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

In the Matter of:

T. Anthony Guajardo, pro se

Case No: D2008-174

IN DISCIPLINARY PROCEEDINGS

ON BEHALF OF RESPONDENT:
T. Anthony Guajardo
2001 E. Campbell, Suite 202
Phoenix, Arizona

ON BEHALF OF THE GOVERNMENT:
Jennifer J. Barnes
Chief Disciplinary Counsel
Office of the General Counsel
5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

Eileen M. Connolly
Appellate Counsel
U.S. Immigration and Customs Enforcement
Department of Homeland Security
5201 Leesburg Pike , Suite 1300
Falls Church, VA 22041

ORDER OF THE IMMIGRATION JUDGE

ORDER: It is hereby ordered that:

[x] 1. The certain of the ground under **8 C.F.R. § 1003.102(l)** set forth in the Notice of Intent to Discipline have been established by clear, convincing, and unequivocal evidence. Any remaining grounds set forth in the Notice of Intent to Discipline have not been established by clear, convincing, and unequivocal evidence and are, hereby, dismissed.

The following disciplinary sanction shall be imposed:

[x] Practitioner shall be suspended from practice before:

[ ] The Board of Immigration Appeals and the Immigration Courts
[ ] United States Citizenship and Immigration Services
[x] Both
Until **6 months -but stayed pending remedial opportunities for respondent as explained in Final Order**

[x] Practitioner shall be **publically** censured

See Final Order of Discipline attached.

Jack W. Staton
Adjudicating Official - United States Immigration Judge
December 2, 2009

APPEAL: WAIVED/RESERVED
APPEAL DUE BY:
EOIR 45

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: **MAIL** (M) PERSONAL SERVICE (P)
TO: [x] PRACTITIONER [ ] PRACTITIONER'S ATT/REP [x] DHS/EOIR
DATE: 12/08/09 BY: COURT STAFF Lea Miner

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF IMMIGRATION JUDGE

Disciplinary Case No D2008-174

IN THE MATTER OF	)	
	)	**IN ATTORNEY DISCIPLINARY PROCEEDINGS**
T. Anthony GUAJARDO	)	**December 2, 2009**
Respondent	)	

On Behalf of the Respondent
T. Anthony Guajardo, *pro se*
2001 E. Campbell, Suite 202
Phoenix, AZ 85016

On Behalf of Executive Office for Immigration Review
Jennifer J. Barnes
Office of General Counsel
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

CHARGES: Failure to Appear for Hearings Without Good Cause, 8 C.F.R. 1003. 102(l)

DECISION AND ORDER Of ADJUDICATING OFFICIAL IMPOSING SANCTIONS

The respondent, T. Anthony Guajardo, is an attorney licensed to practice law in both Arizona and Texas. He is a 'practioner' within the meaning of 8 C.F.R. 1003.101(b). On September 2, 2008, the Executive Office for Immigration Review (hereinafter 'EOIR') began disciplinary proceedings against the respondent under 8 C.F.R. 1003.101 *et seq.* (Exhibit 1) The Department of Homeland Security filed a motion for reciprocal discipline as well. (Exhibit 2) The essence of the EOIR notice of intent to discipline (hereinafter 'NID') relates to failure of the respondent to attend certain immigration court hearings. The respondent does not dispute that he was not present for the hearings; rather, he explains that he had good reasons for failing to be present. Since the parties agree that he did not appear for the hearings, the parties were further able to agree that no transcribed hearing need be conducted. The question to be decided is whether his failures to appear are reasons for discipline in the totality of the circumstances. Thus, the parties agreed that the case could be decided upon the pleadings and papers of record. EOIR must prove the charges by clear and convincing evidence. 8 C.F.R. 1003.106(a)(2)(iv).

I. PROCEDURAL HISTORY

The NID (Exhibit 1) alleged three failures to appear, none of which the respondent seriously disputes. The NID alleged that the respondent failed to appear on December 6, 2006, for a hearing in the *Matter of Pereda-Garcia*, 98 298 277. It also alleged he failed to appear for a hearing on November 6, 2007, in the *Matter of Salas-Salas* 38 089 021. Similarly, the NID alleged that the respondent failed to appear for a hearing on July 9, 2008, in the *Matter of Cheskis*, 88 770 750.

EOIR lodged additional charges (Exhibit 4) in a filing of April 1, 2009, in which it alleged failures to appear on March 25, 2009, in the *Matter of Sanchez Macias*, 086 900 047, and on December 17, 2008, in the *Matter of Verdugo-Villalobos*, 089 814 450. These additional charges were further amended by a filing of April 13, 2009, (Exhibit 5) by repeating the allegations relating to *Sanchez Macias* and *Verdugo Villalobos*, and adding an allegation of a failure to appear on April 9, 2009, in the *Matter of Mendez* 088 767 513. The motion of EOIR to lodge additional charges, not having been objected to, is granted

At a pre-trial conference on June 19, 2009, EOIR withdrew the charges relating to *Verdugo-Villalobos*.

The following exhibits were received and are now admitted into the record. I have paginated each of them separately to make references to them more readily understandable.

EXHIBIT 1	Notice of Intent to Discipline ("NID)" having pages 1 to 92
EXHIBIT 2	DHS Motion for Reciprocal Discipline having pages 1 to 3
EXHIBIT 3	Respondent's Answer to NID having pages 1 to 45
EXHIBIT 4	Motion to Lodge Additional Charges having pages 1 to 21
EXHIBIT 5	Amended Motion to Lodge Additional Charges having pages 1 to 27
EXHIBIT 6	Respondent's Answer to Motions having pages 1 to 33
EXHIBIT 7	Affidavit of Anthony Guajardo having pages 1to 47
EXHIBIT 8	Government's Reply Brief having pages 1 to 29

II. FINDINGS OF FACT

The facts are essentially undisputed. The respondent admits all the factual allegations in the NID from paragraph one to paragraph 19. See Exhibit 3, page 1. He does not dispute that he was the attorney of record in each case, except that in *Matter of Salas Salas*, he says his client ended their relationship well before the hearing at issue. Likewise, the parties agree that the respondent did not attend a master calendar hearing on December 6, 2006, in the *Matter of Pareda Garcia*, 098 298 277. On November 6, 2007, he also failed to appear for a master calendar hearing in the *Matter of Salas-Salas*, 038 089 021. He was not present for a master calendar hearing of July 9, 2008, in the *Matter of Cabral Marquiz Cheskis,* 088 770 750.

Matter of Pareda Garcia

The respondent claimed since the initial contact by EOIR that he was not present at the hearing of December 6, 2006, because he was engaged in a jury trial matter. Exhibit 1, Attachment 1E, page 21. The respondent filed a last minute "expedited motion for continuance" dated December 5, 2006, in the immigration court because a criminal matter had just that day been set for hearing the next day, thus creating a conflict with his obligation to appear in immigration court. Exhibit 1, Attachment 1C, pp.14-15. His obligation to be in the criminal court is further shown in his affidavit, filed at the close of this discipline matter as his closing argument. Exhibit 7, pp. 12-14.

Matter of Salas-Salas

The respondent failed to appear for the master calendar hearing of November 6, 2007, after having filed a motion to withdraw on September 25, 2007. Exhibit 1, Attachment 2C, pp. 30-31. The immigration judge did not act on the motion in the intervening 41 days; the judge neither granted nor denied the motion until November 6, the day of the hearing, when the motion was denied. Neither the respondent nor his client attended the hearing, and the court ordered the client removed *in absentia*. Exhibit 1, Attachment 2D, page 33. The respondent notes that a motion to reopen the *in absentia* hearing was granted. However, the motion was filed pro se, not by this respondent, and was granted upon a finding of inadequate notice of hearing to the alien. Exhibit 8, Attachments 2H & 2I, pp. 22, 24-25.

Matter of Cheskis

The respondent explains that in the case of *Cheskis* he was in criminal court and thus unable to attend the immigration court hearing on July 9, 2008. To corroborate his claim, the respondent provided a Sentence of Imprisonment which shows proceedings on sentencing began in the Superior Court of Arizona on July 9, 2008, at 8:46 a.m. and ended at 8:55 a.m. Exhibit 3, page 6. The hearing in the Arizona court is further corroborated by an attachment to the respondent's Affidavit (Exhibit 7, pp15-16). EOIR does not dispute the respondent's claim and notes that the respondent filed an expedited motion for a continuance for that very reason on the day of hearing. Exhibit 1, Attachment 3D, page 51.

Matter of Sanchez Macias

On March 25, 2009, both the respondent and his client failed to appear for a master calendar hearing, and an *in absentia* order of removal was entered against the alien. Exhibit 4, Attachment 5B & 5C, pp.9,11. Also, Exhibit 5, Attachment 5B & 5C, pp. 9,11. While the respondent denies he failed to appear, he does not assert that he was present for the hearing. He explains that his client terminated his legal services several months prior to the scheduled hearing. However, the respondent does not claim he filed any motion to withdraw with the immigration court. He also asserts that his staff made a calendaring error and scheduled the matter on his own calendar for March 26, 2009. Affidavit of Claudia Uribe, Exhibit 7, Attachment 1, pp.23-24.

Matter of Mendez

Neither the respondent nor his client appeared for a master calendar hearing on April 9, 2009. The client was ordered removed *in absentia*. Exhibit 5, Attachment 7B & 7C, pp. 22,24. The respondent acknowledges receiving a notice of the hearing, but says it gave conflicting and confusing information. His notice of hearing is clearly stamped "THIS HEARING HAS BEEN RESCHEDULED TO A NEW HEARING DATE. PLEASE DISREGARD ANY PREVIOUS HEARING NOTICE." Exhibit 6, p. 26. The same notice has a handwritten note at the top of the page: "Individual hearing is still set for: September 27, 2010." The respondent says he filed a motion to reopen the matter.

III. ANALYSIS

Matters of Pareda-Garica and Matter of Cheskis

In the cases of *Paredes-Garcia* and *Cheskis*, I find that there is good cause to excuse the respondent's failure to appear. The evidence is that the respondent's scheduling conflicts arose suddenly, through no fault of his own. He was apparently informed at the last minute of a change in scheduling in the Arizona criminal court. He acted with dispatch by filing "expedited" motions to continue. He was caught between two courts. While he might have sent someone as a substitute, the immigration court is not bound to accept the substitute. Thus, the respondent's personal failure to attend the hearing would not be necessarily remedied by the substitute.

Further, I recognize that it is not uncommon for criminal courts and for immigration courts to double book cases. That policy can put attorneys at disadvantage. Immigration courts must necessarily be understanding in such cases. After all, the societal costs in the postponement of a jury trial can be higher, if for no other reasons than the compensation of jurors. The delay of an immigration proceeding is likewise of consequence. Yet, as between the two, the immigration court must yield, especially in this circumstance in which the immigration proceeding was a master calendar hearing. A master calendar hearing is generally a group hearing. Thus, the time slot allotted to the proceeding is not a total loss within the court docket because there are other cases to be heard at the master calendar, even if one or more respondents fails to appear. A jury trial, on the other hand, represents a large and expensive undertaking by the state. The comparative systemic damage to the immigration court system occasioned by the failure to appear as opposed to the damage to the criminal justice system for a failure to attend a jury trial augers in favor of attendance at the jury trial. I emphasize, however, that it is not ordinarily a comparative process. The respondent was simply caught between the proverbial rock and a hard place, where two courts simultaneously demanded his attendance. He was not wilfully disobedient to the immigration court. The circumstances forced him to choose between the courts, and he cannot be faulted for choosing as he did. Immigration courts, and all courts must be flexible. I find that the disciplinary charges as to these two matter must be dismissed.

The California Supreme Court cogently observed in *Arthur v. Superior Court of Los Angeles County*, 62 Cal.2d 404, 411, 42 Cal.Rptr. 441(1965):

> When an attorney fails to appear in court with his client, particularly in a criminal matter, the wheels of justice must temporarily grind to a halt. The client cannot be penalized, nor can the court proceed in the absence of counsel. Having allocated time for this case, the court is seldom able to substitute other matters. Thus, the entire administration of justice falters. Without judicious use of contempt power, courts will have little authority over indifferent attorneys who disrupt the judicial process through failure to appear. Nevertheless, to require attorneys always to be present when scheduled, without allowing any flexibility, would be unrealistic.

Of course, had it been shown that the respondent knew for some days prior to the immigration hearings that there was a conflict in his calendar, then the result would be different. *E.g., U.S. v. Smith*, 436 F.2d 1130 (9th Cir. 1970). In such a circumstance, the failure would rest squarely on counsel who knew of the conflict but did not undertake to remedy it in a timely fashion.

Matter of Salas-Salas

The respondent did not attend the hearing of November 6, 2007, because the alien had terminated their relationship. The respondent filed a motion to withdraw well in advance of the scheduled hearing. The immigration court did not rule on a relatively routine matter in more than 40 days. However, since the motion was not granted, the respondent was obliged to be present. He was the attorney of record, and the mere filing of the motion did not change that status.

The regulation applicable at the time of the filing of the E-28 provided:

> Withdrawal or substitution of an attorney or representative may be permitted by an Immigration Judge during proceedings only upon oral or written motion submitted without fee.
> 8 C.F.R.3.17(b) (2003)

Although a motion was submitted, the immigration judge had not acted on it, despite more than 40 days to do so. Consequently, the respondent was the attorney of record and required to present of the hearing. The mere filing of a motion does not excuse the attorney of record from appearing in the matter. *E.g., Hernandez-Vivas v. INS*, 23 F.3d 1557 (9th Cir. 1994);

Matter of Rivera, 19 I&N Dec. 688, 690 (BIA 1988); *Matter of Patel*, 19 I&N Dec. 260 (BIA 1985), *aff'd*, *Patel v. INS*, 803 F.2d 804(5th Cir. 1986).

In his response to EOIR's initial inquiry into his failure appear, the respondent said he was absent from the hearing because he was in another court on urgent business. He seems now to have abandoned that claim since he did not mention again nor argue the point. If it were a point he wanted to press, he nevertheless failed to corroborate it in the same easy way he corroborated his court appearances in *Matter of Pareda-Garcia* and *Matter of Cheskis*.

The respondent notes that a motion to reopen was granted, but that does not ameliorate his failure to appear. The motion to reopen was filed pro se by the alien and was granted because of the respondent's failure to adequately inform the alien of the hearing. Thus, I find that the respondent failed to appear without good cause in the *Matter of Salas-Salas* on November 6, 2007. That charge against the respondent is therefore sustained.

Matter of Sanchez-Macias

The respondent admits that he filed his E-28, Notice of Appearance as Attorney, etc, on September 3, 2008 in the *Matter of Sanchez Macias*, 086 900 047. He also admits that he was served with a notice of hearing on November 12, 2008, which set the case for hearing on March 25, 2009. The respondent disputes having failed to appear from the hearing of March 25, 2009, but it is clear that he did not attend that hearing. He explains that Mr. Sanchez Macias had terminated their relationship months earlier. However, the respondent does not assert that he had made any motion to withdraw from the case, nor does he claim the immigration judge entered an order allowing him to withdraw. He was therefore the attorney of record and duty bound to be in court. The rupture, if at all, of his relationship with his client did not obviate his duties to the immigration court. An attorney of record has two obligations: one to the court and one to the client. The obligations are different, and the severance of the attorney-client relationship is not tantamount to the severance of the court and counsel relationship.

The regulations in effect on the date the respondent filed his E-28 provided:

> Withdrawal or substitution of an attorney or representative may be permitted by an Immigration Judge during proceedings only upon oral or written motion submitted without fee. 8 C.F.R. 1003.17(b) (2008).

However, the respondent did not file any motion to withdraw. He plainly violated the regulation. Even if his claim is that his staff made a calendaring error, it is no good cause for his failure to appear. Cf: *Pretzel & Stouffer v. Imperial Adjusters, Inc.*, 28 F.3d 42, 45 (7th Cir. 1994) ("Mis-calendaring a date is certainly a plausible mistake, but it is the attorney's mistake and he and his client are responsible for the consequences."). *Also see, e.g., Hines v. Seaboard Air Line R.R. Co.*, 341 F.2d 229, 232 (2d Cir.1965) (plaintiff's attorney's failure to note the date of the hearing on plaintiff's Rule 60(b) motion, which resulted in plaintiff failing to appear at the hearing, constituted inexcusable neglect). Thus, I find that the respondent failed to appear without good cause in the *Matter of Sanchez-Macias* at the hearing of March 25, 2009. I also find that this failure to appear marked the second such failure to appear without good cause and brings him into the reach of 8 C.F.R. 1003.102(l) for having repeatedly failed to appear without good cause. In the assessment of sanctions, to be discussed below, I consider this failure to appear weighs particularly against the respondent since he was in disciplinary proceeding for failing to appear when he failed to appear in this matter.

Matter of Mendez

Regarding the charge concerning *Matter of Mendez*, the respondent acknowledges that he filed his E-28 on May 5, 2008. He denies, however, that he received notice of the hearing and denies that he failed to appear while agreeing that an *in absentia* order of removal was entered against Mr. Mendez. Again, it does not seem that the respondent is asserting that he attended this hearing. Additionally, he does not actually claim he did not receive the notice in question; rather he explains that he received a defective notice which on the one hand set the hearing for April 9, 2009, but also had a large hand-written notation that the "[I]ndividual hearing is still set for: September 27, 2010." Even so, that notice of hearing related to a master calendar hearing. The notation about the September hearing related to the merits or individual hearing. Certainly, the hand written notice provided clarification by noting, in effect, that the trial of the case would

take place on September 27, 2010, but that a pre-trial hearing (master calendar hearing) would be held on April 9, 2009. The notice of hearing would not be confusing to an immigration practitioner familiar with the lexicon of immigration proceedings, particularly one with the years of experience the respondent claims. I reject his claim that this was a confusing notice. Consequently, I find that the respondent failed to appear without good cause for a third time.

The respondent points out that the order *in absentia* in the *Matter of Mendez* was vacated upon a motion to reopen that he filed for his client. He did not attach a copy of his motion, and the decision of the immigration judge does not elucidate the reason the motion was granted. The mere granting of that motion, which would in effect excuse the alien's failure to appear, is not tantamount to excusing the respondent's failure to appear. The adjudication of a motion to reopen concerns itself with alien's explanation for the alien's absence. Section 240(b)(5)(C) INA. Thus, the adjudication of the motion to reopen does not operate as *res judicata* or issue preclusion, as the respondent's affiant, David Benavides reaches for in raising the doctrine of *stare decisis* in his arguments on the behalf of the respondent. Exhibit 7, pp. 42-43. Nor would it do so in the previously discussed *Matter of Salas-Salas*.

The respondent presses a number of defenses which basically allege he is the victim of disparate treatment by immigration judges in the Phoenix immigration court. He avers that this disparate treatment is on account of his own national origin and gender. He also says that formal complaints have been filed against the judges and has offered the affidavits related to those complaints to support his claim. He says his own lawyering skill has resulted in the reversal of one of the immigration judge's decisions, inciting the judge to retaliate against him. The respondent claims that other attorneys are granted continuances in the same circumstances in which he is denied such requests. These are all serious claims and may deserve inquiry, but this is not the forum for such, particularly if complaints against the judges have already been filed. There is a separate disciplinary process for complaints against immigration judges. See 8 C.F.R. 1003.109. Moreover, among the three cases in which I have determined that the respondent failed without good cause to appear, in only one did he file any motion for action by the

immigration judge prior to his failing to appear. Even if that particular failure were overlooked, the respondent has repeatedly–twice–failed to appear without good cause.

Respondent's defense also misses an important point axiomatic in everyday life: two wrongs do not make a right. Even if the respondent is right that he is the victim of disparate treatment, his remedy cannot be to ignore the ordinary rules of court. Regardless of the judge, the judge's temperament or feelings about him, the respondent is duty bound to appear for hearings. He cannot do wrong merely because he was wronged himself.

The respondent also protests that the disciplinary regulations do not define 'repeated' and therefore deny him due process. Even so, the word 'repeated' is a common word and should be interpreted in its conventional sense. *Zwick v. Freeman*, 373 F.2d 110, 115 (2nd Cir. 1967). Three failures to appear are "repeated" failures. *E.g.*, *U.S. v. Weyhrauch*, 548 F.3d 1237, 1239 (9th Cir.2008)(characterizing the government's three failed attempts to certify an appeal properly according to the jurisdictional requirements of 18 U.S.C. § 3731 as "repeated" failures); *O'Loghlin v. County of Orange*, 229 F.3d 871(9th Cir. 2000)(characterizing three post-bankruptcy violations of the ADA as "repeated"). *Todd Shipyards Corp. v. Secretary of Labor*, 586 F.2d 683, (9th Cir 1978)(characterizing three separate violations of OSHA standards as 'repeated' violations subjecting the employer to enhanced fines).

The respondent also complains that there are no standards for the granting or denial continuances. However, the regulations provide that good cause must be shown for a continuance to be granted. 8 C.F.R. 1003.29. However, there was no request for a continuance in any of the cases which underlie my finding of repeated failure to attend without good cause. Thus, this complaint is of no weight. Even so, the term 'good cause' has an historic usage in the law.

Similarly, the respondent complains that there are no standards governing the adjudication of a request to withdraw. The lack of standards, if that be the case, does not empower the respondent to ignore his obligation. Until the motion was granted he remained the attorney of record. If the motion were not properly adjudicated then he could raise that on direct

appeal or even by interlocutory appeal. He was not privileged to simply ignore the process commanded by regulation. A regulation has the command of law.

IV. SANCTIONS

In view of all the foregoing, I am constrained to find that the respondent is subject to discipline and that it is in the public interest to impose sanctions. The government has proved by clear and convincing evidence that the respondent has engaged in unprofessional conduct as set forth in 8 C.F.R. 1003.102(l), by repeatedly failing to appear for hearings without good cause. In considering the discipline to be imposed I note that the Attorney General approved a six month suspension for an attorney who failed to appear at two scheduled hearings. *Matter of De Anda*, 17 I. & N. Dec. 54(A.G. 1979). I also consider that the respondent failed to appear for two hearings *after* the commencement of proceedings to discipline him for prior failures to appear. This seems especially derelict, if not brazen. Although the respondent notes that motions to reopen were granted in cases where an *in absentia* order was entered against his client, this is a factor which is both positive and negative. It is positive because, at least as to his clients, the draconian effect of his own failures were lifted from them, though I note the clients were required to pay $110 for the filing of the motions to reopen.

On the other hand, the immigration court's workload was of course increased by the respondent's failure. The *in absentia* hearing was held; the order entered. The motion to reopen was filed, and then the court had then to deal with the case, in effect, a second time. Had the respondent and his client appeared these impacts upon an already burdened court system in Phoenix would have been avoided.

On the respondent's side of the ledger, I find it ameliorative that he admits in his final affidavit (Exhibit 7, page 1) his career has seen finer moments, and he apologizes to all involved in this proceeding. I take this as remorse and his recognition of his failures. I also recognize his many years of service to the legal community and the affidavits in the record which refer to his community role. I consider that two of the charges against the respondent have not been sustained.

Even so, upon consideration of the record as a whole, I conclude that the public interest requires that the respondent be sanctioned under 8 C.F.R. **1003.101(a)(4)*** as follows:

1. A **public censure**, including the filing of this decision with the State Bar of Arizona and the State Bar of Texas.

2. **Actual suspension** from practice before the Board of Immigration Appeals, the Immigration Courts and the Department of Homeland Security for six (6) months, which suspension is **STAYED** provided he attend in person and satisfactorily complete a state bar sanctioned continuing legal education course on law office management and a separate such course on legal ethics no later than May 14, 2010. He is directed to file a certificate of completion for each course with the adjudicating official by May 24, 2010. Should the respondent fail to attend such courses or fail to provide the required certificates of satisfactory completion within the time set, then the six month suspension will take immediate effect on June 1, 2010.

SO ORDERED.

12/4/09

Jack W. Staton
Adjudicating Official-Immigration Judge
December 2, 2009

* Page amended to reflect correct regulation citation