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UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE ADMINISTRATIVE LAW JUDGE

In the Matter of:	)	
	)	
JOHN VANDER WEIT, JR.,	)	**Proceeding No. D06-11**
	)	
Respondent	)	

INITIAL DECISION ON DEFAULT

On January 16, 2007, Harry I. Moatz, Director, Office of Enrollment and Discipline (OED) of the United States Patent and Trademark Office (PTO), instituted this disciplinary proceeding under 35 U.S.C. § 32 and the regulations promulgated thereunder at 37 C.F.R. Part 10 (Rules), against John Vander Weit, Jr. (Respondent), an attorney registered to practice before the PTO (Registration No. 27,011). The Complaint charges Respondent with violating PTO Disciplinary Rule 10.23(c)(5) (37 C.F.R. §10.23(c)(5)) on the basis that he was suspended from practice as an attorney on ethical grounds by a duly constituted State authority. For this violation, the Complaint seeks entry of an order suspending Respondent from practice before the PTO for twelve (12) months pursuant to PTO Rule 10.154 (37 C.F.R. §10.154). No Answer to the Complaint having been received from the Respondent, on July 26, 2007, the Director filed a Motion for Default Judgment.

A. Service

PTO Rule 10.135 provides in pertinent part that -

(a) A complaint may be served on a respondent in any of the following methods:

(1) By handing a copy of the complaint personally to the respondent . . . .

(2) By mailing a copy of the complaint by "Express Mail" or first-class mail to:

(i) A registered practitioner at the address for which separate notice was last received by the Director . . .

* * *

(b) If a complaint served by mail under paragraph (a)(2) of this section is returned

> by the U.S. Postal Service, the Director shall mail a second copy of the complaint to the respondent. If the second copy of the complaint is also returned by the U.S. Postal Service, the Director shall serve the respondent by publishing an appropriate notice in the Official Gazette for four consecutive weeks, in which case the time for answer shall be at least thirty days from the fourth publication of the notice.

37 C.F.R. §10.135.

In the Motion for Default, the Director indicates that on January 8, 2007 he initially attempted to serve Respondent with the Complaint by sending it certified mail to Respondent at two different addresses, the first being a home address Respondent provided to him in January of 1998 in connection with a survey of registered patent attorneys, and the second being that shown as the return address on a letter Respondent sent to him in January 2006. No Answer having been received in response to those mailings, the Director attempted service on Respondent by certified mail at those two addresses again on March 13, 2007. Attached to the Motion for Default are copies of the envelopes indicating all four mailings were returned to the Director marked by the U.S. Postal Service as "unclaimed." *See*, Exhibits A-D to Motion for Default. As a result, for four consecutive weeks, specifically on May 22, May 29, June 5, and June 12, 2007, the Director published an appropriate notice of the pending Complaint in the Official Gazette. *See*, Exhibits E-H to Motion for Default.

On the basis of the foregoing, and 37 C.F.R. §10.135, I find that adequate service of process of the Complaint upon Respondent has been made.[1]

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[1] I note that the language in PTO Rule 10.135(b) stating that "[i]f a complaint served by mail under paragraph (a)(2) of this section is returned by the U.S. Postal Service, [then] the Director shall mail a second copy of the complaint to the respondent," could be read literally to authorize the Director to mail a second copy of the complaint *only* upon return by the Postal Service of the first mailed Complaint, which did not occur here. In this case, after the passage of two months and not having received neither an Answer nor the Complaint returned by the Postal Service, the Director went ahead and remailed the Complaint. I find such action appropriate and authorized by the Rule, in that an alternative literal interpretation prohibiting such action would produce the absurd result of conditioning the Director's attempts at service upon the actions of the Postal Service. An interpretation that produces an absurd result is a noted exception to the general directive that the words in a statute must be interpreted literally. *E.g., Connecticut National Bank v. Germain,* 503 U.S. 249, 253-254 (1992); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring). This principle may be applied to rules as well as statutes. *In re Goldberg*, 460 A.2d 982, 985 (D.C. 1983) (general principles of statutory construction are "commonly used" in interpreting court rules)(citing 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 67.10 (4th ed. 1974)).

B. Default

In accordance with PTO Rule 10.135 (37 C.F.R. §10.135), the time for Respondent to file an Answer to the Complaint was 30 days from the fourth publication of the notice, or until July 12, 2007. The Motion for Default indicates that Respondent has not served the Director with an Answer to the Complaint. To date, this Tribunal has not received an Answer from Respondent nor a response to the Motion for Default which the Director sent on July 26, 2007 to Respondent at the two addresses identified previously.

It is noted that the regulations provide at 37 C.F.R. § 10.143 that "[t]he administrative law judge will determine on a case-by-case basis the time period for a response to a motion...." However, in the context of a motion for default, where the respondent has not answered the complaint or otherwise appeared in the proceeding, it is not necessary to allow extended time for a response to the motion. The regulations provide at 37 C.F.R. § 10.136(d) that failure to file timely an answer "*will* constitute and admission of the allegations in the complaint" (emphasis added), and do not provide a requirement for a motion for default or a response thereto. *See,* Federal Rule of Civil Procedure 55(b)(1) (allowing entry of judgment on default upon request of plaintiff, for failure of defendant to appear).

Therefore, for his failure to file a timely Answer, Respondent is hereby found in default, and is deemed to have admitted all of the allegations in the Complaint.

C. Charges and Findings

The Complaint charges Respondent in one count. Specifically, the Complaint alleges that Respondent was suspended from the practice of law by the Supreme Court of Illinois on "ethical grounds" for 12 months, effective December 13, 2005, and until Respondent completes a legal ethics course and makes restitution to his clients. The Complaint states that the charges brought against Respondent in the Illinois Disciplinary Proceeding involved allegations of making a false statement of material fact in connection with the disciplinary proceeding, failure to respond to a lawful demand for information in a disciplinary investigation, and conduct involving dishonesty, fraud, deceit and misrepresentation, including failure to keep a client reasonably informed or comply with a request for information, failure to deliver all papers or property to a client before withdrawing, and failure to promptly refund unearned fees paid in advance. It notes further that "most, but not all" of the charges against Respondent were proven, but does not specify exactly which charges were proven and thus the basis for the suspension.

The Complaint further alleges that Respondent's said suspension by the Supreme Court of Illinois constitutes a violation of "Disciplinary Rule 37 C.F.R. §10.23*(c)(5)*." Subsection (c) of 37 C.F.R. §10.23, however, merely provides that "[c]onduct which constitutes a violation of paragraphs (a) and (b) of this section [10.23] includes, but is not limited to . . . (5) [s]uspension or disbarment from practice as an attorney . . . on ethical grounds by any duly constituted

authority of a State or the United States. . . ." Thus, it is actually subsections (a) or (b) of Rule 10.23 (37 C.F.R. §10.23(a) and (b)), as more particularly described by Rule 10.23(c)(5), of which Respondent is accused of being in violation.[2] Subsections (a) and (b) provide as follows:

> (a) A practitioner shall not engage in disreputable or gross misconduct.
>
> (b) A practitioner shall not:
>
> (1) Violate a Disciplinary Rule.
>
> (2) Circumvent a Disciplinary Rule through actions of another.
>
> (3) Engage in illegal conduct involving moral turpitude.
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> (6) Engage in any other conduct that adversely reflects on the practitioner's fitness to practice before the Office.

37 C.F.R. §10.23(a) and (b).

Based upon the Order of the Supreme Court of Illinois suspending Respondent from the practice of law on ethical grounds, as alleged in the Complaint, I find Respondent to have engaged in professional misconduct justifying suspension or exclusion under 37 C.F.R. § 10.23.[3]

D. Penalty

As to penalty, the Director requests an entry of an Order pursuant to 37 C.F.R. §10.154 suspending Respondent from practice before the U.S. Patent and Trademark Office for twelve months, that is, the same length of suspension granted by the Supreme Court of Illinois. Rule

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[2] PTO Rule 10.134(b) (37 C.F.R. §10.134(b)) provides that a complaint is sufficient if it fairly informs the respondent of the violation which is the basis of the disciplinary proceeding. The Complaint in this proceeding meets this standard.

[3] Although it is unclear from the Complaint the exact charges upon which Respondent's suspension from practice was based, all of the charges levied against Respondent, if proven true, would be disreputable conduct, adversely reflect upon his fitness to practice, involve dishonesty, and/or be prejudicial to the administration of justice such as to warrant a finding of misconduct under PTO Rule 10.23(b).

10.154 (b) provides that in determining any penalty the following factors be taken into consideration:

> (1) The public interest;
>
> (2) The seriousness of the violation of the Disciplinary Rule;
>
> (3) The deterrent effects deemed necessary;
>
> (4) The integrity of the legal profession; and
>
> (5) Any extenuating circumstances.

37 C.F.R. § 10.154.

In this case, an indeterminate suspension is appropriate because there has not been a record developed respecting all of the circumstances surrounding the professional misconduct. Respondent's default has prevented such an inquiry. Respondent may show cause in the future as to why he failed to respond and may provide some explanation for the misconduct set forth and found herein and why a penalty other than a 12 month suspension effective this date may be more appropriate.[4] Until he does so, however, his name should be removed from the rolls.

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[4] The Complaint indicates that Respondent's 12 month suspension as an attorney by the Supreme Court of Illinois was effective December 13, 2005, and thus, assuming Respondent fulfilled the other conditions of the Order, he may already be reinstated or eligible for reinstatement to the bar in Illinois. An electronic search did not reveal any Order of Reinstatement, however, and in fact, the last relevant entry was an Order of the Supreme Court of Illinois dated March 16, 2007 imposing court costs in the matter on Respondent. Imposing a suspension *nunc pro tunc (i.e.* retroactively*)* is within the equitable discretion of the tribunal based upon the individual circumstances of the case. *See*, Black's Law Dictionary 964 (5th ed. 1979); *In re Goldberg*, 460 A.2d 982, 985 (D.C. 1983) (anticipating that concurrently running reciprocal suspensions "will be the norm," in appropriate circumstances, taking into consideration among other factors whether the attorney promptly notified bar counsel of professional disciplinary action in another jurisdiction and voluntarily refrained from practicing law in the reciprocal jurisdiction during the period of suspension in the original jurisdiction).

ORDER

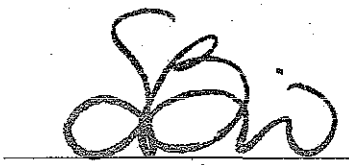
After careful and deliberate consideration of the above facts and conclusions as well as the factors identified in 37 C.F.R. § 10.154(b),

IT IS HEREBY ORDERED, that Respondent, **John Vander Weit, Jr.**, 1100 Campbell Avenue, Chicago Heights, Illinois, 60411, PTO Registration No. 27,011, **be indefinitely suspended from practice as an attorney before the Patent and Trademark Office.**

The Respondent's attention is directed to 37 C.F.R. § 10.158 regarding responsibilities in the case of suspension or exclusion, and 37 C.F.R. § 10.160 concerning petition for reinstatement.

The facts and circumstances of this proceeding shall be fully published in the Patent and Trademark Office's official publication.

DATE: July 31, 2007



Susan L. Biro
Chief Administrative Law Judge[5]

Pursuant to 37 C.F.R. § 10.155, any appeal by the Respondent from this Initial Decision, issued pursuant to 35 U.S.C. § 32 and 37 C.F.R. § 10.154, must be filed in duplicate with the Director, Office of Enrollment and Discipline, U.S. Patent and Trademark Office, P.O. Box 16116, Arlington, Va. 22215, within 30 days of the date of this Decision. Such appeal must include exception to the Administrative Law Judge's Decision. Failure to file such an appeal in accordance with § 10.155, above, will be deemed to be both an acceptance by the Respondent of the Initial Decision and that party's waiver of rights to further administrative and judicial review.

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[5] This decision is issued by the Chief Administrative Law Judge of the United States Environmental Protection Agency. The Administrative Law Judges of the Environmental Protection Agency are authorized to hear cases pending before the United States Department of Commerce, Patent and Trademark Office, pursuant to an Interagency Agreement effective for a period beginning March 22, 1999.