File: D2007-276 Date: NOV 3 2011

In re: JEFFREY SONDEL, ATTORNEY

IN PRACTITIONER DISCIPLINARY PROCEEDINGS

APPEAL

ON BEHALF OF EOIR: Scott Anderson, Deputy Disciplinary Counsel

ON BEHALF OF DHS: Eileen M. Connolly
Chief, Immigration Court Practice Section - East

ON BEHALF OF RESPONDENT: Pro se

On March 10, 2011, an Adjudicating Official issued a "Final Decision and Order", in which she suspended the respondent from practice before the Immigration Courts, Board of Immigration Appeals, and Department of Homeland Security (the "DHS"), for a period of 7 months. The respondent's appeal will be dismissed.

The Adjudicating Official had concluded, on September 29, 2010, that the respondent repeatedly engaged in contumelious or obnoxious conduct at an immigration hearing concerning M H , and that such conduct would constitute contempt of court in a judicial proceeding. Therefore, the Adjudicating Official found, the respondent violated 8 C.F.R. § 1003.102(g), as charged by the Disciplinary Counsel for the Executive Office for Immigration Review. The Adjudicating Official imposed the specific discipline of 7 months' suspension in her March 10, 2011, final order.

In attorney discipline proceedings, the Board reviews findings of fact under the "clearly erroneous" standard. 8 C.F.R. §§ 1003.1(d)(3)(i); 1003.106(c). The Board reviews questions of law, discretion, and judgment and all other issues in appeals de novo. *Matter of Kronegold*, 25 I&N Dec. 157, 159-60 (BIA 2010); 8 C.F.R. §§ 1003.1(d)(3)(ii); 1003.106(c).

The Board has considered the arguments raised on appeal, including the respondent's contentions as to why no discipline should be imposed, and the EOIR Disciplinary Counsel's assertion that a one-year suspension is warranted.[1] Upon such review, the Board finds no reason to disturb either the factual findings or any other conclusion or ruling reached by the Adjudicating Official in her thoughtful, well-reasoned decisions. We therefore will adopt and affirm her September 29, 2010, and March 10, 2011, orders.

[1] *The EOIR Disciplinary Counsel's motion to amend its response brief is granted.*

ORDER: The respondent's appeal is dismissed, and the Adjudicating Official's March 10, 2011, "Final Decision And Order", which incorporated her earlier September 29, 2010, decision, is affirmed.

FURTHER ORDER: The respondent is suspended from practice before the Immigration Courts, Board of Immigration Appeals, and DHS, for a period of 7 months, effective 15 days from this date. 8 C.F.R. § 1003.106(c).

FURTHER ORDER: The respondent is directed to promptly notify, in writing, any clients with cases currently pending before the Board, the Immigration Courts, or the DHS that the respondent has been suspended from practicing before these bodies.

FURTHER ORDER: The respondent shall maintain records to evidence compliance with this order.

FURTHER ORDER: The Board directs that the contents of this notice be made available to the public, including at Immigration Courts and appropriate offices of the DHS.

FOR THE BOARD

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

May 20, 2010

File No: D2007-276	)	
	)	
In the Matter of:	)	IN DISCIPLINARY PROCEEDINGS
	)	
JEFFREY SONDEL	)	Scott Anderson
Respondent.	)	Deputy Disciplinary Counsel
	)	Office of the General Counsel
	)	5107 Leesburg Pike, Suite 2600
	)	Falls Church, Virginia 22041

Jeffrey Sondel
75 Riverside Drive, Suite 5R
New York, New York 10024

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

ORDER DENYING RESPONDENT'S MOTION TO DISMISS, AND ORDER TO SHOW CAUSE WHY DISCIPLINE SHOULD NOT BE IMPOSED

Procedural History

EOIR Disciplinary Counsel filed a Notice of Intent to Discipline on July 28, 2008, charging that the respondent Jeffrey Sondel repeatedly engaged in contumelious or otherwise obnoxious conduct in violation of 8 C.F.R. § 1003.102(g) (2010) with regard to a case in which he acted in a representative capacity, which conduct would constitute contempt of court in a judicial proceeding. The Department of Homeland Security (DHS) filed a motion for reciprocal discipline. The notice set forth specific allegations, made a recommendation for discipline, and attached relevant documents. It also explained the procedure for filing an answer and requesting a hearing. The Respondent filed a timely answer in which he denied the material allegations and requested a hearing. Supporting documents consisting of exhibits A-J were included with the answer.

The case was thereafter assigned to Immigration Judge Mimi Tsankov, who supervised extensive prehearing procedures, and conducted a series of telephonic prehearing conferences. Judge Tsankov determined that the hearing would be conducted in stages, and scheduled the first stage to be heard on November 23 and 24th, 2009 in New York City. In October of 2009, however, Judge Tsankov recused herself and the case was thereafter reassigned to me. Because trial preparation was not yet complete, I conducted a final telephonic prehearing conference on February 18, 2010, after which the hearing was begun telephonically on March 10, 2010. The government's exhibits 1-7 were received in evidence and tape recordings made at the hearing conducted on April 3 and 4, 2007 in the *Matter of M H (A f)* were played into the record. The hearing was then held in abeyance in order to permit the respondent to renew his previously filed motion to dismiss. The renewed motion was timely filed on April 5, 2010, and Disciplinary Counsel filed a response on April 28, 2010. The motion is ripe for adjudication.

The Positions of the Parties with Respect to the Motion

The respondent's motion to dismiss essentially rests on two grounds. First, the respondent asserts that the charges are without merit, and that they should be dismissed summarily because the government's evidence fails even to establish a prima facie case and shows instead that this case should never have been brought. Second, the motion asserts that the charges should be dismissed because numerous material procedural errors and misconduct on the part of the Office of General Counsel, the Office of the Chief Immigration Judge, and Judges Weil, Tsankov, and Thomas "had a profound chilling effect on the Respondent by violating and restricting his due process rights and thereby placing an undue burden on him."

Disciplinary counsel's response to the motion asserts that the evidence presented proves the government's case by clear, unequivocal, and convincing evidence and that the government accordingly rests its case on the documents, transcripts, and audiotapes without the necessity of presenting additional witnesses. The response contends further that none of the procedural issues raised by the respondent presents any reason to dismiss this case, and that some of these issues have in any event already been ruled upon.

There are a few threshold issues which need to be resolved before reaching the substantive question presented.

The Evidentiary Sufficiency of the Transcript

In view of the centrality of the transcript to this proceeding, it is first necessary to address its adequacy as evidence and the weight it should be given because there are discrepancies between it and the tape recordings. The respondent's motion asserts that the transcript "should not be afforded any weight" because it contains material inaccuracies and omissions. No such errors or omissions are identified with specificity, and the motion does not point with specificity to any

particular effect any alleged errors or omissions have had on the respondent's rights in this matter. It should be noted that both at the prehearing conference of February 18, 2010, and by subsequent written order, the respondent was given until March 1 to file his written objections to the government's exhibits. No objections were filed, so respondent's attack on the transcript has arguably been waived. In view of the importance of the question, it will nevertheless be addressed.

As a certified copy of a public record, the transcript is prima facie a correct statement of what occurred at the hearing in *Matter of M H* . *See United States v. Lumumba*, 794 F.2d 806, 815 (2d Cir. 1986) (citing Fed. R. Evid. 902(4)). That it contains inaccuracies and omissions is undisputed. What becomes abundantly clear when listening to the audiotapes from which the transcript was prepared while simultaneously following along in the transcript is that the transcript frequently contains the notation "(indiscernible)" when the matter omitted is perfectly understandable on the tape recording. There are also a number of mistakes in transcription, for example, the transcript uses the word "lamentation" when what the speaker plainly said was "lamination" (Tr. 176) and the word "mulch" when the witness clearly said "emulsion" (Tr. 179). Some sentences are rendered meaningless or incomprehensible, such as, for example, where the transcript reads "use the 279 first," but hearing the tape recording makes evident that what the speaker actually said was, "use some sort of knife or scissors" (Tr. 96).

Such errors do not appear, however, to be material to the issues in this case. The tape recordings provide the best evidence of what happened at the hearing in *Matter of M H* , first, because they are more accurate than the transcript, and second, because the recordings convey, as the bare transcript does not, the volume, pace, tone, and manner of the respondent's speaking both to and about the Immigration Judge and opposing counsel. The audiotapes reflect not only what the respondent said, but also how he said it, while the transcript reflects only what he said. Where there are conflicts between the tapes and the transcript, the tapes are accordingly considered to be the more authoritative record. For ease of reference, however, citations are made to the pages in the transcript.

Whether the Term "Contumelious or Obnoxious" is Too Vague to Provide Notice

Among his other allegations, the respondent contends that the term contumelious or obnoxious is " so vague and nebulous that it violates Respondent's due process rights." *Black's Law Dictionary*, 380 (9th ed. 2009), defines "contumelious" as meaning "insolent, abusive, spiteful, or humiliating," and "contumely" as meaning "insulting language or treatment, scornful rudeness;" the word "obnoxious" is defined as "offensive or objectionable." *Id.* at 1181. It is not self evident what is vague or nebulous about these definitions.

The respondent nevertheless contends that the term "contumelious or obnoxious" is ambiguous, that people of common intelligence must guess at its meaning, and that it is "void for vagueness." Because these generalized assertions may be construed to relate to the question of whether the respondent received adequate notice of the charges against him, the issue is in need of further elaboration.

It is long and well established that the rules setting guidelines for members of a profession need not meet the same standards of clarity required for rules affecting lay people. *In re Keiler*, 380 A.2d 119, 126 (D.D.C. 1977), *overruled in part on other grounds by In re Hutchison*, 534 A.2d 919 (D.C. App. 1987). *Cf. Parker v. Levy*, 417 U.S. 733, 756-57 (1974) (rejecting vagueness challenge to criminal prohibition of "conduct unbecoming an officer and a gentleman" in the Uniform Code of Military Justice).

Thus in *Perez v. Hoblock*, 368 F.3d 166, 174-76 (2d Cir. 2004), the court rejected a vagueness challenge by a licensed thoroughbred owner to a prohibition against "any action detrimental to the best interests of racing" because, when considered with reference to the norms of the horseracing community, it was not vague when applied to an industry veteran. *Cf. Heath v. SEC*, 586 F.3d 122, 139-40 (2d Cir. 2009) (noting that SEC has made clear that industry norms and fiduciary standards are determinative as to what constitutes unethical conduct); *Piscottano v. Murphy*, 511 F.3d 247, 281-82 (2d Cir. 2007) (finding term "behavior that could in any manner reflect negatively on the Department of Corrections" is not vague when applied to corrections officer); *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1137 (3d Cir. 1992) (explaining that the term "sound scholarship and competent teaching" is not vague when applied to a professor who knows the mores of the academic community); *Cranston v. City of Richmond*, 710 P.2d 845, 851-52 (Cal. 1985) (stating that the term "conduct unbecoming" to a member of an occupational group is provided specificity by the common knowledge and understanding of members of the vocation or profession to which the standard applies); *Crimmins v. Am. Stock Exch., Inc.*, 503 F.2d 560 (2d Cir. 1974) (per curiam) (adopting the district court decision rejecting the plaintiff's assertion that the phrase "just and equitable principles of trade" is unconstitutionally vague). The district court decision noted that,

> As an experienced registered representative, plaintiff may be fairly charged with knowledge of the ethical standards of his profession . . . We find that, as applied to plaintiff, the Exchange's standard is not impermissibly vague, and that he lacks standing to attack the Exchange standard on the ground that it might be unconstitutional as applied to others.

Crimmins v. Am. Stock Exch., Inc., 368 F.Supp. 270, 277 (S.D.N.Y. 1973). The same principle applies with respect to attorneys. *In re Snyder*, 472 U.S. 634, 644 (1985) (observing that the phrase "conduct unbecoming a member of the bar" must be read in light of the "complex code of

behavior" to which attorneys are subject) (citing *In re Bithoney*, 486 F.2d 319 (1st Cir. 1973)). *Accord In re Mann*, 311 F.3d 788, 790 (7th Cir. 2002); *Howell v. State Bar of Tex.*, 843 F.2d 205, 206 (5th Cir. 1988) (construing the phrase "conduct that is prejudicial to the administration of justice").

The Court in *Snyder* noted that "[t]he license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice," and observed that,

> All persons involved in the judicial process - judges, litigants, witnesses, and court officers - owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone.

472 U.S. at 647. The obligation of an attorney is not only to serve as an advocate for a client, but also to conduct him or herself as an officer of the court. *Id.* at 644. The Court in *Snyder* said that the term "unbecoming a member of the bar" has to be read in light of the traditional duties imposed upon an attorney, and that more specific guidance can be found in "case law, applicable court rules, and 'the lore of the profession' as embodied in codes of professional conduct." *Id.* at 645. More recently, the court in *In re Moncier*, 550 F. Supp. 2d 768, 796 n.38 (E.D. Tenn. 2008) observed that these generalized standards would include such ethical and professional codes as those adopted by groups like the American Bar Association, the American College of Trial Lawyers, and other similar professional associations.

As a member of the New York bar for thirty years, the respondent, like the respondent in *Crimmins*, may be fairly charged with knowledge of the ethical standards of his profession. *See* 368 F. Supp. at 277. In the context of attorney discipline proceedings, 8 C.F.R. § 1003.102(g) is accordingly not impermissibly vague when applied to him. The respondent's suggestion that the regulation is somehow constitutionally defective because it "do[es] not specifically enumerate the practices that are either required or prohibited" is unsupported in law and is therefore rejected. Due process requires only notice "of such nature as reasonably to convey the required information." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The respondent received such notice.

Whether The Government's Evidence Establishes The Facts Alleged

The Notice of Intent to Discipline made certain allegations about the respondent and his conduct at a hearing before Immigration Judge Jack Weil on April 3 and 4, 2007 in *Matter of* [redacted]. Specifically, the notice alleged in part:

1. Respondent was admitted to the practice of law in New York in 1980.

2. On December 11, 2006, Respondent signed a form EOIR-28 and entered his appearance as counsel of record in the *Matter of M H* (A .).

3. On April 3 and 4, 2007, Respondent appeared at the individual hearing in Mr. H 's case held at the El Centro, California Immigration Court.

4. During the individual hearing, there were numerous instances when Respondent either interrupted the Immigration Judge or spoke while the Immigration Judge was speaking.

5. During the individual hearing, Respondent accused the Immigration Judge of failing to look at documents in the case, disliking people from New York, colluding with government counsel, and being upset with Respondent.

6. During the individual hearing, Respondent had outbursts, went off on tangents, and engaged in sarcastic behavior.

7. During the individual hearing, Respondent threatened to report the immigration judge to the Board of Immigration Appeals and engaged in argumentative behavior towards the immigration judge.

8. Respondent's conduct prolonged the individual hearing.

9. By repeatedly engaging in contumelious or obnoxious behavior during an immigration hearing which would constitute contempt of court in a judicial proceeding, Respondent violated 8 C.F.R. § 1003.102(g).

10. On June 12, 2007, OGC issued Respondent an informal admonition under 8 C.F.R. § 1003.104(c) for violating 8 C.F.R. § 1003.102(1).[1]

The respondent's answer denied the allegations numbered 4, 5, 6, 7, 8, and 9, but made no response to the allegations numbered 1, 2, 3, and 10. Allegations 1, 2, 3 and 10 are accordingly deemed admitted and considered proved without the need for further evidence, as set forth in the Notice.

Respondent's motion first argues that listening to the tapes of the hearing in the *Matter of M H* demonstrates that he conducted himself solely as an ardent and zealous advocate, that he came prepared, submitted extensive documents and materials, that he did not yell, scream or utter

[1] The filing of the Notice of Intent to Discipline permits the informal admonition to be made part of the public record. 8 C.F.R. § 1003.108(b).

profanities, or make malicious, rude or insulting remarks, that he was civil, respectful, competent and professional, and that he did not violate orders, berate or chide witnesses, or interrupt or interfere with the judge or opposing counsel, nor did he prolong the hearing.

The motion further asserts while the respondent came to the hearing prepared, Judge Weil did not, and that any contentious exchanges between the respondent and Judge Weil were "a direct consequence that (sic) Judge Weil concealed for more than 3 1/2 hours into the hearing the fact that he had not reviewed or read any of M H 's file prior to the hearing," and that the Judge's conduct "is of critical importance if one is to understand the context of the Respondent's behavior." The motion noted further that during closing argument the respondent "refrained from mentioning that Judge Weil came unprepared," but nevertheless criticized the Judge for "proceeding in such a methodical and uninformed manner," and for being in "complete ignorance of the evidence of M H 's case prior to the hearing," and alleged that this lack of preparedness "violates [Judge Weil's] professional duties and responsibilities as set forth in the Immigration Judges Benchbook, Training and Practice Manuals." The respondent concludes that "Judge Weil's lack of preparedness and lack of familiarity with Burmese asylum cases compromised a fair and just hearing," and therefore "necessitated zealous and ardent representation" on the respondent's part.

The respondent's motion fails to address the substance of the government's allegations and misses the point altogether. As has previously been explained to the respondent, Judge Weil's conduct is not at issue in this proceeding. The ultimate question in this proceeding is whether the respondent violated 8 C.F.R. § 1003.102(g) by repeatedly engaging in contumelious or obnoxious behavior during an immigration hearing which would constitute contempt of court in a judicial proceeding. Resolution of that question does not depend upon the conduct of Judge Weil or anyone other than the respondent.

The immediate question for purposes of this motion is whether the case should be summarily dismissed at this stage either for insufficiency of evidence or because of any alleged procedural error, or whether the government's evidence is sufficient to shift the burden of going forward to the respondent to produce evidence in rebuttal and/or mitigation and to show cause why discipline should not be imposed upon him. Resolution of that question does not depend upon the conduct of Judge Weil either. Nothing said or done by Judge Weil at the hearing in *Matter of M H* operates to erase the respondent's behavior.[2]

[2] The respondent makes an offer of proof that audiotapes in other subsequent hearings in two other Burmese cases will show that any contentiousness that arose between him and Judge Weil during the M. H hearing was "seemingly worked out." Those tapes are relevant, if at all, to the question of mitigation, not to whether the allegations in the Notice are true.

Although the respondent appears to argue that his complaints about the Immigration Judge's conduct somehow constitute a "defense," no legal authority is cited to support that proposition, and the weight of authority is otherwise. *See, e.g., In re Giampa*, 628 N.Y.S. 2d 323, 325 (N.Y. App. Div. 2d 1995) (rejecting respondent's efforts to justify his own improper conduct by blaming the judges before whom he was trying cases); *Lumumba*, 794 F.2d at 815 (observing that impropriety on the part of a judge may be considered in mitigation but cannot justify or excuse contemptuous conduct) (citing cases); *Bar Ass'n of Greater Cleveland v. Carlin*, 423 N.E.2d 477, 479 (Ohio 1981) (noting that the integrity of the judicial process demands deference to the court on the part of its officers, and that no amount of provocation by a judge can excuse an attorney from his obligations or condone contemptuous acts).

While the respondent contends that the transcript and audiotapes "provide insubstantial evidence" and that OGC has failed even to establish a prima facie case, I find to the contrary that the audiotapes and transcript together provide clear, convincing, and unequivocal evidence not only of what was said by each of the participants at the hearing in the M H case, but also of how it was said. Apart from general denials, the respondent's motion offers nothing to rebut the factual allegations contained in the Notice.

The tapes and transcript reflect numerous instances in which the respondent either interrupted or spoke over the Immigration Judge while the Judge was still speaking (Tr. 19-20, Tr. 22, Tr. 27, Tr. 91, Tr. 141-42, Tr. 149, 151-52, 155, 166, and others). They reflect as well that the respondent repeatedly complained about the Immigration Judge's not having read certain of the documents he submitted (Tr. 137-39, Tr. 150-52), and about the Immigration Judge disliking him or disliking people from New York (Tr. 42, Tr. 46, Tr. 139, Tr. 142), and that the respondent suggested in addition that the Immigration Judge had called a recess in the hearing because he was "upset" with the respondent (Tr. 156). While the respondent never used the term "collude," the record also clearly reflects that the respondent accused the Immigration Judge of doing the government attorney's job for him: "[the government's] "trial attorney . . . asked almost nothing on cross-examination so you did it for him" (Tr. 148), and also made other disparaging remarks about the fairness of the proceeding, for example:

> . . . this guy is from Burma and this really it gets to the point of a travesty (Tr.149).
>
> . . .
>
> I don't know why we're going through this. You say you're fair. This case to me is finished (Tr. 154).
>
> . . .
>
> . . . how much longer does it have to go on like this (Tr. 155)?
>
> . . .
>
> . . . I have to point this out that this case has, has lingered so long because it's, it's a gotcha time (Tr. 232).

While it is perhaps less evident in the cold transcript than it is when listening to the tape recordings, the respondent frequently engaged in sarcastic behavior as well as engaging in tangents and outbursts (Tr. 43-48, Tr. 149-50, Tr. 165-67, Tr. 229-35) including throwing his glasses at one point (Tr. 42). Most of the sarcastic behavior was directed at the Immigration Judge, but some was to, or in reference to, the trial attorney as well (Tr. 149, 152-53, Tr. 231-32). The respondent's tone and the manner in which he addressed the Immigration Judge were frequently aggressive, belligerent, and confrontational. The respondent attempted to intimidate the Immigration Judge to the extent that the Judge felt compelled to explain at the end that his decision in M H 's case was "[n]ot based on theatrics, not based on intimidation or anything else. Based purely on the evidence in this case" (Tr. 243).

There are numerous instances of argumentative and disrespectful conduct (Tr. 143-48, Tr. 150, Tr. 152-56), for example, after the Immigration Judge has suggested that the case might be put over, (Tr. 143-44),

> Mr. Sondel: Fine. But I will not come back. I'd like an opportunity to appear . . . to sit here and do nothing but listen to you make a decision when I can be called on the telephone, telephonically to do that, when my presence here is completely unnecessary. That he's being held in detention for this case for me to fly out here for - - just to hear a decision.
> Judge Weil: I never said it's going to be just for a decision. After reviewing the evidence we may have more questions. We may want more testimony.
> Mr. Sondel: All right.
> Judge Weil: But the bottom line did you knew (sic) this case was in El Centro when you took it? Yes or no?
> Mr. Sondel: I knew. I've also contacted - -
> Judge Weil: Yes or no? Did you know - -
> Mr. Sondel: - - the Board in Washington.
> Judge Weil: - - it was in El Centro?
> Mr. Sondel: I do, I do, Judge. I don't know how you do things here but it's not satisfactory to me. I've been telling the Board in Washington how it has worked here.
> Judge Weil: Okay.
> Mr. Sondel: And it's not permissible.
> Judge Weil: Well that's fine. As long as - -
> Mr. Sondel: It's not acceptable.

The respondent then reiterated his unwillingness to return and repeated his statement about reporting the Judge (Tr. 145-46),

> Mr. Sondel: If you're requiring me - - and start with if I was to come back and do all this after all this evidence, yes. I will advise the BIA. I will advise the - -
> Judge Weil: That's fine.
> Mr. Sondel: - - appropriate people and not your supervisor in San Diego.
> Judge Weil: That's fine.
> Mr. Sondel: The higher officials in Washington of what is happening.[3]

There is evidence as well that the respondent's conduct prolonged the hearing, first at the exhibit stage, by a lengthy and confused presentation during which he in turn objected to his own exhibit, sought to withdraw it, and then offered it again (Tr. 58-66),[4] and then by an attempt to introduce into evidence an outdated statistical report (the TRAC survey) regarding the granting or denial of asylum applications (Tr. 43-44, Tr. 50), a subject to which the respondent returned and belabored again at length in a tangent the middle of the hearing (Tr. 146-148). The hearing was similarly prolonged by respondent's extensive complaints about the fact that the Immigration Judge had not had time to read his prehearing submissions in advance.

After telling the Immigration Judge that he would need only 10 minutes for closing argument (Tr. 160), moreover, the respondent was argumentative and failed to stop talking when the Judge asked him to wrap it up after he had already spoken for much longer than that (Tr. 229-30):

> Judge Weil: Counsel, let's start wrapping it up. Okay?
> Mr. Sondel: I'll wrap it up as soon as I get it on the record and I'll wrap it up soon, Judge. Was he believable?
> Judge Weil: Well I asked for a brief argument.
> Mr. Sondel: By all means I will only do a brief argument, Judge, if I believe it's appropriate in this case.

The respondent then continued to keep talking for another extended period, after which the Immigration Judge finally asked him again to wrap it up, (Tr. 235):

> Judge Weil: Counsel, let the government - -
> Mr. Sondel: We have a very strong case.
> Judge Weil - - we'll move to the government's closing at this point.

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[3] The court in *In re Zeno*, 517 F. Supp. 2d 591, 595 (D. Puerto Rico 2007), found a similar statement of intention to be a "veiled threat."

[4] The Judge's decision in the case observed that in 20 years of immigration law practice, including 13 years on the bench, he had never seen it take so long to get through one exhibit (Tr. 141-42).

> Mr. Sondel: All right. But, Judge, you just told me that I, that you wanted to cut me off.
> Judge Weil. Correct. Thank you.

I therefore conclude that the tapes and transcripts provide prima facie evidence as to each of the government's allegations numbered 4, 5, 6, 7, and 8, and that the government's evidence is sufficient to require that the respondent be given the opportunity to put forth his evidence in rebuttal and/or mitigation. Because the procedure established by Judge Tsankov contemplated that the initial stage would deal only with facts, any legal conclusions will be deferred until the respondent has had an opportunity to present his evidence in rebuttal and/or mitigation. I thus draw no inferences or conclusions with respect to the mixed question of law and fact posed by the allegation numbered 9 until the hearing has been concluded, but I do make preliminary findings that the facts alleged in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 10 are true.

Respondent's Other Allegations of Denial of Due Process

The respondent's motion charges that numerous violations of due process have unduly burdened him. The criticisms begin with Judge Weil's initiation of the complaint,[5] and go on to include complaints about the investigation, the allegedly incomplete record in the M H case, what the motion characterizes as a lack of established procedures or procedural structures, Judge Tsankov's failure to sign or identify the "origins and provenance" of her standing orders or to sign the recusal notice, various alleged misconduct on the part of OGC, the delay in issuing the notice of recusal, and finally, the alleged appearance of impropriety and partiality.

Notwithstanding the multiplicity of allegations, the motion identifies no specific due process right of the respondent's that has been infringed upon, and no specific prejudice that has resulted from a particular infringement. No citation of case law or statutory or regulatory authority accompanied any of these allegations. Procedural due process is, of course, required in attorney disciplinary proceedings, *In re Ruffalo*, 390 U.S. 544, 550 (1968), and fundamental fairness requires that a respondent be given appropriate notice and an opportunity to be heard. *In re Bailey*, 182 F.3d 860, 871 (Fed. Cir. 1999). An attorney's due process rights in disciplinary proceedings do not, however, extend to the full panoply of rights afforded to the accused in a criminal case, *see, e.g., In re Jaffe*, 585 F.3d 118, 121 (2d Cir. 2009) (noting that double jeopardy

[5] The respondent alleges that 8 C.F.R. § 1003.104(a) requires a complaint to contain certain formal elements which were not satisfied by Judge Weil's referral. The contention ignores altogether § 1003.104(b), which provides that OGC may commence a preliminary inquiry on its own initiative, without the necessity of a separate formal complaint. Nothing in this latter provision requires that OGC have personal knowledge in order to commence such an inquiry. Thus whether or not Judge Weil's referral was sufficient to constitute a complaint under the definition set out in § 1003.104(a), it clearly was enough to trigger a preliminary inquiry pursuant to § 1003.104(b).

does not attach in disciplinary proceedings); *accord In re Jacobs*, 44 F.3d 84, 89 (2d Cir. 1994) (rejecting claims based on 5th, 6th, 7th and 8th amendments in disciplinary proceeding).

The respondent received adequate notice and will soon have the opportunity for a hearing. As pointed out in *Sealed Appellant 1 v. Sealed Appellee 1*, 211 F.3d 252, 254 (5th Cir. 2000), while due process requires notice and an opportunity to be heard in disbarment proceedings, "only rarely will more be required," (citing *Crowe v. Smith*, 151 F.3d 217, 229 (5th Cir. 1998)), cert. den. sub nom. *In re Wright*, 526 U.S. 1158 (1999). Regulations governing the conduct of attorneys are civil, not criminal, and the Supreme Court has given greater leeway to enactments having civil rather than criminal penalties. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499-500 (1982); *Perez*, 368 F.3d at 174-76.

Most of the respondent's shotgun allegations of error seek to focus attention on the conduct of the agency or the judges and away from the matters actually at issue in this proceeding. *Cf. Halvonik v. Dudas*, 398 F. Supp. 2d 115, 121-23 (D.D.C. 2005) (criticizing party's attempt to establish procedural irregularities which, even if proven, did nothing to disprove the substantive charges). While it is true that agencies should follow their own rules, administrative law nevertheless recognizes the principle of harmless error. *Horning v. SEC*, 570 F.3d 337, 347 (D.C. Cir. 2009); *In re Fletcher*, 424 F.3d 783, 794 (8th Cir. 2005); *Keys v. Barnhart*, 347 F.3d 990, 994 (7th Cir. 2003). As explained in *In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008), fundamental fairness does not mean that an ideal set of procedures is required or that a level of perfection must be achieved.

To the extent that the respondent's assertions complain about events prior to the issuance of the Notice of Intent to Discipline, moreover, I note that the general rule is that because an administrative investigation adjudicates no legal rights, constitutional challenges to the investigative stage in attorney discipline proceedings are usually rejected summarily. *Romero-Barcelo v. Acevedo-Vila*, 275 F. Supp. 2d 177, 201-02 (D.P.R. 2003); *In re Logan*, 358 A.2d 787, 789-92 (N.J. 1976). This result is consistent with the general principle that full due process rights do not attach at the investigative stage of an administrative process. *Hannah v. Larche*, 363 U.S. 420, 441-42 (1960); *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 98 (2d Cir. 1997); *Gold v. SEC*, 48 F.3d 987, 991-94 (7th Cir. 1995); *Georator Corp. v. EEOC*, 592 F.2d 765, 768-69 (4th Cir. 1979).

The respondent's other allegations of due process violations or prejudice to his rights are, for the most part, inadequately articulated or explained, or are legally and factually unsupported and do not merit extended discussion. Bald conclusions, unaccompanied by any coherent legal argument, provide nothing to address.

Regrettably, there is one exception. Among the respondent's allegations is one that the "close proximity of the offices of the OCIJ, Judge Weil, Judge Thomas and the OGC together with the casualness of their interaction raises the appearance of partiality and legitimate questions about the objectivity and fairness of this proceeding." While the respondent is entitled to his subjective

opinions, he is not entitled to make up his own facts. The real facts are these: other than a brief introduction in an elevator, I do not personally know Judge Weil and have had no other "interaction" with him, "casual" or otherwise. Similarly, I have only the barest of acquaintance with, and rarely see, either of the government's representatives in this matter. There is accordingly no factual basis upon which to claim any appearance of impropriety in my adjudicating this case.[6]

ORDER

The respondent's motion to dismiss is denied. The hearing will be recommenced in New York city in order to provide the respondent an opportunity to offer evidence in rebuttal and/or mitigation and to show cause why discipline should not be imposed upon him.

The parties will be contacted telephonically to establish a date for the resumption of the hearing. Disciplinary counsel is advised to consult in advance with Judge Weil about his schedule in order to facilitate his appearance.

SO ORDERED.

Dated and entered this 20th day of May, 2010.

Ellen K. Thomas
Administrative Law Judge

[6] The appropriate mechanism for challenging a judge is in any event a motion to recuse. *See In re Zalkind*, 872 F.2d 1, 4 (1st Cir. 1989). At the prehearing conference on February 18, 2010, and by subsequent written order the respondent was given until March 1, 2010 to file such a motion or to make written objection to the reassignment of this case. No such motion or objection was filed.

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

September 29, 2010

File No: D2007-276	)	
	)	
In the Matter of:	)	IN DISCIPLINARY PROCEEDINGS
	)	
JEFFREY SONDEL	)	Jennifer J. Barnes
Respondent.	)	Disciplinary Counsel
	)	Office of the General Counsel
	)	5107 Leesburg Pike, Suite 2600
	)	Falls Church, Virginia 22041

Jeffrey Sondel
75 Riverside Drive, Suite 5R
New York, New York 10024

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

MEMORANDUM OF DECISION AND ORDER

This Decision and Order resolves the merits of a charge made against the respondent attorney in EOIR Disciplinary Case No. D2007-276. The question of what specific discipline should be imposed is reserved pending further submissions.

Procedural History

EOIR Disciplinary Counsel filed a Notice of Intent to Discipline on July 28, 2008, which advised that after preliminary inquiry, sufficient evidence was found to warrant charging the respondent Jeffrey Sondel with professional misconduct. The Notice said further that because the respondent's conduct fell within an enumerated ground set forth in 8 C.F.R. § 1003.102, the imposition of discipline upon the respondent was in the public interest. The Statement of Charge asserted more specifically that:

Respondent repeatedly engaged in contumelious or otherwise obnoxious conduct, with regard to a case in which he acted in a representative capacity, which would constitute contempt of court in a judicial proceeding. 8 C.F.R. § 1003.102(g).

The Notice set out a number of allegations about the respondent's conduct at a hearing that took place on April 3 and 4, 2007 at the Immigration Court in El Centro, California before Immigration Judge Jack Weil in the *Matter of M H* and recommended that a one-year suspension be imposed upon the respondent. The Department of Homeland Security (DHS) filed a motion for reciprocal discipline. The respondent filed an answer to the charge in which he specifically denied the government's allegations numbered 4, 5, 6, 7, 8, and 9, and requested a hearing. The respondent made no answer to the allegations numbered 1, 2, 3, and 10, but did raise matters of defense and submit supporting documents. In the absence of any denial, allegations 1, 2, 3 and 10 were subsequently deemed admitted and were considered to be proved without the necessity of further evidence.

On December 29, 2008 the case was assigned to Immigration Judge Mimi Tsankov, who thereafter supervised extensive motion practice, conducted a series of telephonic prehearing conferences, set out a three-stage procedure to be followed in the matter, and ultimately scheduled the initial stage of the case to be heard on November 23 and 24, 2009. In October of 2009, however, Judge Tsankov recused herself, and the case was subsequently reassigned to me. Because the trial preparation for the first stage was not yet complete, I conducted another prehearing conference on February 18, 2010, after which the hearing was begun telephonically on March 10, 2010. The government's exhibits 1-7 were admitted into evidence and the audiotape recordings made at the hearing conducted on April 3 and 4, 2007 in the *Matter of M H* were played into the record. The matter was then held in abeyance in order to permit the respondent to renew his previously filed motion to dismiss.

After briefing by the parties, that motion was denied in an order issued on May 20, 2010 in which I found, contrary to the allegations in the motion, that the audiotapes and transcript of the M H hearing were of sufficient evidentiary quality, that the respondent received adequate notice of the charges against him, that 8 C.F.R. § 1003.102(g) was not impermissibly vague or constitutionally defective as applied to the respondent, that the respondent's multiple allegations of due process violations were unsupported in fact or in law, that there was no appearance of impropriety in my adjudicating this case, and that the government had presented a prima facie case.

Another telephone conference was held on June 17, 2010, after which the hearing was recommenced in the city of New York on July 7, 2010. The respondent's exhibits 5, 6, 7, 8, 9, 10, 11, 12, 13, 19, 20, 22, 23, and 24 were received into evidence, and the respondent presented the testimony of Immigration Judge Jack Weil as well as his own testimony in order to complete the initial stage of this proceeding.

At the close of the hearing, I told the parties that because their respective positions and

arguments had already been sufficiently set forth, no further briefing would be necessary. The respondent wanted to provide a list of case citations and I authorized him to do so. The transcript of the July 7 hearing reflects that both parties clearly understood that this filing was to be limited to a list of citations, with no argument:

> The Court: I'll accept a list of citations.
> Mr. Sondel: Yes, just a list of citations.
> Ms. Barnes: I just wanted to clarify it's just a list of case law, no arguments?
> The Court: No arguments. A list of citations.

Instead, the respondent filed a 10 page document containing a short list of cases together with an extended exposition and argument about them, and the government filed its objection to the submission. The submission recites that the respondent "understands that Judge Thomas only requested a list of citations," but goes on to explain that he nevertheless wanted to present "a vigorous defense."

The respondent confuses vigorous advocacy with disregard for specific instructions; the two should not be conflated. In the first place, I did not "request" the respondent to file a list of cases; I permitted him to do so at his own request. The respondent's submission acknowledges that he was told he could file his list of citations and nothing more, so there was evidently no confusion or misunderstanding as to what he was authorized to file. His submission in fact candidly concedes that he is acting contrary to the specific terms of the authorization he was given. Because the respondent's posthearing submission fails to comport with that authorization, it is neither accepted nor considered.

After the filing of the transcript of the July 7 proceedings, the parties were notified and given an opportunity to review the transcript for errors and to propose any corrections. The government proposed a number of corrections. The respondent made no response. None of the corrections affects the substance of this Decision and Order. Administrative notice is nevertheless taken that the government's corrections more accurately reflect what was said than does the transcript, and the corrections are attached hereto as an appendix.

Summary of Evidence

The allegations in paragraphs 1, 2, 3, and 10 of the Notice of Intent to Discipline are uncontested and have already been deemed admitted. They establish that the respondent was admitted to the practice of law in New York in 1980 (allegation 1); that on December 11, 2006, respondent

signed a form EOIR-28 and entered his appearance as counsel of record in *Matter of M H* (allegation 2); that on April 3 and 4, 2007, respondent appeared at the individual hearing in Mr. H 's case held at the El Centro, California Immigration Court (allegation 3); and that on June 12, 2007, OGC issued respondent an informal admonition under 8 C.F.R. § 1003.104(c) for violating 8 C.F.R. § 1003.102(l).[1]

The government's other factual allegations, despite being denied by the respondent, are for the most part established by the audiotapes and transcript of the M H hearing, and the evidence presented by the respondent on July 7, 2010 did little to contradict or refute them. Rather, the respondent sought to provide a context, and to explain the circumstances that he believed put undue pressure on him or otherwise contributed to his conduct at the M H hearing. Much of his testimony consisted of argument rather than factual exposition.

The respondent described the El Centro Immigration Court as having a very intimidating atmosphere and restricted physical space, and as being unfriendly to outsiders. He also criticized the procedures used by the court.[2] He objected to the fact that opposing counsel failed to give him a copy of the government's impeachment evidence in advance of the M H hearing, as well as to the fact that Judge Weil had not read all his prehearing submissions beforehand. He said both the judge and the government's trial attorney were ignorant about Burma. He also accused Judge Weil of violating certain portions of the Immigration Judges' Bench Book and a Handbook that became effective about a year after the M H hearing, neither of which was offered in evidence. The respondent testified that he had sent a letter of apology to Judge Weil on June 29, 2010, but notwithstanding his apology, the respondent continued to criticize what he believed to be Judge Weil's lack of proper preparation for the M H hearing and lack of prior knowledge about Burma. The respondent also said he had entered the M H hearing that day with some concerns about Judge Weil's fairness because of Disciplinary Case D2007-080, in which Judge Staton, another Immigration Judge at El Centro, had previously filed a complaint against the respondent for failure to appear at two scheduled hearings.

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[1] The filing of the Notice of Intent to Discipline permits the informal admonition to be made part of the public record. *See* 8 C.F.R. § 1003.108(b). The admonition was based on a complaint made against the respondent by Judge Staton in Disciplinary Case D2007-080.

[2] Respondent's answer to the Notice argued that his conduct was appropriate given the environment and atmosphere in the El Centro Immigration Court.

Allegation 4 asserts that there were numerous instances when respondent either interrupted or spoke over the Immigration Judge while the judge was still speaking. The tapes and the transcript of the hearing in *Matter of M H* reflect numerous such instances (MH Tr. 19-20, 22, 27, 91, 141-42, 149, 151-52, 155, 166, and others).[3] They reflect as well that, as alleged in allegation 5, the respondent repeatedly complained about Judge Weil's not having read the documents he submitted (MH Tr. 137-39, 150-52), and about the Immigration Judge disliking him or disliking people from New York (MH Tr. 42, 46, 139, 142), and that the respondent suggested in addition that the Immigration Judge had called a recess in the hearing because he was "upset" with the respondent (MH Tr. 156). At the M H hearing, Judge Weil responded to the last assertion by stating that the reason for the recess was that he had other cases set at one o'clock (MH Tr. 156). At the July 7 hearing Judge Weil testified that although he did not recall specifically, the respondent's suggestion could have been true, and that sometimes the best thing to do is to take a recess.

Allegation 5 also said the respondent accused the Immigration Judge of "colluding with government counsel." While the term "collude" was never used by the respondent, he nevertheless did directly accuse the Immigration Judge of doing the government attorney's job for him: "[the government's] trial attorney . . . asked almost nothing on cross-examination so you did it for him" (MH Tr. 148).[4] The respondent made many other disparaging remarks in open court at the M H hearing about the fairness of the Immigration Judge and the proceeding, for example,

> [T]his guy is from Burma and this really it gets to the point of a travesty (MH Tr.149).
>
> . . . .
>
> I don't know why we're going through this. You say you're fair. This case to me is finished (MH Tr. 154).

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[3] As explained in the order denying the respondent's motion to dismiss, the tape recordings provide the best evidence of what happened at the hearing, first, because they are more accurate than the transcript, and second, because the recordings convey, as the bare transcript does not, the volume, pace, tone, and manner of the respondent's speaking both to and about the Immigration Judge and opposing counsel. Where there are conflicts between the tapes and the transcript, the tapes are accordingly considered to be the more authoritative record. For ease of reference, however, citations are made to the pages in the transcript.

[4] The respondent's answer to the Notice similarly asserted that "Judge Weil identifies too closely with the role of the trial attorney seeming at times to act more like a prosecutor than an objective trier of the facts." Answer at 8.

. . . .

[H]ow much longer does it have to go on like this (MH Tr. 155)?

. . . .

I have to point this out that this case has, has lingered so long because it's, it's a gotcha time (referring to the government's impeachment evidence, but also implying that the Immigration Judge had questioned M H for the purpose of helping the prosecution) (MH Tr. 232).

While it is perhaps less evident in the cold transcript than it is when listening to the tape recordings, the respondent, as allegation 6 asserts, frequently engaged in sarcastic behavior as well as engaging in tangents and outbursts (MH Tr. 43-48, 149-50, 165-67, 229-35) including throwing his glasses (MH Tr. 42). The respondent testified at the July 7 hearing that he had simply put his glasses down. Judge Weil's testimony was that in the small courtroom they were not far apart, and he heard, rather than saw, something go through the air and land closer to the bench, and that he then told the respondent not to throw his pen. The tape and the transcript reflect that after Judge Weil said that, the respondent informed him that it was not a pen, it was his glasses, but he did not deny that he had thrown them (MH Tr. 42).

While the respondent testified on July 7, 2010 that any comments he made at the M H hearing were not intended to be sarcastic, one has only to listen to the tape recordings to conclude from the tone and tenor of many of his remarks that they cannot reasonably be construed in any other way. Most of the respondent's sarcastic behavior was directed at Judge Weil, but some was to, or in reference to, the government's trial attorney as well (MH Tr. 43-45, 47-48, 149, 152-53, 231-32). At one point the judge had to insist vigorously that the respondent stop disparaging the trial attorney,[5] in order to explain to the respondent that the case would be decided on the basis of evidence, and that the government's trial attorney was not required to be an expert on any particular country (MH Tr. 47- 48).

As allegation 7 set forth, the respondent also threatened to report the Immigration Judge to the Board of Immigration Appeals and engaged in other argumentative behavior towards him. There are numerous instances of argumentative and disrespectful conduct (MH Tr. 143-48, 150, 152-56), for example, after the judge suggested that the case might have to be put over (MH Tr. 143-49), the respondent flat out defied the court by saying he would not come back.

[5] "Wait, counsel. Okay. Now I'm stopping. Now I'm stopping. Okay. Now we're going to stop (MH Tr. 47)."

> Mr. Sondel: Fine. But I will not come back.[6] I'd like an opportunity to appear . . . to sit here and do nothing but listen to you make a decision when I can be called on the telephone, telephonically to do that, when my presence here is completely unnecessary. That he's being held in detention for this case for me to fly out here for - - just to hear a decision.
> Judge Weil: I never said it's going to be just for a decision. After reviewing the evidence we may have more questions. We may want more testimony.
> Mr. Sondel: All right.
> Judge Weil: But the bottom line did you knew (sic) this case was in El Centro when you took it? Yes or no?
> Mr. Sondel. I knew. I've also contacted - -
> Judge Weil: Yes or no? Did you know - -
> Mr. Sondel: - - the Board in Washington.
> Judge Weil: - - it was in El Centro?
> Mr. Sondel: I do, I do, Judge. I don't know how you do things here but it's not satisfactory to me. I've been telling the Board in Washington how it has worked here.
> Judge Weil: Okay.
> Mr. Sondel: And it's not permissible.
> Judge Weil: Well that's fine. As long as - -
> Mr. Sondel: It's not acceptable.

The respondent then reiterated that he was unwilling to return, and repeated his statement about reporting the judge (MH Tr. 145-46),

> Mr. Sondel: If you're requiring me - - and start with if I was to come back and do all this after all this evidence, yes. I will advise the BIA. I will advise the - -
> Judge Weil: That's fine.
> Mr. Sondel: - - appropriate people and not your supervisor in San Diego.
> Judge Weil: That's fine.
> Mr. Sondel: The higher officials in Washington of what is happening.

Judge Weil made clear that he understood the respondent's statements to be a threat, although not a particularly effective one (Disc. Tr. 113-15).[7] *Cf. In re Zeno*, 517 F. Supp. 2d 591, 595 (D.P.R. 2007) (finding a similar statement of intention to be a "veiled threat"). The respondent in fact attempted to intimidate the Immigration Judge with sufficient frequency that Judge Weil felt

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[6] A judge need not tolerate disrespect or a deliberate show of defiance in open court. *See United States v. Giovanelli*, 897 F.2d 1227, 1232 (2d Cir. 1990).

[7] The term "Disc. Tr." refers to the transcript of the July 7, 2010 hearing in the disciplinary proceeding, and is used in order to distinguish these references from references to the transcript of the M H hearing, which are cited as "MH Tr."

compelled to explain at the end of the case that his decision to grant asylum was "[n]ot based on theatrics, not based on intimidation or anything else. Based purely on the evidence in this case (MH Tr. 243)." The respondent challenged Judge Weil at the July 7 hearing about this statement, noting that it was only "one sentence," and asked him, "[i]f you can find more sentences to clarify that you were even talking about me. It doesn't even mention my name, who you're referring to, does it (Disc. Tr. 87)?" Judge Weil responded that "[t]he whole thing was about you, Mr. Sondel," and pointed to other sentences in the decision explaining what the outcome was and was not based on (Disc. Tr. 87-89).

The respondent continued to argue that the judge's reference to intimidation "doesn't even directly mention me," and that Judge Weil could have been referring to the trial attorney, although he acknowledged that such a theory was "not too plausible (Disc. Tr. 245)." Judge Weil explained that he felt it was necessary to include a statement about theatrics or intimidation in order to make it clear to the parties that his decision was not influenced one way or the other by the respondent's conduct (Disc. Tr. 86-89). Judge Weil characterized the respondent's physical demeanor at the M H hearing as "somewhat aggressive. Rattled aggressive (Disc. Tr. 170-71)." He noted that M H must have been "scared to death" seeing his attorney's theatrics and aggressive behavior toward the judge (Disc. Tr. 178-79), pointing out that this was M H first contact with the American judicial system, "and Mr. Sondel turned it into a circus, a fiasco (Disc. Tr. 180)." Judge Weil said he wanted M H to understand that the decision in his case was based on the facts.

The respondent's conduct prolonged the M H hearing as set forth in allegation 8, first at the exhibit stage, by a lengthy and confused presentation during which he in turn objected to his own exhibit, sought to withdraw it, and then offered it again (MH Tr. 58-66),[8] and then by an attempt to introduce into evidence an outdated statistical report (the TRAC survey) regarding the granting or denial of asylum applications (MH Tr. 43-44, 50), a subject to which the respondent returned and belabored again at length in a tangent the middle of the hearing (MH Tr. 146-148). The hearing was similarly prolonged by respondent's extensive complaints about the fact that Judge Weil had not had time to read his prehearing submissions in advance, another subject to which the respondent returned again and again. After telling the judge, moreover, that he would need only 10 minutes for closing argument (MH Tr. 160), the respondent failed to stop talking and was argumentative when the judge told him to wrap it up after he had already spoken for much longer than that (MH Tr. 229-30). When told by the judge that only a brief argument had been asked for, the respondent replied, "By all means I will only do a brief argument, Judge, if I believe it's appropriate in this case (MH Tr. 230) (emphasis supplied)." The respondent then continued to keep talking for another extended period until the judge again had to instruct him to wrap it up, and he again replied indignantly (MH Tr. 235).

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[8] The judge's decision in the case observed that in 20 years of immigration law practice he had never seen it take so long to get through one exhibit (Tr. 141-42).

Judge Weil testified that the respondent also prolonged the M H hearing by arguing about matters they should not have spent time on, for example the bond hearing, over which the judge had no control (Disc. Tr. 177), by the respondent's inappropriate arguments about the order in which the judge considered the evidence, and by the respondent's many extrajudicial statements (Disc. Tr. 177). It remains unclear what the purpose was for the respondent's gratuitous comments: "You don't have to like me, Judge. I - - it doesn't matter . . . You don't - - I'm a very qualified skilled person (MH Tr. 42);" "I'm not such a young man any more to do this (MH Tr. 44);" " - - it's always the burden on me (MH Tr. 45);" "Your Honor, you don't have to like me and it's not relevant . . . You know, but you can see I'm not a law clerk . . . why do I refer to other jurisdictions because I am a worldly person (MH Tr. 46);" "You may not like it that I come from New York, but I'm telling you . . . these people hire me because I'm a very good lawyer and I have a tremendous . . . background in Burmese cases (MH Tr. 139);" "I came from New York. I know how - - you don't like it.[9] I know how it works - - you don't want to hear about other jurisdictions (MH Tr. 142)."

Having considered the entire record, including the testimony and evidence presented by each of the parties, I now find for the reasons set forth more fully herein, that the government's factual allegations are supported by clear, convincing, and unequivocal evidence. Those allegations being true, the only question remaining at this stage is whether the government carried its burden with respect to its allegation 9, that by repeatedly engaging in contumelious or obnoxious behavior during an immigration hearing which would constitute contempt of court in a judicial proceeding, the respondent violated 8 C.F.R. § 1003.102(g).

Discussion and Analysis

Listening to the audiotapes of the hearing in *Matter of M H* demonstrates beyond cavil that the respondent's conduct far exceeded the fair boundaries of zealous advocacy, that he made a number of ad hominem attacks on the professional integrity of the presiding judge as well as that of the government's trial attorney, and that he repeatedly engaged in insolent and discourteous conduct degrading both to the tribunal and to the judicial process. The respondent's tone and the manner in which he addressed the Immigration Judge was frequently aggressive, belligerent, and confrontational.

Black's Law Dictionary 380 (9th ed. 2009), defines "contumelious" as meaning "insolent, abusive, spiteful, or humiliating," and "contumely" as meaning "insulting language or treatment, scornful rudeness;" the word "obnoxious" is defined as "offensive or objectionable." *Id.* at 1181. Although the respondent testified that his subjective intent was not to be disrespectful, the fact

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[9] Judge Weil testified that he was "dumbfounded" as to why the respondent kept saying that because most of the attorneys who come to El Centro, which is a detention center, also come there from somewhere else (Disc. Tr. 100).

remains that by any objective standard much of his conduct at the hearing in *Matter of M H* can unequivocally be characterized as obnoxious or contumelious or both. Judge Weil's testimony was that the M H hearing was "a tenser proceeding" than he had ever been involved in before in fifteen years on the bench. The referral he subsequently made to OGC (respondent's exhibit 5) expressly stated, "I do not believe that any person deserves to be treated the way Mr. Sondel treated me and the trial attorney in this proceeding."

I find not only that the respondent's conduct was contumelious and obnoxious within the meaning of 8 C.F.R. § 1003.102(g), but also that it would justify a finding of contempt in a federal or state court. For purposes of this inquiry the government is not required, as the respondent suggests it is (Disc. Tr. 240), to prove all four of the elements that would be needed for a conviction of criminal contempt pursuant to Rule 42 of the Federal Rules of Criminal Procedure or 18 U.S.C. § 401(1) (2006). The conduct need only be of such a nature that it could, if committed in federal or state court, furnish the predicate for a finding of contempt. Unlike a criminal contempt proceeding, the purpose here is not to punish the respondent, but to determine whether his conduct implicates his fitness to function as an officer of the court and whether it is in the public interest for him to continue to practice a profession imbued with the public trust. *Cf. Matter of Searer*, 950 F. Supp. 811, 813 (W.D. Mich. 1996).

I note at the outset that none of the reasons or circumstances set forth by the respondent either justifies or excuses his conduct at the M H hearing. The respondent has during the course of this proceeding at various times attempted to explain or justify his conduct based on the assertion that it was simply zealous advocacy necessary to protect his client's due process rights, that it constituted the "ordinary 'wear and tear' of trial practice," that it was occasioned by the intimidating circumstances of participating in a hearing in the hostile environment of a secure, detained facility, that it was prompted by Judge Weil's improper conduct in failing to read the respondent's prehearing submissions in advance, that Judge Weil had an obligation to warn the respondent when he "crossed the line" and he failed to do so, and that the government "cherry-picked" the evidence. The respondent has also insisted that because Judge Weil subsequently heard without incident two other similar cases in which the respondent appeared as counsel, this fact demonstrates that whatever problems the two had in the M H case were "worked out." Alternatively, he argues that the tapes of the other two cases show that he altered his behavior after the M H hearing.

First, the respondent's conduct cannot be characterized as reflecting the ordinary wear and tear of trial, nor can it be attributed only to zealous advocacy. An attorney is not free to say literally anything and everything imaginable in a courtroom under the pretext of protecting his client's rights to a fair trial and fair representation. *United States v. Cooper*, 872 F.2d 1, 3 (1st Cir. 1989) (citing cases). To the contrary, lawyers have the obligation in their advocacy of demonstrating respect for the law and for legal institutions. In *In re Snyder*, 472 U.S. 634, 644 (1985) it was observed that "[t]he license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice," noting that,

> [a]ll persons involved in the judicial process - judges, litigants, witnesses, and court officers - owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. 472 U.S. at 647.

The minimal level of civility required was not met by the respondent in the M H proceeding. It is well established that "a single incident of rudeness or lack of professional courtesy . . . does [not] rise to the level of conduct unbecoming a member of the bar." *Id.* It is in the nature of the legal process, for example, that on occasion during a rapid interchange between the bench and the bar, the speakers will occasionally interrupt each other. Such isolated incidents do not merit comment and are typically ignored. Where, however, an attorney repeatedly interrupts a judge, particularly when he does so in a belligerent, aggressive or bullying manner, each incident contributes to a cumulative effect that, when considered as part of a continuing course of conduct, takes on a somewhat different character. So it is in this case. *See In re Moncier*, 550 F. Supp. 2d 768, 800-802 (E.D. Tenn. 2008) (finding that Moncier interrupted the Court no fewer than fourteen times, and that the interruptions disrupted the proceedings).

As the court in *Moncier* explained, absent a fire or safety issue or other emergency, it is never acceptable for an attorney to deliberately interrupt a presiding judge while the judge is speaking. *Id.* at 801 and n.44. That obligation, moreover, is not reciprocal: it is simply not an issue when the judge interrupts an attorney because the judge is charged with maintaining order and ensuring the progression of proceedings. For similar reasons, challenging a judge for control of the courtroom is never appropriate either. *Id.* Thus when the respondent set himself up as the arbiter of what was or was not satisfactory, permissible, or acceptable procedure: "I don't know how you do things here but it's not satisfactory to me. ... And it's not permissible. ... It's not acceptable (MH Tr. 144)," his conduct was contemptuous. Similarly, when Judge Weil told the respondent to make a brief closing argument, it was not an acceptable response for him to tell the judge that he would comply "[i]f I believe it's appropriate in this case (MH Tr. 230)."

While there are some specific incidents included in the Notice in which the respondent's conduct would not, standing alone, be sufficient to constitute contempt, the overall course of the respondent's conduct in the M H hearing was sufficient to demonstrate a pattern of contemptuous behavior constituting a significant departure from the conduct of a reasonable attorney abiding by acceptable norms of practice. *Cf. Matter of Cohen*, 370 F. Supp. 1166, 1175 (S.D.N.Y. 1973) (assessing the totality of the lawyer's conduct). There are, moreover, also certain specific incidents which are sufficiently egregious, even standing alone, to support a finding of contempt per se, the most notable among them being accusing the judge of doing the government attorney's job for him. *Cf. Matter of Giampa*, 628 N.Y.S. 2d 323, 324 (N.Y. App. Div. 2d 1995) (attorney, inter alia, accused the judge of prosecuting the case more vigorously than the prosecutor). As explained in *In re Gustafson*, 650 F.2d 1017, 1020 (9th Cir. 1981),

moreover, any lawyer would know that "a charge made in open court that the judge made up his mind before the case started was flagrant contempt of court" (quoting *Barnes v. United States*, 241 F.2d 252, 254 (9th Cir. 1956)). The proper avenue for an assertion of judicial bias or conflict is a motion to recuse, *see Cooper*, 872 F.2d at 4, not a series of disparaging comments in open court.

Respect for the law entails respect for those who administer it. Abusive, disrespectful, and insolent behavior undermines both the institutional role of the judge and the decorum of the tribunal itself. *Moncier*, 550 F. Supp. 2d at 812. The respondent trivializes the seriousness of his conduct when he argues that all he did was annoy "the sensibility" of the judge (Disc. Tr. 226). This case is not based on judicial annoyance. The prohibition against undignified or discourteous conduct in open court does not exist for the sake of the presiding judge, but for the sake of the office he or she holds. *Matter of Vincenti*, 458 A.2d 1268, 1275 (N.J. 1983) (noting that respect for, and confidence in, the judicial system are essential to the maintenance of an orderly system of justice). Such rules exist in order to maintain public respect for a rule of law that depends upon public respect, and not in order to protect the sensitivities of individual judges. *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 133 (Mich. 2006). The ultimate objective of an attorney discipline system is to protect the public, the courts, and the legal profession. *Grievance Adm'r v. Lopatin*, 612 N.W. 2d 120, 126 (Mich. 2000).

Neither can the respondent's conduct be viewed as an innocent mistake by a new or unseasoned lawyer appearing at a detention facility for the first time; the record is clear that by the time of the M H hearing, the respondent had been practicing law for more than 25 years. His answer to the Notice in this matter reflects that by the time he appeared at El Centro he had already had experience in other detention facilities in Elizabeth, N.J., Bradenton, Florida, and El Paso, Texas. The respondent's exhibit 19 reflects that the affiant Moe Chan Liu had accompanied the respondent to the Elizabeth Detention Center "many times" to act as an interpreter for him as he interviewed detained Burmese aliens. The stark environment of a detained setting thus provides no adequate explanation for the respondent's conduct either.

The respondent's letter of purported apology to Judge Weil notwithstanding, he continued at the July 7 hearing to challenge the judge's preparation for and conduct of the M H hearing and to imply that his own conduct was related in part to the fact that Judge Weil had failed to read in advance the documents that he had previously submitted. Judge Weil testified that he made a determination that the case would proceed better if he heard the testimony first, then read the documents afterward in light of the testimony, rather than doing it the other way around (Disc. Tr. 143-44). The record reflects that the judge had also explained that to the respondent at the M H hearing as well, noting that the documents would make more sense in the context of the testimony (MH Tr. 141). The respondent nevertheless continued to argue that the judge should have done it his way and read the documents first. When asked specifically whether he would agree that a judge has the right to decide cases in the way that makes the most sense to them (sic), he said, "No. In theory, but not in practice, no. (Disc. Tr. 297)."

The respondent testified that he had called Judge Weil as a witness "[b]ecause I wanted him to come. I wanted him to testify. I wanted to see if he understands, if he considered that maybe he also could have made mistakes (Disc. Tr. 140)." A number of the respondent's comments about Judge Weil's testimony reflect the same ongoing undercurrent of disparagement or disrespect for the judicial office as is reflected in the M H tapes themselves:

> I'm fair minded no matter what Judge Weil characterizes me, and I've apologized and regret the things I've said and I will address those, but perhaps worse was that he was dissembling here in court today. He did conceal. He didn't explain this to me. He never told me the difference between master hearings and prehearing conferences (Disc. Tr. 207).
>
> . . . .
>
> He said under oath today, he's proud of being methodical. Well, that's fine. But if he had been prepared, he wouldn't have had to been (sic) quite so methodical about things he could have easily known about before the hearing started (Disc. Tr. 209-10).
>
> . . . .
>
> He just proceeded and expected me to figure this out. He said today that other lawyers don't complain. Well, I don't know if that's true (Disc. Tr. 210).
>
> . . . .
>
> Because of the no court rules,[10] because I didn't know, because Judge Staton had already complained about me. Because they don't read the background material about Burma, and I had no way of knowing how fair or not Judge Weil was (Disc. Tr. 220).
>
> . . . .
>
> So here I am on April 3rd in El Centro not knowing what's going to happen with a judge who is meandering and going on with the exhibit and then taking this forensic report and I realize they're going to make a major, major significant aspect of this case without understanding what it even means (Disc. Tr. 221).
>
> . . . .

[10] The respondent has repeatedly asserted that there were "no rules" in the El Centro Immigration Court. The fact is that there are no local rules.

I have been told throughout this hearing that it's not about Judge Weil and his improper conduct. No one ever told me he never - - according to him he didn't even do improper conduct. He wouldn't even go that far to question himself (Disc. Tr. 227).

. . . .

And he came to court today and basically testified that he's proud of it. Knowing nothing about Burma makes you objective and that's fine. Well, no it isn't fine. I'm a lawyer. I went to law school. That's a juror. A juror's not supposed to have any prejudice. Isn't supposed to know about the case or have any predisposition. The role of the judge is to be informed. He's not the jury (Disc. Tr. 230-31).

. . . .

Why do we have that our government write human rights reports? Does he understand that? I don't even - - does he understand what an asylum hearing is about (Disc. Tr. 269)?

. . . .

Judges need to be fair. Judge Weil need (sic) to be fair and certainly I do. But I've been charged. I wanted to charge Judge Weil. It wouldn't be the process. The OGC doesn't have the power to charge Judge Weil with any offense (Disc. Tr. 271).

. . . .

I'm not a - - at the time of the M H hearing I was - - I was concerned what was taking place. And in the absence of an explanation I had reason to believe that he was acting unprofessionally until I was advised otherwise (Disc. Tr. 285).

Even were I to credit that Judge Weil "made mistakes" as the respondent suggests, there is no amount of error or even provocation by a judge that can justify or erase contemptuous conduct on the part of an attorney. Although the respondent still appears to believe that his allegations about Judge Weil are somehow relevant to the issue in this case, the weight of authority is otherwise, as he has previously been advised. *See, e.g.*, *Giampa*, 628 N.Y.S. 2d at 325 (rejecting respondent's efforts to justify his own improper conduct by blaming the judges before whom he was trying cases); *United States v. Lumumba*, 794 F.2d 806, 815 (2d Cir. 1986) (observing that impropriety on the part of a judge may be considered in mitigation but cannot justify or excuse contemptuous

conduct) (citing cases); *Bar Ass'n of Greater Cleveland v. Carlin*, 423 N.E. 2d 477, 479 (Ohio 1981) (noting that the integrity of the judicial process demands deference to the court on the part of its officers, and that no amount of provocation by a judge can excuse an attorney from his obligations or condone contemptuous acts).

The respondent also emphasizes that many reported contempt cases have in common the fact that the respondent was warned first by the trial judge that he would be held in contempt if the conduct persisted. He said he received no such warning. But Immigration Judges do not have contempt powers; although 8 U.S.C. § 1229a(b) (2006) authorizes the Attorney General to promulgate regulations permitting Immigration Judges to sanction lawyers for contempt, those regulations never have been promulgated. Judge Weil thus was without authority to deal summarily with the respondent by way of a contempt citation, so any such warning would have been futile and no more than an empty threat.

Judge Weil testified, moreover, that he actually did try to stop the respondent's conduct in numerous instances, but he did not want to elevate what was already a tense situation (Disc. Tr. 80). He said he made responses to each inappropriate incident, "but I did not come out and make a speech about the rules of conduct that I felt you violated. I think it would have just elevated things and made them worse if I had (Disc. Tr. 81)." Judge Weil testified that he chose not to confront the respondent at that point "because I know (sic) you had two more cases coming down the pike and . . . it would have made it even worse or exacerbated the future cases that I would have to sit through hearing and adjudicate (Disc. Tr. 92)." Judge Weil said he made an affirmative decision to await the completion of all three of the cases in which the respondent was counsel before filing a complaint. Thus when the respondent asked Judge Weil why he had not given him a warning after the M H hearing was over but before they started the next case, the judge said that he "wasn't going to fan the flames (Disc. Tr. 159)." He pointed out that things had been tense in the prior hearing, and "it would not have improved the conduct of the second and third hearing to tell you I was going to file a complaint against you (Disc. Tr. 159)."

A reasonable lawyer should not, in any event, have to be forewarned that threatening, interrupting, and repeatedly impugning the integrity of the presiding judge at a hearing does not meet the minimal standard of professionalism and civility for practice in any tribunal. While the respondent asserts that it is "a specious argument to keep saying that I'm supposed to self police myself . . . to know when I've crossed over the line (Disc. Tr. 246)," the fact is that as a member of the New York bar for over 25 years, the respondent may fairly be charged with knowledge of the basic ethical standards of his profession, including, as explained in *Moncier*, 550 F. Supp. 2d at 796 n.38, such ethical and professional codes as those adopted by groups like the American Bar Association, the American College of Trial Lawyers, and other similar professional associations. As explained long ago in *Snyder*, 472 U.S. at 645, the traditional duties imposed on attorneys can be found in "case law, applicable court rules, and 'the lore of the profession' as embodied in codes of professional conduct." *Cf. Matter of Holtzman*, 577 N.E. 2d 30, 33 (N.Y. App. 1991) (asking whether a reasonable attorney familiar with [the Code of Professional Responsibility] and its ethical strictures would have notice of what conduct is proscribed). An

advance warning, moreover, is not always considered essential even in the context of a criminal contempt when the conduct is "clearly contemptuous." *United States v. Schiffer*, 351 F.2d 91, 94-95 (6th Cir. 1965) (describing the attorney's remarks there as contemptuous per se).

The respondent finally argues that the government "cherry-picked" the evidence and failed to consider his overall conduct in light of all the evidence. He pointed out that there were long stretches during the M H hearing during which he did not speak at all, or interrupt anyone. He said, referring to Judge Weil, that "I let him speak - - I let him speak for around six, seven pages. It must have been over 100, 150 questions. That's after my questions and after the trial attorney (Disc. Tr. 229)." It is, of course, not the attorney's prerogative to "let" the judge speak, and neither the fact that the respondent was silent for part of the M H hearing, nor the fact that he did not interrupt the judge at every possible opportunity, alters the character of the respondent's remarks when he did speak.

Nothing in Judge Weil's testimony suggests, moreover, that he thought the problems with the respondent's conduct in the M H hearing had been "worked out" before the next two cases were heard. Rather, he said that he took pains in all three cases to use appropriate judicial tools to keep the hearings as calm as they could have been "given your conduct" (addressed to Mr. Sondel, Disc. Tr. 127). Judge Weil attributed the fact that the other two cases proceeded more smoothly to the fact that once asylum had been granted in M H 's case, it was reasonable for the respondent to expect that the two other similar cases would have a similar result. Even assuming arguendo that the respondent altered his behavior in the next two hearings, this fact does nothing to retroactively change the character of his conduct at the M H hearing.

Findings and Conclusions

Accordingly, I make the following findings and conclusions:

1. Respondent was admitted to the practice of law in New York in 1980.
2. On December 11, 2006, Respondent signed a form EOIR-28 and entered his appearance as counsel of record in the *Matter of M H* ( ).
3. On April 3 and 4, 2007, Respondent appeared at the individual hearing in *Matter of M H* ( ) held at the El Centro, California Immigration Court.
4. During the individual hearing in *Matter of M H* ( ), there were numerous instances when Respondent either interrupted the Immigration Judge or spoke while the Immigration Judge was speaking.
5. During the individual hearing in *Matter of M H* ( ) Respondent said the Immigration Judge: failed to look at documents in the case; disliked him or disliked people from New York; did the government counsel's job for him; and was upset with Respondent.
6. During the individual hearing in *Matter of M H* ( ), Respondent had outbursts, went off on tangents, and engaged in sarcastic behavior.
7. During the individual hearing in *Matter of M H* ( ), Respondent said

he would report the immigration judge to his supervisors and to the Board of Immigration Appeals, and engaged in argumentative behavior towards the immigration judge.

8. Respondent's conduct prolonged the individual hearing.

9. By repeatedly engaging in contumelious or obnoxious conduct in an immigration hearing which would constitute contempt of court in a judicial proceeding, Respondent violated 8 C.F.R. § 1003.102(g).

10. On June 12, 2007, OGC issued Respondent an informal admonition under 8 C.F.R. § 1003.104(c) for violating 8 C.F.R. § 1003.102(1).

Order

Having considered the entire record, including the testimony and evidence presented, I now find for the reasons set forth more fully herein, that the disciplinary charge is supported by clear, convincing, and unequivocal evidence, and should therefore be, and it hereby is, SUSTAINED. It is accordingly in the public interest that discipline be imposed. The parties will be contacted shortly in order to schedule a telephonic conference to complete the scheduling for the final stage of this proceeding.

SO ORDERED.

Dated and entered this 29th day of September, 2010.

Ellen K. Thomas
Administrative Law Judge

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

March 10, 2011

File No: D2007-276)	IN DISCIPLINARY PROCEEDINGS
)	
In the Matter of:)	
)	
JEFFREY SONDEL)	Jennifer Barnes, Disciplinary Counsel
Respondent.)	Scott Anderson, Deputy Disciplinary Counsel
)	Office of the General Counsel
)	5107 Leesburg Pike, Suite 2600
)	Falls Church, Virginia 22041
Jeffrey Sondel, Esq.	Eileen M. Connolly, Appellate Counsel
75 Riverside Drive, Suite 5R	U.S. Immigration and Customs Enforcement
New York, New York 10024	Appellate and Protection Law Division
	Department of Homeland Security
	5201 Leesburg Pike, Suite 1300
	Falls Church, Virginia 22041

MEMORANDUM OF FINAL DECISION AND ORDER

Evidence was taken in the final stage of this three-part attorney discipline proceeding and the record was completed on December 22, 2010, after which I gave the parties a period of time in which to explore the possibility of resolving the issue of appropriate discipline by agreement. The parties subsequently reported that no agreement was reached and this final decision and order is accordingly entered based on consideration of the record as a whole, which includes the evidence taken on March 10, 2010 and July 7, 2010, as well as on December 22, 2010.

The previous rulings dated May 20, 2010 and September 29, 2010 are hereby incorporated by reference. The former order denied the respondent's motion to dismiss this case on various grounds, and the latter order concluded that the respondent repeatedly engaged in contumelious or obnoxious conduct in a hearing in *Matter of M H* ( ) which conduct would constitute contempt of court in a judicial proceeding, and that in so doing the respondent violated 8 C.F.R. § 1003.102(g). The disciplinary charge was accordingly found to be sustained based on clear, convincing, and unequivocal evidence, and it was found to be in the public interest that discipline be imposed upon the respondent. The question of what specific discipline should be imposed was reserved and is now ripe for resolution.

Disciplinary counsel in this matter urges that a one year suspension should be imposed; the respondent's position is that no discipline is warranted. I have concluded otherwise, as explained in the September 29, 2010 order. In determining the appropriate measure of discipline, consideration must be given not only to the nature of the violation, but also to both mitigating and aggravating factors. Mitigating factors are those which justify a reduction in the degree of discipline to be imposed, while aggravating factors are those which justify a more severe sanction. There are both mitigating and aggravating circumstances to be considered in this case.

Potentially mitigating factors include the fact that the respondent is currently in good standing with the New York State Bar, and that he is generally viewed favorably by his clients. *Cf. Matter of Shah*, 24 I. & N. Dec. 282, 288 n.3 (BIA 2007) (suggesting such factors may be appropriate for adjudicator's consideration). The testimony of respondent's witness M C L on December 22, 2010 was that he had referred many Burmese cases to the respondent, and that the respondent is one of only a few lawyers who understand the conditions in Burma, that he keeps his appointments and knows how to deal with traumatized individuals from Burma, and that he often succeeds when presenting their cases. The respondent represented M C L wife in her asylum claim with good results.

To the respondent's credit is also the fact that the conduct for which he is to be disciplined was not motivated by any dishonest or selfish motive on his part, nor did he gain any personal profit at the expense of his client. The respondent suggests that the subsequent hearing conducted immediately after *Matter of M H* in *Matter of T W* should have not only a mitigating but also an exonerating effect because it demonstrates that he altered his behavior right after the hearing in *Matter of M H* and that therefore this disciplinary case should never have been brought. It is true that the respondent did not engage in the same conduct during the hearing in *Matter of T W* and that fact may be considered in mitigation. The contention that appropriate behavior in the second case excuses contumelious or obnoxious conduct in the first has been rejected in prior orders, and is rejected again. The final potentially mitigating factor is that on June 29, 2010 the respondent sent a letter of apology to Judge Weil.

Among the potentially aggravating factors is the fact that the respondent is a seasoned practitioner having been admitted to the New York State Bar in 1980 so that by the time of the M H hearing he had ample time to become familiar with the minimal standards of basic civility and how lawyers are supposed to conduct themselves in a courtroom setting. The respondent's history of previous discipline and his response to that history is also a potentially aggravating factor, as is his failure to acknowledge the wrongful nature of his conduct or to take

full responsibility for it. Finally, the fact that the respondent displayed some of the same or similar conduct in the course of this proceeding is itself an aggravating factor because it both undercuts the respondent's assertion that his behavior was corrected after the M H hearing, and raises doubts as to the sincerity of any expression of remorse.

The respondent's previous disciplinary history includes a suspension from the New York State Bar from June 7, 1999 (ex. G-9) through June 1, 2004 (ex. R-23) for failure to register or to pay the biennial registration fee, during which time the respondent evidently continued to practice in the Immigration Courts. While I regard a five year suspension from the practice of law as a serious matter, I nevertheless do not give the suspension any substantial aggravating effect because I credit the respondent's testimony that he corrected the problem as soon as he learned of it. While his conduct bespeaks a certain degree of carelessness, I find that the respondent did not knowingly engage in the practice of law while under suspension.

More serious for purposes of this proceeding, however, is the fact that the respondent was already the subject of a previous Informal Admonition[1] on June 12, 2007 for violating 8 C.F.R. § 1003.102(l) by repeatedly failing to appear before Judge Staton at hearings scheduled for March 1, 2007 and March 12, 2007 (ex. G-8). The respondent filed a motion dated January 21, 2011 in which he belatedly objected to the admission of exhibit G-8,[2] and requested that the Informal Admonition be excluded from consideration. Disciplinary Counsel filed a response in opposition to the motion. Because the motion basically constitutes an untimely collateral attack on the Informal Admonition, I decline to entertain it.

The offense that led to the Informal Admonition was of the same general character as was the conduct that led to this proceeding. In *Matter of De Anda*, 17 I. & N. Dec. 54, 58 (BIA 1979), the Board of Immigration Appeals held that an attorney's unexplained failure to appear at two successive scheduled hearings amounted to "contumelious [and] obnoxious conduct" within the meaning of a predecessor regulation, 8 C.F.R. § 292.3(a)(11), a decision that was subsequently affirmed by the Attorney General, 17 I. & N. Dec. 54 at 61-62 (1979). *Cf. Att'y Grievance Comm'n of Md. v. Ficker*, 572 A.2d 501, 505-06 (Md. 1990) (finding that even a failure to be punctual in a scheduled court appearance is not only detrimental to the administration of justice, "but also constitute[s] discourteous conduct degrading to the tribunal").

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[1] The filing of the Notice of Intent to Discipline in this matter permits the Informal Admonition to become public record. 8 C.F.R. § 1003.108(b).

[2] At a prehearing conference on February 18, 2010, the respondent was given a ten-day window of opportunity to file written objections to any of the government's proposed exhibits, notwithstanding his prior failure to comply with Judge Tsankov's scheduling order. His response to that opportunity was to complain that it was too great a burden to have to make objections in writing. Exhibit G-8 was subsequently admitted into evidence on October 19, 2010 without written objection.

The record reflects that even before the respondent failed to appear before Judge Staton for hearings scheduled on March 1, 2007 and March 12, 2007, he had already failed to appear before Judge Weil on January 8, 2007 for the first scheduled hearing in *Matter of M H* and for two other cases originally set for that same day. Judge Weil sent the respondent a letter on January 9, 2007 (ex. G-3) explaining to him that filing a motion for a continuance on the same day the matter was scheduled to be heard does not excuse a party's failure to appear. The letter further advised the respondent that any future failure to appear would be reported to disciplinary authorities.[3]

The written response to the complaint underlying the Informal Admonition is, moreover, shocking in both its content and its tone. The response (ex. R-8) asserts that the respondent was "confounded and angered" to learn that Judge Staton had initiated a complaint against him. It contends that Judge Staton was wrong in not granting the respondent's motions, and that the denial of those motions and the initiation of discipline against the respondent demonstrates that "it is he and not me who has acted and conducted himself improperly." The response asserts further that "the record shows that it was Judge Staton who has engaged in unprofessional and frivolous behavior and it is his conduct that should be investigated and disciplined," and requests that the response itself "serves as a complaint against Judge Staton for violating his responsibilities as an Immigration Judge and for engaging in improper conduct." The response went on to explain why the respondent believed Judge Staton should have granted his motions.

The respondent's approach to this proceeding was similar in tone and content. He repeatedly expressed indignation and outrage that Judge Weil had filed a complaint against him, and that this proceeding was even instituted. He cast himself in the role of a victim, as he did in response to Judge Staton's complaint, and similarly accused Judge Weil of engaging in improper conduct and of violating his responsibilities as an Immigration Judge. The respondent consistently attributed his own conduct in the M H hearing to the fact that Judge Weil had elected to hear the testimony in that case first, before reading the country conditions report, which the respondent characterized as a failure to prepare properly for the hearing. The respondent said several times that he wanted to file a complaint against Judge Weil.

After reviewing the record as a whole and observing the respondent's demeanor in the course of this proceeding it is evident that he is neither prepared to acknowledge the wrongfulness of his conduct or to accept any genuine responsibility for it. Upon my appointment after Judge Tsankov's recusal in this matter, I reviewed the case file, after which I issued an order to the

[3] Why an attorney who received such a warning letter in January would then elect to file similar motions and fail to appear for the cases pending before Judge Staton in March is unelaborated.

parties on December 18, 2009, observing that Judge Tsankov's scheduling order had not been complied with and that relations between the parties had apparently deteriorated to the point where they were unwilling to meet and confer in order to prepare for the hearing. That order transmitted a copy of the Federal Bar Association's Standards for Civility in Professional Conduct and advised the parties that those standards reflected my expectations for conduct in this proceeding.

Those expectations were not met. The first telephonic prehearing conference held thereafter in this matter on February 18, 2010 was unduly lengthy and difficult, largely because of the respondent's unwillingness to focus on the topic at hand and his time-consuming tangents when matters did not proceed as he wanted. I had to either speak over the respondent or cut him off several times because he kept trying to reargue questions about the initiation of this proceeding in the first instance, about various of Judge Tsankov's prehearing orders prior to her recusal, and about the recusal notice itself. When, in response to his many complaints about Judge Weil, I finally asked him, "Do you believe this case is about Judge Weil's conduct?" His response was, "well of course Judge." At the hearing on March 10, 2010, the purpose of which was to enter the audiotapes of the M H hearing into the record, I again had to speak over the respondent. Even after I began playing the tapes, the respondent interrupted the tape to raise other issues. The respondent's motion to dismiss thereafter filed on April 5, 2010 characterized this proceeding as a miscarriage of justice, made shotgun allegations of misconduct by General Counsel's office, OCIJ, Judge Tsankov, Judge Weil and myself, and continued to attribute his own conduct at the M H hearing to the fact that Judge Weil did not prepare for the hearing in the manner the respondent thought was proper.

Regrettably, the respondent is correct in his assertion that this process has taken far too long. But while not all the delay is attributable to the respondent, much of it is. The attitude and approach he took in the course of the proceeding evidenced a fundamental disregard for the judicial process: the respondent routinely ignored explicit instructions, continued to insist on revisiting over and over again issues that had already been resolved, engaged in lengthy rationalizations and denials of his misconduct, and exhibited antagonistic, belligerent, or aggressive behavior on numerous occasions.

Notwithstanding what purported to be a letter of apology to Judge Weil in June of 2010, moreover, the respondent continued in the hearings on July 7 and December 22, 2010 to attribute his conduct in *Matter of M H* to Judge Weil's failure to prepare properly and to persist in other allegations of impropriety by Judge Weil, including accusing the judge of dissembling in the testimony he gave on July 7. I give minimal credence to the respondent's letter because it appears patently insincere in light of his continuing gratuitous personal attacks on Judge Weil

and his continuing insistence that he still has no idea why this case was even brought. The letter itself, moreover, minimizes the nature of the conduct in question. While the letter does acknowledge some "ill-advised and inappropriate remarks," the respondent nowhere owns up to a course of conduct sufficiently obnoxious and obstructive to reflect adversely on the legal profession and to be injurious both to the administrative tribunal and to the opposing party. The letter says that the respondent "did not mean to cast any aspersions or assumptions on you or your rulings, and if that is the impression that was left, that I do regret."

The respondent continues to deny knowing the "real" reason this case was brought. Let us be clear: this case was not instituted because Judge Weil was left with the wrong "impression." This case was brought because the respondent repeatedly engaged in contumelious or obnoxious conduct at the hearing in *Matter of M H*, which conduct would constitute contempt of court in a judicial proceeding, and in so doing he violated 8 C.F.R. § 1003.102(g). The respondent appears not to fully appreciate that fact. His continuing suggestions that there is some hidden motive for Judge Weil's filing the original complaint against him, or for Disciplinary Counsel's issuing the Notice of Intent to Discipline and pursuing this case, are wholly unsupported.

The respondent's refusal to accept responsibility for his own wrongful conduct calls into question whether he is likely in the future to comport himself in a manner that meets the minimal standards and professionalism required in the Immigration Courts without some significant measure of discipline as a motivator. Contrary to the respondent's view that he is exonerated by his conduct in the T W hearing, I find that the hearing tapes in the T W proceeding reflect only that the respondent is capable of professional behavior when a matter is proceeding as he believes it should. What is evident in this proceeding, however, is that there remain serious questions as to whether the respondent is able or willing to conduct himself in a manner that meets minimal standards of professionalism and civility required of practitioners when a matter does not proceed as he wishes.

I recognize that the respondent's practice is limited to immigration matters and that suspension for an entire year as requested by Disciplinary Counsel could have a devastating effect on his practice. That fact argues for mitigation. At the same time, the respondent's lack of appreciation for the gravity of the offense creates a danger of recurrence and I am persuaded that no improvement in the respondent's conduct is likely without a period of suspension sufficient in length to convince the respondent, whether or not he agrees with the decision, that he will have to take steps to modify his approach to litigation if he wishes to practice before the Immigration Courts.

I find that the respondent should be suspended for a period of seven months. During this period the respondent would do well to reexamine his conduct and to entertain the possibility that it could be he himself, and not everybody else, who is in the wrong in this matter. He is encouraged to seek out and attend continuing legal education classes in civility and professionalism.

ORDER

The respondent is suspended for a period of seven months.[4]

SO ORDERED.

Dated and entered this 10th day of March, 2011.

Ellen K. Thomas
Administrative Law Judge

[4] No dates are provided because this order will become final only upon waiver of appeal or expiration of the time for appeal to the Board of Immigration Appeals, whichever comes first, and does not take effect during the pendency of any appeal to the Board. 8 C.F.R.§ 1003.106(b).