

**UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.**

**KAREN L. HAWKINS,
DIRECTOR,
OFFICE OF PROFESSIONAL
RESPONSIBILITY,
INTERNAL REVENUE SERVICE**

Complainant,

v.

DAVID O. CHRISTENSEN

Respondent.

**Complaint Number: 2012-00005
Docket Number: 12-IRS-0003**

**HON. PARLEN L. McKENNA
Administrative Law Judge**

DECISION AND ORDER REGARDING SANCTION

This case involves the Internal Revenue Service's (IRS) Office of Professional Responsibility's (OPR or Complainant) request to disbar Respondent from practice before the IRS. The basic facts of Respondent's conduct for which he may be sanctioned under 31 C.F.R. Part 10 (Circular 230) are not disputed. In 2008, Respondent pled guilty in Washington State Superior Court for one count of first degree theft and subsequently had his Certified Public Account (CPA) license revoked by the governing CPA bodies of Washington State and Oregon as a result of his conviction. The only issue remaining after I granted Complainant's Motion for Summary Adjudication was the proper sanction for Respondent's violations.¹ Following a hearing and review of the record, I have determined that Respondent should be **DISBARRED** from practice before the IRS for the reasons provided in this Decision and Order.

¹ That Order also denied Respondent's Motion for Summary Adjudication. See Joint Exhibit 7.

Principles of Law

OPR's Ability to Discipline IRS Practitioners

The Secretary of the Treasury's holds authority to "regulate the practice of representatives of persons before the Department of the Treasury," 31 U.S.C. § 330(a), including the power to suspend or disbar an individual from practice for a number of reasons as long as the individual is first provided with "notice and opportunity" for hearing before an administrative law judge. *Id.* at § 330(b).

The OPR Director has the authority under Circular 230 and Delegation Order No. 25-16 (2012) to bring proceedings to suspend or disbar practitioners before the IRS. *See* 31 C.F.R. § 10.50(a). Under 31 C.F.R. § 10.50(e), any sanctions imposed "shall take into account all relevant facts and circumstances." Relevant precedent has stated that the purpose of the disciplinary proceeding is to have the sanction determined by the judge or the agency, not by OPR. *In re* (b)(3)/26 USC 6103 (Complaint No. 2010-08), Appeal Decision at 4 (06/02/2011). In rendering a decision, the assigned judge must include a statement of findings and conclusions, as well as the reasons or basis for making such findings and conclusions, and an order of censure, suspension, disbarment, monetary penalty, disqualification, or dismissal of the complaint. 31 C.F.R. § 10.76(a).

Incompetence and Disreputable Conduct under Sections 10.51(a)(2) and (a)(10)

The regulations include a conviction of any criminal offense involving dishonesty or a breach of trust as a basis for sanctioning a practitioner. 31 C.F.R. § 10.51(a)(2). A practitioner may also be sanctioned if that person is disbarred or suspended "from practice as an attorney, certified public accountant, public accountant or actuary by any duly constituted authority of any

State, territory, or possession of the United States, including a Commonwealth, or the District of Columbia, any Federal court of record or any Federal agency, body or board.” 31 C.F.R. § 10.51(a)(10). See also Washburn v. Shapiro, 409 F. Supp. 3 (D.C. Fla. 1976) (substantial evidence supported disbarment of practitioner under Section 10.51 standards where he was convicted of a criminal offense under U.S. revenue laws involving dishonesty and breach of trust).

Evidentiary Standard and Standard of Proof

The applicable evidentiary standard states that the rules of evidence prevailing in a court of law and equity are not controlling, but the judge may exclude evidence that is irrelevant, immaterial, or unduly repetitious. See 31 C.F.R. § 10.73(a). Strict, formal rules of evidence thus do not apply.

The standard of proof differs depending on the nature of the sanction. See 31 C.F.R. § 10.76(b). Because Complainant sought Respondent’s disbarment, the applicable standard is clear and convincing evidence. Id. The clear and convincing standard has been defined “as evidence of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established, and, as well, as evidence that proves the facts at issue to be highly probable.” Jimenez v. Daimler Chrysler Corp., 269 F.3d 439, 450 (4th Cir. 2001) (internal quotation marks, citations omitted); see also Addington v. Texas, 441 U.S. 418 (1979) (explaining that the clear and convincing evidence is an intermediate standard somewhere between proof by a preponderance of the evidence and proof beyond a reasonable doubt).

Following disbarment, a respondent will not be permitted to practice before the IRS until authorized to do so pursuant to 31 C.F.R. § 10.81. Five years following disbarment, a former practitioner may apply to the IRS for reinstatement. 31 C.F.R. § 10.81.

Findings of Fact

The findings of fact and conclusions of law that follow are based on a thorough review of the pleadings, exhibits and the parties' arguments. Each exhibit entered into evidence, although perhaps not specifically discussed, has been considered in rendering this decision.

Respondent's Conviction, Revocation of CPA Licenses, and Procedural History

1. On or about May 31, 1985, Respondent was granted a Certified Public Accountant (CPA) license by the Washington State Board of Accountancy, permitting him to practice as a CPA in the State of Washington. See Agency Complaint dated August 31, 2012, Exhibit 2.
2. Respondent's Washington State CPA license remained current and in good standing through June 30, 2009, when Respondent failed to renew his individual license to practice public accounting. See Agency Complaint dated August 31, 2012, page 4, ¶ 8.
3. On or about December 5, 1983, Respondent was granted a CPA license by the State of Oregon Board of Accountancy, permitting him to practice as a CPA in the State of Oregon. See Agency Complaint dated August 31, 2012, Exhibit 3.
4. Respondent's Oregon State CPA license remained current and in good standing through July 12, 2010. See Agency Complaint dated August 31, 2012, page 5, ¶ 14.
5. On or about December 16, 2008, Respondent pled guilty in the Superior Court for Clark County, Washington to one count of first degree theft in violation of Washington Criminal Code §§ 9A.56.020(1)(a) and 9A.56.030(1)(a) and agreed to pay restitution in the amount of \$66,400.00 in connection with his role in misappropriating monies as the conservator of his daughter's trust account. Joint Exhibit 1 at Attachment 1, ¶ 2.7.
6. On December 16, 2008, Respondent was found guilty based on his plea and the judge entered a Felony Judgment and Sentence. Id. at ¶ 2.8.
7. On July 12, 2010, based upon the Felony Judgment and Sentence, the Washington State Board of Accountancy accepted and adopted a Stipulation and Agreed Order (Washington State Order) by which his CPA license in Washington State was revoked. In addition, Respondent was prohibited from reapplying for reinstatement for at least five years, required to pay a fine of \$5,000 and fulfill other stated conditions. Joint Exhibit 1 at Attachment 1.

8. The Washington State Order concluded that Respondent's conduct related to his conviction for felony theft constituted violations under WAC 4-25-610 (related to exercise of professional judgment, etc.); WAC 4-25-620 (CPA required to be honest, objective and free of conflicts of interest); WAC 4-25-631 (CPA required to comply with Professional Code of Conduct); WAC 4-25-650 (prohibits a CPA from committing acts that reflect adversely on CPA's fitness to represent himself as a CPA); and WAC 4-25-910 (prohibits a CPA from engaging in acts of fiscal dishonesty or fraud, discharging a trustee's duties in a negligent manner or breaching fiduciary duty, borrowing from trust funds with or without disclosure and violating rules of professional conduct). Id.
9. On August 3, 2010, based upon the Felony Judgment and Sentence, the Board of Accountancy of the State of Oregon issued a Final Order by which Respondent's CPA license in Oregon was revoked for an indefinite period as a result of his dishonesty, fraud or misrepresentation outside the practice of public accountancy. Joint Exhibit 1 at Attachment 2.
10. On May 18, 2012, Complainant signed a Decision on Expedited Suspension which: 1) suspended Respondent from practicing before the IRS pursuant to 31 C.F.R. § 10.82(c) and 2) notified Respondent of his right to have the suspension lifted in an administrative proceedings before an administrative law judge by requesting the issuance of a complaint under 31 C.F.R. § 10.60 within two years of the date of decision. Joint Exhibit 1 at Attachments 9, 10.
11. On August 8, 2012, OPR received a letter from Respondent that requested a complaint be issued. Joint Exhibit 1 at Attachment 11.
12. On or about August 31, 2012, Complainant filed a Complaint. Joint Exhibit 1.
13. The Complaint alleged three counts: 1) that Respondent was convicted of one-count of first-degree theft in violation of Washington Criminal Code §§ 9A.56.020(1)(a) and 9A.56.030(1)(a), where the conduct underlying the conviction involved dishonesty and/or a breach of trust. Complainant asserted that this conviction constitutes incompetence and disreputable conduct pursuant to 31 C.F.R. § 10.51 and § 10.51(a)(2) (Rev. 4-2008)²; 2) Respondent's disbarment from practice as a CPA by the Washington State Board of Accountancy constitutes incompetence and disreputable conduct pursuant to 31 C.F.R. § 10.51 and § 10.51(a)(10) (Rev. 4-2008); and 3) Respondent's disbarment from practice as a CPA by the Oregon Board of Accountancy constitutes incompetence and disreputable conduct pursuant to 31 C.F.R. § 10.51 and § 10.51(a)(10) (Rev. 4-2008). Id.
14. On or about September 30, 2012, Respondent filed an Answer, which admitted the allegations in the Complaint.³ Joint Exhibit 2.

² Under 31 C.F.R. § 10.91 (Rev. 8-2011), the current procedural regulations shall be used, but where the conduct in question was engaged in prior to the effective date of the most recent changes, such conduct will be judged by the regulations in effect at the time the conduct occurred – thus the initial reference to Rev. 4-2008 is made here but applies to each reference other than procedural rules contained in Subparts D and E.

³ Under 31 C.F.R. § 10.64, Complainant thus need not produce further evidence as to fact of violation.

15. On November 9, 2012, this case was assigned to me for review and disposition.⁴
16. On February 20, 2013, I issued an Order finding the fact of Respondent's violations proven on all three counts but reserving the issue of the proper sanction for those violations until after a hearing. Joint Exhibit 7.
17. On April 10, 2013, a hearing was held in Seattle, Washington at which Respondent appeared and was represented by Mr. William P. Lapp, Esq. and OPR was represented by Mr. Timothy E. Heinlein, Esq.
18. OPR called one witness, Ms. Karen L. Hawkins, OPR's Director, in support of its requested sanction of disbarment. Respondent's counsel called one witness (Respondent) in rebuttal to the Agency's proposed sanction.
19. At the hearing, the parties stipulated to the joint introduction of exhibits. These admitted exhibits are identified in Attachment A.

The Circumstances surrounding Respondent's Conduct⁵

20. Upon his mother's death, Respondent's younger brother held a life interest in Respondent's mother's estate/trust (the Jennie Christensen Trust or Trust). Tr. at 13:10-13 (April 10, 2013); see also Joint Exh. 3 at Attachment A (Trust document).
21. Once his brother died, any remaining amount of Trust money would go to Respondent's daughter and his younger brother's son. Tr. at 13:12-15 (April 10, 2013); Id.
22. At one time, Respondent was a beneficiary along with his brother in his mother's will but his mother rescinded that will and left her estate to Respondent's brother as outlined above. Tr. at 71:15-22 (April 10, 2013).
23. One year after his mother's passing in 2001, only about \$230,000 remained of the \$650,000 trust assets and so Respondent hired an attorney to challenge the trust because he was concerned nothing would be left for his daughter. Tr. at 13:16-24; 74:5-10 (April 10, 2013); see also Joint Exh. 3.
24. Respondent brought a civil suit against his brother in which both he and his daughter were named complainants, with Respondent listed as guardian ad litem for his daughter. Tr. at 71:23-72:17 (April 10, 2013); Joint Exhibit 3 at Attachment F (indicating that Respondent decided to challenge the Trust for himself and his daughter).
25. Respondent brought the suit in his personal capacity in part because he claimed that his mother owed him approximately \$22,000 when she passed away because he had borrowed

⁴ The case had earlier been assigned to an Administrative Law Judge at the Environmental Protection Agency, but was transferred back to the IRS for reassignment on October 23, 2012. The case thereafter transferred to the United States Coast Guard Docketing Center pursuant to inter-agency agreement. Upon receipt thereof, this matter was assigned to me for hearing and decision.

⁵ References to the hearing transcript take the form of "Tr. at [page #:line#] (April 10, 2013)."

\$8,000 from her and secured that loan with \$30,000 worth of stock. Tr. at 73:11-18 (April 10, 2013).

26. On December 2, 2004, Respondent obtained a \$90,000 settlement related to the Trust on behalf of his daughter under the Uniform Transfer to Minors Act. Tr. at 74:8-10 (April 10, 2013); Joint Exhibit 1 at Attachment 1; see also Joint Exhibit 3 at Attachment B (settlement document).
27. On December 7, 2004, Respondent placed \$75,000 of the \$90,000 settlement into his personal Ameritrade account and subsequently lost approximately \$14,000 of that money in trading activity. Tr. at 75:16-76:2 (April 10, 2013); Joint Exhibit 1 at Attachment 1.
28. When the settlement check was issued, Respondent “roughly estimated” his expenditures as reimbursement for the costs of obtaining the settlement and immediately kept \$15,000 of the settlement funds. Joint Exhibit 1 at Attachment 7 page 5; see also Joint Exhibit 3 at Attachment F page 4.
29. Respondent admitted that he worked on the Trust issue in his office and paid people to help him accumulate all the accounting records and receipts but could not recall how exactly he paid them (but believed he paid them with cash or with a personal check). Tr. at 14:25-15:14 (April 10, 2013).
30. In an accounting filed in the Superior Court of Washington, Respondent stated that as of May 24, 2006, only \$23,637.54 remained for distribution to his daughter. Joint Exhibit 1 at Attachment 1; see also Joint Exhibit 1 at Attachment 7 (accounting filed).
31. Respondent asserted that he did not “waste” any of his daughter’s money related to the Trust and that the accounting he filed detailed his expenditures incurred on behalf of his daughter to obtain the settlement. Tr. at 11:4-16 (April 10, 2013); Joint Exhibit 1 at Attachment 7 (accounting detailing expenditures).
32. As noted in Finding of Fact No. 5, Respondent pled guilty in Washington State Superior Court to one count of first degree theft and agreed to pay restitution in connection with his handling of the settlement funds. Joint Exhibit 1 at Attachment 1.
33. As a result of Respondent’s plea, Respondent was sentenced to partial confinement (20 days work crew and 20 days work/educational release) and ordered to pay the restitution amount, \$500 victim assessment, \$200 court costs, a \$500 fine, and a \$100 felony DNA collection fee. Id.; see also Joint Exhibit 3 at Attachments D, E.

OPR’s Role Relating to Practitioner Discipline and Evaluation of Respondent’s Conduct

34. Ms. Karen L. Hawkins had been employed as Director of OPR for approximately four years at the time of the hearing. Tr. at 16:25-17:5 (April 10, 2013).
35. OPR’s mission is to interpret and apply the standards of practice for tax professionals in a fair and equitable fashion, with a broader mission to do outreach and education concerning

Circular 230 and what it means to practice before the IRS and prosecute disciplinary actions when necessary. Tr. at 17:17-18:3 (April 10, 2013).

36. OPR has an independent function within the IRS, which is not directly connected to the IRS assessment and collection of tax functions under Title 26, and OPR holds exclusive authority over the disciplinary functions and Circular 230 conduct matters. Tr. at 18:6-19:7; 25:1-8 (April 10, 2013).
37. OPR is responsible for ensuring that the representatives – whether they are advisors, planners, preparers, or controversy workers – are all competent and qualified so that taxpayers conduct themselves appropriately before the IRS. Tr. at 22:9-13 (April 10, 2013).
38. The sanctions available to OPR under Circular 230 include censure, suspension, disbarment and since 2004, monetary sanctions. Tr. at 26:21-25 (April 10, 2013).
39. Censure is a one-time, public reprimand that is published in the Internal Revenue Bulletin for a practitioner's violation of Circular 230, which can be coupled with follow-on criteria like continuing education. Tr. at 27:1-28:8 (April 10, 2013).
40. Suspension is a period of time ranging from one to fifty-nine months during which a practitioner is prevented from practicing before the IRS. Tr. at 28:10-17 (April 10, 2013).
41. Disbarment is longer than a suspension with a minimum of five years and Circular 230 requires the practitioner to demonstrate that the practitioner has regained fitness to practice before the IRS. Tr. at 33:5-13 (April 10, 2013).
42. OPR does not seek to punish practitioners through disciplinary proceedings. Tr. at 81:3-8 (April 10, 2013).

Respondent's Obtaining a PTIN

43. To regulate tax preparers, the IRS issued regulations under Title 26 that made it mandatory for all return preparers to get a Preparer Tax Identification Number (PTIN) and due to the newness of the program, the IRS Commissioner decided to phase this program in beginning in 2010 over the course of four years. Tr. at 39:18-40:13 (April 10, 2013).⁶

⁶ In Loving v. I.R.S., 2013 WL 204667 (January 18, 2013), the District Court held that the statute allowing the IRS to regulate representatives practicing before the agency did not include tax return preparers and therefore the regulations related to tax preparers were invalid. Loving is currently on appeal to the D.C. Circuit. The IRS moved for a stay of the injunction pending appeal, but was denied. See Loving v. I.R.S., 2013 WL 394046 (Feb. 1, 2013). That decision made it clear that "the IRS may no longer condition PTIN eligibility on being 'authorized to practice' under 31 U.S.C. § 330" and that what the Court enjoined are the requirements that tax-return preparers must pay fees unrelated to the PTIN, pass a qualifying exam, and complete continuing-education requirements. Id. at *1. This case is therefore limited to determining Respondent's fitness to practice before the IRS and does not involve the PTIN issue. In the event that the IRS ultimately prevails on this issue, Respondent's PTIN would be revoked. Conversely, if the IRS loses, Respondent would retain his PTIN unless some other regulatory impediment determines otherwise.

44. Generally, anyone who applied for a PTIN was given one and if there were concerns about that person's suitability to prepare returns, it would be addressed after the fact. Tr. at 40:20-41:4 (April 10, 2013).
45. Respondent applied for and received a PTIN. Tr. at 41:9-10 (April 10, 2013).
46. On the application for PTIN, one of the two questions is whether the applicant has been convicted of a felony within 10 years prior to the application. Tr. at 44:1-5 (April 10, 2013).
47. The Return Preparer Office, which issues the PTINs, has been issuing PTINs without looking at these felony convictions, but those who self-identified as such were given a provisional PTIN pending an examination of the felony Tr. at 44:6-16 (April 10, 2013).
48. When a practitioner is suspended or disbarred, OPR will notify the vendor to "pull the PTIN" so that such practitioners cannot prepare tax returns and when they are reinstated, they notify the vendor so that they can reinstate the PTIN. Tr. At 32:16-33:2 (April 10, 2013).
49. Ms. Hawkins opined that PTIN holders are subject to Circular 230 in its entirety and that OPR can discipline such holders by taking away their PTIN. Tr. At 42:8-19 (April 10, 2013).
50. At OPR's direction, the Return Preparer Office will revoke or invalidate a PTIN. Tr. At 45:3-14 (April 10, 2013).
51. Respondent wanted to retain his PTIN so that he could continue preparing tax returns. Tr. at 86:1-2 (April 10, 2013).
52. Respondent currently works part-time for an LLC doing special projects, preparing financial statements, reviewing the company's accounting, and writing contracts with foreign entities. Tr. at 87:19-88:6 (April 10, 2013).

Analysis

As explained in the Order Regarding Summary Adjudication Motions, Respondent's conviction for theft under Washington state law is encompassed by IRS disciplinary regulations as representing incompetent or disreputable conduct. Specifically, Washington Revised Code 9A.56.020(1)(a) defines "theft" as: "To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." Section 9A.56.030(1)(a) further provides that a person is guilty of first degree theft if he or she commits theft of property or services which exceeds five thousand dollars in value other than a firearm. Under relevant precedent, only the "intent to deprive" the

victim of property or services is required, and lack of consent of the owner need not be proved by direct evidence. See State v. Vargas, 683 P.2d 234 (1984); State v. D.H., 643 P.2d 457 (1982). This conviction falls squarely under actionable offenses contemplated by 31 C.F.R. § 10.51(a)(2).

Furthermore, the loss of Respondent's CPA licenses in Washington and Oregon as a result of this conviction meets the standards for the imposition of IRS practitioner discipline under 31 C.F.R. §10.51(a)(10). That section merely requires the fact of Respondent's disbarment or suspension as a CPA, which occurred both in Washington and Oregon. Accordingly, the record provides clear and convincing evidence that Respondent committed acts that are deemed incompetent or disreputable under Circular 230. Thus, OPR's Motion for Summary Adjudication was granted with respect to the fact of Respondent's three violations of Circular 230.

The hearing was held to decide the appropriate sanction for these proven violations. Respondent correctly maintained that the regulations do not mandate any particular sanction and instead outline that the Secretary (or the Secretary's delegate) "may censure, suspend, or disbar any practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable". 31 C.F.R. § 10.50(a) (emphasis added).

SANCTION

Complainant's Arguments for Disbarment

In its post-hearing brief, OPR presented several bases for Respondent's disbarment. First, OPR argued that Respondent's felony conviction for theft in the first degree based on stealing \$90,000 from his daughter is extremely serious misconduct that warrant's the highest sanction possible. OPR Post Hearing Brief at 6-10. In addition, OPR counsel discussed other

IRS practitioner discipline cases where the practitioner was disbarred (In re (b)(3)/26 USC 6103 and In re (b)(3)/26 USC 6103) or received a lengthy suspension (In re (b)(3)/26 USC 6103). Id. at 7-8.⁷

OPR counsel also highlighted the circumstances that led to Respondent's conviction as well as Ms. Hawkins' rationale for seeking disbarment: namely: 1) Circular 230's explicit prohibition against conflicts of interest; 2) Respondent's admitted working on a matter related to a trust without adequate experience or knowledge of trust and estate laws; and 3) Respondent's day trading activities with his daughter's money, which was a breach of fiduciary duty. Id. at 8-9. OPR counsel also pointed to two different state CPA licensing authorities conclusions that Respondent's conduct and conviction for theft merited revoking those licenses. Id. at 9-10.

Second, OPR counsel argued that Respondent's lack of integrity in attempting to characterize his conduct as a personal, family matter supported disbarment. OPR Post Hearing Brief at 10-13. Specifically, OPR counsel took issue with Respondent's cloaking "his felony theft in all the trappings of business behavior" and then characterizing his activities as professional or personal when it best suited him. Id. at 11-13. In support, OPR counsel cited to both Respondent's testimony at the hearing and his September 13, 2011 response to OPR. Joint Exhibit 1 at Attachment 7; Joint Exhibit 3, Attachment C. (Respondent's charging of fees/expenses to his daughter and submission of an accounting of funds spent).

Third, OPR counsel stated that Respondent's lack of remorse and acceptance of responsibility recommends a sanction of disbarment. OPR Post Hearing Brief at 13-17.

Finally, OPR counsel argued that Respondent's identified mitigating circumstances do not outweigh the aggravating factors OPR identified. OPR Post Hearing Brief at 18-19.

Respondent's Arguments against Disbarment

⁷ These cases are publically available online at <http://www.irs.gov/Tax-Professionals/Enrolled-Actuaries/Final-Agency-Decisions>.

Respondent's Post Hearing Brief offered proposed findings of fact and conclusions of law. First, Respondent proposed that other than one late personal tax return, there was no record of any previous problems with his preparation of tax returns for himself or his clients.

Respondent's Post Hearing Brief at 1. Furthermore, Respondent proposed that in his tax return preparation practice, his clients paid him when his work was completed and he exerted no control over client funds and held no funds in trust. Id.

Respondent also proposed conclusions of law. See Respondent's Post Hearing Brief at 2. First, Respondent correctly reiterated that any sanction imposed shall take into account all relevant facts and circumstances under 31 C.F.R. § 10.50(e). Id. Second, Respondent correctly stated that Complainant bore the burden of proof and that the standard of proof for disbarment or a suspension of six months or longer was by clear and convincing evidence under 31 C.F.R. § 10.76(b). Id.

Finally, Respondent argued that OPR's disciplinary sanctions serve to protect the public, not to punish the practitioner. Id. Respondent argued that OPR had failed to present any clear and convincing evidence about what threat Respondent posed to the public if he were allowed to continue preparing tax returns. Furthermore, Respondent claimed that OPR failed to present sufficient evidence how disbarment would rectify any such threat to the public and that any disbarment would be arbitrary and capricious. Id. In conclusion, Respondent argued that OPR's actions were untimely given that his conviction occurred in December 2008 and OPR's efforts to disbar Respondent at this time indicates that the purpose of these proceedings is punitive. Id.⁸

⁸ OPR counsel's Reply addressed Respondent's contentions concerning the alleged "punitive" nature of these proceedings and Respondent's apparent request for a modified sanction that would allow him to continue preparing tax returns. As for the first issue, OPR counsel correctly points out that IRS precedent is clear regarding the date from which any disbarment should run (i.e., in this case from the date of Respondent's expedited suspension). See Reply at 2 (citing In re [REDACTED] (b)(3)/26 USC 6102). As for the second issue, if Respondent is requesting such a "hybrid" sanction, I agree with OPR counsel that I am precluded by the procedural regulations from imposing any sanction other than those explicitly listed in 31 C.F.R. § 10.76(a)(1).

Complainant's Rebuttal to Respondent's Arguments in Mitigation⁹

At the hearing, Ms. Hawkins addressed Respondent's asserted mitigating factors. Tr. at 53:16 et seq. (April 10, 2013); see also Joint Exhibit 1 at Attachments 7, 8. With respect to Respondent's 29 years of practice before the IRS without disciplinary action, Ms. Hawkins agreed that this experience was worthy of some credit as a mitigating factor. Tr. at 53:23-54:4; 55:6-8 (April 10, 2013); Joint Exhibit 1 at Attachment 7. However, Ms. Hawkins discounted Respondent's asserted age of 61 as a mitigating factor without more information provided (e.g., how his age played into his conduct or otherwise excused it). Tr. at 55:9-19 (April 10, 2013); Joint Exhibit 1 at Attachment 7.

Respondent's "many years of continuing education" is also a factor that Ms. Hawkins discounted as not being specific to tax preparation or understanding the requirements of practicing before the IRS because she assumed most of this was related to his CPA continuing education requirements. Tr. at 55:24-56:16 (April 10, 2013); Joint Exhibit 1 at Attachment 7. Respondent's asserted that 18 years of peer reviews through the American Institute of Certified Public Accountants (AICPA) is a mitigating factor. Tr. at 56:17-21 (April 10, 2013); Joint Exhibit 1 at Attachment 7. Ms. Hawkins did not consider the AICPA reviews as a significant mitigating factor because the AICPA, as she understood it, "does nothing in the tax arena" and is more geared toward assuring that CPA practices are in good order. Tr. at 56:23-57:11 (April 10, 2013).

Respondent asserted as a mitigating factor his limited experience in trust and estate issues. Tr. at 57:12-14 (April 10, 2013); Joint Exhibit 1 at Attachment 7. Ms. Hawkins viewed this as an aggravating factor in that OPR is concerned about practitioners being qualified and competent. In this regard, she asserted that Respondent took on a matter for which he was not

⁹ Respondent did not submit a rebuttal to Complainant's assertion of aggravating factors.

qualified or about which he was not familiar. Despite these problems, Respondent nevertheless charged his professional hourly rate and sought travel and per diem reimbursement. Tr. at 57:15-58:3 (April 10, 2013).

Respondent termed the facts surrounding his conviction as a personal, family matter, not connected to his practice representing clients before the IRS. Tr. at 58:9-59:11 (April 10, 2013); Joint Exhibit 1 at Attachment 7. Ms. Hawkins objected to Respondent's assertions stating that they were irreconcilably inconsistent. Tr. at 58:4-59:11 (April 10, 2013).

Respondent's next listed mitigating factor dealt with the civil case with his daughter and his claim that she did not object to his use of the funds. Tr. at 59:12-13 (April 10, 2013); Joint Exhibit 1 at Attachment 7. Ms. Hawkins objected to this claimed mitigating factor because she deemed it irrelevant that Respondent was able to negotiate a resolution of the civil case with his daughter. Tr. at 59:14-60:1 (April 10, 2013).

Respondent's next listed mitigating factor asserted that "intervening circumstances" do not support a suspension. Tr. at 60:16-17 (April 10, 2013); Joint Exhibit 1 at Attachment 7. Ms. Hawkins was unsure what Respondent meant by "intervening circumstances" and maintained that Respondent should be disbarred based on his conduct. Tr. at 60:19-25 (April 10, 2013).

Respondent argued in mitigation that the offense bore no relationship to the specific occupational standard in determining the fitness of an individual to receive or hold a license. Tr. at 61:1-5 (April 10, 2013); Joint Exhibit 1 at Attachment 7. Ms. Hawkins objected to this asserted mitigating factor because the felony theft conviction and the two CPA license revocations fall squarely within Circular 230's definitions of disreputable conduct. Tr. at 61:6-15 (April 10, 2013).

Clear and Convincing Evidence Establishes the Proper Sanction is Disbarment

Respondent's conduct in handling his daughter's money from the Trust was criminal, egregious, and reflected extremely poor judgment. To be sure, the circumstances surrounding Respondent's actions were related to a family dispute; both on the front end with his younger brother and on the back end with his daughter over the proceeds from the settlement related to that Trust. In each instance, one can appreciate that Respondent might not have conducted himself as he normally would absent these particular family circumstances. As such, the overall circumstances might suggest some slight mitigation. However, read in the overall context, these particular circumstances do not excuse his conduct or indicate a sanction less than disbarment.

While the cases OPR counsel cites in support of disbarment are distinguishable to some degree, they generally support a finding of disbarment in this case. For example, in (b)(3)/26 USC 6103, the respondent was disbarred by the Oregon Board of Accountancy much like Respondent. See In re (b)(3)/26 USC 6103, Complaint No. 2012-00002 (December 7, 2012). (b)(3)/26 USC 6103's conduct was particularly egregious as it related to a federal conviction for bank fraud based in part on the submission of fabricated tax returns and money laundering. Id. Additionally, (b)(3)/26 USC 6103 falsely identified himself as a licensed CPA in an IRS communication after his CPA license had been revoked and further (b)(3)/26 USC 6103. Id. Moreover, (b)(3)/26 USC 6103 had a history of professional misconduct prior to his CPA license revocation. Id. at 24. Unlike Respondent, (b)(3)/26 USC 6103's actions involved multiple counts and the fabrication of tax documents. However, (b)(3)/26 USC 6103, like Respondent's case, involved significant dishonest acts that clearly require disbarment.

In (b)(3)/26 USC 6103, the judge disbarred the respondent in connection with (b)(3)/26 USC 6103's conviction in federal court for multiple felonies, including making a false declaration in bankruptcy proceedings, bankruptcy fraud, and money laundering and concealment and subsequent

disbarment from the State Bar of Arizona and suspension by the State Bar of Texas. See In re (b)(3)/26 USC 6103, Complaint No. 2009-27 (July 7, 2010). Respondent in that case filed for bankruptcy seeking to discharge over \$450,000 in debt but took several measures to conceal assets from the bankruptcy court. Id. at 6.¹⁰

In contrast to these disbarments, (b)(3)/26 USC 6103 represents a case where the appellate authority considered a lengthy suspension of three years a sufficient sanction where a CPA had been convicted for one count of aiding and abetting in the failure to pay income tax. See In re (b)(3)/26 USC 6103, Complaint No. 2009-16 (Decision on Appeal, March 31, 2011). The appellate authority reviewed the judge's imposition of a 24 month suspension and increased it to 36 months based in large part on (b)(3)/26 USC 6103's deceptive practices during the disciplinary process and lack of remorse. Id. at 5-6.

I agree with Ms. Hawkins assessment of each of Respondent's asserted mitigating factors. I will not discuss each asserted mitigation factor in detail as the relevance of several is questionable. Ultimately, none of the stated factors excuse or lessen the explicitly unlawful conduct in which he engaged. Respondent failed to persuasively articulate how any of his proposed mitigating factors should lead one to conclude that anything other than disbarment is the appropriate sanction. For example, his age of 61 and his medical condition [Redacted], by themselves do not lend me to conclude that his illegal conduct should be disregarded or that a suspension would be appropriate.

Respondent's record of no prior disciplinary proceedings before OPR during his lengthy practice before the IRS is commendable, but surely, compliance should be the norm and the lack of prior discipline cannot be construed as a significant mitigating factor.

¹⁰ Much like Respondent, (b)(3)/26 USC 6103 argued that his actions were not related to his practice before the IRS and were "personal" in nature. Id. at 7. As discussed in this Decision and Order, such arguments are not persuasive.

Additionally, his invocation that this was purely a family matter not connected to his IRS practice is unavailing. Respondent's conviction and revocation of his CPA licenses has more to do with general concerns about his honesty, integrity and ability to comport himself in an appropriate manner with someone else's money.

In contrast, significant aggravating factors present themselves. Respondent took control of funds that did not belong to him and immediately engaged in a form of "self help" by deducting \$15,000 from those funds as compensation for the time and money spent in obtaining the settlement. One must question whether this \$15,000 was taken in part as a result of Respondent's belief that his mother owed him \$22,000.

It was only when facing a civil suit by his own daughter that he produced an accounting outlining what happened to the \$90,000 from the settlement, which set forth expenses as if his daughter were a client of his for whom he had performed professional services. Whether Respondent legally should have been entitled to reimbursement for his efforts in obtaining the settlement is separate from the unlawful means by which he elected to conduct himself.

Furthermore, Respondent took \$75,000 of the money and lost a considerable amount (ca. \$14,000) in trading activities. Such a fundamental breach of fiduciary duty cannot be condoned. In sum, Respondent failed to exercise any sort of reasonable judgment in his dealings with his daughter's money. Respondent's conduct reflects extremely poorly on his ability to comport himself under the requirements of Circular 230.

Conclusions of Law

1. At all material times, Respondent David O. Christensen was a Certified Public Accountant engaged in practice before the IRS. See Joint Exhibit 1 at ¶ 1; Joint Exhibit 2.¹¹
2. Respondent engaged in incompetent and disreputable conduct within the meaning of Section 31 C.F.R. §§ 10.51(a)(2) and 10.51(a)(10) as evidenced by his felony conviction for theft in Washington State Superior Court and the revocation of his CPA license by the governing bodies in Washington State and Oregon.
3. The proper sanction for Respondent's disreputable conduct is disbarment.

WHEREFORE:

Order

IT IS HEREBY ORDERED THAT Respondent David O. Christensen is **DISBARRED** from practice before the IRS effective as of May 18, 2012 (the date of Respondent's Expedited Suspension).

Done and dated on this 23rd day of July, 2013 at
Alameda, California.

/s/ Parlen L. McKenna
HON. PARLEN L. McKENNA
Administrative Law Judge
U.S. Coast Guard

Pursuant to 31 C.F.R. § 10.77, this Decision may be appealed to the Secretary of the Treasury within thirty (30) days from the date of service of this Decision on the parties. The Notice of Appeal must be filed in duplicate with the Director, Office of Professional Responsibility, 1111 Constitution Ave. NW, SE:OPR 7238IR, Washington D.C. 20224, and shall include a brief that states the party's exceptions to this Decision and supporting reasons for any exceptions.

¹¹ Respondent's Answer admitted OPR's jurisdiction. See 31 C.F.R. § 10.64(c) (no further proof or evidence needed for admitted allegations).

CERTIFICATE OF SERVICE

I hereby certify that I have served the forgoing **DECISION AND ORDER** (12-IRS-0003) upon the following parties and entities in this proceeding as indicated in the manner described below:

ALJ Docketing Center
United States Coast Guard
[Redacted]
Baltimore, Maryland [Redacted]
[Redacted]
[Redacted]
(Via Facsimile)

Timothy E. Heinlein
Office of Chief Counsel (IRS)
General Legal Services
[Redacted]
San Francisco, CA [Redacted]
[Redacted]
[Redacted]
(Via Facsimile)

Ms. Diana M. Gertscher
Internal Revenue Service [Redacted]
[Redacted]
Washington, DC [Redacted]
(Via First Class Mail)

William P. Lapp, Esq.
Attorney at Law, PLLC
[Redacted]
Bellevue, WA [Redacted]
Email: [Redacted]
(Respondent's counsel)
(Via First Class Mail)

Done and dated on this 23rd day of July 2013 at
Alameda, California.

/s/ Cindy J Melendres
Cindy J. Melendres
Paralegal Specialist to the
Hon. Parlen L. McKenna

LIST OF WITNESSES AND EXHIBITS

OPR Witness

1) Ms. Karen L. Hawkins, Director, Office of Professional Responsibility

Respondent's Witness

1) Respondent David O. Christensen

Joint Exhibits

Joint Exhibit 1: Complaint (including 11 attachments)

Joint Exhibit 2: Respondent's Answer to the Complaint

Joint Exhibit 3: Respondent's Motion for Summary Adjudication (including attachments A-F)

Joint Exhibit 4: Complainant's Motion for Summary Adjudication

Joint Exhibit 5: Complainant's Response to Summary Adjudication Motion (including one attachment)

Joint Exhibit 6: Respondent's Opposition to Complainant's Motion for Summary Adjudication (including one attachment)

Joint Exhibit 7: Court's Order regarding Summary Adjudication Motions

ATTACHMENT A

RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW¹²

Complainant's Proposed Findings of Fact:

1. Respondent's misconduct is among the most serious of offenses, which displays an unchecked combination of felonious and unethical behavior

Ruling: **ACCEPTED AND INCORPORATED AS MODIFIED.**

2. Respondent has displayed a lack of integrity, including in his testimony at trial, in attempting to distinguish his professional actions from his "father-daughter" relationship.

Ruling: **ACCEPTED AND INCORPORATED.**

3. Respondent continues to demonstrate a genuine lack of remorse for his misconduct.

Ruling: **ACCEPTED IN PART AND INCORPORATED AND REJECTED IN PART.** Accepted as to the fact Respondent blames others for his problems and continues to make excuses for his indefensible conduct. Rejected to the extent that Complainant asserts Respondent does not genuinely feel remorseful for the consequences of his illegal conduct.

4. On December 2, 2004, Respondent "received a check in the amount of \$90,000 as custodian under the Uniform Transfers to Minors Act for the benefit of his daughter" and was to act as conservator of her trust until she reached 21 years of age. [citing JE1, Attachment 1 at ¶ 2.3]

Ruling: **ACCEPTED AND INCORPORATED.**

5. Respondent initially deposited \$90,000 into his personal bank account and then a few days later transferred \$75,000 of his daughter's money to his personal Ameritrade account. [citing Id., ¶¶ 2.4, 2.5].

Ruling: **ACCEPTED AND INCORPORATED.**

¹² On May 8, 2013 and May 20, 2013, respectively, Respondent and Complainant filed their post-hearing briefs, including proposed findings of fact and conclusion of law. Rulings on these submissions are set forth herein. Importantly, these proceedings are conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 556. See 31 C.F.R. § 10.72 (a)(3)(ii). Under 31 C.F.R. § 10.75, parties "must be afforded a reasonable opportunity to submit proposed findings of fact and conclusions [of law] and their supporting reasons." The judge's decision "must include a statement of findings and conclusions, as well as the reasons for making such findings and conclusions". 31 C.F.R. § 10.76. While both parties made such a submission, neither separated their proposed findings and conclusions from their narrative arguments. Please see **Attachment B** for an example of another way to submit these materials. **Attachment B** was taken from 2009 WL 3721029 (N.O.A.A.) Re: *Pesca Azteca, S.A. de C.V. (F/V AZTECA 1)*, Docket No. SW0702652. In any event, I have attempted to separate the findings and conclusions from the arguments as best I could and ruled on what I believed to be each parties proffer.

6. As of May 2006, when Respondent resigned as the conservator of his daughter's trust, \$23,637.54 of his daughter's \$90,000 remained. [citing Id., ¶ 2.7].

Ruling: **ACCEPTED AND INCORPORATED.**

7. Respondent's conviction demonstrates that he lacks the requisite level of honesty in financial dealing with others to represent taxpayers before the Internal Revenue Service.

Ruling: **ACCEPTED AND INCORPORATED** to the extent that such ruling comports with the decision herein.

8. Respondent's actions that were the basis of his felony conviction was not just a family matter between a father and his daughter

Ruling: **ACCEPTED AND INCORPORATED.**

Respondent's Proposed Findings of Fact:

1. Ostensibly, disciplinary sanctions under IRS regulations are not designed to punish a practitioner, but to protect the public.

Ruling: **ACCEPTED AND INCORPORATED** to the extent that it comports with the decision herein.

2. The IRS presented no clear and convincing evidence that demonstrated what threat Respondent presented to the public or what harm he could inflict on clients were he allowed to continue preparing tax returns.

Ruling: **REJECTED** for the reasons stated herein.

Complainant's Proposed Conclusions of Law:

1. Respondent's actions that were the basis of his felony conviction demonstrate multiple Circular 230 violations

Ruling: **ACCEPTED AND INCORPORATED.**

2. The Seriousness of Respondent's offenses warrants disbarment.

Ruling: **ACCEPTED AND INCORPORATED.**

Respondent's Proposed Conclusions of Law:

1. Under 31 C.F.R. § 10.50(e), any sanctions imposed "shall take into account all relevant facts and circumstances."

Ruling: **ACCEPTED AND INCORPORATED.**

2. As the complaining party, the IRS bears the burden of proof. For a disbarment or suspension of six months or longer, the judge must apply the clear and convincing evidentiary standard. 31 C.F.R. § 10.76(b).

Ruling: **ACCEPTED AND INCORPORATED.**

3. The IRS presented no clear and convincing evidence that demonstrates why after a five-disbarment, Respondent would no longer be as much of a threat to the public and could then re-apply for a PTIN number.

Ruling: **REJECTED** for the reasons stated herein. Importantly, without a doubt, no reasonable thinking person could review Respondent's actions that resulted in his felony conviction and not conclude that he is severely challenged ethically and lacks the necessary common sense and honesty to retain the right to retain his PTIN. Finally, after five years, Respondent is not guaranteed reinstatement. Quite to the contrary, Respondent will have the burden of proof to demonstrate to the IRS that he has rehabilitated himself and should be trusted working with taxpayers.

4. The IRS "one size fits all" punishment of automatic disbarment for five years is arbitrary and capricious.

Ruling: **REJECTED** for the reasons stated herein. As noted above, it is not the OPR that is imposing an arbitrary and capricious disbarment under a "one size fits all" policy. Just the opposite is true since Respondent was accorded a hearing from an independent judge outside of the IRS. After a complete review of all the record evidence, this judge finds by clear and convincing evidence that disbarment is the only sanction that is warranted.