

2/19/01

Final Order No. DOH-01-0370-FOI-MQA

FILED DATE - 3/2/01

Department of Health

STATE OF FLORIDA
BOARD OF MEDICINE

By: Vicki P. Kenon
Deputy Agency Clerk

DEPARTMENT OF HEALTH,

Petitioner,

vs.

CASE NO.: 1999-55254
LICENSE NO.: ME0045316

BENJAMIN PAZ OCAMPO, M.D.,

Respondent.

_____ /

FINAL ORDER

THIS CAUSE came before the Board of Medicine (Board) pursuant to Sections 120.569 and 120.57(2), Florida Statutes, on February 2, 2001, in Tampa, Florida, for consideration of the Administrative Complaint (attached hereto as Exhibit A) in the above-styled cause. At the hearing, Petitioner was represented by Larry G. McPherson, Jr., Senior Prosecuting Attorney. Respondent was present and represented by G. Thomas Bowden, II, Esquire. The facts are not in dispute.

Upon consideration, it is ORDERED:

1. The allegations of fact set forth in the Administrative Complaint are approved and adopted and incorporated herein by reference as the findings of fact by the Board.

2. The conclusions of law alleged and set forth in the Administrative Complaint are approved and adopted and incorporated herein by reference as the conclusions of law by the Board.

3. The violations set forth warrant disciplinary action by the Board. THEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED:

1. Respondent shall pay an administrative fine in the amount of \$5000 to the Board. Said fine shall be paid within 90 days from the date this Final Order is filed.

2. Respondent shall pay the costs associated with this case in the amount of \$513.41. Said costs shall be paid within 90 days from the date this Final Order is filed.

3. Respondent shall be and hereby is REPRIMANDED.

4. Respondent shall be placed on probation for a period of three years subject to the following terms and conditions:

a. Respondent shall comply with all state and federal statutes, rules and regulations pertaining to the practice of medicine, including Chapters 456, 458, 893, Florida Statutes, and Rule 64B8, Florida Administrative Code.

b. Respondent shall appear before the Probationer's Committee at the first meeting after said probation commences, at the last meeting of the Probationer's Committee preceding termination of probation, quarterly, and at such other times requested by the committee.

Respondent shall be noticed by Board staff of the date, time and place of the Board's Probationer's Committee whereat Respondent's appearance is required. Failure of the Respondent to appear as requested or directed shall be considered a violation of the terms of probation, and shall subject the Respondent to disciplinary action.

c. In the event the Respondent leaves the State of Florida for a period of thirty days or more or otherwise does not engage in the active practice of medicine in the State of Florida, then certain provisions of Respondent's probation (and only those provisions of said probation) shall be tolled as enumerated below and shall remain in a tolled status until Respondent returns to active practice in the State of Florida. Respondent must keep current residence and business addresses on file with the Board. Respondent shall notify the Board within ten (10) days of any changes of said addresses. Furthermore, Respondent shall notify the Board within ten (10) days in the event that Respondent leaves the active practice of medicine in Florida.

d. In the event that Respondent leaves the active practice of medicine in this state for a period of thirty days or more, the following provisions of probation shall be tolled:

- (1) The time period of probation shall be tolled.
- (2) The provisions regarding supervision, whether direct or indirect by another physician.
- (3) The provisions regarding preparation of investigative reports detailing compliance with this Stipulation.

e. Respondent shall not practice except under the indirect supervision of a physician fully licensed under Chapter 458 to be approved by the Board's Probationer's Committee. Absent provision for and compliance with the terms regarding temporary approval of a monitoring physician set forth below, Respondent shall cease practice and not practice until the Probationer's Committee approves a

monitoring physician. Respondent shall have the monitoring physician present at the first probation appearance before the Probationer's Committee. Prior to approval of the monitoring physician by the committee, the Respondent shall provide to the monitoring physician a copy of the Administrative Complaint and Final Order filed in this case. A failure of the Respondent or the monitoring physician to appear at the scheduled probation meeting shall constitute a violation of the Board's Final Order. Prior to the approval of the monitoring physician by the committee, Respondent shall submit to the committee a current curriculum vitae and description of the current practice of the proposed monitoring physician. Said materials shall be received in the Board office no later than fourteen days before the Respondent's first scheduled probation appearance. The attached definition of a monitoring physician is incorporated herein. The responsibilities of a monitoring physician shall include:

(1) Submit quarterly reports, in affidavit form, which shall include:

- A. Brief statement of why physician is on probation.
- B. Description of probationer's practice.
- C. Brief statement of probationer's compliance with terms of probation.
- D. Brief description of probationer's relationship with monitoring physician.
- E. Detail any problems which may have arisen with probationer.

(2) Review 25 percent of all Respondent's patient records

selected on a random basis at least once every month. In order to comply with this responsibility of random review, the monitoring physician shall go to Respondent's office once every month. At that time, the monitoring physician shall be responsible for making the random selection of the records to be reviewed by the monitoring physician.

- (3) Review 100 percent of all patient records patients for all Baker action in order to determine the appropriateness of the treatment and care. Said review shall be addressed in each quarterly report.
- (4) Report to the Board any violations by the probationer of Chapter 456 and 458, Florida Statutes, and the rules promulgated pursuant thereto.

g. The Board shall confer authority on the Chairperson of the Board's Probationer's Committee to temporarily approve Respondent's supervisory/monitoring physician. In order to obtain this temporary approval, Respondent shall submit to the Chairperson of the Probationer's Committee the name and curriculum vitae of the proposed supervising/monitoring physician. This information shall be furnished to the Chairperson of the Probationer's Committee by way of the Board of Medicine's Executive Director, within 48 hours after Respondent receives the Final Order in this matter. This information may be faxed to the Board of Medicine at (850) 488-9325, or may be sent by overnight mail to the Board of Medicine, 4052 Bald Cypress Way, Bin #C03, Tallahassee, Florida 32399-1753. In order to provide time for

Respondent's proposed supervisory/monitoring physician to be approved or disapproved by the Chairperson of the Probationer's Committee, Respondent shall be allowed to practice medicine while approval is being sought, but only for a period of five working days after Respondent receives the Final Order. If Respondent's supervising/monitoring physician has not been approved during that time frame, then Respondent shall cease practicing until such time as the supervising/monitoring physician is temporarily approved. In the event that the proposed monitoring/supervising physician is not approved, then Respondent shall cease practicing immediately. Should Respondent's monitoring/supervising physician be approved, said approval shall only remain in effect until the next meeting of the Probationer's Committee. Absent said approval, Respondent shall not practice medicine until a monitoring/supervising physician is approved.

h. In view of the need for ongoing and continuous monitoring or supervision, Respondent shall also submit the curriculum vitae and name of an alternate supervising/monitoring physician who shall be approved by Probationer's Committee. Such physician shall be licensed pursuant to Chapter 458, Florida Statutes, and shall have the same duties and responsibilities as specified for Respondent's monitoring/supervising physician during those periods of time which Respondent's monitoring/supervising physician is temporarily unable to provide supervision. Prior to practicing under the indirect supervision of the alternate monitoring physician or the direct

supervision of the alternate supervising physician, Respondent shall so advise the Board in writing. Respondent shall further advise the Board in writing of the period of time during which Respondent shall practice under the supervision of the alternate monitoring/supervising physician. Respondent shall not practice unless Respondent is under the supervision of either the approved supervising/monitoring physician or the approved alternate.

i. Respondent shall submit quarterly reports in affidavit form, the contents of which shall be specified by the Board. The reports shall include:

- (1) Brief statement of why physician is on probation.
- (2) Practice location.
- (3) Describe current practice (type and composition).
- (4) Brief statement of compliance with probationary terms.
- (5) Describe relationship with monitoring/supervising physician.
- (6) Advise Board of any problems.

This Final Order shall take effect upon being filed with the Clerk of the Department of Health.

DONE AND ORDERED this 21st day of February, 2001.

BOARD OF MEDICINE

for Tanya Williams
GASTON ACOSTA-RUA, M.D.
CHAIRMAN

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE AGENCY FOR HEALTH CARE ADMINISTRATION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to Benjamin P. Ocampo, M.D., 12954 Farmington Trail, Seminole, Florida 33776; to G. Thomas Bowden, II, Esquire, Law Office of Donald W. Weidner, 11265 Alumni Way, Suite 201, Jacksonville, Florida 32246, and by interoffice delivery to Kathryn L. Kasprzak, Chief Medical Attorney, and Simone Marstiller, Senior Attorney - Appeals, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, Florida 32308-5403, on or before 5:00 p.m., this _____ day of _____, 2001.

STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,)
)
 Petitioner,)
)
 v.)
)
 BENJAMIN PAZ OCAMPO, M.D.,)
)
 Respondent.)
 _____)

CASE NO. 1999-55254

ADMINISTRATIVE COMPLAINT

COMES NOW the Petitioner, Department of Health, hereinafter referred to as "Petitioner," and files this Administrative Complaint before the Board of Medicine against Benjamin Paz Ocampo, M.D., hereinafter referred to as "Respondent," and alleges:

1. Effective July 1, 1997, Petitioner is the state agency charged with regulating the practice of medicine pursuant to Section 20.43, Florida Statutes; Chapter 455, Florida Statutes, and Chapter 458, Florida Statutes. Pursuant to the provisions of Section 20.43(3), Florida Statutes, the Petitioner has contracted with the Agency for Health Care Administration to provide consumer complaint, investigative, and prosecutorial services required by the Division of Medical Quality Assurance, councils, or boards, as appropriate.
2. Respondent is and has been at all times material hereto a licensed physician in the State of Florida, having been issued license number ME 45316. Respondent's last known address is 12954 Farmington Trail, Seminole, Florida 33776.
3. Respondent is not board certified.

A

4. On or about March 31, 1999, the United States Department of Health and Human Services (USDHHS) found that, among other findings, Respondent furnished items or services substantially in excess of 24 patients' needs and of a quality that failed to meet professionally recognized standards of health care, and admitted or authorized the admission of patients under Florida's Mental Health Act (Baker Act), Chapter 394, Florida Statutes, when the patients did not meet the criteria under the Baker Act for voluntary commitment/examination.

5. Effective twenty days from on or about March 31, 1999, the USDHHS excluded Respondent from participation in the Medicare, Medicaid and all Federal health care programs, as defined in section 1128B(f) of the Social Security Act, 42 U.S.C. Section 1320a-76(f), for a period of fifteen (15) years.

6. Respondent failed to notify the Board of Medicine in the State of Florida concerning the action taken by the USDHHS, Office of Inspector General, within the required 30 days set forth in Section 458.331(1)(kk), Florida Statutes.

COUNT ONE

7. Petitioner realleges and incorporates paragraphs one (1) through six (6), as if fully set forth herein this Count One.

8. Respondent had a license or the authority to practice medicine revoked, suspended, or otherwise acted against, including the denial of licensure, by the licensing authority of any jurisdiction, including its agencies or subdivisions, in that the USDHHS excluded Respondent from participation in the Medicare, Medicaid and all Federal health care programs as defined in section 1128B(f) of the Social Security Act for a period of fifteen (15) years.

9. Based on the foregoing, Respondent violated Section 458.331(1)(b), Florida Statutes, by having a license or the authority to practice medicine revoked, suspended, or otherwise acted against, including the denial of licensure, by the licensing authority of any jurisdiction, including its agencies or subdivisions. The licensing authority's acceptance of a physician's relinquishment of a license, stipulation, consent order, or other settlement, offered in response to or in anticipation of the filing of administrative charges against the physician's license, shall be construed as action against the physician's license.

COUNT TWO

10. Petitioner realleges and incorporates paragraphs one (1) through six (6) and paragraph eight (8) as if fully set forth herein this Count Two.

11. Respondent failed to report to the Board, in writing and within the 30 day time limit set forth in Section 458.331(1)(kk), Florida Statutes, his exclusion from participating in the Medicare, Medicaid and all Federal health care programs, as defined in section 1128B(f) of the Social Security Act, for a period of fifteen (15) years.


12. Based on the foregoing allegations, the Respondent violated section 458.331(1)(kk), Florida Statutes by failing to report to the board, in writing, within 30 days if action as defined in section of 458.331(1)(b), Florida Statutes, has been taken against one's license to practice medicine in another state, territory, or country.

WHEREFORE, the Petitioner respectfully requests the Board of Medicine enter an order imposing one or more of the following penalties: permanent revocation or suspension of the Respondent's license, restriction of the Respondent's practice, imposition of an administrative

fine, issuance of a reprimand, placement of the Respondent on probation, the assessment of costs related to the investigation and prosecution of this case as provided for in Section 455.624(4), Florida Statutes, and/or any other relief that the Board deems appropriate.

SIGNED this 19th day of June, 2000.

Robert G. Brooks, M.D., Secretary


Kathryn L. Kasprzak
Chief Medical Attorney

COUNSEL FOR DEPARTMENT:
Kathryn L. Kasprzak
Chief Medical Attorney
Agency for Health Care Administration
P. O. Box 14229
Tallahassee, Florida 32317-4229
Florida Bar # 0937819
KLK/JET/te
PCP: June 16, 2000
PCP Members: Ashkar, Zachariah, Rodriguez

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK Rene Combs
DATE 6/19/00

STATE OF FLORIDA
DEPARTMENT OF HEALTH

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK *Elisa Floyd*
DATE 4/6/01

BENJAMIN PAZ OCAMPO, M.D.)
Respondent/Appellant,)
vs.)
DEPARTMENT OF HEALTH)
Petitioner/Appellee.)

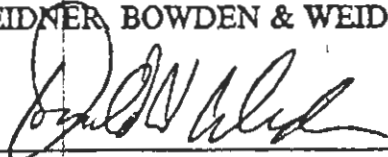
Case No.: 1999-55254

NOTICE OF ADMINISTRATIVE APPEAL

NOTICE IS GIVEN that Benjamin Paz Ocampo, M.D., Appellant, appeals to the First District Court of Appeals, the Final Order of the Department of Health, filed with the Clerk of the Department of Health on March 21, 2001. The nature of the order is a refusal by the Department of Health to grant Respondent's request for a formal hearing and imposition of discipline contrary to Florida law.

Respectfully submitted this 5th day of April, 2001.

WEIDNER, BOWDEN & WEIDNER, P.A.

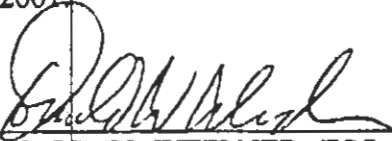


DONALD W. WEIDNER, ESQ.
Florida Bar No.: 185200
G. THOMAS BOWDEN, II, ESQ.
Florida Bar No.: 110698
11265 Alumni Way, Suite 201
Jacksonville, Florida 32246
(904) 641-0004
Counsel for Appellant

STATE OF FLORIDA, DEPT. OF HEALTH
I HEREBY CERTIFY that the above and foregoing is a true and correct copy of a Notice of Appeal received by the Department of Health on the 18 day of April, 2001.
SIGNED: *Marlean Lee Floyd*
Deputy Agency Clerk
DATE: April 16, 2001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished to John Terrel, Esq., and Simone Marsteller, Esq., Department of Health, P.O. Box 14229, Tallahassee, Florida 32317-4229 by U.S. Mail this 31 day of April, 2001.


DONALD W. WEIDNER, ESQ.



DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA 32399-1850

JON S. WHEELER
CLERK OF THE COURT

(850) 488-6151

February 28, 2002

R. S. Power, Clerk
Department Of Health
4052 Bald Cypress Way
Bin A02
Tallahassee, FL 32399

RE: Benjamin Paz Ocampo, v. Department of Health
M.D.
Docket No: 1D01-1351
Lower Tribunal Case No.: 1999-55254.

RECEIVED
OFFICE OF THE CLERK
02 MAR 12 PM 2:00

Dear Mr. Power:

I have been directed by the court to issue the attached mandate in the above-styled cause. It is enclosed with a certified copy of this Court's opinion.

Yours truly,

Jon S. Wheeler
Clerk of the Court

JSW/jm
Enclosures

c: (letter and mandate only)
G. Thomas Bowden, II
Lisa Pease

Donald W. Weidner

Benjamin Paz Ocampo,
M.D.

M A N D A T E

From

DISTRICT COURT OF APPEAL OF FLORIDA FIRST DISTRICT

To Gaston Acosta-Rua, M.D., Chairman, State Of Florida, Board Of Medicine

WHEREAS, in that certain cause filed in this Court styled:

BENJAMIN PAZ OCAMPO,
M.D.

Case No : 1D01-1351

v.

Lower Tribunal Case No : 1999-55254

DEPARTMENT OF HEALTH

The attached opinion was issued on February 12, 2002.

YOU ARE HEREBY COMMANDED that further proceedings, if required, be had in accordance with said opinion, the rules of Court, and the laws of the State of Florida.

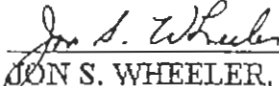
WITNESS the Honorable MICHAEL E. ALLEN, Chief Judge

of the District Court of Appeal of Florida, First District,

and the Seal of said Court done at Tallahassee, Florida,

on this 28th day of February 2002.





JON S. WHEELER, Clerk
District Court of Appeal of Florida, First District

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

BENJAMIN PAZ OCAMPO,
M.D.,

Appellant,

v.

DEPARTMENT OF HEALTH,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D01-1351

Opinion filed February 12, 2002.

An appeal from an order of the Department of Health.

Donald W. Weidner and G. Thomas Bowden, II, of Weidner, Bowden & Weidner,
Jacksonville, for Appellant.

Lisa Pease, Senior Appellate Attorney, Agency for Health Care Administration,
Tallahassee, for Appellee.

DAVIS, J.

Appellant, Benjamin Paz Ocampo, M.D. (Ocampo), timely appeals a final administrative order of Appellee, Florida Department of Health (DOH), disciplining his license for violations of sections 458.331(1)(b) and (kk) of the Florida Statutes.

Because we find Ocampo was improperly charged with violations of these sections, we reverse the final order.

In an administrative complaint, DOH alleged that Ocampo violated section 458.331(1)(b), Florida Statutes, by having

a license or the authority to practice medicine revoked, suspended, or otherwise acted against, including the denial of licensure, by the licensing authority of any jurisdiction, including its agencies or subdivisions, in that the [United States Department of Health and Human Services] excluded [Ocampo] from participation in the Medicare, Medicaid and all Federal health care programs as defined in section 1128B(f) of the Social Security Act for a period of fifteen (15) years.

DOH further alleged that Ocampo violated section 458.331(1)(kk), Florida Statutes, by failing to report the exclusion in writing to the Board of Medicine (the Board) within thirty days of learning of the exclusion. The case was referred to the Division of Administrative Hearings (DOAH) by DOH, but jurisdiction was later relinquished to the Board for a hearing not involving disputed issues of material fact pursuant to section 120.57(2), Florida Statutes.

At the hearing before the Board, Ocampo argued that the exclusion of a physician by the federal government from participation in federal health care programs was not action by the licensing authority of any jurisdiction as prohibited by section 458.331(1)(b), Florida Statutes. We agree.

An administrative agency is a creature of statute. Florida Dep't of Ins. and Treasurer v. Bankers Ins. Co., 694 So. 2d 70 (Fla. 1st DCA 1997). An agency can only do what it is authorized to do by the Legislature. Id. An agency's interpretation of the statute it administers is entitled to deference. Id. However, an appellate court can overturn the agency's interpretation of a statute if the interpretation is clearly erroneous. Department of Natural Res. v. Wingfield Dev. Co., 581 So. 2d 193 (Fla. 1st DCA 1991).

The plain language of section 458.331(1)(b), Florida Statutes (1999), provides that a violation of the Medical Practice Act occurs when a physician's "license or the authority to practice medicine [is] revoked, suspended, or otherwise acted against, including the denial of licensure, by the licensing authority of any jurisdiction, including its agencies or subdivisions." Similarly, a violation of section 458.331(1)(kk), Florida Statutes (1999), occurs when a physician fails to inform the Board of the action referred to in section 458.331(1)(b), Florida Statutes (1999). Section 120.52(9), Florida Statutes (1999), defines a license as a "franchise, permit, certification, registration, charter, or similar form of authorization required by law, but it does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act." Section 458.305(3), Florida Statutes (1999), defines the practice of medicine as "the diagnosis, treatment,

operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition."

This Court has generally adopted a narrow reading of professional disciplinary statutes, noting that disciplinary statutes are penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee. See, e.g., Elmariah v. Department of Prof'l Regulation, 574 So. 2d 164 (Fla. 1st DCA 1990). In Elmariah, this Court held that false statements made by a physician on an application for staff privileges at a hospital did not constitute "making deceptive, untrue, or fraudulent representations in the practice of medicine" as proscribed by section 458.331(1)(l), Florida Statutes (1983). Id. at 165. Further, in Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923 (Fla. 1st DCA 1977), this Court held that a physician's allegedly receiving "kick-backs" from a hospital did not constitute "unprofessional conduct" within the meaning of section 458.1201(1)(m), Florida Statutes (1977), which allowed discipline of a physician who was

guilty of immoral or unprofessional conduct; incompetence, negligence, or willful misconduct. Unprofessional conduct shall include any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice in his area of expertise as determined by the board, in which proceeding actual injury to a patient need not be established; when the same is committed in the course of his practice, whether committed within or without this state.

Lester, 348 So. 2d at 924-25.

A plain reading of the statute at issue reveals the Board's determination that Ocampo's exclusion from all federal health care programs violates section 458.331(1)(b), Florida Statutes (1999), is clearly erroneous. First, DOH does not dispute that the only privilege taken away from Ocampo by his exclusion from federal health care programs is the entitlement to bill the federal government, which is not included in Florida's definition of the "practice of medicine." § 458.305(3), Fla. Stat. (1999). Thus, Ocampo still has the same authority to practice medicine as he did prior to the exclusion. While it may affect Ocampo's ability to practice medicine because some patients will most likely be forced to go elsewhere, it does not affect his authority. Further, DOH does not dispute that a Medicare provider number is not a license pursuant to section 120.52(9), Florida Statutes (1999). Thus, while the federal government may be a licensing authority for certain purposes, it is not "the" licensing authority for purposes of section 458.331(1)(b), Florida Statutes (1999), because it has not licensed Ocampo.

As Ocampo was improperly disciplined for a violation of section 458.331(1)(b), Florida Statutes (1999), it follows that the discipline imposed for the violation of section 458.331(1)(kk), Florida Statutes (1999), was also improper. Both charges should have been dismissed. In so concluding, we decline to address

the remaining issues presented by Ocampo. Accordingly, DOH's final order disciplining Ocampo is reversed.

ALLEN, C.I., and MINER, J., CONCUR.

