

II of the Amended Complaint alleges violation of 37 C.F.R. §§ 10.23(b)(1) and (6) and 10.23(c)(5) because Respondent was disbarred from practice as an attorney by the Massachusetts Board of Overseers on December 15, 2004, based on the same eleven felony convictions cited in Count I of the Complaint, and failed to notify the OED Director of his permanent disbarment in Massachusetts as ordered by this Tribunal. On the basis of these allegations, Complainant requests entry of an order excluding Respondent from practice before the PTO pursuant to 37 C.F.R. § 10.154.

On February 3, 2006, Respondent filed Motions to Stay Proceedings and for Partial **Summary** Judgment,³ which are opposed by Complainant. With regard to Count II, Respondent asserts that reciprocal discipline should not be imposed which is identical to the discipline that was imposed by Massachusetts. Respondent maintains that in Massachusetts Respondent resigned and then was summarily disbarred, but there was no hearing and no facts were adduced. Rather, Respondent submits that a stay should be granted pending the outcome of the proceedings in 'twoother jurisdictions where he is disputing the disciplinary actions against him. Respondent is the subject of disciplinary actions in Pennsylvania and the District of Columbia, and Respondent contends that the status of all proceedings should be taken into account before judgment is rendered in this matter. Additionally, Respondent proffers, by affidavit, his offer to refrain voluntarily from representing clients before the US PTO pending a final determination in this proceeding.

Respondent also moves for partial summary judgment, arguing that no genuine issue exists as to any material fact and that Respondent is entitled to judgment on the issues raised as a matter of law. Respondent contends that pursuant to the State Department guidelines, the crimes for which Respondent was convicted are not considered to be crimes of moral turpitude, and that such guidelines should be employed in this proceeding. ~~According to Respondent, he did not engage in illegal conduct~~ involving moral turpitude, he did not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, and he was not convicted of a criminal offense involving moral turpitude, dishonesty, or breach of trust.

³ Respondent's Motion to Dismiss Complaint was denied on January 21, 2005.

Complainant opposes Respondent's Motions to Stay Proceedings and for Partial Summary Judgment. Complainant argues with regard to Count I that the only issue presented is whether Respondent's felony convictions, or the essential elements underlying those crimes, involve moral turpitude, dishonesty, fraud, deceit, misrepresentation, or breach of trust and that such issue is one of law. See, e.y., *In re Tidwell*, 831 A. 2d 953,957 (D.C. 2003). Complainant maintains that Respondent has not established that each of his eleven felony convictions, as a matter of law, does not involve moral turpitude, dishonesty, fraud, deceit, misrepresentation, or breach of trust. I readily agree.

As pointed out by Complainant, a felony conviction is conclusive evidence of a lack of good moral character for registration to practice before the PTO under 37 C.F.R. §§ 11.7(h)(1) and (h)(1)(ii)(B). Complainant also persuasively argues that the crimes and underlying elements of the crimes for which Respondent was convicted include elements of dishonesty, inducement, conspiracy, or involved illegal sexual activity with a child and, as such, Respondent's felony convictions involved moral turpitude. See *Jordan v. DeGeorge*, 341 U.S. 223,227 (1951); *Padilla v. Gonzales*, 397 F.3d 1016, 1020 (7th Cir. 2005); *Omagah v. Ashcroft*, 288 F.3d 254,262 (5th Cir. 2002); *Taylor v. United States*, 396 F.3d 1322, 1329 (11th Cir. 2005).

Complainant maintains that pursuant to the Foreign Affairs Manual cited by Respondent, Respondent's convictions would still constitute moral turpitude. See Foreign Affairs Manual at 9 FAM 40.21(a) N2.2. For example, Complainant notes that the Foreign Affairs Manual defines moral turpitude as including any conviction where an element of the crime involves fraud and that Respondent's conviction under 8 U.S.C. § 1324(a)(1)(A)(iv) inherently included the underlying violation of 8 U.S.C. § 1324c(a)(2), which involves the use and falsification of documents for immigration purposes. As noted by Complainant, Respondent's convictions under 18 U.S.C. § 371 and 8.U.S.C. § 1324 expressly include "conspiracy" as an element. Moreover, the Foreign Affairs Manual interprets a crime involving moral turpitude as any crime involving fraud against Government functions, mail fraud, contributing to the delinquency of a minor, gross indecency, or lewdness. See Foreign Affairs Manual at 9 FAM 40.21(a) N2.3-2, N2.3-3.

Finally, Complainant convincingly argues that, without reaching the question of moral turpitude, Respondent's felony convictions violate 37 C.F.R. §§ 10.23(b)(4) and 10.23(c)(1) because his crimes involve dishonesty, fraud, deceit, or misrepresentation. For example, Complainant notes that

Respondent's conviction of conspiracy under 18 U.S.C. § 371 necessarily involves elements of dishonesty, deceit, and misrepresentation. See, e.g., *United States v. Broce*, 488 U.S. 563, 570 (1989); *Dennis v. United States*, 384 U.S. 855, 861 (1966).

Accordingly, I find that summary judgment is not warranted, and Respondent's Motion for Partial Summary Judgment is **Denied**.

Complainant opposes Respondent's Motion to Stay Proceedings which is based on waiting for the final determinations of the Pennsylvania and District of Columbia disciplinary proceedings against Respondent. First, Complainant observes that on January 26, 2006 after Respondent's motion, the Supreme Court of Pennsylvania issued an order disbarring Respondent from the practice of law in Pennsylvania. As such, Respondent's argument concerning the Pennsylvania proceeding is now moot.

Complainant also contends that a stay is not warranted because the charge in the Complaint in this matter concerns reciprocal discipline due to Respondent's Massachusetts disbarment and therefore no evidence from the Pennsylvania or District of Columbia disciplinary proceeding is necessary for the prosecution of the charges in this proceeding. I agree. Addressing Respondent's argument that the Massachusetts disbarment resulted from a resignation without a hearing, Complainant points out that Respondent's disbarment resulted from a disciplinary action that was initiated due to the same eleven felony convictions that are the basis of Count I and that by offering his resignation, Respondent was required **by** Massachusetts rule to waive his right to be heard and admit to the charges made by Massachusetts bar counsel.' See Mass S.J.C. Rule 4:01, sec. 15.

Complainant persuasively argues that this proceeding already has been stayed once and that there are no unusual circumstances that justify suspending this proceeding any further. See 37 C.F.R. § 10.139(c). Finally, Complainant maintains that Respondent's suggested argument that his failure to give notice of his Massachusetts disbarment to the OED warrants a stay is without merit. Complainant correctly notes that while Respondent's failure to give notice in violation of this

⁴ Respondent, in his Affidavit and Resignation dated May 31, 2005, acknowledges that any formal Order of Disbarment could have an adverse impact on his status as a patent agent before the US PTO.

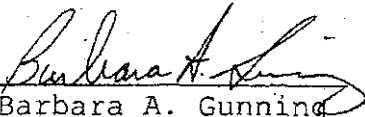
Tribunal's Order may reflect upon his conduct in this proceeding, it is not a sufficient basis, or necessary fact, required for the adjudication of the Complaint against Respondent.

Accordingly, Respondent's Motion to Stay Proceedings is **Denied.**

The parties are reminded that the hearing in this matter will be held beginning promptly at 9:30 a.m. on Tuesday, **April 4, 2006**, in San Jose, California and continuing if necessary on April 5, 2006.⁵ The parties will be notified of the location and of other procedures pertinent to the hearing when those arrangements are complete.

THE RESPONDENT IS HEREBY ADVISED THAT FAILURE TO APPEAR AT THE HEARING WITHOUT GOOD CAUSE BEING SHOWN THEREFOR, MAY RESULT IN DEFAULT JUDGMENT BEING ENTERED AGAINST IT.

IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.


Barbara A. Gunning
Administrative Law Judge

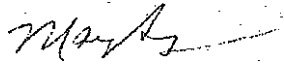
Dated: February 28, 2006
Washington, D.C.

⁵On February 3, 2006, Complainant filed its Response to Respondent's Pre-Hearing Statement and Preservation of Objection to Expert Opinion Testimony by Lay Witness. Therein, Complainant objects to proposed witnesses identified by Respondent in his prehearing exchange who will be providing testimony concerning Respondent's "legal competency" on the grounds that such witnesses are not shown to have any professional background, qualifications, or experience that would qualify them as being eligible to provide expert testimony concerning Respondent's "legal competency." Complainant preserves its right at hearing to object to the admission of any lay testimony related to Respondent's "legal competency" on the grounds that the lay witnesses are not qualified as experts in accordance with this Tribunal's Order.

**In the Matter of *Harry L. Moatz, Director Office of Enrollment and Discipline, Complainant*
v. Michael David Rostoker, Respondent.
Proceeding No. D04-15**

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Respondent's Motion to Stay Proceedings; Order Denying Respondent's Motion for Partial Summary Judgment**, dated February 28, 2006, was sent this day in the following manner to the addressees listed below.



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Legal Staff Assistant

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Dated: February 28, 2006
Washington, D.C.