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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **EDUARDO MARMOLEJO RIVERA**, **Member No. 52737**, A Member of the State Bar.	**Case No. 03-O-01778-RAP** **DECISION & ORDER OF INACTIVE ENROLLMENT**

I. Introduction

In this contested matter, respondent **EDUARDO MARMOLEJO RIVERA** is charged with three counts of misconduct. The court finds, by clear and convincing evidence, that respondent is culpable of all of the charges, involving (1) failure to comply with laws - interference with enforcement of Internal Revenue laws, (2) advising the violation of law, and (3) moral turpitude-misrepresentation.

The State Bar urges disbarment. Respondent argues that he should not be disciplined. The court, however, concludes and recommends that, in view of respondent's misconduct and the evidence in aggravation, respondent should be disbarred from the practice of law for in the State of California. Moreover, in light of its disbarment recommendation, the court will order that respondent be involuntarily enrolled as an inactive member of the State Bar of California in accordance with Business and Professions Code section 6007, subdivision (c)(4).[1] (Rules Proc. of State Bar, rule 220(c).)

[1]Unless otherwise noted, all further statutory references are to this code.

II. Pertinent Procedural History

The State Bar initiated this proceeding by filing a notice of disciplinary charges (NDC) on June 27, 2005. Thereafter, respondent filed a response to the NDC on July 21, 2005.

As a result of respondent's failure to file a pretrial statement, the court ordered that respondent be precluded from presenting any witnesses or evidence at trial. (Rules Proc. of State Bar, rule 211(f).) But respondent was allowed to testify at trial.

Trial was held on December 7, 2005. The State Bar was represented in this proceeding by Deputy Trial Counsel Joseph R. Carlucci. Respondent appeared in propria persona. The court took this proceeding under submission for decision at the conclusion of trial on December 7, 2005.

III. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 2, 1972, and has been a member of the State Bar since that time.

B. Federal District Court Findings

On or about April 10, 2003, the United States filed a complaint against respondent in the United States District Court for the Central District of California in case number CV 03-2520-GHK (JWJx), entitled *United States v. Eduardo Marmolejo Rivera,* ("the complaint") (See exhibits 2 & 3). In the complaint, the United States (1) alleged that respondent prepares, promotes, and sells abusive tax schemes that falsely purports to exempt his clients from federal income taxation and (2) sought a permanent injunction against respondent pursuant to Internal Revenue Code (I.R.C.) section 7408 (26 U.S.C. § 7408) for violating I.R.C. sections 6700 and 6701 (26 U.S.C. §§ 6700 & 6701).

Even though respondent was personally served with at copy of the United States' complaint, he failed to file an answer. Thus, the United States filed and served on respondent a request for entry of respondent's default. And the federal district clerk properly entered respondent's default on May 9, 2003. Thereafter, the United States filed a motion for default judgment and permanent injunction, which it supported with numerous declarations and extensive documentary evidence. In a June 8, 2003, e-mail newsletter respondent sent to some of his clients and potential clients, respondent stated

that he has decided to let the Office of the United States Attorney attempt to take a default in its lawsuit against him. And, in any event, respondent did not respond to United States' motion for default judgment and permanent injunction. After hearing arguments from the United States at a June 23, 2003, hearing, the federal district court filed a default judgment and permanent injunction against respondent on July 18, 2003.[2] Respondent never appealed that adverse judgment and injunction, and they are now final. (See exhibit 56.)

In its judgment and injunction, the federal court found, among other things, that respondent "prepares, promotes, and sells abusive tax schemes purporting to exempt his customers from federal income taxation. He markets his schemes, which he describes as 'legal documentation, educational materials, and workshops to educate, inspire and assist the people in their desire to opt out of the voluntary tax system with the least amount of risk,' through his website www.EdRivera.com." That respondent "claims on his website that private employers are not required to withhold federal taxes from their employees' wages. He urges employers to stop withholding federal taxes, and warns them that doing so 'creates a real liability for the private employer.' " That respondent states, on his website, " '[i]f you do not file [U.S. Individual Income Tax] returns, you have no federal income tax liability. There is no other means by which [you] ... can be subject to or liable for any income tax.' " That respondent "sells opinion letters consisting of frivolous arguments such as that the federal income tax is voluntary, that Americans employed in the private sector are exempt from federal income tax and do not need to file federal returns, and that the IRS has no authority to assess or collect taxes."

More specifically, the federal court found that respondent made "at least the following false and fraudulent statements concerning the internal revenue laws and the effectiveness of his tax schemes:

(a) only federal employees are subject to federal income tax;

(b) private-sector employers are not required to withhold federal taxes from their

[2]The judgment and injunction were thereafter entered on July 21, 2003.

employees' wages;

(c) federal taxes are voluntary or consensual;

(d) filing federal tax returns is voluntary;

(e) the IRS does not have the authority to assess or collect taxes;

(f) federal income tax can be avoided by not filing federal income tax returns;

(g) federal tax liability can be avoided by relying on Rivera's opinions;

(h) Rivera's letters will cause the IRS to cease assessment or collection activities;

(i) Rivera's letters will have any effect upon IRS liens and levies;

(j) Rivera can establish in IRS records that his customers have no federal tax liability;

(k) violation of the internal revenue laws is not a crime; and

(l) people cannot be convicted of a tax crime because no federal district court has jurisdiction over them."

(See exhibit 56, at pp. 7-8.)

The federal court concluded the respondent violated I.R.C. sections 6700 and 6701 by impeding the IRS's assessment and collection efforts by advising his customers not to file federal income tax returns and not to pay federal taxes. The court also concluded that a permanent injunction, pursuant to I.R.C. section 7408, was necessary for the enforcement of the internal revenue laws and to prevent respondent from interfering with the enforcement of the internal revenue laws.

Even though California applies principles of collateral estoppel to default judgments to give preclusive effect to their underlying factual findings (*Flood v. Simpson* (1975) 45 Cal.App.3d 644, 651, fn. 12, and cases there cited.), this court cannot give preclusive effect to the federal court's factual findings to bind respondent to them in this State Bar Court proceeding. The reason why is that the federal court findings were made under the preponderance-of-the-evidence standard of proof (*United States v. Estate Preservation Services* (9th Cir.2000) 202 F.3d 1093, 1098) and not the clear-and-convincing-evidence standard applicable in attorney disciplinary proceedings. (*In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 324-325).

Nevertheless, it is clear that this court may still rely upon the federal court finding as evidence even though they were made under the preponderance-of-the-evidence standard. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 324-325.) In that regard, those findings are entitled to a strong presumption of validity in this court because they are supported by substantial evidence (*Id*. at p. 325), if not clear and convincing evidence.

C. Respondent's Scheme to Advise Violation of I.R.C. Rules

Respondent has operated his website (i.e., www.EdRivera.com) (See exhibit 14, p.3) since the late 1990's. The website is still available on-line. On his website, respondent offers for sale tax schemes, prepared by respondent, purporting to exempt his customers from federal income taxation.

Respondent sells opinion letters as follows. For $100, a single letter delivered via e-mail, if paid for electronically. For $150, a single letter delivered via mail, if paid for by postal money order. For $500, four letters, including research and a motion to dismiss a federal indictment (of any kind). For $1,000, for four letters, with research and a motion to dismiss a federal indictment plus documents "to establish business and personal non-liability. For $2,000, a "COMPLETE PACKAGE of [his] opinion letters, agent letters, lien, levy, law suit and employer kit." As the federal court correctly found, the letters make frivolous arguments and false statements such as that the federal income tax is voluntary, that Americans employed in the private sector are exempt from federal income tax and do not need to file federal returns, and that the I.R.S. has no authority to assess or collect taxes. (See exhibit 14, p.13.)

Respondent markets his opinion letters for use in avoiding criminal charges, for submission to the I.R.S., and for persuading bankers to resist I.R.S. collection efforts. Respondent advises customers to rely on his opinion letters in deciding to opt out of payroll withholding taxes. Respondent states that "The purpose of [his] opinion letters . . . is to provide a reliance defense for the recipient should there be a need to establish that the matters of fact and law expressed in the opinion letter were relied on by the person for whom the letter was written." (See exhibit 14, p. 57).

Respondent drafts letters for his customers to give to their employers demanding that the employer stop withholding taxes. (See Exhibit 14, p.82-84).

In February 2003, two of respondent's customers sent his opinion letters to the I.R.S. (See exhibits 23 and 24.) In the letters, respondent claimed that because his client failed to file tax returns for 1998, 1999, or 2000, they "have no legal duty to make and file a United States Individual Income Tax Return and pay the tax on those returns for any years in the future." (See exhibit 23, p. 1.) Respondent continues, "I can assure you that unless you are employed by the government of the United States you are not liable for any federal income tax" and are not required to file a tax return. (See exhibit 24, p. 2.) Respondent recommends that his client "share a copy" of his opinion letters with the I..R.S. and "demand that [the I.R.S.] either produce evidence that you are engaged in an excisable activity or cease and desist from making such claims on your income." (See exhibit 24, p. 11.) Respondent advises his customer to aggressively pursue a program of asset protection. Among the various programs for asset protection are transferring title to your business interests and other property (and even the possession, if you so choose) into trust, or corporation or other legal entity, keeping your assets off-shore, and the like. An additional benefit is that if the government can't prove that you have a substantial amount of income, or if you lack reachable assets, the likelihood that they pursue you is greatly diminished. (See exhibit 24, p. 11.)

Respondent posts sample opinion letters on his website. Respondent recommends a customer send to the I.R.S. a letter that states that his critique of [of an I.R.S. notice of intent to levy] will assist the I.R.S. employee that sent this to you in making an early determination that you do not have any liability of any kind. . . If this matter does progress, it will be necessary for the [I.R.S.] employee to identify, with specificity and particularity, the exact nature and identification of the government to which this Department of the Treasury and Internal Revenue Service pertains. (See exhibit 14, p. 57.) Respondent further states that I.R.C. section 6331 does not apply to those in the private sector and even if it did the only way a federal income tax liability can be created is for a person to make a U.S. Individual Income Tax Return that creates one. (See exhibit 14, p. 60.) All federal income taxes . . . have . . . to be voluntary to be legal. (See exhibit 14, p. 60.)

Respondent advertises that for $3,500 a year, he will represent customers before the I.R.S. (See exhibit 14, p. 14.) His representation will consist of a "power of attorney so that [he] can

respond to all I.R.S. notices and establish in your record hat you have no liability. (See exhibit 14, p.14). Respondent also includes the I.R.S. Freedom of Information Act (FOIA) request for the client, demanding copies of "what the I.R.S. has put on your file." (See exhibit 14, p.14).

On his website, respondent quotes a customer as declaring "victory . . . I haven't heard anything from the I.R.S. since you sent your letters to them. Thanks!" (See exhibit 14, p.11).

Respondent often begins his representation of his tax clients by sending the I.R.S. a power of attorney and declaration of representative (which is I.R.S. Form 2848) on which he states that the purpose of his representation is to determine non-liability for all federal taxation. (See exhibits 29, 33 & 40.)

Respondent sends a revenue officer a demand for the officer's personal written authority to collect taxes from respondent's customer/client. (See exhibit 48). He claims that his customer/client to be "a non-filer . . . [and] has ceased to volunteer to be involved in federal income taxes." (See exhibit 46, p. 5.)

For another customer, respondent complained to the I.R.S. that a revenue officer, apparently unaware to respondent's customer was not an individual who received federal income, took it upon himself to alter or change the official individual master file to indicate that she had a federal income tax liability. (See exhibit 30, pp. 7 & 10.)

On behalf of another customer, respondent wrote several letters to a revenue officer, demanding the revenue officer's "personal written authority to: . . . (12). Perform any claimed official duty." (See exhibit 32, p. 3.) Respondent stated that he had confirmed that his client was not liable for federal income taxes and that he had steadfastly sought to establish his client's "status an a nonfiler with the Internal Revenue Service." (See exhibit 36, p. 17.) Respondent claimed that his client had "revoked all prior income tax returns . . . and . . . will never again make himself liable for any state or federal income tax by making a return." (See exhibit 36, p. 15.)

For other clients, respondent sent the I.R.S. several letters claiming that they were entitled to a federal tax refund and challenging the I.R.S. attempts to collect taxes from them. (See exhibits 40, 41 & 42.) In these letters, respondent stated that there is no public law that imposes an income

tax or any other tax on or measured by income, wages, or earning. (See exhibit 40, p. 5.)

Respondent erroneously claims on his website that violations of internal revenue laws are not crimes, and that he can prove the non-existence of tax crimes. (See exhibit 14, p. 143.) Respondent also erroneously claims that people cannot be convicted of tax crimes because federal district courts do not have any judicial power over people living in the fifty states. (See exhibit 14, p. 308.)

In apparent response to the United States' federal court complaint, respondent announced in an e-mail from newsletter that he will modify his program by selling his opinions in book form, rather than letter form, and by claiming that federal taxes are consensual, rather than voluntary. Respondent, however, admits that "[t]here is . . . little difference between consensual and voluntary.

On his website, respondent recruits (i.e., advertizes for) new attorneys to join him in selling his abusive tax schemes. (See exhibit 14, pp. 334-335.) Respondent admitted while testifying in this court that he is seeking to expand his operation by recruiting attorneys to join him in what he describes as a "profitable and exciting business." Attorneys associated with respondent also write letters and hold meetings, seminars, and workshops for employers, tax professionals, and the general public and falsely claim that Americans are not liable for federal taxes. (See exhibit 14, p. 335.) Respondent claimed that he will supply his attorneys with "a legal package . . . complete with everything that you need to begin this exciting and profitable business. It includes a complete assortment of documents . . . and responses needed for various letters and notices that the I..R.S. is likely to send you. . . . [¶] [Respondent also offers] an assistant who will come into your [law] office and set up your files and computer with everything you need to get started." (See exhibit 14, p. 335.)

The record clearly establishes that the federal district court correctly found that, on his website, respondent makes "at least the following false and fraudulent statements concerning the internal revenue laws and the effectiveness of his tax schemes:

(a) only federal employees are subject to federal income tax;

(b) private-sector employers are not required to withhold federal taxes from their employees' wages;

(c) federal taxes are voluntary or consensual;

(d) filing federal tax returns is voluntary;

(e) the IRS does not have the authority to assess or collect taxes;

(f) federal income tax can be avoided by not filing federal income tax returns;

(g) federal tax liability can be avoided by relying on Rivera's opinions;

(h) Rivera's letters will cause the IRS to cease assessment or collection activities;

(i) Rivera's letters will have any effect upon IRS liens and levies;

(j) Rivera can establish in IRS records that his customers have no federal tax liability;

(k) violation of the internal revenue laws is not a crime; and

(l) people cannot be convicted of a tax crime because no federal district court has jurisdiction over them.

The record also clearly establishes that the harm caused by respondent's website and letters is ongoing and immediate. Respondent now meritlessly claims his relationship to his customers/clients is student/pupil to teacher. In the face of federal court permanent injunction and finding of facts, respondent wrongfully continues to sell for profit the same false and misleading material claiming that he continues to "believes what he believes."

The record clearly establishes that respondent knows that the benefits he states will be derived from participation in his tax schemes are false. As he repeatedly reminds his customers/clients and the recipients of his letters, he is a licensed attorney and has been practicing law for thirty years. (See exhibits 14, p. 4-8; 48, p. 17; 32, p. 6; 36, p. 15; 24, pp. 11-12.) Respondent is well aware and knows that his frivolous letters will not affect his customer's tax liability or prevent I.R.S. assessment and collection. Yet, he does not disclose these facts to his customers/clients even though he clearly owes them a fiduciary duty to do so.

Respondent violated I.R.C. section 6701 with his opinion letters and his letters to the I.R.S. on behalf of his clients. Respondent prepares these letters for his clients to rely on in "opting" out of federal taxes, and to use as a reliance defense against the I.R.S. (See exhibit 14, p. 13, 57.) Respondent knows that his letters will be used in connection with a material matter before the I.R.C. (e.g., the determination of civil and criminal liability relating to federal income tax), and he knows

that his letters, which falsely and frivolously state that his clients have no tax liability, will result in a false and fraudulent understatement of his clients' tax liabilities under well-established law and long standing legal precedent (See exhibits 46, p. 5; 30, p. 10; 36, p. 17.) Respondent's testimony and assertions to the contrary are not only implausible and self-serving, they are not credible.

In addition, respondent actions were not done in good faith to test the validity of any law, rule, or ruling of a tribunal. Without question, the federal district court correctly found and concluded: "Even cursory research would reveal that his 'opinions' – that private-sector employees are exempt from federal taxation, that the IRS has no authority to assess and collect taxes, and that paying taxes is voluntary – are without merit and have been universally rejected by the courts. Respondent's statements are knowingly false and fraudulent, and they "strike at the very heart of the internal revenue laws: the obligation to pay tax and file returns, the employer's obligation to withhold and pay over payroll taxes to the IRS, and the IRS's authority to assess and collect taxes." (See exhibit 56 pp. 12-13.)

On his website, respondent advertises and proudly proclaims that he an attorney who has practiced law for 30 years. As such, readers and later customers/clients, reasonably expect and are entitled to professional, competent advise. Yet respondent did not just dispense "bad" or faulty advise to his readers and customers/clients, but intentionally, deliberately, and knowingly dispensed erroneous legal advise knowing that, if followed, it will subject his customers/clients to civil and/or criminal liability. Even assuming arguendo that respondent honestly and in good faith believed that the government did not have the authority collect income taxes and that the federal court did not have jurisdiction over taxation matters, he had a fiduciary duty to fully disclose to his potential customers/clients and actual customers/clients (1) that his beliefs were contrary to well-established law and long standing legal precedent and (2) that anyone following his legal advise based on his beliefs runs a very, very high risk of incurring significant repercussions (including penalties, interest, and criminal prosecution). However, respondent has never done so.

The respondent's website is still available on-line, although respondent claims that, since the federal court permanent injunction was issued, letters are available now without his letterhead. The

subject matter is still the same but the relationship has changed to teacher/pupil relationship. Respondent still sells his material to customers and they can do what they want with the material. Respondent claims that his newsletter is no longer available on-line.

Respondent continues to frivolously assert that the federal court's default judgment and permanent injunction have effect only in federal territories (and not the fifty states) and that the effect of the injunction on him is that man's law is limited in time and place. Furthermore, the way the tax laws are written, and "employee" is not subject to taxation. Unquestionably, respondent continues to ignore federal statutes and settled case law in the area of federal income tax.

Count 1: Failure to Comply with Laws - Interference with Enforcement of Internal Revenue Laws (§ 6068, subd. (a))

Section 6068, subdivision (a) provides that a member must support the Constitution and laws of the United States and of this state.

The court finds, by clear and convincing evidence, that respondent willfully violated section 6068, subdivision (a), by violating I.R.C. sections 6700 and 6701. Respondent violated sections 6700 and 6701 by preparing, promoting, and selling opinion letters, legal representation, and asset protection schemes that he designed to "educate" and assist his clients in avoiding the assessment or collection of their correct income tax. As the federal court correctly found, respondent knew and knows that "his claims are false and his arguments are frivolous and have been repeatedly rejected by courts. (See exhibit 56, p. 14.) Respondent organized or sold an entity, plan, scheme, or arrangement and made false and fraudulent statements regarding the tax benefits to be derived from the entity, plan, scheme, or arrangement knowing (1) that the statements were false and fraudulent, (2) that the statements pertained to a material matter (or would be used in connection with a material matter) arising under the internal revenue laws, and (3) that his clients' reliance on the statements would result in an understatement of their tax liability.

Count 2: Advising Violation of Law (Rule 3-210 of the Rules of Professional Conduct)[3]

Rule 3-210 provides that a member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling in invalid. A member may take appropriate steps in good faith to test the validity of any law rule, or ruling of a tribunal.

By clear and convincing evidence, respondent wilfully violated rule 3-210, by promoting, and selling opinion letters, legal representation, and asset protection to "educate" and assist his clients to avoid the assessment or collection of their correct federal tax despite well-established case law and statutory law in contravention of such conduct, respondent advised a violation of a law without believing in good faith that the law was invalid, in wilful violation of rule 3-210, Rules of Professional Conduct.

Count 3: Moral Turpitude (§ 6106)

Section 6106, prohibits the commission of any act by a member involving moral turpitude, dishonesty or corruption.

By clear and convincing evidence, respondent wilfully violated section 6106, by making misrepresentations to his clients, customers, and to the general public through his website and in his opinion letters regarding the internal revenue laws and the effectiveness of his tax services, respondent committed an acts involving moral turpitude if not dishonesty and corruption in wilful violation of section 6106. In short, respondent's conduct underlying his violations of section 6068, subdivision (a) and rule 3-210 clearly involved moral turpitude in willful violation of section 6106.

It is not duplicate to rely on an act of misconduct to find that an attorney has willfully violated both (1) a rule or statute and (2) section 6106. (See, e.g., *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 169 [attorney's misappropriation of $929 violated trust account rule and section 6106].) In other words, it is not duplicative to find that an attorney's violation of rule (or statute) is egregious that it rises to the level of an act involving moral turpitude,

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[3]Unless otherwise indicated, all further references to rules are to the Rules of Professional Conduct of the State Bar of California.

dishonesty, or corruption in violation of section 6106. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520.)

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factor was shown by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(e).)

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent has two prior records of discipline. (Std. 1.2(b)(i).)

Respondent's first prior record is the State Bar Court's August 7, 1992, decision in case number 89-O-16823 (*Rivera* I) in which it recommended that respondent be privately reproval for his violations of former rule 2-111(A)(2) and rule 3-700(D)(2) and former rule 6-101(A)(2) and rule 3-110(A). In accordance with that decision, the State Bar Court Presiding Judge privately reproved respondent on February 2, 2004.

Respondent's second prior record is the Supreme Court's December 7, 1993, order in *In re Edward Marmolejo Rivera on Discipline*, case number S035296 (State Bar Court case number 91-O-00393) (*Rivera* II) in which the court placed respondent on ninety days' stayed suspension and two years' probation on conditions, including restitution to a client of $400 in unearmend fees. The misconduct in *Rivera* II involved two separate client matters. In the first client matter, respondent improperly entered into a business transaction with a client in violation of rule 3-310(C)(3) and improperly attempted to use $1,075 in trust account funds for his personal expenses in violation of rule 4-100(A) (and former rule 5-100). In the second client matter, respondent failed to competently peform the legal services for which he was retained in violation of rule 3-100(A) and imporperly withdrew from representation and failed to refund $400 in unearned fees.

Respondent committed multiple acts of wrongdoing, including failure to comply with laws-interference with enforcement of internal revenue laws. (Std. 1.2(b)(ii).)

Respondent's misconduct was surrounded by or followed by bad faith, concealment, and dishonesty separate and apart from that establishing the found rule and statutory violations. (Std. 1.2(b)(iii).) For example, respondent demonstrated bad faith and concealment by not fully disclosing to his potential customers/clients and to his actual customers/clients the fact that his legal opinions and advise are (1) contrary to well-established law and long standing legal precedent and (2) that following his legal advise based on his beliefs runs a very high risk of incurring significant repercussions.

Respondents misconduct significantly harmed his client/customers and exposed them to penalties, interest, criminal prosecution, and tax audits. His misconduct also significantly harmed the effectiveness of the federal government's ability to collect federal personal income taxes. (Std. 1.2(b)(iv).)

As the federal court aptly found and concluded, the customers/clients who follow respondent's advise do not file federal income tax returns or pay their federal income taxes and respondent directs his customers/clients to resist I.R.S. examination and collection efforts with copies of his opinion letters, and writes the I.R.S. on behalf of his customers. By instructing his customers/clients to rely on his letters and opinions to resist the I.R.S., respondent impedes I.R.S. examination and collection efforts. With respect to just the six customers/clients involved in the United States' complaint, on whose behalf respondent was attempting to block I.R.S. examination and collection procedures; the unpaid assessments and audit deficiencies totaled more than $9.5 million in tax, interest, and penalties. Moreover, the I.R.S. will have to devote substantial time and resources simply to identify his other customers/clients and it might still never be able to detect and recover all the revenue loss attributable to respondent.

Respondent demonstrates indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible

professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) As the review department noted more than 14 years ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not do so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

The standards for respondent's misconduct provide a broad range of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the client. (Stds.1.6, 2.2(a), 2.3 and 2.10.) In that regard, standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

In the present proceeding, the most severe sanction for respondent 's misconduct is found in standard 1.7(b), which provides that, if an attorney has two prior records of discipline, the discipline imposed in the current proceeding is to be disbarment unless the most compelling mitigating circumstances clearly predominate. However, standard 1.7(b) is not to be strictly applied in cases such as the present one in which the misconduct in both the prior proceedings was committed in the same general time period. (See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618-619.) Thus, the court also looks to standards 1.7(a) and 2.3 for guidance.

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. And standard 2.3 provides: “Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result

in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law."

Under standard 2.3, the extent to which respondent's customers/clients and the government were harmed and harmed or misled by respondent's misconduct, the magnitude of his misconduct, and its direct relation to his practice of law all support a recommendation of but disbarment. This is particularly true in light of the fact that respondent's indifference towards rectification and frivolous attempts to justify his continued misconduct by changing from letters and motions to book format. As discussed above, respondent continues to engage in the same misconduct and his claims to the contrary are neither credible nor plausible. They are, at best, semantics. "Respondent's use of specious and unsupported arguments in an attempt to evade culpability in this matter reveals a lack of appreciation both for his misconduct and for his obligations as an attorney." (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631647.) This is yet further evidence that respondent's misconduct is not aberrational and that the problems are deeply rooted.

In sum, the court rejects respondent's claims of good faith belief. " 'The law does not require false penitence. [Citation.] But it does require that the [attorney] accept responsibility for his acts and come to grips with his culpability. [Citation.]' [Citation.]" (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 595.)

Furthermore, respondent's insistence in misinterpreting the Constitution, important laws, and significant court opinions in such a way as to fit his needs and those of his customers/clients will clearly negatively impact not only his future customers/client, but law, the courts, and the legal profession. (Cf. *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192, 206.) This establishes respondent's his lack of respect for the law and the judicial process. Respondent's misconduct is akin to that in *In re Morse* (1995) 11 Cal.4th 184. In that case, the Supreme Court observed: "Morse, like any attorney accused of misconduct, had the right to defend himself vigorously. Morse's conduct, however, reflects a seeming unwillingness even to consider the appropriateness of his statutory interpretation or to acknowledge that at some point his position was

meritless or even wrong to any extent. Put simply, Morse went beyond tenacity to truculence." (*Id*. at p. 209.)

In support of its disbarment recommendation, the State Bar cited several cases, including *In re Crooks* (1990) 51 Cal.3d 1090 and *In re Aquino* (1989) 49 Cal.3d 1122. The court also views *In re Morse, supra*, 11 Cal.4th 184, as instructive. In that case, the attorney mailed to the public, over a period of more than four years, millions of unlawful misleading advertisements offering homestead filing services. In addition, the attorney's solicitations did not comply with the simple statutory disclosures required by section 17537.6. The attorney's failure to include the statutory disclosures was originally found to be the result of gross negligence. However, when the attorney disregarded a request from the California Attorney General's Office to stop mailing the unlawful advertisements, the attorney's misconduct was characterized as reckless or intentional. (*Id*. at pp. 195, 206.) There the attorney made "a net profit of $150,000 to $200,000" off of his misleading solicitations. (*Id*. at p. 209.) The attorney was placed on five years' stayed suspension and five years probation on conditions, including a period of three years' actual suspension and $170,000 in *cy pres* restitution.[4] (*Id*. at pp. 211-212.)

Respondent's false statements and misrepresentations where much more extensive than the misleading advertising in *Morse*. Respondent's misconduct resulted in substantially greater harm than the misleading advertising in *Morse*. Respondent's misconduct touched on more aspects of the practice of law than did the misconduct of the attorney in *Morse*. Plus, respondent knew, but did not disclose, that his misconduct exposed his potential customers/clients and his actual customers/clients to penalties, interest, criminal prosecution, and tax audits. (See *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 475.) In short, the court concludes that only disbarment will adequately protect the public, the courts, and the profession.

[4]If the attorney paid the entire $170,000 in restitution within two years, his actual suspension would be reduced from three years to two years. (*Id*. at pp. 211-212.)

VI. Recommended Discipline

The court recommends that respondent **EDUARDO MARMOLEJO RIVERA** be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

VII. Rule 955 & Costs

The court recommends that Rivera be ordered to comply with California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment

VIII. Order of Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that Eduardo Marmolejo Rivera be involuntary enrolled as an inactive member of the State Bar of California effective three days after the service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)).

Dated: March 7, 2006.

RICHARD A. PLATEL
Judge of the State Bar Court