

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
UNITED STATES IMMIGRATION COURT  
401 West A Street, Suite 800  
San Diego, California 92101**

Case No.: D20001-102

Date: May 8, 2002

In the Matter of

H. David SCHMERIN,

Respondent

**ATTORNEY DISCIPLINARY  
PROCEEDINGS**

**ON BEHALF OF THE RESPONDENT:**

Pro se

**ON BEHALF OF OGC-EOIR:**

Jennifer Barnes, Esquire  
Office of General Counsel  
Executive Office for Immigration Review  
5107 Leesburg Pike, Suite 2600  
Falls Church, Virginia 92101

**ORDER AND DECISION OF THE ADJUDICATING OFFICER**

On September 21, 2001, the Office of the General Counsel for the Executive Office for Immigration Review (OGC-EOIR) filed a petition for immediate suspension of the respondent with the Board of Immigration Appeals (Board) pursuant to 8 C.F.R. § 3.103(a)(1) (2001). OGC-EOIR requested that the Board immediately suspend the respondent from practice before the Board and the Immigration Courts. In support of the petition, OGC-EOIR filed a Notice of Intent to Discipline pursuant to 8 C.F.R. §§ 3.102(e)(1) and (h) (2001), a preliminary inquiry report, conviction documents, and an order of suspension issued by the Review Department of the State Bar of California dated February 2, 2002. OGC-EOIR alleges that on February 2, 2001, the respondent was convicted of violating California Penal Code (CPC) section 496(a) for receiving stolen property for which he was sentenced to 30 days in jail, three years probation, restitution in the amount of \$1,000, and 250 hours of community service. Subsequently, on April 2, 2001, the State Bar of California placed the respondent on an interim suspension pursuant to California Rules of Court 951(a). Based on the conviction and the suspension, OGC-EOIR alleges that the respondent has violated the Rules and Procedures of Professional Conduct for Practitioners, in particular, 8 C.F.R. §§ 3.102(e)(1) and (h), for being subject to an interim order of suspension and having pled guilty to a serious crime. OGC-EOIR contends that the respondent should be disciplined for his violations unless he demonstrates by clear and convincing evidence that an exception applies pursuant to 8 C.F.R. § 3.103(b)(2).

On September 28, 2002, the Immigration and Naturalization Service (Service) filed a motion for reciprocal discipline. It requests that any discipline imposed on the respondent

restricting his authority to practice before the Board also apply to his authority to practice before the Service pursuant to 8 C.F.R. § 3.105. The Service also filed a motion to broaden the scope of the petition for immediate suspension. The Service moves to join in this action and requests that the Board broaden the scope of the immediate suspension so that it also applies to the respondent's authority to practice before the Service.

On October 4, 2001, OGC-EOIR filed a Notice of Service notifying the Board that a Notice of Intent to Discipline had been filed pursuant to 8 C.F.R. § 3.105(a) and indicating that the respondent had thirty days to answer to the Board.

On October 29, 2001<sup>1</sup>, the Board granted OGC-EOIR's request for immediate suspension from the practice of law before the Board, Immigration Courts, and Service pending the final disposition of proceedings. The decision was based on evidence of the theft conviction and order of suspension from the State Bar of California. The Board directed the respondent to notify clients with cases currently pending before the Board, the Immigration Courts, or the Service.

On November 9, 2001, the respondent filed a request for a hearing to dispute the allegations in the Notice of Intent to Discipline and to offer evidence in mitigation in order to show that disciplinary action less than that imposed by the State Bar should be taken. The respondent denies that he pled guilty and asserts that he entered a plea of *nolo contendere* to a misdemeanor. He claims that he did not commit the acts alleged but entered a plea to "avoid the risk associated with the criminal trial and because, respondent, mistakenly believed that the State Bar of California, was bound by the rule to deny his culpability in subsequently [sic] civil or administrative proceeding."

On November 21, 2001, the Board notified the respondent that his case had been forwarded to the Office of the Chief Immigration Judge (OCIJ) whereby an Immigration Judge would be appointed as an "adjudicating official."

On December 18, 2001, the OCIJ notified Immigration Judge Fernandez that he had been designated as the "adjudicating official" for these proceedings.

On February 5, 2002, a pretrial telephonic hearing was held in order to delineate the issues before the Court. The Court initially confirmed with the respondent that he wanted to represent himself. Respondent stated that he did not want time to retain a lawyer and would represent himself. OGC-EOIR asserted that it seeks to indefinitely suspend the respondent for a minimum of one year after which time he may petition the Board for reinstatement. The respondent indicated that he desired to show that full restitution had been made to the victim and that mitigating factors will establish that he should only be suspended for a year or less. His offer of proof as to mitigating factors is a special agent of the secret service who has knowledge

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<sup>1</sup>Amending its October 12, 2001 order.

of the circumstances surrounding the underlying criminal conviction. OGC-EOIR indicated its objection to any attempt to go behind the conviction and retry the criminal case and its ultimate concern about the need for a full hearing or evidentiary witnesses. The respondent contended that he does not intend to re-litigate the criminal case but only to show that full restitution was made and that he deserves a suspension of less than one year. The Court allowed OGC-EOIR until March 7, 2002 to file a pretrial brief to address issues in the case including updating the record regarding the proceedings before the California State Bar. The respondent was allowed until April 8, 2002 to submit a pretrial brief with copies of any evidence he wished the Court to consider, including written declarations of any witnesses that he would call, in order for the Court to determine if there was a need for further evidentiary hearings on the issues.

On March 5, 2002, OGC-EOIR filed its pre-hearing statement in which it reiterates its request to have the respondent disciplined based on his conviction for a serious crime under 8 C.F.R. §§ 3.103(b) and 3.102(b). OGC-EOIR also provided information updating the status of the respondent's disciplinary proceedings with the State Bar. According to OGC-EOIR, on October 10, 2001, the Supreme Court of California accepted the respondent's resignation from the State Bar with charges pending. OGC-EOIR seeks the respondent's indefinite suspension from practice before the Board, the Immigration Courts, and the Service in light of having pled *nolo contendere* to and having been convicted of violating CPC § 496(a). It asserts that the remaining issue, as the conviction has been established, is what sanction should be imposed upon the consideration of any aggravating or mitigating factors presented. OGC-EOIR cites to the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1991 edition) (Standards) as an authority used by courts to discipline attorneys. OGC-EOIR suggests that as per Rule 3.0 of Standards, in imposing sanctions after a finding of lawyer misconduct, a court should consider such factors as the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors. OGC-EOIR goes on to list examples of such aggravating and mitigating factors. OGC-EOIR recommends that the respondent be indefinitely suspended. As such he will be eligible to petition the Board for reinstatement after one year. The petition may only be granted if he meets the definition of attorney pursuant to 8 C.F.R. § 1.1(f) and he can demonstrate that he possesses the moral and professional qualifications required to appear before the Board, the Immigration Courts, and the Service pursuant 8 C.F.R. § 3.107(b)(2).

The respondent did not file his pretrial statement, brief, or copies of any documents, declarations, etc., that he intended to submit.

On April 19, 2002, this Court ordered *sua sponte* that the respondent's filing deadline be extended until April 30, 2002. The Court advised the respondent that if he failed to submit his pre-hearing statement, evidence, and witness declarations by the extended deadline, the Court may consider the evidentiary record closed, admit all of the documents already in the file as evidence, and, without further hearing, render a decision adjudicating all matters in the case.

On May 2, 2002, OGC-EOIR filed a motion requesting that, in light of the respondent's failure to comply with the Court's order, the Court proceed with the case and issue an order placing the respondent on indefinite suspension.

To date, the respondent has not filed anything in response to the Court's orders.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the record, the Court finds that the respondent has been given an opportunity to present his evidence and has not done so. He has also failed to present an explanation as to why he has not presented any evidence to support his position. Therefore, the documents submitted by OGC-EOIR will be admitted as evidence and the evidentiary record is closed. The Court will now make the following findings of fact and conclusions of law.

An adjudicating official may impose disciplinary sanctions against any practitioner if he finds that such person has engaged in criminal, unethical, or unprofessional conduct. 8 C.F.R. § 3.101(a). A practitioner shall be subject to disciplinary sanctions in the public interest if he has been found guilty of or pled *nolo contendere* to a serious crime<sup>2</sup> in any court of the United States. 8 C.F.R. § 3.102(h). In matters concerning criminal convictions, a certified copy of the court record, docket entry, or plea shall be conclusive evidence of the commission of the crime in any summary disciplinary proceedings based thereon. 8 C.F.R. § 3.013(b)(1). In rendering a decision, the adjudicating official shall consider the following: the complaint, the preliminary inquiry report, the Notice of Intent to Discipline, the answer and any supporting documents, and any other evidence presented at the hearing. 8 C.F.R. § 3.106(a)(1)(iv). Counsel for the government shall bear the burden of proving the grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline by clear, unequivocal, and convincing evidence. *Id.* If the adjudicating officer finds that one or more of the grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline have been established, he shall rule that the disciplinary sanctions set forth in the Notice of Intent to Discipline be adopted, modified, or otherwise amended. 8 C.F.R. § 3.106(b).

It has been established that on December 6, 2000, the respondent pled *nolo contendere* to violating CPC § 496(a) for receiving stolen property. The respondent was found guilty and convicted on that same date to count three of a three count information. Count three involved the receipt or concealment of a check for \$38,406.54, knowing said check to be stolen. The respondent was sentenced to serve 30 days in jail, three years probation, pay a restitution fine in

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<sup>2</sup>A serious crime is defined as "any felony and also includes any lesser crime, a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves...misrepresentation, fraud,...deceit, dishonesty, bribery, extortion, misappropriation, theft, or and attempt, or a conspiracy or solicitation of another, to commit a serious crime." 8 C.F.R. § 102(h).

the amount of \$1,000, and complete 250 hours of community service. *See* Minute Order for the Superior Court of California, County of Los Angeles for Case No. BA200715. It appears, from the minutes submitted by OGC-EOIR, that the respondent paid \$38,000 in restitution as of December 6, 2000. The offense of receiving stolen property qualifies as a "serious crime" under 8 C.F.R. § 102(h) as it involves knowingly receiving property that has been stolen or obtained through theft or extortion. *See* CPC § 496(a). It has also been established that on April 2, 2001, the respondent was suspended from the practice of law by the State Bar of California pending final disposition of disciplinary proceedings since he was convicted of violating CPC § 496(a). *See* Review Department of the State Bar Court in Bank. The respondent subsequently admitted, and the OGC-EOIR confirmed, that on October 10, 2001 the Supreme Court of California accepted his resignation from the Bar with all charges pending. Thus, the Court finds that the respondent is subject to discipline for having been found guilty of, and having pled *nolo contendere*, to a serious crime under 8 C.F.R. § 3.102(h).

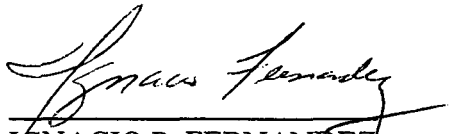
OGC-EOIR has recommended that the respondent be indefinitely suspended from practice before the Board, the Immigration Courts, and the Service with permission to petition the Board for reinstatement after one year and upon showing that he meets the definition of attorney under 8 C.F.R. § 1.1(f) and can demonstrate by clear, unequivocal, and convincing evidence that he possesses the moral and professional qualifications required to appear before the Board, the Immigration Courts, and the Service pursuant to 8 C.F.R. § 3.107(b). The respondent has not submitted any evidence with this Court to show any mitigating factors that warrant the imposition of a lesser penalty. The Court finds that the recommended penalty is a just one and will adopt it pursuant to 8 C.F.R. § 3.106(b). Accordingly,

**ORDER**

**IT IS ORDERED** that the respondent be indefinitely suspended from practicing before the Board, the Immigration Courts, and the Service;

**IT IS FURTHER ORDERED** that the respondent be eligible to petition the Board for reinstatement after one year from the date of this order;

**IT IS FURTHER ORDERED** that reinstatement by the Board may only be granted if the respondent can show that he is an attorney as defined in 8 C.F.R. § 1.1(f) and can demonstrate by clear, unequivocal, and convincing evidence that he possesses the moral and professional qualifications required to appear before the Board, the Immigration Courts, and the Service pursuant to 8 C.F.R. § 3.107(b).

  
IGNACIO P. FERNANDEZ  
Adjudicating Officer

cc: Respondent  
Ms. Barnes for OGC-EOIR  
Mr. Balasquide for the Service