UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT

IN THE MATTER OF	:	**IN ATTORNEY DISCIPLINE PROCEEDINGS**
Melvin DUKE	:	**Case #D2007-312**
RESPONDENT	:	

BEFORE: Jeffrey L. Romig
United States Immigration Judge

CHARGES: **8 C.F.R. 1003.102(e)(1); 8 C.F.R. 1003.102(f); 8 C.F.R. 1003.102(l)**

OGC/DHS REQUEST: Expulsion from practice before the Board, Immigration Courts, and DHS, pursuant to **8 C.F.R. § 1003.101(a)(1)**

APPEARANCES

ON BEHALF OF RESPONDENT:

Pro se

ON BEHALF OF EOIR OFFICE OF GENERAL COUNSEL:

Scott Anderson, Esq.
Deputy Bar Counsel
Jennifer J. Barnes, Esq.
Bar Counsel

MEMORANDUM OF DECISION AND ORDER

On May 22, 2008, an Attorney Disciplinary Proceeding was conducted in the above cited matter at the Immigration Court in New York, New York, before the undersigned Immigration Judge.[1] This Decision and Order will address the charges against, and the discipline to be imposed on, the Respondent attorney, Melvin Duke.

I. Procedural History

On December 11, 2007, the Executive Office for Immigration Review ("EOIR"), Office of General Counsel ("OGC"), filed a Petition for Immediate Suspension and a Notice of Intent to Discipline ("NID") against the Respondent. The purpose of the NID was to initiate summary reciprocal disciplinary proceedings based on an April 10, 2000, disbarment order from the New York Supreme Court, Appellate Division, Second Judicial Department. The Notice also charged the Respondent with misconduct under **8 C.F.R. 1003.102(f)**, and proposed the Respondent's expulsion from practice before EOIR. On December 21, 2007, the Department of Homeland Security ("DHS") joined the case and requested that any order restricting the Respondent's right to practice before EOIR also apply to DHS.[2]

On January 8, 2008, the Board of Immigration Appeals ("BIA" or "the Board") issued an order suspending the Respondent from practicing before the Board, the Immigration Courts, and DHS. On January 23, 2008, the Respondent filed a motion to reconsider this order, which the BIA denied. The Respondent also requested a hearing on the charges in the NID, which was granted, and the record was forwarded to the Office of the Chief Immigration Judge for further

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[1]Appointed to hear this case by the United States Chief Immigration Judge. **8 C.F.R. 1003.106(a)(1)(i)**. The hearing was conducted by video conference, with the parties present at the Immigration Court in New York City, and the undersigned Immigration Judge sitting in York, Pennsylvania.

[2]The DHS was represented in this matter by Eileen M. Connolly, Appellate Counsel.

proceedings.[3] At a pre-trial conference on March 21, 2008, the respondent was advised of his right to counsel in the instant proceedings. He elected to represent himself.

Specifically, the Respondent has been charged with the following:

> **Charge I**: The Respondent, having been subject to a final order of disbarment in a state where he was previously admitted to practice law, is subject to disciplinary sanctions in the public interest under **8 C.F.R. 1003.102(e)(1)** and **1003.103(b)**.
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> **Charge II**: The Respondent knowingly or with reckless disregard made a false or misleading communication about his qualifications to serve as a practitioner before the Board and the Immigration Courts in violation of **8 C.F.R. 1003.102(f)**.
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> **Charge III**: The Respondent repeatedly failed to appear for scheduled hearings in a timely manner without good cause in violation of **8 C.F.R. 1003.102(l)**.

Each charge was accompanied by numerous allegations; in written answers, the Respondent admitted some, denied others, and provided explanations for allegations that he neither admitted nor denied. The Court has considered all allegations, the Respondent's answers, OGC's Statement of Facts and Law, the Respondent's Attorney Response, and all documentary evidence and testimony presented. The Court's decision and order now follow.

II. Statement of the Law and Findings of the Court

Disciplinary sanctions for practice before Immigration Courts and the BIA are governed by regulation. See **Subpart G– Professional Conduct for Practitioners– Rules and Procedures, 8 C.F.R. 1003.101 et. sequel**. The grounds for the imposition of disciplinary sanctions are found at **8 C.F.R. 1003.102**:

> "It is deemed to be in the public interest for an adjudicating official or the Board to impose disciplinary sanctions against any practitioner who falls within one or more of the categories enumerated in this section, but these categories do not constitute the exclusive grounds for which disciplinary sanctions may be imposed in the public interest..."

Persons who violate their professional duties can face disciplinary sanctions to include

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[3]The BIA also granted OGC's Motion for Leave to File an Additional Disciplinary Charge, which was subsequently filed by OGC on February 5, 2008.

reprimand, suspension or expulsion. After a hearing is conducted by an Immigration Judge, the regulations at **8 C.F.R. 1003.106(b)** provide the following with regard to the decision:

> The adjudicating official shall consider the entire record, including any testimony and evidence presented at the hearing and, as soon as practicable after the hearing, render a decision. If the adjudicating official finds that one or more of the grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline have been established by clear, unequivocal and convincing evidence, he or she shall rule that the disciplinary sanctions set forth in the Notice of Intent to Discipline be adopted, modified, or otherwise amended.

As noted above, OGC has filed three disciplinary charges against the Respondent. The Court now **SUSTAINS** all three charges, and will address each separately, below.

a. Charge 1

Charge 1 provides as follows: "The Respondent, having been subject to a final order of disbarment in a state where he was previously admitted to practice law, is subject to disciplinary sanctions in the public interest under **8 C.F.R. 1003.102(e)(1)** and **1003.103(b)**."

8 C.F.R. 1003.102 states that a practitioner who falls within one of the categories listed in that section "shall be subject to disciplinary sanctions in the public interest." Specifically, **8 C.F.R. 1003.102(e)(1)** subjects to disciplinary sanctions any attorney who "is subject to a final order of disbarment or suspension, or has resigned with an admission of misconduct in the jurisdiction of any state, possession, territory, commonwealth, or the District of Columbia, or in any Federal court in which the practitioner is admitted to practice." The provisions at **8 C.F.R. 1003.103(a)** and **(b)** describe the steps that OGC and the BIA must take to immediately suspend from practice, through summary disciplinary proceedings, any practitioner who has been disbarred or suspended on an interim or final basis.

The Respondent does not dispute that on April 10, 2000, he was issued a disbarment order from the New York Supreme Court, Appellate Division, Second Judicial Department, barring him from practice in the state of New York. The opinion from the Supreme Court of the State of New York reflects that the Respondent was found to have: 1) negligently misappropriated trust funds; 2) commingled trust and personal funds; 3) improperly drew an

escrow account check to cash; 4) failed to maintain required attorney records; and 5) failed to cooperate timely with state disciplinary authorities. The Court concluded its opinion by stating that the Respondent "is guilty of conversion and other serious acts of professional misconduct which warrant his disbarment." Disbarment leads to a presumption of disciplinary sanctions under **8 C.F.R. 1003.102(e)(1)**, unless the disciplined attorney can rebut the presumption of summary discipline:

> by demonstrating by clear, unequivocal, and convincing evidence that: the underlying disciplinary proceeding was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; there was such an infirmity of proof establishing the attorney's professional misconduct as to give rise to the clear conviction that the adjudicating official could not, consistent with his or her duty, accept as final the conclusion on that subject; or the imposition of discipline by the adjudicating official would result in grave injustice. **8 C.F.R. 1003.103(b)(2)(i), (ii), (iii).**

The Respondent has not rebutted this presumption by clear, unequivocal and convincing evidence. As OGC notes in their Statement of Law and Facts, "These regulatory factors reflect the holding in the U.S. Supreme Court's seminal case on the standards to be followed by federal courts when imposing reciprocal discipline based on a state court of disbarment." **Selling v. Radford, 143 U.S. 46, 51 (1917).** OGC also correctly observes that the Supreme Court's conclusions in **Selling** were ultimately adopted by the BIA and applied to the BIA's own disciplinary proceedings.[4]

The Respondent testified at the instant disciplinary hearing that he made "no secret" of his disbarment in New York, as this was a matter of public record since April 2000. OGC apparently did not learn of the Respondent's New York disbarment until it started these proceedings in December 2007. However, as will be discussed below, the respondent had the

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[4] "If [the Service] concludes that minimum procedural due process was afforded in the hearing of claims in [the state suspension] proceedings and that the evidence against respondent was minimally sufficient, reliance on the state decision-making process is not improper. Indeed, the propriety of reliance is enhanced... by the fact that the Board of Immigration Appeals is not a court of general jurisdiction, but the intended repository of a relatively narrow expertise. Relitigation before the Board of matters of state or even constitutional law previously litigated before a state supreme court thus seems particularly inappropriate. The state decision-making process, then, both in its weighing of evidence in the record and in its analysis of legal questions raised, may, if conducted in accordance with procedural due process and not patently erroneous in its result, be accepted and adopted by the Board in the course of a suspension proceeding." **Matter of Bogard, 15 I. & N. Dec. 552, 561 (BIA 1975, AG 1976).**

opportunity, indeed the obligation, to notify EOIR of the disbarment every time he entered an appearance before the Board or in an Immigration Court. He did not submit as evidence any Entry of Appearance Form (EOIR-27; EOIR-28) in which he disclosed his disbarment in New York. On the other hand, OGC has presented copies of 33 Forms EOIR-27/28, filed by the Respondent between September 2005 and August 2007, in which the respondent failed to disclose his disbarment in New York.

The requirement that an attorney disclose his disbarment in the Entry of Appearance Form, even where he has a valid law license in a separate jurisdiction, is not an unsettled issue. In **Matter of Sparrow, 20 I. & N. Dec. 920, 930 (BIA 1994),** the Board stated: "We conclude that an attorney filing a Form G-28[5] does have a duty to disclose disciplinary actions or other restrictions on his practice of law in the bars of courts in jurisdictions other than those in which he claims to be in good standing."

I do not consider the imposition of discipline against the respondent to amount to a "grave injustice," under circumstances where he must bear responsibility for failing to notify EOIR of the New York disbarment, and in a context where EOIR officials, of necessity, must rely upon counsel's representations as to his qualifications in the Entry of Appearance Form. **Id. at 931.** Moreover, there is a certain irony that the EOIR disciplinary proceedings were not initiated until the respondent was eligible to request reinstatement in New York. Here again, the delay is attributable to the Respondent's misconduct in failing to notify EOIR of his disbarment.

The record reflects that the New Jersey bar authorities became aware of the respondent's disbarment in New York in a timely fashion. The New Jersey bar authorities elected not to disbar the Respondent, due to the conclusion that if the respondent's violation of regulations regarding escrow accounts had occurred in New Jersey, he would not have been disbarred. The New Jersey bar authorities decided only to reprimand the Respondent, and he used his New Jersey bar membership as the basis for his subsequent entries of appearance in EOIR proceedings.

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[5]The holding in this case is also extended to Forms EOIR27/28, which are virtually identical to the previous Form G-28. **Matter of Sparrow, supra, at 931-32.**

However, I do not consider the decision of the New Jersey bar authorities as a basis to diminish the discipline imposed against the Respondent in the instant proceedings. The regulations plainly provide that a person no longer qualifies as an attorney if he is "under any order of any court . . . disbarring him . . . in the practice of law." **8 C.F.R. 1001.1(f); Matter of Sparrow, supra, at 930.** The imposition of reciprocal discipline arising out of the New York disbarment appears warranted in the respondent's case, and he has not established a "grave injustice" resulting from the reciprocal discipline, where he repeatedly failed to disclose his disbarment in New York to EOIR officials. Accordingly, Charge 1 has been sustained by clear, unequivocal, and convincing evidence.

b. Charge 2

Charge 2 provides as follows: "The Respondent knowingly or with reckless disregard made a false or misleading communication about his qualifications to serve as a practitioner before the Board and the Immigration Courts in violation of the Rules at **8 C.F.R. 1003.102(f).**"

8 C.F.R. 1003.102(f) subjects to discipline any attorney who, "knowingly or with reckless disregard makes a false or misleading communication about his or her qualifications or services. A communication is misleading if it: contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or, contains an assertion about the practitioner or his or her qualifications or services that cannot be substantiated." **Id.**

This particular charge arises because the Respondent filed at least 33 Forms EOIR-27/28 in which he indicated that he was an attorney in good standing with the New Jersey Supreme Court. The Respondent did not indicate that he had been disbarred in New York, failing in each instance to check the box asking whether he was "subject to any order of any court or administrative agency disbarring, suspending, enjoining, restraining, or otherwise restricting [him] in the practice of law." **See Attachments 2a-2gg, NID.** The Respondent explained in his Answer that he believed the form did not require him to report his New York disbarment, as he was still permitted to practice in New Jersey. As noted above, the issue of whether an attorney with a valid license in one jurisdiction, has a duty to disclose a disbarment in a separate

jurisdiction, was resolved by the Board in **Matter of Sparrow, supra**.

Moreover, the respondent's explanation for failing to disclose his New York disbarment was not persuasive. He stated that he had not read over the Forms EOIR-27/28, so as to familiarize himself with the contents of these forms. He claimed that he believed his valid bar membership in New Jersey sufficed for his continued entries of appearance in EOIR proceedings, following his disbarment in New York. He added that he was unaware of the definition of "attorney" at **8 C.F.R. 1001.1(f)**, simply because he had not read the back of the Forms EOIR-27/28 which he submitted.

I need not reach the issue of whether the Respondent's repeated failure to disclose his New York disbarment in the Forms EOIR-27/28 was done wilfully. **Cf. Matter of Sparrow, supra, at 932** (attorney with valid law license in New York and California "willfully and falsely represented that he was an attorney within the meaning of **8 C.F.R. 1.1(f)** when he concealed that he had been suspended from the practice of law in Maryland . . ."). The respondent's admitted negligence in completing and signing the Forms EOIR-27/28, while omitting his New York disbarment, compels the conclusion that he made misleading communications about his qualifications in a manner that constitutes, at a minimum, "reckless disregard." **8 C.F.R. 1003.102(f)**. A law student or accredited representative seeking to enter an appearance would have to read the Forms EOIR-27/28 in their entirety, as well as the accompanying regulations, to verify his or her eligibility to represent an alien in removal proceedings. An attorney is subject to a higher standard of due diligence in completing and signing the Entry of Appearance. The Form itself provides that the attorney's signature "constitutes a representation . . . that he is authorized and qualified to represent individuals" in removal proceedings. By any objective standard, an attorney who has been disbarred, but repeatedly files the Form EOIR-27/28 without disclosing the disbarment, has made a misleading communication about his qualifications with reckless disregard for the integrity of the EOIR process.

As for this Respondent, he admittedly was disciplined by New York Bar authorities in April 2000 for his failure to familiarize himself with regulations regarding escrow accounts. He accordingly is not in a proper position to argue that his failure to complete the Form EOIR-27/28 with due diligence should be excused. By failing repeatedly to indicate that he was disbarred in

New York, the Respondent is subject to discipline pursuant to **8 C.F.R. 1003.102(f)**. Accordingly, Charge 2 has also been sustained by clear, unequivocal, and convincing evidence.

c. Charge 3

The final charge provides as follows: "The Respondent repeatedly failed to appear for scheduled hearings in a timely manner without good cause in violation of **8 C.F.R. 1003.102(l)**." This charge arises out of specific allegations related to the case of Francisco Avila. The Respondent was retained to represent Mr. Avila, and on July 21, 2006, he filed with the Immigration Court in York, Pennsylvania, the Form EOIR-28 entering his appearance. The Respondent, again, has not seriously contested that he failed to appear for scheduled hearings in Mr. Avila's case on numerous occasions. His explanation for the failures to appear was that he only agreed to represent Mr. Avila on a temporary basis, primarily to obtain a bond. After Mr. Avila was released on bond, and venue was changed to the Immigration Court in New York, the Respondent said he believed no attorney-client relationship existed and, to the best of his knowledge, Mr. Avila was seeking other counsel. The Respondent also suggested, remarkably, that his duty had been to assist Mr. Avila's employer, rather than Mr. Avila directly.

Once an attorney files a Form EOIR-28, he remains attorney of record, until or unless his withdrawal or substitution is permitted by an Immigration Judge, upon oral or written motion. **8 C.F.R. 1003.17.** Additionally, the BIA has explicitly recognized that "under the regulations, there is no 'limited' appearance of counsel in immigration proceedings." **Matter of Velasquez, 19 I. & N. Dec. 377, 384 (BIA 1986).** Notwithstanding the Respondent's explanation that he thought he was only responsible for the bond hearing, his filing of the Form EOIR-28 in Mr. Avila's case made him the attorney of record for all subsequent hearings, unless he withdrew with express permission of an Immigration Judge.

The Respondent's explanation for his "limited appearance" on behalf of Mr. Avila was, once again, that he was unaware that such appearances are proscribed by the Form EOIR-28, because he had not read it. He was also unaware of the citation to **Matter of Velasquez, supra**, on the back of the Form EOIR-28. The Respondent stated further that part of his problem in

representing Mr. Avila was that the Respondent could not ethically prepare an asylum request on behalf of Mr. Avila, because he was a citizen of Ecuador. Yet, the record reflects that the respondent indicated at a hearing in York on July 21, 2006, that the respondent would be requesting asylum. The Respondent repeated this claim at a hearing in New York City on January 24, 2007. The Respondent had failed to appear for a prior hearing in New York on September 27, 2006. Thus, the Respondent had more than 6 months to meet with his client and determine whether asylum was appropriate relief for Mr. Avila. However, the Respondent indicated at the hearing on January 24, 2007, that Mr. Avila would be requesting asylum, and that the Respondent needed more time to prepare the application.

Mr. Avila was ordered removed in absentia after he and the Respondent did not appear for a hearing on April 25, 2007; notice had been mailed to the Respondent as the attorney of record. The Respondent filed a motion to reopen on behalf of Mr. Avila, which was granted.

On August 17, 2007, an Immigration Judge in New York City issued a specific decision, in reply to the Respondent's belated motion to withdraw in Mr. Avila's case. Although the Respondent's motion to withdraw was dated June 21, 2007, it was not received at the Court in New York City until August 15, 2007. The Immigration Judge's interim order set forth certain conditions, including that the Respondent discuss Mr. Avila's case with any new attorney who agreed to represent him, before the Respondent would be permitted to withdraw. The Respondent failed to appear for the next hearing on November 7, 2007, and Mr. Avila had not obtained new counsel. The Respondent's numerous failures to appear resulted in a protracted proceeding for what ought to have been a straightforward case.

In **Matter of Deanda, 17 I. & N. Dec. 54 (BIA 1979; AG 1979),** the Board held that an attorney who filed to appear for two successive hearings so that his client could apply for discretionary relief was subject to a 6-month suspension, based on the attorney's unexplained failures to appear. The Respondent here failed to appear for five hearings in Mr. Avila's case. The in absentia order against Mr. Avila was rescinded, apparently because an Immigration Judge was satisfied that the Respondent was genuinely confused about receipt of two different hearing notices for Mr. Avila's case. In any event, the Respondent has not offered "good cause" for the hearings he missed in Mr. Avila's case on the following dates: September 27, 2006; June 13,

2007; August 1, 2007; and November 7, 2007.

The Respondent's business trips to Guyana during 2007 do not constitute good cause for his numerous failures to appear in Mr. Avila's case. His repeated trips to Guyana, for which he would stay as long as 1 month outside the United States, would appear to impact adversely his ability to represent aliens in removal proceedings in New York City. In any event, such travel without prior notice to the Immigration Judge that he could not attend a scheduled hearing is not excusable, particularly where the Respondent has shown a fundamental misunderstanding as to his duty to his client and the Immigration Court regarding the necessity to appear for all scheduled hearings. Moreover, the record reflects that the respondent's travel to Guyana was offered as a defense to the charges that the New York disciplinary authorities brought against him in 1999. He therefore had prior knowledge of the importance of limiting his foreign travel so that it would not interfere with his practice of law in New York. The third and final charge has been sustained by clear, unequivocal, and convincing evidence.

III. Sanction

There are sympathetic factors in the Respondent's case. He indicated that he has five children to support, including two who are attending college. He also advised that he needs his law practice, which has been 95% an immigration law practice in the past few years, to support his family and pay his mortgage. The Respondent also expressed remorse for his disciplinary violations, and he requested that the sanction imposed be limited to a 6-month suspension.

However, considering that all three charges have been sustained, the Court will adopt the recommended discipline of the OGC and order the respondent's expulsion from the practice of law before EOIR and DHS. The respondent's misconduct is commensurate with that of other practitioners who have been ordered expelled. **See Matter of Ramos, 23 I. & N. Dec. 843 (BIA 2005); Matter of Gadda, 23 I. & N. Dec. 645 (BIA 2003)**. The Court does not enter this order lightly, but after having considered the cumulative effect of the sustained charges, my conclusion is that the Respondent's misconduct is egregious in nature and warrants expulsion.

As a practical matter, the Respondent cannot qualify as an "attorney" as long as he is subject to the disbarment order from the Supreme Court of the State of New York. **Matter of Ramos, supra, at 846**. Notwithstanding the disbarment in New York, the respondent became eligible to apply for reinstatement there, 7 years after he had been disbarred. **See Matter of Truong, 24 I. & N. Dec. 52 (BIA 2006).** He advised that he did apply for reinstatement in New York, but has not indicated whether that request was approved. He will only be eligible to apply for reinstatement before EOIR and DHS if he can demonstrate that he qualifies as an "attorney" under **8 C.F.R. 1001.1(f)**, and after 1-year has elapsed from the Board's January 8, 2008, order of suspension. **8 C.F.R. 1003.107(b)**.

IT IS SO ORDERED.

June 30, 2008
Date

Jeffrey L. Romig
Immigration Judge
York, Pennsylvania

CERTIFICATE OF SERVICE

This Memorandum of Decision and Order on Case D #2007-312 was served on the following persons in the manner so noted on this the 30th day of June, 2008:

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