew that Mr. Wolfe had tax problems or was a tax evader until he was arrested, and that he never heard Wolfe and Respondent talking about tax matters before that time. Tr. 97.

Additionally, Respondent offered the testimony of Mauro Hipol, Franklin Stuck and Gary Knadle. Mr. Hipol, a retired Tax Auditor from the State of Florida Department of Revenue, testified that he has known Respondent for 45 years, that they had had lunch together many times when he was a state tax auditor and sometimes discussed their tougher cases, and that issues regarding penalties and interest that Respondent raised on behalf of his clients were all settled by Mr. Hipol's supervisor or colleague without any dispute. Tr. 108-114. Mr. Stuck, a retired investment banker, next testified that he is a close friend of Respondent, that he has been a tax client of Respondent's for 38 years, and that Respondent has organized businesses for him. Tr. 120-123. Respondent is "one of the most honest people I've met, caring and doing things to help people when, many times, maybe they didn't deserve it" and “the most trustworthy person of all my friends." he asserted Tr. 120-123. Mr. Stuck also proclaimed that he knows many of Respondent's other clients and that everyone he knows holds Respondent in high esteem. Tr. 124. He further testified that he does not think that Respondent would knowingly or willfully help someone evade taxes. Tr. 130. Similarly, Mr. Knadle, also an investment banker, client and close friend of Respondent for 33 years, also testified that he knows many of Respondent's clients and that Respondent has a totally professional reputation of the utmost integrity, and is very thorough in his work, as evidenced by tax audits. Tr. 134-138. It is not in Respondent's character to get mad,

[4] No adverse inference is taken from the quality of Respondent's examination of witnesses, pleadings, and brief in that this Tribunal is aware that Respondent is not an attorney and is defending himself *pro se*. Therefore, consistent with the practice of the federal courts, this Tribunal has adopted a more lenient standard of competence and compliance when evaluating his submissions. *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (The *pro se* complaint is held "to less stringent standards than formal pleadings drafted by lawyers."):*Shaffer v. Saffle*, 148 F.3d 1180. 118l (10th Cir. 1998) ("A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings.") (quoting *Hall v. Bellmon*, 935 F.2d 1106. 1110 (10th Cir. 1991)); *Maduaklam v. Columbia University*. 866 F.2d 53, 56 (2d Cir. 1989) ("While it is true that Rule 11 [is] applied both to represented and pro se litigants, the court may consider the special circumstances of litigants who are untutored in the law.").

Mr. Knadle asserted, and recollected that Respondent had waived his charges for preparing the tax returns of some clients when they were going through tough financial times. Tr. 138-139.

(b)(3)/26 USC 6103, president and CEO of an electronics company, and Respondent's client of six years, also offered his testimony at hearing. (b)(3)/26 USC 6103 recalled that he had received "[redacted] (b)(3)/26 USC 6103 by an organization which he knew had some negative references on the Internet. Tr. 148-150, 158-159. 161-162. He then hired Respondent to review (b)(3)/26 USC 6103 Tr. 149-150, 159. (b)(3)/26 USC 6103 Tr. 150-152. 160. (b)(3)/26 USC 6103 . Tr. 152-153. Respondent is "the kind of person that helps the IRS from the standpoint of (b)(3)/26 USC 6103 asserted. Tr. 155. Regretfully, he added, due to his suspension, Respondent was unable to (b)(3)/26 USC 6103 , which "really made things very difficult," (b)(3)/26 USC 6103 commented. Tr. 153.

As his last such witness, Respondent offered the testimony of Edward Phillips, Esquire, a tax attorney, who has taught CPAs since 1978. Mr. Phillips testified that he has worked on a lot of cases with Respondent, that they have referred clients to each other, and that Respondent is an "excellent CPA" with "complete honesty and integrity," Tr. 164-169. It would be inconsistent with Respondent's character to be a tax protester, Mr. Phillips opined, since most of his income is from tax returns and representing people before the IRS, and that Respondent "aggressively represented people before the IRS, but he didn't do anything illegal, or anything to evade taxes'" Tr. 185-186.

In sum, based upon long-standing personal and professional relationships with him, Respondent's many witnesses testified consistently as to his trustworthiness and honesty, and opined that he would not lie or mislead others. Tr. 61. 69-70, 82, 86-87, 98.100, 102, 113,122, 124, 154, 168, 182-183; R's Ex.4.

To this testimony, Respondent added his own during which he acknowledged that he is guilty of the misdemeanor charge of willful blindness in aiding Earl Wolfe to evade taxes in 2004. Tr. 200-01. He stated, however, that he did not knowingly or willfully aid Mr. Wolfe to evade taxes, and that he did not make any money from helping him. Tr. 201, 218. Respondent explained that he is just a generally helpful person and in this instance was simply trying to help a friend, stating-

> I helped a friend, a bowling teammate of mine, because he asked for my help. I didn't know he was a bad guy. It turns out if you help a bad guy you can get into trouble. I helped him with routine, everyday business that was not illegal…
>
> Even though I didn't know about my friend's tax problems, that truth was overlooked [by the Government]. I helped the wrong guy and for that I am truly sorry and I paid dearly.

Tr. 206, 225-26.

Elaborating on the circumstances which led to his convictions, Respondent recalled that he first met Earl Wolfe in late 1999, early 2000. Tr. 342. In 2003, at the bowling alley, “out of nowhere.” Wolfe asked him if he could form a limited liability company (LLC) for his architectural business, because he was then operating as a sole practitioner and wanted to organize his business into a corporate entity. Tr. 343-44, 347. In response, Respondent created SunBlest Designs LLC, and identified himself therein on behalf of the corporation. Tr. 343-47. He could not recall at hearing whether Wolfe was identified in the Articles of Organization, but knew that he and Wolfe were signatories on SunBlest's bank account. Tr. 344-45, 346, 347. Nevertheless, he testified, at some point Wolfe came to him and said he needed a letter in order to cash checks made out to SunBlest at a check cashing location, because "they wouldn't accept him," and Wolfe said it was inconvenient for him to use the bank where the account was held. Tr. 345-346. Respondent asserted he "did not question [Wolfe] "when he said he needed a letter." and wrote him one. Tr. 345. As to professionals cashing checks for work in this manner, Respondent admitted that "it's very unusual and I guess [I did it] without thinking much about it, and I truly regret doing it ... but I had no thoughts that he was doing anything wrong. I thought that this was just normal business" Tr. 346. Respondent said that he "had no idea it made any difference" to involve an entity rather than Wolfe's personal name, since he intended to give Wolfe a Form 1099 for whatever income Wolfe received that Respondent was aware of, and Wolfe would "have to pick it up as income, so it wouldn't matter whether he dealt in all cash." Tr. 260, 262, 345.

According to Respondent, in 2004 Wolfe again approached him at the bowling alley and mentioned that in connection with the completion of the construction of his house, he was looking to secure a private mortgage, explaining that he could not qualify for a bank loan due to a bad credit rating. Tr. 347·48. 364. Coincidentally, shortly thereafter, another client of Respondent’s, Mr. Balkunas, asked him whether he knew where he could get a good return on his money, at which point Respondent told Mr. Balkunas about his friend Wolfe, and negotiated a mortgage arrangement between the two men. Tr. 347-48. Because Balkunas thought Wolfe was a credit risk, Respondent testified, he created a corporation, Promethian Construction, to hold title to the property and thereby protect Balkunas in the event of default. Tr. 349. (b)(3)/26 USC 6103 testified that he did not know until May 2008, in the course of the criminal proceeding, that the property for the mortgage was previously in the name of the "Office of the Presiding Overseer of the Domicile Creators Services Ministry and His Successors," a corporation sole; he had assumed the property was owned by Linda Edell, Wolfe's domestic partner. Tr. 349-351. (b)(3)/26 USC 6103 further alleged that he did not prepare the deed or mortgage or attend the closing, and upon receipt gave the closing documents directly to his secretary to mail a copy to both sides and file. Tr. 350-51. He also claimed that he did not feel the need to investigate who owned the property because he was going to get the deed and the funds to invest in construction of the house on the property, and control the money through the new corporation. Tr. 351. He also claimed that at the time he did not know what a "corporation sole" was and none of the 200 to 300 tax seminars he ever attended ever covered tax protesters. Tr. 352-53.

Thereafter in 2005-2006, at his request, Earl Wolfe provided Respondent with free professional advice in regard to two houses he was building and "helped" him with his general contractor. Tr. 342-43. (b)(3)/26 USC 6103 described this free advice as being "very valuable" to him. Tr. 343.

Eventually, in 2008, (b)(3)/26 USC 6103 was charged with felony conspiracy along with Wolfe and Edell, and hired counsel to represent him. Tr. 353; C's Ex. 8. Respondent explained that just a few

days before his trial on the charge was set to begin, his remaining co-defendant, Linda Edell, entered into a plea agreement leaving only himself to go to trial.[5] Tr. 237; R's Ex. 2. He recalled his attorney at that point advising him that a letter he had signed refusing a summons, which prosecutors intended to present a trial, was "a very damaging document"' and that he should plead guilty. Tr. 366: see. Tr. 296: C's Ex. 5 pp. 22-23. He testified that he decided to plead guilty to the criminal charge because if he were "convicted for a crime I did not do," he could have been sentenced to five years in prison. Tr. 223. (b)(3)/26 USC 6103 asserted that his attorneys coerced and intimidated him into pleading guilty "to get this thing over with," and told him that by pleading guilty, "nothing would happen to me bad. It would be a slap on the wrist."' Tr. 223, 239, 252, 257, 264. As a result, he now believes that he received bad advice from his attorneys. Tr. 227. Respondent testified that he signed a two page plea agreement on Friday afternoon, and on Monday morning, just before the hearing was to begin, he was presented with a 7-page substitute plea agreement, that his attorney told him not to read, just to sign, or they would have to go to trial in ten minutes. Tr. 239. Nevertheless, (b)(3)/26 USC 6103 stated, he did read the new agreement and refused to sign it, advising his attorneys of many incorrect statements therein, and that then his attorney talked with the prosecutor to try to make the changes, and ten minutes later he was presented with a new plea agreement which he "had no alternative" and was coerced to sign, and which he characterizes as a "bait and switch maneuver." Tr.239-240. (b)(3)/26 USC 6103 asserted that the Government's modification of the charge from a Title 18 charge to a Title 26 charge in the revised plea agreement enabled OPR to initiate the expedited suspension under 31 C.F.R. § 10.82, and his attorney did not tell him, and he did not know, of that modification or what it would mean for him. Tr. 236. He asserted that he did not know until just before the hearing in this matter that the Rules (Circular 230) only cover Title 26 charges. Tr. 237. Respondent stated that he regrets signing the Plea Agreement (C's Ex. 6) and if he had to do it over again, he would have gone to trial on the criminal charge and he believes he would have won. Tr. 240.

Further, Respondent recalled that during the August 4, 2008 Plea Colloquy, he told the judge exactly what his attorney told him to say. Tr. 252. 257. As a result, he claimed, while under oath during the Colloquy, he made statements that were false, including the following: that he was guilty, that he was not coerced into signing the Plea Agreement, that he had had enough time to discuss it fully with his attorney, that he knowingly and willfully aided Mr. Wolfe, that he gave Wolfe tax advice, that he caused the creation of an entity to conceal income, that he became aware that Wolfe's and Edell's personal residence was in the name of the Office of the Presiding Overseer of the Domicile Creative Services Ministry, that he knew or should have known that his actions would allow Wolfe to conceal his income from third parties, that he read the Plea Agreement in its entirety, and that he agreed with the statements in the Plea Agreement read by the prosecutor. Tr. 252-55, 257, 258, 261-64.

Respondent also testified that he has never had his CPA license suspended or revoked, never had clients complain to the Florida Department of Business and Professional Regulation (DBPR) about his tax preparation or advice, that neither IRS nor the DBPR never [sic] has reported any problem to him, and that he has no bad tax record. Tr. 210-211. 228. He stated that he has about 300 to 400 clients, that he has prepared about 10,000 tax returns in his career, and has done about 200 tax audits, but many of those were for tax returns he did not prepare. Tr. 21 1-12. Mr. Legal testified about the need for clients to have him handle their IRS correspondence, and the

[5] Ms. Edell pleaded guilty to the felony charge and was sentenced to 180 days of "house arrest." R's Ex. 2. Mr. Wolfe had been previously (on August 21, 2008) convicted of conspiracy to commit tax fraud and filing false tax returns. He was sentenced to a period of 41/2 years of incarceration. R's Ex. 2: C's Ex. 8.

special skills he has to handle them, his years of experience, and that he has handled thousands of them over his career. Tr. 212-14, 216-17. He explained the inconvenience and hardship his clients have suffered because he has been unable to correspond with the IRS on their behalf while he has been suspended. Tr. 215. He opined that he is a very conservative CPA, who has prepared tax returns for many individuals who make a lot of money and pay a lot of taxes, and that he has prepared tax returns paying over $100 million in taxes during his career. Tr. 218.

(b)(3)/26 USC 6103 further averred that the hurricanes of 2004 and 2005 that hit Southeast Florida had a very significant effect on his business, and caused him severe stress. Tr. 204; R's Ex. 9. In response to Complainant's argument that his character witnesses did not really know his character, in that some of them did not believe that it was consistent with his character for him to make the unprofessional statements that Respondent admits making to the IRS Special Agent Darci Smith, Respondent asserted that such stress is one of the reasons he treated the Agent as he did, that she did not tell him the subject of her investigation, and that he knew that he did not do anything wrong, so he thought he had nothing to lose. Tr. 206, 233-35. He stated that he regrets tremendously having said impolite things to her, and that he believes that after he said them, the Government targeted him. Tr.234-35. Respondent also claimed that he refused the summons from the IRS Special Agent because "no harm can come to a person who refuses an IRS Summons that is not supported by a Court Order. And the Summons is [sic] served upon my bank for my personal bank records were not supported by a Court Order….[and] had nothing to do with Wolfe and nothing to do with taxes." Tr. 221.

Finally, Respondent claimed, his probation officer had advised him that he could represent to this Tribunal that he is in compliance with his probation requirements and that the officer could apply on Respondent's behalf for early termination when half of the three-year probation term is completed. Tr. 199-200.

VI. RESPONDENT'S MOTION FOR LEAVE TO SUBMIT POST HEARING EVIDENCE

On November 23, 2009, Respondent submitted a Motion for Leave of Court to have this Tribunal Accept Reference Letter as Post-Hearing Exhibit, along with a letter from Henry W. Lehwald. Respondent explained that Mr. Lehwald, one of his best clients, had been scheduled to be a witness at the hearing but was unable to attend due to illness with swine flu. Tr. 8.

Complainant submitted an Objection to the Motion, arguing that Complainant cannot cross examine the witness, and that Respondent did not request that the record remain open to allow later submission or the written statement. Further, Complainant argues that the letter is not dated, sworn to or notarized, that it is repetitive of the live testimony presented, and that the letter was mailed nearly three weeks after the hearing. Respondent's Response to the Objection states that he did not know to request that the record remain open.

The Motion was submitted more than a month prior to the date that record in this matter closed, December 31, 2009. The Motion is in essence a motion to reopen the hearing to introduce additional evidence. While the Rules do not specifically refer to such motions, rules of practice for hearings before other federal government agencies often do provide for such motions, setting out

general criteria such as a showing of good cause why the evidence was not presented at hearing, and that it is not cumulative. *See* e.g.. 40 C.F.R. § 22.28, 7 C.F.R. § 1.146(a) (2), 18 C.F.R. § 385.716(a), 20 C.F.R. § 725.454, 29 C.F.R. § 102.65(e) (1). Under the general authorities of the ALJ set out in 31 C.F.R. § 10.70. Respondent's Motion will be addressed as a motion to reopen the hearing to admit the letter of Mr. Lehwald.

The assertion that Mr. Lehwald was ill at the time of the hearing is accepted as good cause for why his testimony, oral or written, was not presented at the hearing. The contents of the letter is not cumulative, in that it includes examples of Respondent's integrity in preparing clients' [sic] tax returns, which are not duplicative of other witness' testimony. The inability to cross examine, and the fact that the letter is not dated, sworn or notarized, do not render the letter inadmissible but are factors that affect the weight it is given as evidence.

Accordingly, Respondent's Motion for Leave to Submit Post-Hearing Evidence is **GRANTED**. The letter of Mr. Lehwald, presented as an attachment to Respondent's Motion and as Tab 23 of his First Post-Hearing Brief and Answer to Complainant's Initial Post-Hearing Brief ("R's Brief"), is hereby accepted into the record as Respondent's Exhibit 29.

Mr. Lehwald states in the letter that he is a retired investment banker corporate executive and Respondent has been his CPA for 33 years and was the CPA for his family, corporations, and many of his employees, and that Respondent earned his trust. Respondent's Brief, Tab 23. He states further that if he was ever audited "there would be no problems because [Respondent] took so much care to do our taxes right," and when he complained that he is paying too much in taxes. Respondent would say "stop complaining. If you need more money work harder and make more money." *Id*.

VII. OTHER DOCUMENTS INCLUDED IN RESPONDENT'S POST HEARING BRIEF

Respondent's Brief is presented in the format of separate documents, marked with numerical tabs, but with sequential page numbers through the whole Brief. Most of these documents consist of Respondent's arguments and suggested findings and conclusions, which are appropriate for a brief. Some of the documents, however, are not argument, and were not accompanied by a motion to reopen the hearing, namely, parts of Tab 16 (pages 16a and 16b) and Tab 19 (pages 73a, 73b, 73c, 73d), and Tabs 3, 8, 22, 24 and 25.

Respondent's Brief pages 16a and 16b are what appears to be an unsigned letter from Earl Wolfe, dated December 28, 2008, which has already been excluded from evidence. *See*, Order dated Sept. 29, 2009, at 6. Respondent believes that Complainant is being "punitive" by withholding from Respondent its signed copy of the letter, that the letter is "exculpatory evidence which must be a violation of this Court, and law, and code of ethics," and that such withholding "should be specially addressed by this Tribunal." R's Brief pp. 16-17. Material exculpatory evidence is required in criminal proceedings to be turned over by the government. *Brady v. Maryland*, 373 U. S. 83. 87 (1963): *United States v. Agures,* 427 U.S. 97 (1976) (prosecution has duty to volunteer exculpatory material to accused). However, the government is not required to turn over exculpatory evidence in administrative proceedings. *Mister Discount Stockbrokers Inc. v. SEC*, 768 F.2d 875 (7th Cir. 1985); *NLRB v. Nueva Engineering Inc*. 761 F.2d 961 (4th Cir 1985) (rejecting application of *Brady* to SEC disciplinary proceeding). Furthermore, the subjects in the

letter are either irrelevant to the issues in this case or cumulative, already covered by Respondent's or his witness' testimony at the hearing, in that the letter states Wolfe's conclusory opinion that Respondent was wrongfully convicted in the criminal proceeding, describes Respondent as honest and honorable, denies Respondent's involvement in creating the corporation sole named "The Presiding Overseer of the Domicile Creators Services Ministry...," denies that Respondent provided him accounting advice or prepared tax returns, and indicates the purpose of Respondent's creation of Prommethian Construction and SunBlest Designs. In fact, the letter would not help Respondent, as statements in the letter suggest that Respondent knew that the property in Jupiter, Florida was owned by the corporation sole, "The Presiding Overseer…," at the time Respondent arranged for the mortgage with Mr. Balkunas. There is no requirement for Complainant to have turned over the signed letter from Mr. Wolfe, and no basis to admit the letter into evidence.

Respondent's Brief, Tab 19 includes one page of argument and attached pages which appear to be excerpts from online newspapers. R's Brief pp. 73a-73d. Respondent's Brief Tabs 3 and 8 are Respondent's assertions, which are in effect new testimony, in response to the testimony at hearing (b)(3)/26 USC 6103 . Tabs 22 and 24 of Respondent's Brief are (b)(3)/26 USC 6103 . Respondent's Brief Tab 25 is represented by Respondent as an application and affidavit for search warrant to indicate that Agent Darci Smith lied to Judge Snow.

No motion or argument in support of reopening the hearing having been presented by Respondent, these documents are not accepted into the record and are not considered in rendering the decision herein. However, whether or not these documents are accepted into the record has no bearing on the outcome herein. (b)(3)/26 USC 6103 is not considered an aggravating factor in assessing the sanction in the circumstances of this case. Complainant did not present documentary evidence of (b)(3)/26 USC 6103, and presented testimony only as to (b)(3)/26 USC 6103 . The testimony does not support any conclusion that Respondent has willfully failed to timely pay his taxes. As to the application and affidavit for search warrant, Respondent's claims that the criminal proceeding was based on lies of Government personnel is addressed in the Discussion, below.

VIII. DISCUSSION

Complainant requests that Respondent be suspended indefinitely, that is, 'the indefinite suspension imposed on the Respondent by the Director, Office of Professional Responsibility… should be affirmed." Complainant's Initial Post- Hearing Brief (C's Brief) at 1. Referring to the list of aggravating and mitigating factors set out in the ABA Standards, as noted in the July 21 Order, and in support of its position as to the appropriate sanction, Complainant asserts that the following aggravating factors are present in this case: a "pattern of misconduct," "multiple offenses," "submission of false evidence or statements during the disciplinary process," "refusal to acknowledge wrongful nature of conduct," and "substantial experience."

Respondent's position is that based on his having served 90 days home detention, his excellent probation status, and many mitigating factors, the suspension should be lifted immediately and Respondent automatically reinstated to practice before the IRS. Respondent's Post-Hearing Brief (R's Brief) p 8. Respondent argues that OPR has great flexibility in assessing sanctions, there is very little OPR precedent for this case, that a judge's order of suspension should

provide for automatic reinstatement and that OPR has no standard policy to determine the term of suspension. R's Brief p. 7.

Respondent urges this Tribunal to mitigate the sanction based on the circumstances of the conviction. *i.e.* that the Plea Agreement and plea testimony were "not truthful" and were the result of prosecutorial misconduct. R's Brief pp.37, 63. Respondent explains,"[b]ut for the fact that lies by Government Agents falsely incriminated (b)(3)/26 USC 6103 there would be no real evidence whatsoever" against him, and that once he was indicted for a felony, he was "entrapped in the system that was seriously prejudiced against him." R's Brief pp. 8, 25, 28, 31, 38. He argues that by getting Respondent "to enter a plea, rather than go to trial, the Government was able to prevent any such evidence of prosecutorial misconduct from going into the record…" R's Brief at 28.

Respondent has been suspended from practice before the IRS since January 13, 2009, the effective date of the Acting Director of OPR's decision indefinitely suspending him due to his conviction under Title 26 of the United States Code. The Rules provide that an expedited suspension remains effective until the suspension is lifted by the Director of OPR, or by the ALJ or Secretary of the Treasury in a proceeding instituted under U.S.C. § 10.60. 31 U.S.C. § 10.82(f). After the hearing, the ALJ may issue an order of censure, suspension, disbarment, monetary penalty, disqualification (of an appraiser), or dismissal of the complaint. 31 C.F.R. § 10.76(a). In this case, continuing the suspension or immediately lifting it with a reprimand are the only potential outcomes, as OPR has not requested disbarment or monetary penalty, and no grounds have been shown for dismissal of the Complaint. Therefore, the first issue is whether the suspension should be immediately lifted.

A. Whether Immediately Lifting the Suspension is an Appropriate Sanction

1. Arguments of the parties

Complainant's position is that Respondent knowingly engaged in criminal behavior that seriously adversely affected his fitness to practice before the IRS. C's Brief at 3. Pointing out Respondent's admission of "willful blindness" Complainant argues that "willful blindness" indicates that Respondent "knowingly" engaged in criminal conduct within the meaning of the ABA Standards. Section 5.12. Complainant posits that "a plea of guilty to a federal tax-related crime must, as a matter of law, be found to seriously adversely reflect on his fitness to represent taxpayers before the IRS" *Id.*

Further Complainant asserts that Respondent did not engage in due diligence in his dealings with Wolfe, as he did not ask questions when "obvious red flags" were raised that any experienced CPA would have thought about. C's Brief at 23. Complainant believes that such failure must be found to have been a conscious decision on his part, proceeding to act by "willfully, knowingly and intentionally ignoring relevant facts." *Id*. at 23-24. Complainant suggests that innocent people do not plead guilty when they can be sent to prison for a year on such a plea, and Respondent "knew, or should have known, that a plea of guilty would warrant a sanction by OPR." *Id.* at 24.

Additionally, Complainant suggests that there are no mitigating factors that would warrant imposing the sanction of a reprimand. Complainant asserts that Respondent in fact has a prior

disciplinary record, which he has been "less than forthright about," citing C's Ex. 14, 16 and 17 and Court Ex. 1 p. 1015.

In response, Respondent points out that Wolfe evaded taxes for 20 years, 11 of which were before Respondent met him. R's Brief p. 27. (b)(3)/26 USC 6103 explains that the letter he provided to enable Wolfe to cash checks at the check cashing store was not illegal, and he gave Wolfe a Form 1099 requiring Wolfe to note that income on his tax return. R's Brief p. 25. He also argues that the incorporation of Sun Blest Designs and arranging private financing for Wolfe was not illegal, as Respondent did not know Wolfe's tax matters at the time. Respondent argues that the entire IRS case against him "proceeded forward because no one questioned the Government's convenient and intentional failure to acknowledge the time line of when (b)(3)/26 USC 6103 knew what about [Wolfe]" and was "based on federal agents lying to federal judges in a material way to establish that (b)(3)/26 USC 6103 aided Wolfe in evading taxes… and that (b)(3)/26 USC 6103 was a member of tax protester groups." R's Brief p. 25. He argues that he was "not in any way involved with [Wolfe's] tax evasion" and that '[only in retrospect was it determined, in a punitive act by IRS. as part of the creation of one-sided plea agreement that [Respondent] was guilty of willful blindness," and that "IRS acknowledged that [Respondent] did not knowingly aid [Wolfe] in [his] tax evasion." R's Brief pp. 26, 27, 42.

Moreover, Respondent argues his "admission of 'willful blindness' was a contrived writing of the Government to cover up their prosecutorial misconduct" and does not meet the criterion of "knowingly." R's Brief pp. 28, 38. He claims that he "only acknowledged what he was instructed by his attorneys to say" and that "in retrospect [Respondent] had to say that [he] should have known or could have known" about Wolfe's tax evasion, but that actually "[t]here were no 'red flags,' only tidbits embellished by the Government to cover up their prosecutorial misconduct." R's Brief p. 26. Respondent asserts that at the time of the plea agreement, he did not know what "willful blindness" meant but saw the definition of "willful blindness" for the first time in Complainant's Brief, and that the words in the definition do not describe his state of mind as to Wolfe's tax matters. R's Brief p. 42.

Respondent further asserts that Complainant's attorney abuses his Government power and "continues the pattern of prosecutorial misconduct" in refusing to investigate the prosecutorial misconduct in the criminal proceeding, objecting to presentation of evidence and witnesses at the hearing to prove it, "strong armed tactics and intentional delay"[6] R's Brief p. 25, 34. See also. R's Brief pp. 14, 17, 36.

In addition, Respondent submits that his efforts to present testimony of his co-defendants and prosecutor in the criminal action, and of Agent Darci Smith, should be considered as support for his testimony and arguments. R's Brief at 44. Respondent also alleges that there is no case precedent for a CPA being found guilty of '"willful blindness" in a tax case, and therefore that this case involves "selective prosecution without any evidence." R's Brief at 73.

[6] Respondent objects to Complainant's reference to a "tax protester-like motion" to quash the IRS agent's summons as unfair, and "wishes that it would have been the centerpiece of the hearing, with Agent Smith and Prosecutor Nieman at the hearing to answer [Respondent's] questions." R's Brief p. 34. Complainant stated that Respondent "signed…what the [prosecuting attorney in the criminal matter] characterized as a 'tax protester-like' motion to quash the agent's summons" C's Brief at 14. No consideration is given to such reference to the document, particularly where it was not admitted as evidence.

Finally, Respondent argues that his right as stated in Circular 230 to have a conference with the Director of OPR was denied when he was only provided with a telephone conference with a subordinate of the Director merely announcing the sanction against Respondent. R's Brief p. 62. Therefore, he suggests, this denial of his rights should be a mitigating factor in assessing the sanction. *Id.*

2. Findings of Fact, Analysis and Conclusions

Under the American Bar Association Standards, suspension is generally appropriate for knowingly engaging in "*criminal* conduct… that *seriously* adversely reflects on the lawyer's fitness to practice," whereas a reprimand is appropriate for knowingly engaging in "*any other conduct* that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." ABA Standards 5.12, 5.13 (italics added). Thus, by analogy, the fact that the conduct of Respondent, a CPA, violated criminal tax laws suggests that suspension is the appropriate remedy.

Nevertheless, it is noted that on occasion courts have imposed a reprimand on attorneys who have been convicted of a crime similar to Respondent's where there are extenuating circumstances. For example, in *Louisiana State Bar Ass'n v. Weinstein*, 416 So.2d 62, 64 (La. 1982), where an attorney pled guilty to aiding and abetting in making false statements to federal agency, but the practice of using false statements about down payments in mortgage closing packages was widespread in the local area and "knowingly tolerated, if not encouraged" by a Federal Housing Authority area director, the attorney had successfully completed his probation, and several other mitigating factors applied, the attorney was publicly reprimanded.

Similarly, in a disciplinary proceeding involving an experienced attorney who had pled guilty to two counts of violating 26 U.S.C. § 7203 "in his capacity as an accountant," and been sentenced to three months imprisonment (execution suspended in lieu of two years probation and 250 hours of community service) and a $10,000 fine. only a censure was imposed considering his cooperation throughout the proceeding, his previously unblemished record, the fact that he had already been punished for transgression, and that *"the misconduct was unrelated to his practice of law" In re Richards*, 151 A.2d 205. 206 (N.Y. App. Div. 2d Dep't 1989) (italics added). See also, *In re John H. Haley Ark. Ba*r 55014, 60 F. Supp. 2d 926, 927 (E.D. Ark. 1999) (In lieu of usual practice of indefinitely suspending attorney convicted of a crime and referring matter to state Committee on Professional Conduct for institution of appropriate disciplinary proceeding. in the first instance the federal court adjudicated the matter issuing reprimand to attorney who had pled guilty to a misdemeanor charge of aiding and abetting a violation of 26 U.S.C. § 7203 and been sentenced to three years probation, a $30,000 fine, and $40,000 in restitution, in light of evidence of record documenting that the guilty plea was negotiated with specific intent to avoid negatively reflecting on his fitness to practice, the misdemeanor occurred eight years previously, the attorney's advanced age (68), and previously unblemished 44 year career.).

On the other hand, it is also observed that disciplinary sanctions against attorneys are not necessarily comparable to sanctions imposed by OPR on tax practitioners. Suspension imposed on an attorney generally is a harsher penalty than suspending a practitioner from practice before the IRS, since an attorney who is suspended from the bar essentially cannot practice his profession to earn a living, whereas an accountant who is suspended from practice before the IRS can still practice accountancy, prepare tax forms for clients and respond to questions in IRS audits about

tax returns that he prepared on behalf of clients. Tr. 19. The evidence shows that the suspension has not prevented Respondent from earning a living in his chosen profession. Tr. 19, 218.

Respondent's argument that his rights to have a conference with the Director were denied does not rise to the level of an extenuating circumstance warranting imposition of only censure. This argument was fully addressed in the July 21 Order (at 12), which concluded that OPR' s procedures did not deny Respondent the requisite level of due process. As noted therein, the provision which Respondent believes OPR violated is 31 C.F.R. §§ 10.82(c) and (e), which provide in pertinent part that "the respondent may request a conference with the Director… to address the merits of the complaint," "[t]he Director…*or his or her designee will preside at a conference described in this section*" and "[t]he conference will be held *at a place and time selected by the Director…*" (italics added). At his request, OPR staff held a telephone conference with Respondent. There is no indication from the evidence of record that if Respondent had an opportunity to fully explain his position in an in-person conference with the Director, the expedited suspension would not have been imposed, or that Respondent would have been able to better present his case in this proceeding. Thus, this argument does not mitigate the sanction to be imposed here and is rejected.

Allegations of prosecutorial misconduct also do not constitute such extenuating or mitigating circumstances in a disciplinary proceeding where the respondent pled guilty to a crime. *In re DeRose*. 55 P.3d 126, 131 (Colo. 2002) (where attorney pled guilty to structuring payments to evade federal reporting requirements, in subsequent disciplinary proceeding, court properly disregarded argument that alleged misconduct of federal prosecutor during indictment should be mitigating factor; "[a] guilty plea waives any procedural irregularities, including defects in the indictment process."). Respondent cannot present in this proceeding evidence to prove his innocence as to the crime to which he pled guilty or to contest the essential elements thereof. *Board of Medical Practice v. Perry-Hooker*, 427 A.2d 1334, 1337 (Vt. 1981) (convicted medical practitioner entitled in disciplinary proceeding to introduce evidence relevant to the issue of the sanction to be imposed for conviction, but not evidence on the issue of his guilt of the offenses for which he was convicted nor evidence inconsistent with any essential element of those offenses); *In re Carr*, 874 So. 2d 823, 827-828 (La. 2004) (in post conviction disciplinary proceeding. the sole issue to be determined is whether the crime warrants discipline and, if so, the extent thereof and while the lawyer not make any arguments inconsistent with the essential elements of the crime he may offer evidence of mitigating circumstances.); *Turco v. Monroe County Bar Association*, 554 F.2d 515 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977) (an attorney convicted of a criminal offense may introduce evidence in mitigation and explanation in a subsequent disciplinary proceeding, but he may not relitigate the issue of his guilt of the offense for which he was convicted). By pleading guilty, and not challenging the procedures in the criminal matter, such as by claiming ineffective assistance of counsel, (b)(3)/26 USC 6103 waived his opportunity in this disciplinary proceeding to show prosecutorial misconduct, his misunderstanding of the plea agreement and/or his innocence. See, *Blohm v. Commissioner of IRS*, 994 F.2d 1542, 1555 (11th Cir, 1993) (taxpayer who pled guilty to tax evasion held collaterally estopped from denying fraud in subsequent civil proceeding where he claimed innocence, that the criminal indictment was fraudulently obtained, and that he was unaware that his plea may be used against him in subsequent civil proceeding: court stated, "[t]he collateral consequences stemming from a guilty plea remain the same whether or not accompanied by an assertion of innocence"). Such waiver is particularly justified where the judge in the criminal proceeding gave Respondent more than ample opportunity to inquire as to the meaning of terms in the plea agreement, to withdraw his guilty plea and go to trial instead, to allege any prosecutorial

misconduct, ineffective assistance of counsel, and/or duress in accepting the plea, and to express any second thoughts about whether he in fact was guilty. C's Exs. 4, 5. There is a strong presumption that statements made during a plea colloquy are true, and "the representations of the defendant… as well as any findings made by the judge in accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings," *Blackledge v. Allison,* 431 U.S. 63, 74 (1977). It is observed that Respondent obtained the benefit he sought to obtain through his representations made in support of his guilty plea, in that he received a sentence for his crime which did not include any period of incarceration. C's Exs. 1, 6.

Respondent's assertions of duress, coercion and intimidation in forcing him to sign the plea agreement are not supported by specific fact, as his testimony indicates that his stress and pressure were caused by his "disgust[] with" and objections to some items on the plea agreement, unfamiliarity with criminal proceedings, and especially the fear of going to trial and being found guilty for a felony carrying a possible five year prison sentence. Tr. 223, 239-40, 254, 257, 260-61, 264, 279. The following testimony of Mr. Phillips supports this finding:

> Q: You're a tax attorney and a friend. Did you ever attempt to talk him out of pleading guilty in the criminal case?
>
> A: Yes, as a matter of fact we – the – (b)(3)/26 USC 6103 discussed it with me and the criminal attorney was calling me on the other line at the same time indicating that…The criminal attorney was pointing out that you're crazy – you're not a good friend if you don't tell him to plead because you don't want any chance that he's going to jail. And what's the difference if they put an ankle – a bracelet on his ankle for a few months, then at least he won't go to jail.

Tr. 190. Duress means "the threat of confinement or detention or other threat of harm, used to compel a person to do something that is against his or her will or judgment" and coercion involves "compulsion by physical force or threat of physical force" or threats "intended to restrict another's freedom of action." *Black's Law Dictionary* 252, 520. (7th ed. 1999). A plea is not rendered involuntary because it was entered out of fear of a heavier sentence following trial. *Brady v. United States*, 397 U.S. 742, 749, 754 (1970) (plea not invalid because it was entered fearing imposition of death sentence if convicted after trial; plea is voluntary if defendant was "fully aware of the direct consequences including the actual value of any commitments made to him by the court, prosecutor or his own counsel," was not induced by "actual or threatened physical harm or mental coercion overbearing the will of the defendant… by threats (or promises to discontinue improper harassment), misrepresentation… or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes.)"). At the time he pled guilty, Respondent was a mature well-educated adult, a professional with extensive personal and business experience in stressful, contested situations. Respondent does not indicate that he pled guilty against his will or that he was not free to refuse to plead guilty. Instead, he complains that in retrospect he would not have pleaded guilty if he knew that a disciplinary proceeding would follow.

Lack of notice, including lack of advice from his attorney, that a disciplinary proceeding could follow his guilty plea is not a mitigating factor in this proceeding, which is collateral to the criminal proceeding. Under *Strickland v. Washington*, 466 U.S. 668, 688 (1984), to prevail on a claim of ineffective assistance of counsel in violation of Sixth Amendment rights, a defendant

must show that his counsel's representation fell below an objective standard of reasonableness, and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different. This standard is not met for an attorney's failure to inform a client prior to his guilty plea about matters that are collateral to the criminal proceeding. "[A]ctual knowledge of consequences which are collateral to the guilty plea is not a prerequisite to a knowing and intelligent plea," and a civil proceeding, "which may result from a criminal prosecution, but is not a part of and enmeshed in the criminal proceeding" is a collateral matter. *United States v. George*, 869 F.2d 333, 337 (7th Cir. 1989). The Supreme Court has very recently ruled that a deportation proceeding is not such a collateral matter, and that an attorney has a duty to advise his client about possible consequences of deportation in pleading guilty to a crime, where deportation is intimately related to the criminal process and is a very severe consequence. *Padilla v. Kentucky*, No. 08-651, 559 U.S. _ (March 31, 2010). No authority has been presented or otherwise found which supports imposition of a duty for counsel to advise his client of adverse consequences of a professional disciplinary proceeding arising from a guilty plea. Respondent admits that his attorney was very experienced and had an excellent reputation, and that Respondent did not seek to have the plea overturned and did not file any claim of the attorney's incompetence, yet Respondent regrets hiring him. Tr. 300, 353-54. There is no evidence that Respondent's attorney or the judge gave him incorrect advice, such as assurance that a plea would not affect his CPA license or tax practice; vague statements that "nothing would happen to me bad" and he would only receive a "slap on the wrist" do not rise to the level of incorrect advice or unreasonableness. Tr. 223, 239; C's Ex. 4.

Respondent's argument that he did not know until after he was sentenced that his conviction was for a Title 26 tax violation subjecting him to disciplinary action by OPR, has not been shown to result in undue prejudice to him and thus is not a mitigating factor. Even if he was sentenced for a Title 18 misdemeanor, he could still be subject to disciplinary action under 10.51(a)(6) for "willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax" or perhaps subject to expedited suspension under 31 C.F.R. § 10.51(a)(2) for "[c]onviction of any criminal offense involving dishonesty or breach of trust." If he was not subject to expedited suspension under 31 C.F.R. § 10.82(b)(2), as Complainant has pointed out, it could have sought disbarment in a complaint under Section 10.50 [sic]. R's Brief at 5. Respondent, being a CPA and practitioner before the IRS, was actually or constructively aware of the criminal provisions of the Tax Code, and of Circular 230, which govern his conduct as a tax practitioner, and cannot be heard to complain that at the time of his plea to a crime of aiding and assisting in failure to pay income tax he had no notice that the plea could affect his practice before the IRS.

Thus, Respondent's arguments that he got bad advice from his attorney, pled guilty under duress, and regrets pleading guilty do not provide any basis for presenting testimony or evidence as to his guilt or as to the elements of the crime, and are not mitigating factors in this proceeding.

As indicated above, Respondent had no entitlement to present in this proceeding evidence as to whether he "aided and abetted in the failure to pay income tax," "did knowingly and willfully aid and assist one Earl Wolfe in the failure to pay personal income taxes for the tax year 2004"… or "aided and assisted by willful blindness Earl Wolfe in failing to pay his 2004 income tax liability." C's Exs. 1, 3; C's Ex. 6 p. 5. However, in regard to determining the sanction, Respondent was permitted to offer testimony and evidence to explain how he aided and assisted Mr. Wolfe in failure to pay income tax, such as his mental state and/or his willful blindness rather than actual

knowledge of Mr. Wolfe's tax evasion activities. But by pleading guilty to "knowingly and willfully aid[ing] and assist[ing] ... in the failure to pay income tax." he cannot attempt to negate the element of "knowingly" by denying that he had willful blindness, by claiming that he did not know what it meant when he pleaded guilty, or by asserting that it is a "contrived" term. There is plenty of court precedent defining and finding willful blindness. That concept has been used and applied in regard to actions of accountants for a very long time. *See. U.S v. Benjamin,* 328 F.2d 854. 863 (2d Cir. 1964) (accountants could not "escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented a knowledge they knew they did not possess."). "Willful blindness" is the logical corollary to the duty to "exercise due diligence" and/or the "duty to inquire" imposed upon accountants. See, Rule 10.22 ("[a] practitioner must exercise due diligence…"); *United States v. Anthony Natelli,* 527 F.2d 311, 320 (2d Cir. 1975) (upholding CPA's conviction for false statement based upon duty to inquire). A finding of "willful blindness" allows the fact finder "to impute the element of knowledge to a defendant if the evidence indicates that he purposely closed his eyes to knowing what was taking place around him" (*United States v. Schnabe*l. 939 F.2d 197, 203 (4th Cir. 1991), or was "aware of facts that put him on notice that criminal activity was probably afoot and deliberately failed to make further inquiry." *United States v. Barnhardt,* 979 F.2d 647, 651-2 (8th Cir. 1992). Willful blindness may serve as the basis for knowledge if, "in light of certain obvious facts, reasonable inferences support a finding that the defendant's failure to investigate is equivalent to 'burying ones head in the sand'" and may be proven if the government proves that defendants were not actually aware of the fact that they were assisting a person in crime, but their ignorance was "based entirely on a conscious decision to avoid learning the truth" *United Stales v. Chavez-Alvarez,* No. 09-1308 and 09-1533, 2010 U.S. App. LEXIS 3180 * 9, 10 (8th Cir., Feb. 18, 2010) (quoting *United States v. Florez,* 368 F.3d 1042 (8th Cir. 2004). Willful blindness has been found where the evidence supports a finding that the defendant intentionally insulated himself from knowledge of tax obligations. *United States v Dean,* 487 F.3d 840, 851 (11th Cir. 2007). An attorney was convicted of money laundering conspiracy with willful blindness where he created corporations naming himself as president and opened checking accounts, and evidence showed he was objectively aware of the high probability of unlawful activity but he did not ask natural follow up questions. *United States v. Flore*s, 454 F.3d 149, 155-56 (3rd Cir. 2006). Respondent's testimony at the plea colloquy hearing indicates that he understood the term, and his argument that he did not know what "willful blindness" meant at the time he executed the Plea Agreement is difficult to reconcile with his plain voluntary statement under oath to the judge at the Plea Colloquy that "I understand the concept of willful ignorance and willful blindness…" C's Ex. 4 pp. 9, 11, 12.

Moreover, in terms of credibility, this Tribunal generally observed that Respondent's testimony as a whole lacked consistency, cohesion, reflectiveness and thoughtfulness. Instead, his testimony gave the clear impression of the existence of a tendency on his part to compromise his honesty and integrity, even in a formal legal proceeding, to accomplish an immediate desired goal, a characteristic which seriously adversely affects his fitness to hold a position of public trust as a practitioner before the IRS. For example, after his conviction and prior to his criminal sentencing, as part of the pre-sentencing investigation, (b)(3)/26 USC 6103 in writing acceded that "in retrospect," he "should have known or could have known" not to help Wolfe, accepted "full and complete responsibility" for his misdemeanor conviction, and "recognize[d] the seriousness of the matter" R's Ex. 1. He reiterated these sentiments at the sentencing hearing that "I could have known or I should have known" and "if I would have been more thorough in my investigation," but then also proclaimed that there was "nothing I could do to know about" the fact that Wolfe was a tax protester. C's Ex. 5 p. 17. A year later during the hearing of this case, under oath, he continued to

vacillate back and forth between admitting and denying guilt for the crime to which he pled guilty. *See e.g.*, Tr. 200-01, 252-55, 257, 258, 261-64, 280-82. He suggested on the one hand that he should have known Wolfe was a tax evader, but that he could not imagine how he could have known unless Wolfe or someone else explicitly told him because tax matters are "private." Tr. 363. The fact that he is not an attorney, the circumstances of the plea, and his apparent confusion with the initial conspiracy charge and the language of the Judgment, Superseding Information and Plea Agreement are all taken into consideration, but Respondent's inconsistency expresses more than mere confusion, particularly considering his written statements in the record. R's Ex. 2, R's Brief pp. 8, 11-12, 36, 42-44. Testimony by his witnesses as to his honesty and trustworthiness with clients, friends, and their businesses does not necessarily translate to credibility, honesty and trustworthiness with the Government. In addition, Respondent's credibility, particularly as to his claim that he was the victim of prosecutorial misconduct in the criminal matter, is diminished by his baseless accusation that Complainant's counsel here abuses his Government power and "continues the pattern of prosecutorial misconduct." R's Brief pp. 14, 16, 25, 29, 30, 34.

The evidence of record, including Respondent's "admission" that he is too trusting and "help[s] people too often" and his insistence that he should not be responsible for what he does not know, suggests a vulnerability to help others engage in wrongdoing by "looking the other way,'" which also undermines his fitness to hold a position of public trust as a tax practitioner before the IRS. C's Ex. 4 p. 11, C's Ex. 5 at 16; R's Ex. 1 p. 2; R's Brief pp. 42-44; Tr.206, 225-26. Such vulnerability is particularly evident in the rationale offered by Respondent for providing Wolfe with the check cashing letter - that he intended to subsequently provide Wolfe with a Form 1099 reporting the income received by SunBlest of which he (Respondent) was aware - which utterly ignores the reality that by virtue of such check cashing system he would not necessarily be aware of such income. This vulnerability, strengthened by his desire to please his clients and friends, is somewhat mitigated by, but not negated by, the fact that he has not previously been found by IRS to have helped a client evade taxes, and the testimony of his witnesses that he would not "knowingly or willfully help someone evade taxes," that he prepared corrective tax returns for people who were evading taxes, and that tax audits were not a problem because he "took so much care to do [his clients'] taxes right." Tr. 130, 134, 155; R's Ex. 29. Indeed, there are many instances of CPAs who have been found to have helped their clients in evading taxes. *See e.g., United Slates v. Secor*, 73 Fed. Appx. 554. Nos. 02-4066, -4069, -4195, 2003 U.S. App. LEXIS 16367 (4th Cir., Aug. 11, 2003) (tax attorney and CPA willfully prepared and filed false tax returns, either with actual knowledge of wrongdoing or by willful blindness); *United Slates v. Mercer*. 472 F. Supp.2d 1319 (D. Utah 2007), as amended. 2007 U.S. Dist. LEXIS 9628 (D. Utah, Feb. 12, 2007) (tax preparer aided and assisted preparation and filing of false tax return): *United States v. Noske*, 117 F.3d 1353 (8th Cir. 1997) (accountant/tax preparer helped clients hide income and assets from the IRS).

Respondent as a CPA and practitioner before the IRS occupies a position of public trust. *United States v. Mercer*, 472 F. Supp.2d at 1321-22. He also has a duty, as any person has, not to aid or abet in the evasion of tax liability, and thus has the obligation not to ignore indications that his actions may lead to evasion of tax liability. As a practitioner before the IRS, with training and extensive experience in tax matters, awareness of the Tax Code and Circular 230, and occupying a position of public trust, such obligation rises to a higher level. Respondent's creation of SunBlest Designs, LLC at Wolfe's request, opening a bank account for that entity using its Employer Identification Number (EIN), and being asked to provide a letter to enable Wolfe to cash checks made out to SunBlest Designs at a check cashing store constitute evidence that Respondent knew

or should have known that Wolfe was trying to hide his assets. *See,* C's Ex. 6 p. 5. In particular it is noted that although the company was ostensibly created for the specific purpose of carrying out Wolfe's architectural/drafting business, there is no evidence whatsoever that Wolfe's name appeared on or in that entity's Articles of Organization, other than Respondent's vague recollection to that effect. Tr.345-47. Moreover, the fact that Wolfe needed a letter *from Respondent*, who acknowledged *he* was identified therein, strongly suggests otherwise.[7] *Id*. In any case, before he provided Wolfe with what he admitted was an "unusual" letter, Respondent should have asked Wolfe questions to determine whether Respondent could be aiding and abetting in the evasion of income tax in that Respondent acknowledged at hearing that he was unaware of any other professionals who cashed checks for their services in such a manner and that he had never been asked to provide, and had never provided, such a letter before. Tr. 346. Respondent testified that "[a]t the time that I had a corporate entity involved, rather than a personal name, I had no idea it made any difference. Whatever taxable income he was going to get that I was aware of, I gave him a 1099 on."[8] Tr. 260. This testimony about a Form1099 (tr. 260, 262) does not show a good faith belief that Wolfe would pay personal income tax, as the Form 1099 may have likely identified the recipient of the income as the corporation by its EIN (rather than Wolfe personally by his social security number) and/or would only reflect the income received of which Respondent was made aware by Wolfe. Affirmative acts that constitute tax evasion or attempted evasion of tax include concealment of assets, such as converting payments made to a business to cash, money order or cashier's check, which have a likely effect of misleading the IRS and precluding it from effectively assessing tax liability. *United Slates v. Miller*, 588 F.3d 897,907 (5th Cir. 2009); *Payne v. Commissioner*, TC Memo 2005-130, 2005 Tax Ct. Memo LEXIS 131 * 16 (Tax Court, May 31, 2005) (practice of cashing checks at check cashing store rather than the bank concealed income and enabled parties to deal in cash, which is one of the 11 "badges of fraud" that courts use to

---

[7] The Florida Limited Liability Company Act. Fla. Stat. § 608.401-608.705, requires that the Articles of Organization for an LLC be submitted in the form prescribed by the Department of State Division of Corporations ("State") and executed by a "member or a representative of a member." Fla. Stat. § 608.407(3), 608.4018. The instructions for completing the State form provide that the Articles shall include "[t]he name and address of each Manager or Managing member. Insert "MGR" for each Manager. Insert "MGRM" for each Managing Member. **IMPORTANT: Most financial institutions require this information to be recorded with the Florida Department of State."** See, State Forms and Instructions to form an LCC, publicly accessible at: http://form.sunbiz.org/pdf/cr2e047.pdf (emphasis in original). A "manager" under the statute is "a person who is appointed or elected to manage a manager-managed company and,… may be, but need not be, a member of the limited liability company. "Fla. Stat. § 608.402 (18). A 'Member' means any person who has been admitted to a limited liability company as a member in accordance with this chapter *and has an economic interest in a limited liability company…"* Fla. Stat. § 608.402(21) (emphasis added). Mr. Wolfe's need to obtain a letter *from Respondent* in order to cash checks made payable to the company suggests that he was not identified in the Articles of Organization filed for the company as a manager or member, but that Respondent *was* identified as a manager or member thereof, *i.e.* he took responsibility for it. Further, in executing the Articles, (b)(3)/26 USC 6103 held himself out as a "representative" of a member of the company, that is Wolfe. As such, he arguably had a higher level of responsibility to consciously monitor the financial activity of the company to assure its tax obligations would be fulfilled.

[8] "For federal tax purposes, an LLC may be treated as a partnership or corporation or disregarded as an entity separate from its owner. By default, a domestic LLC with only one member is disregarded as an entity separate from its owner and must include all of its income and expenses on the owner's tax return." An LLC with two members is by default treated as a partnership. In either case, an LLC may elect to be taxable as a corporation. *See*, IRS Publication. Instructions for Form SS-4 (Rev. January 2010) Application for Employer Identification Number, p. 3., publical1y accessible at: http://www.irs.gov/pub/irs-pdf/iss4.pdf. The record is unclear as to how many "members" SunBlest Designs, LLC had or whether it made any tax elections. There is no evidence in the record that Wolfe was identified as a member thereof in the documents filed with the Department of State.

determine whether fraud has been proven by circumstantial evidence and reasonable inferences from the facts).

In addition, there is the matter of Respondent arranging a private mortgage for Wolfe with Mr. Robert Balkunas. Respondent stated that Wolfe explained his need for a private mortgage as due to his "bad credit rating" and that such assertion suggested nothing untoward to him, even though at the time he was aware that only 5% of people were in such a situation.[9] Tr. 348, 364. Further, Respondent said he accepted this explanation as the basis for the private mortgage without further inquiry even though it was his belief at the time that Ms. Edell was the sole Owner of the property, having inherited it from her mother. Tr. 350. Respondent's explanation as to the need for the title of the property under such circumstances to be transferred to a newly formed Promethian Corporation, and the greater benefit therefrom Mr. Balkunas would derive in the event of default, was vague and unpersuasive, particularly in light of his denial at hearing that such transfer had anything to do with the title to the Wolfe/Edell property being held in the name of the "Office of the Presiding Overseer… a corporation sole.[10] Tr. 350-52. Also unconvincing was Respondent's claim at hearing that prior to May 2008, he was unaware of the corporation sole holding title because he had never looked at the settlement documents he received on the 2004 deed and construction loan *he was entrusted to personally administer* on an on-going basis between two of his friends/clients, and even if he had seen that "crazy names" therein, "*it wouldn't have drawn any red flag whose name [the property] was in."* Tr. 351-52 (emphasis added). At the very least Respondent would have been expected to acknowledge becoming aware of the corporation sole by March 2008, when he was indicted with Wolfe and Edell, and such indictment identified Wolfe as having held himself out as a *"priest"* in order to form the corporation sole in Nevada. C's Ex. 8.

In sum, Respondent's argument that there "were no 'red flags' as to Wolfe's tax evasion, only tidbits embellished by the Government" (R's Brief p. 26), and so he did not avoid seeing what was there to be seen, is simply not persuasive. As a trained and experienced tax professional, Respondent knew or should have known that Wolfe was attempting to evade taxes.

The findings of fact and conclusions of law above do not support an immediate lifting of the suspension. They are, however, considered in determining the period of suspension to impose.

---

[9] It is commonly known that 2004 was right in the midst of the subprime lending boom.

[10] A "corporation sole" is a corporate entity "composed of a single member and his successors in the office. Illustrative of corporations sole are the king or queen of England, the chamberlain of the city of London, who could take a recognizance to himself and his successors in trust for the orphans, a bishop, dean, canon, vicar, abbot, or parson, etc., under the English law, who could take land in fee to himself and his successors" *Hurley v. Werly*, 203 So. 2d 530, 534 (Fla. App. 1967) *quoting* 18 C.J.S. Corporations §15, p. 393. Florida recognizes the existence of "corporation sole" under common law. *Id*. Until recently Nevada permitted the creation of corporation sole by an "archbishop, bishop, … president of congregation, overseer… other presiding officer or clergyman of a church or religious society or denomination…in whom is vested the legal title to property held for the purposes, use or benefit of the church or religious society… Nev. Rev. Stat. Ann. § 84.020. However, no new corporation soles may be formed in Nevada after June 9, 2009. 2009 Nev. ALS 488. *See also*, The Modem Corporation Sole, 93 Dickinson Law Review, No. 1 Fall 1988 (suggesting that most states recognize the existence of corporation sole under statutory or common law).

B. Whether Reinstatement Should be in Sole Discretion of OPR

Complainant asserts that "[i]t is OPR's strongly-held position that OPR must determine a practitioner's fitness to practice ... when a suspension is completed to ensure that the practitioner is in full compliance with Circular 230." C's Brief at 4; see, Tr. 49. Therefore, Complainant submits that any order that terminates the suspension must also provide that reinstatement is contingent on OPR's determination of fitness to practice before the IRS. *Id.* In support, Complainant points to decisions imposing suspension with reinstatement at the sole discretion of OPR: *Director, OPR v.* (b)(3)/26 USC 6103. Complaint No. 2009-02 (Aug. 17, 2009) and *Acting Director, OPR v.* (b)(3)/26 USC 6103 Complaint No. 2009-15 (July 24, 2009).

Complainant's post-hearing brief states that OPR will entertain a request from Respondent for reinstatement when his three year probation period is completed, in two more years, pointing out that Respondent has successfully completed one year of probation. C's Brief at 5.

Respondent objects to OPR having unfettered discretion to determine when he is fit to practice and when the suspension should be lifted, where OPR may never find that he is fit to practice because he does not show remorse, believing that he "had been framed." R' s Brief p. 41.

Questions raised by the parties are whether to continue the indefinite suspension imposed by OPR in the expedited proceeding, and whether suspension for a term should include a condition that Respondent must apply for reinstatement or whether reinstatement should be automatic at the end of the term. As to the first question, an indefinite suspension after hearing is not clearly supported by the Rules, as it would appear to render the hearing unnecessary, and because the Rules refer to an ALJ imposing "a period of suspension" and "lifting" an indefinite suspension, but do not refer to an ALJ imposing or continuing an indefinite suspension. 31 U.S.C. §§ 10.79, 10.82(f). Moreover, disbarment which "is essentially a suspension for five years" (Tr. 22), in that under the Rules a respondent may petition OPR for reinstatement five years after his disbarment (31 C.F.R. § 10.81), is similar to indefinite suspension, except that the latter has no frame of reference for when to apply for reinstatement. OPR has not sought disbarment and the facts of this case do not meet the ABA standard for disbarment: "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 "any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on…fitness to practice." ABA Standard 5.11.

As to the second question, the Rules refer to neither a suspension with a requirement that the respondent prove fitness prior to reinstatement, nor automatic reinstatement after a term of suspension. In settlement agreements imposing suspension for a term, OPR generally imposes a requirement to apply for reinstatement. Tr. 44. In decisions on default, ALJs have imposed a requirement to apply for reinstatement. *Director, OPR v.* (b)(3)/26 USC 6103, Complaint No. 2009-02 (Default Decision and Order, Aug. 17, 2009): *Acting Director, OPR v.* (b)(3)/26 USC 6103, Complaint No. 2009·15 (Default Decision and Order, July 24, 2009). Such condition is appropriate where the facts relevant to the sanction have not been stipulated or elicited at a hearing, but is not necessarily appropriate

where facts have been presented at a hearing.[11] Administrative Law Judges and the administrative appellate tribunal for OPR cases have imposed terms of suspension without a requirement for respondent to apply for reinstatement. *See. e.g., Kevin Francis,* No. 2004-9 (Decision on Appeal, Feb. 4, 2008) (available on the internet at www.irs.gov/taxpros); [unpublished case citation redacted].

It is concluded that suspension for a term with automatic reinstatement is an appropriate sanction under the Rules, and that if OPR seeks a condition of application for reinstatement, it must show at the hearing a sufficient basis for imposing that condition on a particular respondent.

The remaining issues are, therefore, the length of a term of suspension to impose on Respondent, and whether OPR has shown a sufficient basis for imposing a condition that he be reinstated only upon application to OPR. In addition to the nature and circumstances of the conduct at issue, discussed above, the mitigating and aggravating factors set out in the ABA standards for attorney misconduct are used herein as a framework for addressing these issues.

C. Factors in Mitigation/Aggravation of Length of Suspension and Reinstatement

Prior Disciplinary Offenses or Absence or Remoteness of Prior Offenses

As to the factor of prior disciplinary offenses, Complainant does not request that Respondent's prior disciplinary offenses with the Florida Board of Accountancy and "SEC-related problems" be considered as aggravating circumstances, due to their age and dissimilarity to the underlying offense at issue here.

There is no evidence of prior violations by Respondent of the Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, and Appraisers before the Internal Revenue Service. 31 C.F.R. Part 10. This absence of prior offenses is a mitigating factor.

Dishonest or Selfish Motive or Absence Thereof

Despite Respondent's admission at hearing that he received some free advice from Wolfe on the housing he was buildings after creating the corporations and such for him. Complainant accepts Respondent's assertion that he was not paid for his services to Earl Wolfe, and therefore, does not claim that Respondent had a dishonest or selfish motive. Complainant argues, however, that Respondent should not be given a "slap on the wrist" based on the factor "absence of a dishonest or selfish motive," when that factor was raised in the criminal proceeding, and nevertheless the District Court accepted Respondent's guilty plea and imposed what Respondent considers a severe sanction. C's Brief at 14. Suspension has been determined as the appropriate sanction in this case, but the fact that Respondent had no dishonest or selfish motive at the particular time he undertook the actions to aid Wolfe is a mitigating factor to be taken into account in determining the length of suspension.

[11] After being subject to the sanction or censure or suspension, the future representations of the practitioner are subject to any conditions prescribed by OPR and designed to promote high standards of conduct. 31 C.F.R. § 10.79(d). However, such conditions are not the same as a requirement to petition for reinstatement.

Pattern of Misconduct Multiple Offenses

Regarding "pattern of misconduct," Complainant argues that the "charged underlying criminal behavior by Respondent took place over several years…and consisted of a number of different actions," as listed in the Plea Agreement. C s Brief at 6. Complainant also considers as a separate aggravating factor that the one charge was "based on a number of criminal actions on [Respondent's] part." Cs Brief 7. This argument is overstated. Respondent aided one person -Wolfe -and was found guilty on one charge for one tax year involving a comparatively small amount of tax evasion. As such, the facts of record do not support an increase in the term of suspension, or suspension being subject to application for reinstatement, based on this factor.

False Statements, Deceptive Practices During Disciplinary Process, or Full and Free Disclosure to Disciplinary Board or Cooperative Attitude Toward Proceedings

As to the factor of submitting false evidence or statements during the disciplinary process, Complainant argues that Respondent lied or attempted to mislead this Tribunal on a number of issues, including a claim that he had a "clean" "unblemished" and "'problem-free" professional practice, when he had three prior disciplinary actions taken by the State Accountancy Board. C s Brief at 8. Complainant argues that Respondent exaggerated his physical condition as severe, yet testimony indicated he was able to work and continue bowling, and only quit golfing because he was too busy. Complainant argues that Respondent attempted to mislead this Tribunal by asserting that the Florida District Court Judge (Zloch) who sentenced him, informed him that pleading guilty would not affect his CPA license. In addition, Complainant asserts that Respondent "has admitted to numerous instances of perjury before Judge Zloch" C's Brief at 10.

As to the factor "full and free disclosure to the disciplinary board," Complainant asserts that Respondent misled this Tribunal on several occasions and that there were "other credibility problems" with his testimony. C's Brief at 15. In particular, Complainant points to Respondent's testimony that he did not know that the Florida Board of Accountancy would seek to discipline him if he pled guilty, and that he was forced to sign the Plea Agreement or go to trial "in 10 minutes" and that he only scanned it before signing it, where Judge Zloch at the sentencing hearing gave Respondent an opportunity to withdraw his guilty plea and go to trial at a later date, and there were two months between the Plea Agreement and the sentencing hearing. C's Brief at 15-16, citing C's Ex. 5 p. 16, C's Ex. 21 p. 2, C's Ex. 22 p. 6 and Tr. 223, 239. 240, 264

In response to Complainant's assertion that Respondent committed perjury in proceedings with Judge Zloch. Respondent asserts that any perjury was done "with a gun to his head," the Government having drafted the Plea Agreement and coerced him to sign it "under duress," as he had to "go along with the Government" and "lie it into evidence," R's Brief pp. 35, 36, 58, 59. Respondent asserts that the prosecutor, judge, and Respondent's attorneys "knowingly conspired together and suborned that perjury." R's Brief pp. 59-60.

Advocacy and persuasiveness should not advance to the level of misrepresentation, but where the respondent is *pro se*, lenience must be granted. Lenience is particularly appropriate regarding the less significant subjects of testimony and argument, where Complainant itself has toed the line between advocacy and misrepresentation, in a statement in Complainant's Brief (at 4) that Ms. Schechet "testified that it is OPR's general policy ... to have indefinite suspensions run concurrently with the relevant criminal sentence," when she merely testified that the "best

indicator" is "the length of the probation and whether he's complied with the terms…," and she specifically testified that "it's not an office policy, but it's generally the way we look at it" Tr. 17-18, 43.

Nevertheless, as discussed above, Respondent has made some statements which are inconsistent or baseless in the course of this proceeding, which are aggravating circumstances. On the other hand, he fully and appropriately cooperated in this proceeding and at the hearing, which is a mitigating circumstance.

Remorse or Refusal to Acknowledge Wrongful Nature of Conduct

With regard to refusal to acknowledge the wrongful nature of his conduct, Complainant points out that Respondent repeatedly testified that he was an innocent victim of the criminal justice system, that he was coerced by his attorney into pleading guilty but was not in fact guilty. Therefore, Complainant asserts that this is an aggravating factor in this case. The factor of "remorse" is not a mitigating factor, Complainant argues, because Respondent has demonstrated no remorse for his actions that assisted Wolfe's tax evasion activities.

Respondent asserts that he cannot be remorseful where he has been "framed," where the "entire case" against him was based on prosecutorial misconduct, and therefore lack of contrition should not be an aggravating factor. R's Brief pp. 11-12, 31. He acknowledges that he is guilty of a misdemeanor charge of willful blindness in aiding Wolfe to evade taxes, but asserts that he did not knowingly or willfully help Wolfe evade tax. Tr. 200-01.

It was clear from his testimony at hearing that Respondent's on-going indignation for having to suffer the investigation, arrest, conviction and results thereof, where he was indicted with and then relieved of a felony charge of conspiracy, by far overshadows and prevents him from experiencing any remorse for his conduct in aid of Wolfe. *See. e.g.* Tr. 226, 234-35; R's Brief p. 11-12. In these circumstances, remorse is not a mitigating factor, and lack of remorse is an aggravating factor.

Experience

Complainant argues that Respondent has "substantial experience," in that Respondent has been a CPA for 35 years and knew or should have known that "red flags" were being raised in his dealings with Wolfe. C's Brief at 11. This point is well taken.

Character or Reputation

Complainant asserts that the factor of "character or reputation" should not be considered a mitigating factor despite the many friends and clients who testified on his behalf because none of them knew "the real (b)(3)/26 USC 6103." Cs Brief at 17-19. Acknowledging that Respondent is held in very high regard concerning his honesty and trustworthiness, with many contented clients, Complainant points out that the witnesses testified that Respondent would not lie to or mislead this Tribunal or a district court judge, and that some testified that the unprofessional statements Respondent admits making to the IRS Special Agent were not consistent with his character. Cs Brief at 17-19.

Based upon the hearing testimony, there is no question that (b)(3)/26 USC 6103 's character and reputation among his colleagues, clients and friends before and even after his conviction is excellent, and this mitigating factor must be taken into account in determining the sanction herein. *See, Louisiana State Bar Ass'n v. Weinstein*, 416 So.2d 62 (La. 1982) (where attorney was convicted of aiding and abetting in making false statements to federal agency, the testimony of business and professional persons "enthusiastically endorsing" respondent, and clients continuing to trust respondent with large sums of money, were factors considered in mitigation of sanction in bar disciplinary proceeding). Complainant's attempts to discredit the testimony of Respondent's many witnesses are not persuasive, as it is not unusual for clients and friends not to be able to predict a person's reactions in all situations and the record suggests that Respondent's misfeasance emanated from Wolfe and the investigation which followed.

Imposition of Other Penalties or Sanctions

Complainant urges that "imposition of other penalties or sanctions" should not mitigate the sanction, where OPR has an independent interest in this matter, distinct from those of the criminal and Accountancy Board proceedings. C's Brief at 21. Complainant believes that even if Respondent's concern is well-founded that his CPA license will be suspended by the Florida Board of Accountancy if OPR's suspension is sustained, that concern is not sufficient to reduce the sanction in this proceeding to a reprimand. Cs Brief at 21. Complainant explains that (b)(3)/26 USC 6103 signed the Plea Agreement under the advice of very capable counsel, told the judge that he read and agreed with it, and did not seek to withdraw the plea, appeal, or charge his attorney with malpractice; if he wanted to avoid discipline by OPR or the State of Florida, he could have gone to trial. C's Brief at 22. Complainant urges that it must be "the sole determinant of when the Respondent is again fit to practice" and "in the absence of any true contrition ..., the indefinite suspension should last at least until the Respondent is no longer on probation in the criminal proceeding." Cs Brief at 22.

The sanction imposed in this case is based upon and rendered solely in the context of practice before the IRS, and does not consider Respondent's fitness to practice accountancy in Florida, which is an entirely separate matter to be decided by a separate tribunal. Therefore, Respondent's concern that his CPA license may be affected is not a mitigating factor in this case.

However, the sanction imposed in the criminal matter, and circumstances surrounding it, may be a mitigating factor in a subsequent disciplinary case. *Louisiana State Bar Ass'n v. Weinstein*, 416 So.2d 62 (La. 1982) (where attorney received three years of probation as sentence for aiding and abetting in making false statements and paid a total of $16,500 in fines and settlement, the fact that he had been "severely punished," the harshness of the original 42 count felony indictment, "vast difference" between the indictment and the plea agreement, the time and expense incurred in defending federal charges, and the fact that the sentencing judge did not see fit to impose confinement, were considered as mitigating circumstances in bar disciplinary proceeding). The sanction imposed in the criminal matter, and the events that led up to it, had a major impact on Respondent and his business. *See. e.g.,* Tr. 203, 357. Such sanction is already a deterrent to any future misconduct on the part of Respondent, in addition to the sanction imposed in this proceeding which is for the same conduct. Therefore it is considered a mitigating factor herein.

In addition, during his testimony, Respondent asserted that the existing suspension from practice before the IRS has had a "major impact on [his] ability to make a living" and is a "real detriment to [his] practice." R's Brief p. 30: Tr. 211-216. He and his clients both noted the inconvenience caused by his suspension. Tr. 153.211-216.

Personal Problems, Physical Disability

Because Respondent has not alleged that he helped Wolfe because of any personal or emotional problems or mental disability, and because his physical ailments did not cause the criminal activity and are unrelated to OPR's sanction. Complainant argues there should be no mitigation of the sanction based on any such problems. C's Brief at 14. 19-20. Complainant argues that Respondent indicated that his stress is caused in significant part by his guilty plea and possibility of losing his CPA license. *Id.* As to this factor, Complainant's arguments are persuasive and no mitigation of the sanction is warranted for this factor. However, Respondent's advanced age (63) and family responsibilities, including supporting a minor child, is considered in mitigation of the sanction here. Tr. 229, 207-08.

Timely Good Faith Effort to Make Restitution or Rectify

Complainant asserts that the factor of "timely good faith effort to make restitution or to rectify consequences of misconduct" should not mitigate the sanction, where Respondent admitted that he mistreated the IRS Special Agent, Darci Smith, who interviewed him during her investigation of Wolfe, and where he signed a motion to quash her summons.

This factor is not relevant to this case. There is no act presented by either party or otherwise apparent which Respondent did or could undertake to rectify the misconduct at issue.

Other Factors

Complainant submits that another aggravating factor, which is not on the ABA Standards list is that fact that Respondent's arrest and conviction received wide-spread publicity, and allowing Respondent to be reinstated to practice before the IRS prior to completion of his criminal sentence "would, if known, cast doubt in the general community about IRS/OPR's commitment to protecting the taxpaying public from tax practitioners who engage in criminal activity related to this country's tax laws." C's Brief at 12. Complainant points out that in a relevant context, courts have held that extensive publicity surrounding a federal employee's misconduct can have severe repercussions on the mission of the agency, and may be considered as an aggravating factor in assessing a penalty, citing *Case v. Department of the Army*, 861 F.2d 728 (Fed. Cir. 1988).

The past publicity given to Respondent's arrest and conviction however is a two edged sword. Complainant's concern is only potential, as to future publicity if Respondent's sanction is mitigated. Respondent has no doubt already suffered the negative impact of such past publicity and will suffer from any additional future publicity as to the sanction imposed, regardless of what it is, as it is a public reiteration and reminder of his crime and conviction. Thus, the past and future publicity of Respondent's arrest and conviction is not an aggravating factor and does not support a requirement to apply for reinstatement, particularly where the conviction is a misdemeanor which

does not involve Respondent's representation of a client before the IRS, would not appear to have severe repercussions on the mission of the IRS, and evidences the IRS's enforcement of laws.

IX. APPROPRIATE PERIOD OF SUSPENSION

Given a three year term of probation and Ms. Schechet's testimony that absent contrition, the best indicator of whether the practitioner has taken responsibility for this conviction is the length of the probation and whether he has complied with its terms (tr. 17-18), without any mitigating factors, it might be appropriate to impose on a practitioner a three year term of suspension. However, a shorter term is warranted here, given the nature of the violation, the findings of fact in this case and the mitigating factors found herein. Furthermore, the term of probation does not give rise to a reliable parallel term of suspension in this proceeding given Respondent's testimony that he is in compliance with his probation and that his probation officer may apply for early termination of his probation when he has served half of his probation, and Ms. Schechet's testimony that OPR would consider a request for reinstatement before the end of the probationary period. Tr. 45-48. 199-200. Moreover, there are considerations such as those mentioned above with regard to suspension from practice before the IRS which are different from imposition of criminal sanctions and compliance with probation.

Considering the entire record, regarding the nature and severity of the violation, the circumstances of the violation, Respondent's explanations regarding his conduct, the actual or potential injury to the public caused by Respondent's misconduct, and the aggravating and mitigating factors discussed above, the appropriate sanction to impose for Respondent's disreputable conduct is suspension for a period of two years from the date that his probation went into effect. This period of suspension is severe enough to deter other practitioners from like conduct, and to protect the public, the IRS, and the integrity of professional practice before the IRS. In reaching this conclusion, particularly significant weight was given to the fact that Respondent had no prior similar offenses, the crime was not undertaken with a selfish motive and/or for appreciable personal gain, that the crime reflected actions taken in isolation, rather than multiple crimes involving numerous victims, Respondents advanced age, and most importantly, the positive character testimony provided by Respondent's various witnesses.

X. WHETHER TQ REQUIRE APPLICATION TO OPR FOR REINSTATEMENT TO PRACTICE

The final issue is whether OPR has shown a sufficient basis for imposing a condition that Respondent be reinstated only upon application to OPR. Respondent fears that if such condition is imposed, he will never be reinstated because OPR will require him to show remorse for his actions and he will never do so to its satisfaction. In this regard, this Tribunal suspects Respondent's concern is well founded even though Ms. Schechet testified at hearing that OPR is not designed to be punitive, but rather rehabilitative" Tr. 17,45.

Regrettably, despite all the evidence and his own sworn admissions to the contrary, to date, Respondent has stubbornly refused to acknowledge the fact that he bears any culpability for his conviction. Tr. 201, 226-27. He continues to deny that the totality of circumstances surrounding Wolfe - including the "unusual" request for the check cashing letter - should have aroused his suspicions as a trained and experienced tax professional, and that his actions or inactions in aid of Wolfe, including avoiding awareness of the existence of the corporation sole, indicate "willful

blindness." that he "shut his eyes to what was plainly to be seen." *United States v. Benjamin* 328 F.2d 854, 863 (2d Cir. N.Y. 1964). He is just an "innocent victim," a "helper," Mr. Legal still insists, and the guilty ones are prosecutor and lawyers. Tr. 34,206,225-26,236.301. 333. The period of suspension assessed herein will give Respondent sufficient opportunity to reflect on his misconduct and reassess his duties to the IRS, which will adequately protect the public and ensure the integrity or tax practitioners. Perhaps, it will lead Respondent to a sincere epiphany in this regard, or not. In any case, there is no doubt that the criminal matter and this disciplinary proceeding have had a serious impact on Respondent, and the period of suspension would deter any future similar misconduct on the part of Respondent and of members of the community of tax practitioners.

There is no specific rehabilitative act that Respondent could do to demonstrate future fitness to practice, and (b)(3)/26 USC 6103 does not reflect the nature of the violation at issue in this case. *Cf., Director v.* , No. 2006-23 (Decision on Appeal, April 2008) (suspension for (b)(3)/26 USC 6103 with requirement to apply for reinstatement (b)(3)/26 USC 6103); , No. 2007-28 (Decision on Appeal, Dec. 9. 2009) (suspension for (b)(3)/26 USC 6103 with requirement to apply for reinstatement); (b)(3)/ 26 USC 6103 , No. 2008-12 (Decision on Appeal. Jan. 20, 2009) (suspension for (b)(3)/26 USC 6103 with requirement to apply for reinstatement). Therefore a requirement to apply for reinstatement is not necessary in the circumstances of this case, even where Respondent has not expressed genuine remorse for his misconduct. *See. In re Watts*, 9J 8 N.E.2d 330 (Ind. 2009) (where attorney lacked insight into his misconduct, 120 day suspension with automatic reinstatement was sufficient to give respondent opportunity to reflect on his misconduct,. reassess his duties to his clients, and take any further corrective action); *In re Alcorn*, 41 P.3d 600 (Ariz. 2002) ("There is no need to prove rehabilitation in this case," and respondents "will have learned their lesson" by the six month suspension. “We are less concerned with rehabilitation and more concerned with deterring others and maintaining the integrity of the profession;” court considered that there is no danger that respondents will repeat the misconduct in the future.); *cf. In re Fulkerson*, 912 N.E.2d 822 (Ind. 2009) (suspension imposed with requirement to apply for reinstatement, where, among other violations, respondent deliberately deceived jail personnel and did not take responsibility for misconduct or express remorse).[12]

XI. CONCLUSIONS

1. The appropriate sanction to impose on Respondent for disreputable conduct under 31 C.F.R. §§ 10.50 and 10.51 is suspension from practice before the IRS for a period of two years from the date that his probation went into effect.

2. OPR has not shown a sufficient basis for imposing a condition that Respondent be reinstated only upon application to OPR.

3. The suspension shall be lifted on September 29, 2010, upon the condition that Respondent’s probation in Florida has not been revoked.

[12] It is observed that various state bars impose automatic reinstatement for suspensions of less than a certain period of time, such as six months or one year, but those time periods do not suggest a similar bright line rule here, as suspension from practice as an attorney generally is more severe than suspension from practice before the IRS.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and the entire record, it is herby

ORDERED that Respondent, (b)(3)/26 USC 6103, C.P.A., continues to be suspended from practice before the Internal Revenue Service until **September 29, 2010**, which is the date upon which the existing suspension imposed under 31 C.F.R. § 10.82 shall be "lifted" under 31 C.F.R. § 10.82(f)(2), **provided that** Respondent's probation in Florida has not been revoked, in which event Respondent shall be reinstated only upon application to OPR.

Susan L. Biro
Chief Administrative Law Judge

Dated: April 15, 2010
Washington, D.C.

Pursuant to 31 C.F.R. § 10.77, this Decision and order may be appealed to the Secretary of the Treasury within thirty (30) days from the date that this Decision is served on the parties. The appeal and brief must be filed in duplicate with the Director of Professional Responsibility and shall include exceptions to the Decision of the Administrative Law Judge and supporting reasons therefore.