UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the Matter of:	)	
	)	
Henry N. Portner,	)	**Proceeding No. D2011-44**
	)	
Respondent	)	
	)	
	)	

FINAL ORDER UNDER 37 C.F.R. § 11.24

Pursuant to 37 C.F.R. §§ 11.19 and 11.24(d), the Director of the United States Patent and Trademark Office (USPTO or Office) hereby orders the public reprimand of Henry N. Portner (Respondent) for violation of 37 C.F.R. § 10.23(b)(6).

I. BACKGROUND AND PROCEDURAL HISTORY

At all times relevant to this matter, Respondent has been an attorney admitted to practice law in the State of Florida and has been authorized to represent others in trademark matters before the USPTO. Conditional Guilty Plea for Consent Judgment in the Supreme Court of Florida ("Guilty Plea") at ¶1. Complaint for Reciprocal Discipline Under 37 C.F.R § 11.24 at ¶1.

On August 19, 2010, the Supreme Court of Florida directed that Respondent be publicly reprimanded by the Chair of the Statewide Advertising Grievance Commission. The Florida Bar v. Henry Neil Portner, Case No. SC10-288, Lower Tribunal No(s). 2009-90, 159(02S). The public reprimand was based on a referee's report that accepted a Consent Judgment that was jointly proposed by Respondent and The Florida Bar. In the parties' Conditional Guilty Plea for Consent Judgment, Respondent admitted to violating Rules 4-7.2(c)(1), 4-7.2(c)(1)(A), 4-7(c)(1)(C), 4-7.2(a)(1), 4-7.7(a), 4-7.4(b)(2)(F), 4-

7.4(b)(2)(I), and 4-7.9(b) of the Rules Regulating the Florida Bar. Guilty Plea at ¶3. Respondent specifically agreed that a "public reprimand to be administered by letter from the Chair of the Statewide Advertising Grievance Commission and included in the Florida Supreme Court's published opinions" would serve as "an appropriate discipline" for his misconduct. *Id.* at ¶6. Respondent agreed that he was "acting freely and voluntarily in this matter, and tenders this Plea without fear or threat of coercion." *Id.* at ¶2. Respondent personally signed the Guilty Plea, as did his attorney, Elizabeth S. Conan, who represented him in the disciplinary proceedings. *Id.* at ¶2.

The reprimand was issued because Respondent "disseminated or caused to be disseminated a direct mail advertisement for foreclosure defense and loan modification representation on various occasions in 2009." Guilty Plea at ¶4. Respondent admitted in the Guilty Plea that: (1) the direct mail advertisement was "misleading" in that the return address location stated "Our Final Notice" and "Re: JP Morgan Chase Bank," the upper right-hand side of the letter stated:

> Confidential
> File Number LAA 06999
> Assigned: Legal Department

and the communication was labeled "Loan Modification Notice" across the width of the page; (2) the advertisement did not include the first sentence required under Florida Rules: "If you have already retained a lawyer for this matter, please disregard this letter;" (3) the advertisement failed to disclose how Respondent obtained the intended recipient's name and address; (4) the advertisement did not contain Respondent's name as the lawyer responsible for the content of the advertisement; (5) the listed trade name "Loan Assistance of America Law Firm" was misleading; and (6) the advertisement was not timely filed for

review as required by Florida rules. *Id.* at ¶4(A)-(L).

On June 17, 2011, the Director of the Office and Enrollment and Discipline (OED Director) served a Complaint for Reciprocal Discipline Under 37 C.F.R. § 11.24 (OED Complaint) on Respondent. In the OED Complaint, the OED Director requested that the USPTO Director impose reciprocal discipline on Respondent for violating 37 C.F.R. § 10.23(b)(6)[1] when he was reprimanded on ethical grounds by a duly constituted authority of a State. *Id.* at 2-3. On July 19, 2011, Respondent filed a letter responding to the OED Complaint opposing imposition of reciprocal disciplinary action (Response), which OED received on October 25, 2011.

On October 7, 2011, the Acting Deputy General Counsel for General Law, on behalf of the USPTO Director, issued an Order giving Respondent forty days to file a response "containing all information that Respondent believes is sufficient to establish a genuine issue of material fact that the imposition of discipline identical to that imposed by the Supreme Court of Florida Bar would be unwarranted based upon any of the grounds permissible under 37 C.F.R. § 11.24(d)(1)." Notice and Order Pursuant to 37 C.F.R. § 11.24 at 1-2. Although Respondent had already filed a Response, the USPTO Director nevertheless issued the Order due to the requirements of 37 C.F.R. § 11.24(b).[2] In light of Respondent's prior filing of his Response, the USPTO Director stated that Respondent could file additional information during the forty-day period set forth by the Order. *Id.* at 2, n. 1. Respondent did not file any additional information in response to the USPTO

[1] Section 10.23(b)(6) provides that "[a] practitioner shall not . . . [e]ngage in any conduct that adversely reflects on the practitioner's fitness to practice before the office."

[2] Section 11.24(b) provides that "the USPTO Director *shall* issue a notice directed to the practitioner . . . containing . . . [a]n order directing the practitioner to file a response with the USPTO Director . . . within forty days of the date of the notice establishing a genuine issue of material fact . . . that the imposition of the identical . . . public reprimand . . . would be unwarranted and the reason for that claim." (emphasis added).

Director's Notice and Order.

In his Response, Respondent claims that the Office cannot subject him to reciprocal discipline because he meets at least one of the standards set forth in 37 C.F.R. § 11.24(d)(1) that an attorney must meet to prevent the imposition of reciprocal discipline. *See* Response. Specifically, Respondent raises eleven objections to the imposition of reciprocal discipline: Respondent's objections 1-6, 9, 10 & 11 can all be construed as "due process" arguments; Respondent's objection 7 alleges an "infirmity of proof;" and Respondent's objection 8 alleges that imposition of reciprocal discipline would result in "grave injustice." Response at 1-2. As discussed below, the Office finds that Respondent has not shown by clear and convincing evidence that there is a genuine issue of material fact with regard to any of the standards set forth in 37 C.F.R. § 11.24(d)(1).

II. LEGAL STANDARD

Under 37 C.F.R. § 11.24(d), the USPTO, in accordance with *Selling v. Radford*, 243 U.S. 46 (1917), has codified standards for imposing reciprocal discipline based on a state's disciplinary adjudication. Under *Selling*, state disbarment creates a federal-level presumption that imposition of reciprocal discipline is proper unless an independent review of the record reveals: (1) a want of due process, (2) an infirmity of proof of the misconduct, or (3) that grave injustice would result from the imposition of reciprocal discipline. Federal courts have generally "concluded that in reciprocal discipline cases, it is the respondent attorney's burden to demonstrate, by clear and convincing evidence, that one of the *Selling* elements precludes reciprocal discipline." *In re Kramer,* 282 F.3d 721, 724 (9th Cir. 2002); *In re Friedman*, 51 F.3d 20, 22 (2nd Cir. 1995). "This standard is narrow, for '. . . [a Federal court, or here the USPTO Director is] not sitting as a court of review to discover

error in the [hearing judge's] or the [state] courts' proceedings.'" *In re Zdravkovich*, 634 F.3d 574, 578 (D.C. Cir. 2011) (quoting *In re Sibley*, 564 F.3d 1335, 1341 (D.C. Cir. 2009)).

Below is the language of 37 C.F.R. § 11.24(d), which mirrors the standard set forth in *Selling*:

> The USPTO Director shall consider any timely filed response and shall impose the identical public censure, public reprimand, probation, disbarment, suspension, or disciplinary disqualification unless the practitioner clearly and convincingly demonstrates, and the USPTO Director finds there is a genuine issue of material fact that:
>
> (i) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute deprivation of due process;
> (ii) There was such infirmity of proof establishing the conduct as to give rise to the clear conviction that the Office could not, consistently with its duty, accept as final the conclusion on that subject;
> (iii) The imposition of the same public censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification by the Office would result in a grave injustice; or
> (iv) Any argument that the practitioner was not publicly censured, publicly reprimanded, placed on probation, disbarred, suspended or disciplinarily disqualified.

The Office reiterates that, to prevent the imposition of reciprocal discipline, Respondent is required to demonstrate that he meets one of these factors by clear and convincing evidence—a task that is particularly difficult for Respondent because he stipulated to the facts as set forth in the Guilty Plea, admitted that he violated the Rules Regulating the Florida Bar, and agreed that a public reprimand was the appropriate discipline for his misconduct. *See* Guilty Plea at ¶4, ¶6.

III. ANALYSIS

a. Deprivation of Due Process.

Respondent argues that 37 C.F.R. § 11.24(d)(i) should apply because the procedure used by the Supreme Court of Florida was so lacking in notice or opportunity to be heard as

to constitute a deprivation of due process. Response at 2-3. Among the eleven objections raised by Respondent, several can be construed as "due process" challenges to the Florida disciplinary sanction. Respondent specifically objects: (1) that the Rules Regulating the Florida Bar violate the First Amendment; (2) that the Rules Regulating the Florida Bar violate his constitutional right to practice in Interstate Commerce; (3) that the Rules Regulating the Florida Bar amount to prior restraint on speech and differ materially from the rules in five other states where he practices law; (4) that the Florida Bar Board of Ethics met in secret resulting in a violation of his due process rights; (5) that Florida Bar officials raised their recommended discipline from "minor misconduct" to a public reprimand without cause; (6) that the Rules Regulating the Florida Bar violated due process because Respondent was barred from appearing in his defense; (9) that USPTO imposition of reciprocal discipline would be arbitrary, capricious, unreasonable and unconstitutional; (10) that he was under "extreme business compulsion and economic duress from the Florida Bar" when he agreed to his public reprimand; and (11) that the Rules Regulating the Florida Bar were adopted without study or proof that the rules were the least restrictive of the rights of attorneys.

Respondent's various arguments contesting the legitimacy of the Rules Regulating the Florida Bar themselves and their application to his specific case were waived by Respondent. To the extent Respondent believed the Rules Regulating the Florida Bar were unconstitutional, or that Florida Bar officials had violated his due process rights during the disciplinary investigation and proceedings, he had the right to contest those issues before the Supreme Court of Florida. Rather than raising any of these challenges, Respondent entered into a Guilty Plea and sought a Consent Judgment asking the Supreme Court of

Florida to impose the public reprimand that he received. *See* Guilty Plea. Florida Bar officials served Respondent's legal counsel with a copy of a Complaint on February 16, 2010. The Complaint specifically explained the allegations against Respondent, notified him of the Florida Rules he was charged with violating, and included a copy of one of the offending direct mail advertisements at issue. More than four months later, on June 24, 2010 Respondent himself signed his Guilty Plea. The Guilty Plea was also signed on June 25, 2010 by Respondent's own legal counsel who represented him during the disciplinary process. He specifically agreed to a number of stipulated facts, and agreed that he had violated the Rules Regulating the Florida Bar at issue, and agreed specifically that imposition of a public reprimand would be an "appropriate discipline" for his misconduct. Guilty Plea at ¶6. Furthermore, Respondent specifically signed the Guilty Plea noting that he was "acting freely and voluntarily in this matter, and tenders this Plea without fear or threat of coercion." Guilty Plea at ¶2.

Having specifically consented to imposition of a public reprimand by the Supreme Court of Florida, after being provided specific notice of the nature of his misconduct, and of the Florida rules he had violated, Respondent has waived any right to challenge the adequacy of due process he received in Florida, or the Constitutionality of the entire system of Florida rules governing attorney conduct. *See, e.g. In Re Bielec*, 755 A.2d 1018, 1023 (D.C. Ct. App. 2000) (holding that "an attorney who knowingly and voluntarily waives his or her right to any further process . . . in the originating court consequently waives the right to a hearing in the [reciprocal jurisdiction];") *In re Richardson*, 692 A.2d 427, (respondent attorney waived his right to challenge due process in originating jurisdiction when he voluntarily resigned from the state's bar, and specifically holding that "an individual may

waive process to which he or she has a right.") In sum, given the voluntary nature of the Florida discipline under circumstances that demonstrate due process by the State of Florida, Respondent has failed to show by clear and convincing evidence that the State of Florida's "procedure . . . was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process . . ." under 37 C.F.R. 11.24(d)(i).

b. Infirmity of Proof.

Respondent further argues that there is such an infirmity of proof as to give rise to the clear conviction that the Office could not, consistently with its duty, accept the Supreme Court of Florida's imposition of a public reprimand. *See* 37 C.F.R. § 11.24(d)(ii). Respondent's challenge fails, however, because, as shown above, he consented to this discipline and stipulated to the facts relied upon in the disciplinary proceeding. If Respondent believed that the evidence of misconduct was weak, he could have challenged the facts and the finding of misconduct, as well as the imposition of the discipline, rather than stipulating to all these matters. As a result, Respondent has failed to show that there was "such infirmity of proof establishing the conduct as to give rise to the clear conviction that the Office could not . . . accept the final conclusion . . ." in the Subcommittee Determination. 37 C.F.R. § 11.24(d)(ii).

c. Grave Injustice.

Respondent finally argues that the adoption of the sanction imposed by the Subcommittee Determination would result in a grave injustice under 37 C.F.R. § 11.24(d)(iii). Response at ¶8. Specifically, Respondent complains that Florida officials should not have taken disciplinary action because the complaint against him was anonymous. The circumstances under which the direct mail advertisement came to the attention of Florida Bar officials have no bearing upon whether Respondent violated the

ethical rules, or whether the discipline imposed was warranted. Respondent's argument also fails because he agreed with the Florida Bar that a public reprimand was the appropriate sanction for his misconduct. Guilty Plea at 6. Respondent has not attempted to show that the original sanction (public reprimand) was too harsh for the type of misconduct to which he admitted. *See In re Benjamin*, 870 F. Supp. 41, 43-44 (N.D.N.Y. 1994) (finding that adoption of discipline imposed by another authority is a grave injustice when respondent's conduct is not sufficiently grave to warrant the discipline that was imposed). None of these arguments demonstrate that the discipline imposed by the Subcommittee Determination was discordant with his admitted misconduct. *See In re Benjamin*, 870 F. Supp. at 43-44. Thus, Respondent's argument that adoption of the discipline imposed by the Florida Supreme Court would result in a grave injustice is denied.

IV. CONCLUSION

For the reasons discussed above, the USPTO Director denies Respondent's objection to the imposition of reciprocal discipline for his violation of 37 C.F.R. § 10.23(b)(6).

ORDER

ACCORDINGLY, it is:

ORDERED that Respondent is publicly reprimanded; and

ORDERED that the OED Director shall make public the following Notice in the Official Gazette:

Notice of Reprimand

> This concerns Henry N. Portner of Jupiter, Florida, an attorney licensed in Florida and authorized to represent others before the United States Patent and Trademark Office ("USPTO") in trademark and non-patent matters. In a reciprocal disciplinary proceeding, the USPTO Director ordered that Mr. Portner be publicly

reprimanded by the USPTO for violating 37 C.F.R. § 10.23(b)(6) when he was publicly reprimanded by the Supreme Court of Florida. Mr. Portner is not a registered patent practitioner and is not authorized to practice patent law before the USPTO.

In Florida Bar v. Henry Neil Portner, Case No. SC 10-288 (Fla. Aug 19, 2010), the Supreme Court of Florida publicly reprimanded Mr. Portner. The public reprimand was predicated upon a determination that Mr. Portner disseminated or caused to be disseminated a direct mail advertisement for foreclosure defense and loan modification representation on various occasions in 2009. Statements in the direct mail advertisement were misleading; the advertisement lacked the necessary language stating that "If you have already retained a lawyer for this matter, please disregard this letter;" failed to disclose how respondent obtained the intended recipient's name and address; lacked the name of the lawyer responsible for the content of the advertisement; the trade name listed in the advertisement was misleading; and the advertisement was not timely filed for review either before or simultaneously with the dissemination of the advertisement to the public as required.

This action is taken pursuant to the provisions of 35 U.S.C. § 2(b)(2)(D) and 37 C.F.R. §§ 11.24 and 11.59. Disciplinary decisions are available for public review at the Office of Enrollment and Discipline's Reading Room located at: http://des.usp.gov/Foia?OEDReadingRoom.jsp.

JUN 22 2012

Date

Bernard J. Knight
General Counsel
United States Patent and Trademark Office

on behalf of
David Kappos
Under Secretary of Commerce for
Intellectual Property and Director of the
United States Patent and Trademark Office

cc:

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NOTICE OF REPRIMAND

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JUN 22 2012
Date

Bernard J. Knight
General Counsel
United States Patent and Trademark Office

on behalf of
David Kappos
Under Secretary of Commerce for
Intellectual Property and Director of the
United States Patent and Trademark Office