

**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE ADMINISTRATIVE LAW JUDGE**

In the Matter of:

Kyle H. Flindt,

Respondent.

Proceeding No. D2016-04

INITIAL DECISION

Before: Susan L. Biro
Chief Administrative Law Judge, EPA¹

Issued: August 4, 2017

Appearances:

For Complainant:

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¹ This Initial 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 May 15, 2014.

I. PROCEDURAL HISTORY

This action was initiated December 3, 2015, when the Director of the Office of Enrollment and Discipline (“OED” or “Director”), United States Patent and Trademark Office (“PTO” or “Agency”), issued a Complaint and Notice of Proceedings (“Complaint”) against Respondent Kyle H. Flindt (“Respondent”) under 35 U.S.C. §§ 2(b)(2)(D) and 32, and under 37 C.F.R. §§ 11.19, 11.32, and 11.39. The Complaint charged Respondent with three counts of professional misconduct through violations of the PTO Rules of Professional Conduct (“PTO Rules”), 37 C.F.R. §§ 11.101 through 11.901. Respondent is alleged to have, among other things, failed to act with the requisite diligence, made false and misleading statements, failed to cooperate with a PTO disciplinary investigation, and failed to maintain adequate records of his client trust account. The OED Director seeks to have Respondent suspended from practice before the PTO and such other relief as the Tribunal deems warranted.

After being granted an extension of time, Respondent filed an Answer to the Complaint on February 3, 2016. That Answer, however, responded only to the first count of the Complaint. *See* Answer at 2-32. On March 8, 2016, Respondent filed for leave to amend his Answer, and on August 5, 2016, he filed an Amended Answer to the Complaint addressing all counts.²

On March 1, 2016, the Tribunal entered an Order Scheduling Prehearing Procedures and Hearing. The OED Director timely filed his prehearing statement on April 29, 2016, and with leave granted, supplemented it on August 25, 2016. Respondent did not file a prehearing statement.

On May 13, 2016, the OED Director filed a Motion for Summary Judgment on Counts II and III of the Complaint. Respondent did not file a response to the Motion, however, he did submit a Prehearing Brief on August 5, 2016, which addressed some of the issues raised in the Motion. By Order dated August 15, 2016, summary judgment was granted on Count II of the Complaint and Respondent was found to have violated the PTO Rules of Professional Conduct, 37 C.F.R. §§ 11.801(b) and 11.804(d). Summary judgment was denied as to the allegations of violation set forth in Count III of the Complaint. *See* Order Granting in Part and Denying in Part the Director’s Motion for Summary Judgment on Counts II and III of the Complaint (Aug. 15, 2016), at 11.

The hearing in this matter was held on September 14, 2016, in Seattle, Washington.³ Respondent was the only witness to testify in person at the hearing. Also offered and accepted into evidence were the OED Director’s 35 exhibits (numbered 1–11, 13–35A).⁴

² The Order granting Respondent’s Motion to Amend his Answer directed him to file his Amended Answer on or before April 15, 2016. *See*, Order Granting Motion to Amend Answer (Apr. 4, 2016), and Order Granting Motion for Extension of Deadlines (Apr. 8, 2016). Without seeking further leave, Respondent submitted his Amended Answer four months past the deadline.

³ Citation to the hearing transcript will be in the following form: “Tr. ____.”

⁴ The Director’s exhibits are cited to herein as “DX ____.” DX 35 and 35A are respectively the transcript and errata sheet of the deposition of Steven Capeder taken by the Director on May 27, 2016, in lieu of Mr. Capeder’s personal

The undersigned received the hearing transcript on September 23, 2016, and forwarded it to the parties on September 28, 2016, along with a Post-Hearing Scheduling Order. Both parties filed their initial Post-Hearing Briefs on October 31, 2016. The OED Director filed a Post-Hearing Reply Brief on December 8, 2016. Nothing further was filed thereafter, and the record closed with that filing.

II. LEGAL BACKGROUND

Congress authorized the PTO to promulgate regulations governing “the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office.” 35 U.S.C. § 2(b)(2)(D). If an attorney does not comply with regulations issued under § 2(b)(2)(D), or if he is “shown to be incompetent or disreputable, or guilty of gross misconduct,” the PTO may suspend or exclude the attorney from further practice before the PTO. 35 U.S.C. § 32. *See also Sheinbein v. Dudas*, 465 F.3d 493, 495 (Fed. Cir. 2006). “Under these statutes, the PTO has the exclusive authority to establish qualifications for admitting persons to practice before it, and to suspend or exclude them from practicing before it.” *Kroll v. Finnerty*, 242 F.3d 1359, 1364 (Fed. Cir. 2001).

In 2013, the PTO issued revised regulations governing attorney conduct and practice. The new regulations, entitled Rules of Professional Conduct (“Rules”), are based upon the American Bar Association (“ABA”) Model Code of Professional Responsibility. *See Changes to Representation of Others Before the United States Patent and Trademark Office*, 78 Fed. Reg. 20179 (Apr. 3, 2013) (Final Rule) (codified at 37 C.F.R. §§ 11.101-11.901). In updating its regulations, the PTO sought to “provid[e] attorneys with consistent professional conduct standards, and large bodies of both case law and opinions written by disciplinary authorities that have adopted the ABA Model Rules.”⁵ *Id.* at 20180.

III. VIOLATIONS ALLEGED

As noted above, the Complaint contains three Counts. Within Count I, Respondent is alleged to have violated five PTO Rules (37 C.F.R. §§ 11.103, 11.104(a)(3), 11.804(c), 11.105(b) and 11.804(i)), which relate primarily to the quality of the legal services he provided to a client. Compl. ¶¶ 1-104. Count II of the Complaint alleges two Rule violations (37 C.F.R. §§ 11.801(b) and 11.804(d)), which relate to the extent of Respondent’s cooperation with OED in its investigation of this matter. Compl. ¶¶ 105-134. Count III alleges three Rule violations (37 C.F.R. §§ 11.115(a), 11.115(f)(1) and 11.801(b)), all of which relate to record-keeping.⁶ Compl. ¶¶ 135-143.

appearance at hearing. Attached to DX 35 are 33 separately numbered deposition exhibits referenced therein. The Capeder deposition exhibits are cited to herein as “Depo. Ex. ___.”

⁵ Also useful to understanding the PTO Rules is the PTO Code of Professional Responsibility (“PTO Code”), 37 C.F.R. §§ 10.20 through 10.112 (in effect until May 3, 2013), the Comments and Annotations to the ABA Model Rules, as well as decisions and opinions issued by state bars. *See Changes to Representation of Others Before the United States Patent and Trademark Office*, 78 Fed. Reg. at 20180.

⁶ The Director’s Post-Hearing Brief (cited herein as “DB___”) indicated that the OED was no longer pursuing the allegations charged in Count III(a) of the Complaint at ¶ 143(a), that Respondent violated 37 C.F.R. § 11.115(a) (b)

IV. **BURDEN OF PROOF**

The OED Director must prove alleged violations by “clear and convincing evidence.” 37 C.F.R. § 11.49; *Johnson*, PTO Proceeding No. D2014-12, slip op. at 2 (Dec. 31, 2014) (Initial Decision).⁷ Likewise, it is Respondent’s burden to prove any affirmative defense by clear and convincing evidence.⁸ 37 C.F.R. § 11.49. This standard “protect[s] particularly important interests . . . where there is a clear liberty interest at stake.” *Johnson*, slip op. at 3 (quoting *Thomas v. Nicholson*, 423 F.3d 1279, 1283 (Fed. Cir. 2005)) (internal quotation marks omitted). “Clear and convincing evidence” requires a level of proof that falls “between a preponderance of the evidence and proof beyond a reasonable doubt.” *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 424-25 (1979)) (internal quotation marks omitted). The evidence produced must be of such weight so as to “produce[] in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.” *Id.* (quoting *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 450 (4th Cir. 2001)) (internal quotation marks omitted). “Evidence is clear if it is certain, unambiguous, and plain to the understanding, and it is convincing if it is reasonable and persuasive enough to cause the trier of facts to believe it.” *Id.* (quoting *Foster v. Alliedsignal, Inc.*, 293 F.3d 1187, 1194 (10th Cir. 2002)) (internal quotation marks omitted).

V. **FACTUAL BACKGROUND**

Respondent, Kyle H. Flindt, trained as an electrical and computer engineer. Tr. 51; DX 4. In 1998, he was registered with the PTO as a patent agent. Tr. 17; DX 1. The following year, Respondent graduated from Brigham Young University Law School and became a member of the Utah State bar.⁹ Tr. 16; DX 2. On December 8, 1999, his PTO registration status was changed to that of a patent attorney.¹⁰ Tr. 16; DX 1, 4. Based upon reciprocity, Respondent was admitted to the Washington State Bar on March 28, 2006.¹¹ Tr. 21; DX 3.

After graduating law school, Respondent held a series of relatively short-term positions with a variety of law firms in Utah, Oregon, Florida, and Washington, primarily focusing on intellectual property law. Tr. 16-22; DX 4. In or about 2008, he opened his own solo law

failing to hold client funds separately from the practitioner's own property, and to have a separate and identifiable account in which to deposit client funds. DB at 36 n.11.

⁷ PTO case decisions cited here are publically accessible via the search portal available at: https://e-foia.uspto.gov/foia.uspto.gov/Foia/DispatchOEDServlet?decisionType=&contractNo=D2001-14&respName=&txtInput_StartDate=&txtInput_EndDate=&docTextSearch=&page=60.

⁸ Respondent did not raise any affirmative defenses in his Amended Answer.

⁹ The Respondent is currently administratively suspended from the Utah Bar based upon non-payment of dues. Compl. ¶ 3; Ans. ¶ 2; DX 2; Tr. 21.

¹⁰ Respondent’s PTO registration number is 42,539. DX 1.

¹¹ Respondent’s Washington State Bar number is 37322 and his current status is “active.” Compl. ¶ 4; Ans. ¶ 4; DX 3.

practice, the Flindt Intellectual Law Property Group (“Flindt Law”), doing business as “Inventive Spark,” in Issaquah, Washington. Tr. 22-23, 117-18.

In 2010, Respondent/Flindt Law was contacted by Steven Capeder to secure trademarks in connection with a book Mr. Capeder had written entitled the “Four Seasons Diet.” Tr. 24-27, 60, 92; DX 28; DX 35 at 16-17, 117-18. On or about June 17, 2010, Mr. Capeder executed a written engagement letter with Flindt Law, setting forth the terms under which such legal work would be provided, and was presented with the firm’s list of “Typical Charges” for services as of 2010.¹² Tr. 27, 58; DX 28; DX 6 at 110; DX 35 at 192-93, 197-99. Thereafter, and for the next several years, Respondent, promptly and satisfactorily, completed a series of more than 20 trademark matters for Mr. Capeder, charging him discrete fixed-fees, totaling approximately \$25,000. Tr. 26, 109, 117-21; DX 28; DX 35 at 16, 191, 200-01.

While working on obtaining trademarks for his book, Mr. Capeder disclosed to Respondent that he had an idea for an invention. DX 35 at 15-16, 19-20. In 2013, Respondent, along with a few of Mr. Capeder’s friends and family members met at Mr. Capeder’s house to discuss his idea for a round watch keyboard. DX 35 at 209-10; Tr. 60, 119-20. At some point thereafter, Mr. Capeder decided that his idea had come along “far enough,” and asked for Respondent’s recommendations in terms of obtaining legal protection for his invention. DX 35 at 20. As a first step, Respondent suggested that his client “familiarize [him]self with what was there,” meaning existent patents related to his idea, in order to find the “white space” or vacant legal/technical area, in which to direct his patent application. Tr. 92-93, 121-23. Mr. Capeder agreed, and on May 8, 2013, Respondent performed a patent search for a flat fee of \$300. Tr. 120, 123-24; DX 6 at 17. *See also* Tr. 60-61. After receiving the search results, and discussing them with Respondent, Mr. Capeder said he had a better understanding of what he needed to do to obtain a patent for his idea, and so spent the next year working on his invention, a “stand alone” computer application, specifically a keyboard, for texting and messaging. DX 35 at 27-30.

In May of 2014, believing that he had “the keyboard pretty much figured out,” Mr. Capeder advised Respondent that he was “ready to begin work on the patent.” DX 35 at 30, 32. However, at the time, Mr. Capeder’s financial situation was “pretty bleak,” as he was an unemployed real estate contractor, who had just emerged from bankruptcy, and was living in his mother’s home. DX 35 at 15, 46, 112, 226, 228, 236; Tr. 50. With these financial constraints in mind, Mr. Capeder informed Respondent that he was “tight on money” and wanted to obtain the patent “on a budget.” DX 35 at 30. Mr. Capeder claimed that in response to his predicament, Respondent declared that if he spent time “doing the legwork,” and gave him “everything in a format I can use,” then “it will save you quite a bit of time and money.” DX 35 at 30-31, 219, 226-27.

Respondent explained at hearing that at that point, although they had not gone out together socially, he considered Mr. Capeder a “close friend,” and was therefore, “concerned with helping

¹² The 2010 engagement letter between Respondent and Mr. Capeder issued in connection with the trademark work as offered into evidence is unsigned. DX 28. However, both parties acknowledged that Mr. Capeder timely signed the agreement. Tr. 58; DX 35 at 192, 198.

him succeed in what he was trying to do.”¹³ Tr. 91-92. Thus, he was willing to discuss with him at no charge, all that was involved in obtain legal protection for his invention, raising capital, as well as producing and marketing a product. Tr. 90-92; DX 6 at 18. However, Respondent testified, he also tried to impress upon his friend the idea that he should get a job and not put all his time, energy, and money solely into obtaining the patent, as there was a lot of competition in the computer software area and he did not have the financial resources to independently bring his invention idea to fruition. Tr. 92-94, 125, 135, 139, 143. Respondent indicated that his awareness of the field’s very competitive nature came in part from the fact that a few months prior to their meeting in May 2014, as part of his then full-time work at AEON, he had drafted and filed an international patent application for a keyboard with clickable or linkable emoji for another client, which had similar “foundations” to Mr. Capeder’s software idea. Tr. 96-97. Mr. Capeder, however, was not persuaded by Respondent’s efforts to redirect him, and, although neither a lawyer nor a “computer guy,” focused his resources almost exclusively on preparing the documentation he believed was needed in order to get “a better price on the patent applications.” DX 35 at 15, 31, 219-220, 282.

The men held a follow up meeting on June 4, 2014. DX 35 at 32, 250; DX 6 at 19; Tr. 123-24. At this meeting, Mr. Capeder presented Respondent with all the information and sketches he had on his idea and inquired as to the “next step.” DX 35 at 32-33, 190, 220, 246, 282; Depo. Ex. 31; Tr. 124-25. Although Mr. Capeder was “very focused” on getting a provisional utility application, Respondent strongly recommended his client apply for a design patent, explaining at hearing that doing so would take advantage of the fact that Mr. Capeder was “a little bit obsessive compulsive,” “really digs down,” and had indicated that he had determined the best iteration of the keyboard. Tr. 124-25. In the end, Mr. Capeder agreed to do both, and for the sake of efficiency, agreed to use the professional drawings created for the design patent for the provisional application as well, to kill “two birds with one stone.” Tr. 94-95, 125; DX 35 at 250-51. In his deposition testimony, Mr. Capeder alleged that Respondent counseled him that “if you file the design patent first and the provisional after that, then it could invalidate both patents, so you have to file both patents on the same day.” DX 35 at 75, 77, 129, 314-15.

As to the terms upon which the applications would to be done, Respondent testified that at this point in time he was in the very end stage of closing his solo law practice, having already transitioned all of his other clients over to AEON Law, the new firm for which he was then working full-time as an associate.¹⁴ Tr. 29, 93, 102. Therefore, he strongly encouraged Mr. Capeder to also transition to AEON, and advised him of all the benefits the firm had to offer. Tr. 29, 92, 161-62. However, Mr. Capeder indicated to Respondent that he could not afford to retain the firm’s services, and that he needed a “cheaper” option. Tr. 92, 135, 143, 145. Respondent stated, that because of their existing relationship, he “tried to find a way that . . . [he] could help.” Tr. 92-93.

¹³ Respondent testified at hearing that Mr. Capeder knew Respondent’s wife, she had come to his home as part of her missionary work, and that they had attended church together. Tr. 74; DX 35 at 19.

¹⁴ Respondent testified at hearing in September 2016 that he remains employed at AEON Law. Tr. 156-157. See also, DX 1.

As such, Respondent testified he offered, under the auspices of Flindt Law, to “mentor” or “coach” his client through the patent process, similar to a retention option AEON Law offered its clients, although he did not have the paralegal or other resources of the firm. Tr. 124, 145 (Only AEON, not Flindt Law offers mentoring); Tr. 137, 146. Under this arrangement, Respondent stated that he anticipated he “would basically be drafting the design application,” with the help of a hired professional draftsman. Tr. 126. However, in terms of the provisional utility application, Respondent stated that he expected Mr. Capeder to write “the text and the support,” “then I was essentially going to be putting it in the right places in the application,” and “when there were areas that he had a hard time with or a challenge, . . . I would fill in those gaps.” *Id.* As they went through each stage in the process, Respondent believed he would be able to teach his client what was needed so he would be able to write the sections of the application on his own, even though Mr. Capeder had no prior patent experience. Tr. 145-46. Nevertheless, as to certain parts, such as the description of the structure of the computer and database structures, Respondent admitted to knowing that he would have to draft those on his own, as his client had no background in those technical areas. Tr. 137, 146 (citing DX 25 at 49). Such a “mentoring” arrangement differed significantly from his usual professional practice of drafting patents, Respondent advised this Tribunal. Tr. 137-38. In most cases, Respondent said, an inventor would initially present him with a written narrative description of the invention, he and the client would engage in a two-hour “disclosure meeting,” and then he would draft the patent application and present it to the client for a brief “review” before filing. *Id.*

Respondent adamantly maintained at hearing that Mr. Capeder agreed to his offer to engage in this limited “mentoring” or coaching arrangement in exchange for a reduced fee. Tr. 65-68, 137, 140, 141. In support, he primarily cited the modest flat-fee of \$2,000 for which he agreed to perform the work, compared to his standard professional fees for similar work at the time or in 2010 in the \$6,000 to \$8,000 range. Tr. 64, 70 (capped-fee arrangement), 147. As justification therefor, Respondent explained that at the time he estimated that his limited work mentoring his client through the applications would take approximately ten hours, noting that drafting a design application, with four or five drawings from scratch generally takes him about four to five hours to write (one hour per drawing), and a provisional application takes him “maybe 20 hours to write.” Tr. 98, 126-28, 138. Further, Respondent explained that he offered his services to Mr. Capeder on the two patents as “a package” deal for \$2,000 (ten hours at the rate of \$200 per hour), in part because his client was not enthused about filing for a design patent, which Respondent favored, and because his client “wanted the total fees not to be more than a certain amount.” Tr. 131-32.

In his deposition testimony, Mr. Capeder acknowledged Respondent offered him a mentoring arrangement. DX 35 at 34, 222-23, 229. However, he steadfastly testified that he explicitly rejected this offer and instead retained Respondent to professionally prepare the two patent applications on his behalf for a reduced fee which Respondent was willing to do based upon the background material he had already prepared and provided following Respondent’s prior instructions. *Id.* Mr. Capeder recalled that at that point, he felt it was “100 percent clear” that he had given drafting the necessary information on the invention his “best stab” as an inventor, and that now Respondent was going to “take over” and “prepare and file” the applications. DX 35 at 42-43, 47, 49, 302-03; Depo. Exs. 1, 29; Tr. 63-64. With regard to the fee, Mr. Capeder testified that Respondent agreed “to attempt to do a design patent and a provisional [utility] patent for

\$2,000,” with a “big caveat” “that there was a good chance it could be more than that,” and if Respondent “came to realize it was going to be more,” he would so advise Mr. Capeder and they “would have a conversation about that.”¹⁵ DX 35 at 34, 37, 223-24, 226-27, 304; Tr. 64-65, 70; Depo. Ex. 1.

As to the time frame for the work, Mr. Capeder testified that he told Respondent during the June 4 meeting that he was planning to move from Washington to California with his girlfriend in August, and wanted to file the applications before he left. DX 35 at 45-46; DX 6 at 21. In response, Respondent estimated and agreed that it would only take “one to two months from the date of that meeting,” to have “both patents finished and filed.” DX 35 at 36. Mr. Capeder testified that based upon the agreement with Respondent as he understood it, he gave Respondent \$1,000 in cash, “as a deposit towards design and provisional patent applications.” DX 35 at 39, 231; Depo. Ex. 30; Tr. 63. Mr. Capeder testified that he recalled Respondent stating at the time that the balance of the fee would be due when the work was “finished.” DX 35 at 204-05, 301. However, Respondent testified that he anticipated his client would pay the balance of the legal fees due the “next week, after receiving the bids back from the draftsman.” Tr. 132.

Unfortunately, the parties did not mutually execute any document specifically confirming the terms of their 2014 arrangement with regard to the patent applications. Tr. 29, 68-69, 126-127; DX 35 at 221-222, 226-229, 300; Resp. Am. Ans. at 11, p. 5, 30. At hearing, Respondent opined that he believed the prior engagement letter signed in 2010 applied to this work, however, Mr. Capeder strongly disagreed. Tr. 68; DX 35 at 22, 206-07. Both parties cited in support of their respective positions emails Mr. Capeder sent Respondent within a few days of their June 4 meeting. Tr. 63-65; DX 35 at 47-48. *See also* Depo. Ex. 1. Specifically, Mr. Capeder cited an email he sent Respondent on June 9, 2014 “to make sure we are on the same page,” which stated in relevant part that “you [Respondent] are *going to prepare and file* a design and provisional patent,” and “[w]e are hoping this can be accomplished for under \$2,000 . . .” but “if as you work on this you start to anticipate your fees will go above \$2,000, you will let me know before going above the \$2,000 threshold.” Depo. Ex. 1 (emphasis added); DX 35 at 48. Respondent, on the other hand, cited text from the same email in which Mr. Capeder stated that he “could meet this week to pay for draftsman, *your fees*, filing fees, etc., if necessary.” Depo. Ex. 1 (emphasis added); Tr. 66. In further support of his understanding of the agreement, Respondent cited a subsequent email sent to him by Mr. Capeder, after a telephone conversation between the men, which stated that “per our conversation, \$2,000 will cover approximately 10 hours of your *review time* for a provisional patent, at which time we will meet to discuss whether further work/changes etc. is warranted.” Depo. Ex. 2 (emphasis added); Tr. 68.

Immediately after the parties’ June 4 meeting, Mr. Capeder sent Respondent revised sketches of his design, asking that they be forwarded to the professional draftsman, Mark Criddle,

¹⁵ Mr. Capeder testified that based upon his conversations with Respondent he was aware of the difference between types of patents, explaining that a design patent “patent[s] simply the look of something, the design,” and a provisional utility patent “goes into more of the functionality.” DX 35 at 35-36. Further, he was aware that a provisional patent “allows you to get protection for a year,” “rough protection of the important things,” and a non-provisional utility patent is “bigger, more extensive, takes longer to prepare,” and gives “long-term protection.” *Id.* at 36.

who was retained and paid by Mr. Capeder to prepare the formal drawings for both applications. DX 35 at 54; DX 6 at 20. Thereafter, Mr. Capeder said he waited patiently to received his drawings. DX 35 at 51; Depo. Ex. 3. Receiving nothing, a few weeks later, on June 27, 2014, he made a status inquiry of Respondent and/or the draftsman. Depo. Ex. 4; DX 35 at 53-55. In response, Respondent forwarded the initial drawings the draftsmen had sent to him a few days before on or about June 25, 2014. DX 6 at 22; Depo. Ex. 5. Upon review, Mr. Capeder found that the drawings did not include his most recent design iteration and immediately advised the draftsman, expressing concern regarding the delay and a desire to "expedite" the matter. DX 6 at 22; Depo. Ex. 5. Apparently, there was some miscommunication or delay in Respondent sending notice via email to Mr. Criddle for the need for changes to be made to the drawings. Depo. Ex. 6; DX 35 at 56-57. As a result, the draftsman did not produce the revised drawings, which he identified as the "final keyboard design," until July 29, 2014, almost two months after the parties initial June 4 meeting. Depo. Ex. 7, 32.

Promptly upon receipt of the drawings, Respondent advised Mr. Capeder that he would look them over and inquired as to Mr. Capeder's availability to meet "this week." Depo. Ex. 7; DX 35 at 60-61. The record indicates that a few days later, on August 2, 2014, Mr. Capeder sent Respondent a number of emails responding to his counsel's requests for clarification and descriptions of the figures seen in the drawings, as well as his own request for a number of changes to be made to the design including the addition of a "thumb key." Depo. Ex. 8; DX 35 at 60-63. A couple of days later, via two separate emails, Mr. Capeder inquired of Respondent as to the "time frame for getting the design patent finished" and asks for a copy of Respondent's draft of the design patent. Depo. Ex. 8. Mr. Capeder testified that at this point he was "thinking the patent was 90 percent finished and [Respondent's] just going to insert some of these changes and it's literally a week away from being filed." DX 35 at 62-63.

On August 5, 2014, Respondent emailed Mr. Capeder promising to send him the design patent "after I get home." Depo. Ex. 9; DX 35 at 63-64. Later that day, Respondent forwarded via email a copy of the "Design Specification and Drawings" to his client, stating in regard thereto that "it brings up some interesting questions, let me know when you are available to discuss," and asked for his contact information to "use for the filing." DX 6 at 23, 24. Mr. Capeder promptly responded, noting one error in the design and stating he was "available to discuss whenever" Respondent was free. DX 6 at 24; DX 35 at 65-66. Mr. Capeder testified that the parties spoke later that day, during which Respondent asked him to provide a list of the top ten features of the invention and flowcharts indicating how the application operated. DX 35 at 67-69. The next day, on August 6, 2014, Mr. Capeder sent Respondent a list of the top features and a narrative explanation in lieu of a flowchart, explaining that he "had no idea what [Respondent] was talking about" in terms of flowcharts, so "did the best [he] could." DX 6 at 26-27; DX 35 at 66-70. Mr. Capeder testified that at this point he was expecting to shortly meet with Respondent and for the patents to be finished in a few days, that is by August 8 or 9. DX 35 at 67-68, 71; DX 6 at 25. Thus, hearing nothing more from Respondent, on Friday, August 8, 2014, he emailed him inquiring as to scheduling a meeting for over the weekend and about getting a "rough draft [of] the provisional patent." DX 6 at 28-30; DX 35 at 71-72. On Monday, August 11, 2014, Respondent responded to his client's email, explaining he did not receive it until then, stating that he has some questions regarding the flowchart and drawings, and asking to schedule a meeting for Wednesday. DX 6 at 30.

Mr. Capeder testified that he attended the Wednesday, August 13, 2014 meeting with Respondent expecting to be “shown two 99 percent finished patent applications,” which would be filed “in the next day or two.” DX 35 at 73. Instead, he said, Respondent first told him he had spent more time than he originally indicated, that \$2,000 “was not going to be enough to cover his fee,” and that he wanted him to pay an additional \$1,000 for his time. DX 35 at 37-38, 73-74, 304-05; Tr. 70. As he had “expected that all along,” Mr. Capeder stated that he agreed to the fee increase, particularly since Respondent represented that \$3,000 would be the total of the fees he would charge for the work.¹⁶ DX 25 at 37-38, 73-74. Next, he recalled, Respondent gave him a “doom and gloom speech,” that “just devastated me,” regarding the “*Alice* decision,” saying it “would now be extremely difficult, if not impossible for me to patent my invention.” DX 35 at 74, 312-13. In light of the fact that he was “tight on money,” Respondent suggested to him that, “at this point, it might be better for me to just cut [his] losses and give up.” DX 35 at 74, 312-13. Furthermore, at the meeting Respondent presented him with only a draft of the design patent, and not the provisional patent. DX 35 at 74-75, 342-43.

As to what occurred at this meeting, Respondent explained at hearing that, about two weeks after his initial June 4 meeting with Mr. Capeder, the Supreme Court issued its decision in *Alice Corp. v. CLS Bank International*, 134 S. Ct. 2347 (2014). According to Respondent, the *Alice* decision substantially raised and tightened the legal requirements for obtaining utility patents on software applications. Tr. 99, 158. Before *Alice*, he opined, “we could get by with a flowchart and a kind of a general purpose computer, but after that point, it was really uncertain,” but they knew from the decision that merely saying “I’ve got a new keyboard and how it works, [] is not enough,” as that would be considered an unpatentable “abstract idea.” Tr. 99-100, 112. In addition, at that point what his client had was only a “book” sized narrative going back to the “Roman era,” and some concepts behind his invention that “weren’t finished yet.” Tr. 139. Therefore, Respondent said, he recommended his client just file for the design patent, because in order to obtain a utility patent he would need to submit much more detailed information on his invention. Tr. 147-48, 150. This significant legal requirement would be in addition to his already substantial technical burden of gathering the “underlying support to overcome” “prior art,” *i.e.*, the “wide variety of technology” that “is already out there,” Respondent noted. Tr. 112.

Despite Respondent’s “doom and gloom” speech, Mr. Capeder was not persuaded to give up his desire to obtain a utility patent for his invention. Rather, after this meeting, Mr. Capeder testified that he felt that “the ball was in my court” to give Respondent “ammunition” to show that his invention did not simply reflect an abstract idea of the type found invalid in *Alice*. DX 35 at 75-76, 77-78, 312. Therefore, immediately after the parties meeting, he emailed Respondent stating that he was going to work on revising his “spreadsheet to add in many more factors that should help you draft a good patent,” and send it back later that night. DX 6 at 31; DX 35 at 76, 312-13. The following day, August 14, 2014, Mr. Capeder email Respondent his “vastly expanded” spreadsheet with word key analysis, representing his “ammunition.” DX 6 at 32; DX 35 at 313-14. At this point, Mr. Capeder said he anticipated filing both the patents the following Monday. DX 35 at 77; DX 6 at 33.

¹⁶ While his client agreed to the additional fee at the August 13 meeting, Respondent testified that he did not promptly pay it, and failed to pay the full legal fees due until October, some two months later. Tr. 150.

The record suggests that at this point Respondent ceased communicating with his client for an extended period. There is no evidence that Respondent timely replied to Mr. Capeder's August 14, 2014 email and spreadsheet, nor did he respond to Mr. Capeder email inquiry asking for an "update" as to the status of the keyboard patents sent a week later, on August 21, 2014, and then sent again on August 27, 2014. DX 6 at 34, 35; DX 35 at 78-79. In addition, Mr. Capeder found that he was unsuccessful when he tried thereafter to reach Respondent by telephone, and so notified him by email on September 8, 2014. DX 6 at 36; DX 35 at 79-80. On September 17, 2014, Mr. Capeder again emailed his attorney inquiring as to the status of the patents. Depo. Ex. 10; DX 35 at 80-81. Mr. Capeder testified that on or about September 19 or 20, Respondent finally telephoned him, giving a series of reasons for not responding sooner including that his computer had been hacked and/or crashed, and promising that he would finish both patents and email them to him later that afternoon for review, after which they would meet in the evening to finalize everything. DX 35 at 81-82; DX 6 at 37-40. By this point, however, Mr. Capeder said he begun to worry that Respondent was "up to no good," but he was still waiting to see what would happen. DX 35 at 82-83; DX 6 at 38.

Despite Respondent's promise, Mr. Capeder did not promptly receive the draft patents and so on the evening on September 20, 2014, he emailed Respondent noting that fact and inquiring as to "what the plan is to get them finished." DX 35 at 83, 316-18; DX 6 at 41. Respondent did not reply to the email. DX 35 at 86. While waiting for a response, on Wednesday, September 24, 2014, Mr. Capeder emailed Respondent with an idea for a "minor change," believing it represented the addition of "one to two sentences" in the application. DX 35 at 86-87; DX 6 at 42.

On September 26, 2017, Respondent finally telephoned his client in response, again representing that he would send the draft applications to him that night and meet with him the following day. DX 35 at 87-88; DX 6 at 47. Again, having not received the draft patents as promised, early the following day, Mr. Capeder inquired of Respondent as to their status. DX 6 at 47-48, 52; DX 35 at 87-88. This time Respondent did promptly respond to his client's inquiry by telephone, during which he offered excuses for the delay and committed to forwarding the applications by 1 p.m. that day (Saturday). DX 35 at 88-90; DX 6 at 50, 52. Having not received the applications, Mr. Capeder spoke by telephone with Respondent late on Saturday, during which call Respondent represented he was hoping to finish up the patents and meet with Mr. Capeder on Sunday. DX 6 at 51; DX 35 at 91.

On Monday, September 29, Mr. Capeder followed up by email with Respondent asking how much more work he had to do on the applications. DX 6 at 51; DX 35 at 91, 93. Mr. Capeder testified that he felt that at that point Respondent "should be very, very close" to finishing the patent applications. DX 35 at 91; DX 6 at 51. Early on Wednesday, October 1, 2014, Respondent telephoned his client, promising to send the draft applications that morning, and when they did not arrive by the afternoon, Mr. Capeder sent Respondent another inquiring email as to the status. DX 6 at 53; DX 35 at 92-93. The next day, October 2, 2014, Mr. Capeder sent Respondent an email advising him that he would be free to meet on the patents "anytime today or tomorrow" "so we can get this finished." DX 6 at 54; DX 35 at 93-94.

Respondent did not promptly respond to Mr. Capeder's October 2, 2014 email, nor did Respondent send him the promised draft applications. DX 35 at 94-95. Consequently, early the next day, Mr. Capeder sent him another e-mail gently venting his frustration at the state of events stating:

Every week for the past few months, it seems as though you are going to finish that week, and then something always seems to happen, and I get pushed off to the following week. Anyway, I am really hoping to get things wrapped up ASAP, so any update truly appreciated.

DX 6 at 55; DX 35 at 95-96. Three days later, on Monday, October 6, Respondent telephoned his client in response, this time representing he had only "30-60 minutes" of work to do to finish up the applications. DX 35 at 96; DX 6 at 57-58. Hearing nothing further, on Friday, October 10, 2014, Mr. Capeder emailed Respondent again stating that based upon his representations on Monday, he would hope that he would be finished with the applications "today or tomorrow." DX 6 at 57; DX 35 at 97-98. Respondent called Mr. Capeder in response later that day promising again to get him the draft applications by that evening. DX 35 at 98-99; DX 6 at 56. Respondent again failed to send Mr. Capeder the draft applications. DX 35 at 99; DX 6 at 43.

On Monday, October 13, 2014, Mr. Capeder emailed Respondent again, acknowledging that he had previously added a picture to the application, and that he was thinking of making a few more minor changes, but did not "want to add any more time to this if you are super close to finishing." DX 6 at 43; DX 35 at 99-100, 318-19. Furthermore, he again asked Respondent for "any news on the patent progress." DX 6 at 43; DX 35 at 99-100, 318-19. The following day, October 14, Respondent called in response, representing to him that "the patents were finished and all he had to do was review them and that he would email them later that evening." DX 35 at 100, 325. However, Respondent did not email the applications to his client that evening. *Id.*; DX 6 at 60.

Mr. Capeder testified that at this point he was "at the end with [his] attorney," that it was "unbelievable" that "for the umpteenth time" he had not him send the applications as promised. DX 35 at 101; DX 6 at 62. Nevertheless, on the following Thursday, October 16, 2014, Mr. Capeder again sent Respondent only a gentle reminder of his unfulfilled promises made. DX 6 at 61; DX 35 at 101. Later on Thursday morning, Respondent called Mr. Capeder in response, stating both that "he had finished both patents" and that he had "a few minor questions that needed some clarification," to finish up. DX 35 at 102. By 1 p.m. that day, Mr. Capeder responded to Respondent's requests for clarification via email, explaining narratively and using a sketch to show certain functions of the keyboard. DX 6 at 63; DX 35 at 102-103, 320, 326. Thereafter, Mr. Capeder testified, Respondent telephoned him advising that based upon the clarification received, he "would definitely finish up both of my patents that day, all he had to do was review them again." DX 35 at 103. However, in addition, Mr. Capeder recalled, Respondent advised that his "mortgage was past due," and asked Mr. Capeder to pay him for the purportedly finished applications. DX 35 at 102-10; DX 6 at 64. Mr. Capeder capitulated to Respondent's request and that evening gave Respondent an additional \$2,000 in cash to cover the balance of the

flat-fee of \$3000 for his legal services, plus \$225 in advance for PTO filing fees. DX 35 at 105-06, 304-05, 321; Tr. 70-72. In return, Respondent presented Mr. Capeder with the first four pages of the provisional application and told him that he “just had to go home and give the patent one more final review and that he would email it [the entire provisional application] to me later that evening.” DX 35 at 106-07, 110; DX 6 at 73-76. Respondent also advised his client that if Mr. Capeder’s edits to the draft were minor, they would file the application “the next day,” and if they were more substantial, maybe the day after, but they definitely would file “by Friday or Saturday at the very latest.” DX 35 at 106-07, 110; DX 6 at 71. During this meeting, Respondent also had Mr. Capeder execute and date a PTO form Certification for Micro Entity Status in connection with the design application. DX 35 at 109-10; DX 24 at 1; Tr. 72.

Mr. Capeder did not receive the patent applications from Respondent for review on Thursday, October 16, nor Friday, October 17. DX 35 at 111. However, on Saturday, October 18, 2014, Respondent contacted his client by telephone and reported to him that “he was having trouble finishing the flowcharts.” *Id.* Mr. Capeder testified that he found this claim “shocking” based upon Respondent’s prior representations, *inter alia*, that he was “100 percent finished” and the fact he had never reported any problem with the flowcharts since Mr. Capeder had provided the information related to them three months earlier. DX 35 at 111-12, 321-23. In response, Mr. Capeder said he requested a copy of the provisional patent application, to which Respondent demurred, stating he would provide the completed draft application once he received the flowcharts from him. DX 35 at 112. Respondent also asked his client a series of clarifying questions, which Mr. Capeder said “dumbfounded” him as those were “things that I had already been explaining to him, things he already knew, things that should have already been in my provisional application.” DX 35 at 112, 323-24. Mr. Capeder described his attitude at this point as “pissed off,” feeling that Respondent, who was comparatively financially well-off, had taken advantage of him to pay his mortgage. DX 35 at 112-13. “[I]t suddenly became clear that he lied saying the patents were done,” he declared. DX 35 at 113.

Nevertheless, later on October 18, Mr. Capeder emailed Respondent attempting to provide him with the clarifying information he required relevant to the flowcharts. DX 35 at 113, 323-24; DX 11. After another couple of days of silence, he followed up with Respondent inquiring “how the flowcharts were coming along,” believing that “all he had to do was finish the flowcharts and the patents were finished.” DX 35 at 114. In response, Respondent asked Mr. Capeder to prepare new draft flowchart sketches for him, which he did, and sent to Respondent on October 21, 2014. DX 6 at 78; DX 35 at 114-15, 330-331. Mr. Capeder testified that Respondent expressed to him how he was “impressed,” “just floored at how amazing my flowcharts were,” and because of that indicated he should be able to finish things up in a few days and file the patents by October 24. DX 35 at 115-17; DX 6 at 79-80.

The patents did not get filed by October 24, 2014, but per their arrangements Mr. Capeder tried contacting Respondent by phone on October 25, 2014, and failing to connect, emailed him. DX 6 at 72; DX 35 at 117. In the email, Mr. Capeder expressed to Respondent his frustration with having paid him the prior week on his promise of being finished, and stated “I really needed to get this patent filed so I can get started on my bids, and my Kickstarter campaign, and then I need to get a temporary job ASAP so I can pay my bills. I am afraid to get a job now as it could

affect my ability to get the bids and Kickstarter campaign off the ground, but time is really of the essence to me.” DX 6 at 72. *See also*, DX 35 at 117-19.

Respondent did not respond to his client’s email. DX 35 at 119-20. Mr. Capeder testified that he eventually reached Respondent by telephone on October 27, 2014, and admitted that during the call he was “noticeably upset,” as he felt “pissed” that Respondent had “stole[n]” his money to pay his mortgage. DX 35 at 119-20. Respondent became upset in response, telling his client that he had not sent him the applications because he had “lost power at his office the prior weekend,” but that the patents were essentially finished and “he could file both patents that day if he wanted him to.” DX 35 at 120. In the end, however, the parties agreed that Respondent would give his client the provisional application on October 29. DX 35 at 120-21.

On the morning of October 29, 2014, Mr. Capeder sent Respondent an email reminding him of his promise to provide him with an “actual draft of the provisional patent to review.” DX 6 at 82, 84; DX 35 at 121-22. Respondent promptly emailed his client a reply, stating that he planned to send “a draft of the final images by 1pm today. And then after you review, we should be able to discuss any changes at 3 pm.” DX 6 at 84; DX 35 at 122. Respondent did not send his client the draft application by 1 p.m. however; instead he called him in the early evening stating that he had “been working away for an hour and a half,” and would send the draft later that evening. DX 35 at 122. Nevertheless, Respondent did not send the draft that evening either. DX 35 at 122-23. *See also*, DX 6 at 85. At this point, Mr. Capeder said he felt that Respondent had “destroyed” all his “joy and passion” and “enthusiasm for the project.” DX 35 at 123, DX 6 at 85.

The following day, October 30, 2014, at 4:43 am, Mr. Capeder sent his attorney a very plaintive email, explaining his seriously depressed emotional state, noting that for “well over two months,” he felt the patents were going to be filed “within a week,” that he “seem[s] to be stuck in some kind of nightmare that keeps replaying itself,” and that he feels “powerless,” and that’s why he “keeps making super minor tweeks [sic] to various keyboards.” DX 35 at 123-26. He inquired if Respondent had a new completion date. *Id.* The parties then engaged in a series of telephone calls, wherein Respondent again promised imminent completion, and then pushed it off saying Mr. Capeder’s changes were going to take time to incorporate in the sketches. DX 6 at 87. Mr. Capeder expressed to Respondent that if that was the case, at this point Respondent should “forget” the changes and “just use any old sketches,” so he would have “very little left to do.” *Id.* Mr. Capeder memorialized the exchange in an email sent to Respondent later that day at 2:33 p.m. DX 6 at 87; DX 35 at 127-28. About a half hour later, Mr. Capeder emailed Respondent again, indicating that if he had known months ago that completing the provisional would have taken so long, he would have had Respondent just filed the design patent and inquired whether “there is some reason not to file to [sic] design patent with figure 16 so at least I have some protection?” DX 6 at 88. Mr. Capeder testified that he was prompted to send this later email because by this time he had begun speaking with other patent attorneys who were “dumbfounded that he hadn’t filed the design patent when it was finished [on] August 18th.” DX 35 at 128-29.

By phone, Respondent responded later that day to Mr. Capeder’s emails of October 30, raising a “file issue,” but he did not provide Mr. Capeder with the draft applications or explain why he could not proceed to file the design application. Depo. Ex. 13; DX 35 at 129-30. The

following day, Respondent inquired of his client whether he had heard from Mark Criddle, the draftsman. Depo. Ex. 13; DX 35 at 130.

The day after, Saturday, November 1, 2014, at 5:16 a.m., Mr. Capeder wrote Respondent stating: "I wish I knew some way to get you to finish the patent so you can file it. I wish there was some way I could just finish it myself, but there is not." DX 6 at 91; DX 35 at 130-31. He ends by stating that he hopes Respondent can "find a way to at least get [him] a working draft to review today." DX 6 at 91; DX 35 at 130-31. Mr. Capeder testified that at this point given the three months of delay he was interviewing other patent attorneys, so he was just hoping to get a draft from Respondent that another attorney could finish. DX 35 at 131. A little over two hours later, Mr. Capeder followed up by sending another email to Respondent stating

I need to get this patent filed and finished no matter what it takes at this point.

....

My only thought at this point is for you to do as much as you can this weekend, and then email me whatever you have late today or tomorrow

At that point I can at least start contacting other patent attorney's [sic]

This is certainly not what I want to do, but at this point I no longer know what options I have left. I just can't keep going on this way.

DX 6 at 92; DX 35 at 131-32. Approximately, four hours later, he sent yet another e-mail, reiterating his prior sentiments and requesting Respondent forward his most recent draft of the provisional application. DX 6 at 93; DX 35 at 132-33. Getting no response to his prior emails, a little over an hour later, Mr. Capeder sent a fourth email to Respondent noting that he had unsuccessfully tried to reach him by telephone several times today, and asked Respondent to call him. Depo. Ex. 14; DX 35 at 134-35.

Respondent never responded to Mr. Capeder's multiple efforts to contact him on November 1, 2014. DX 35 at 135. As a result, the following day, Mr. Capeder sent him a lengthy three (3) page email in which he angrily reiterated the litany of Respondent's false promises to produce copies of the draft applications and made a "formal demand" for them, stating, *inter alia*, "[g]iven that I have paid you in full for both patents, I should be entitled to a copy of your work." DX 6 at 94-96; DX 35 at 135-36. Again, receiving no response to his communique, on Monday November 3, 2014, Mr. Capeder wrote Respondent by email yet again, asking for his "client file" and mentioning to being aware of his right to seek help from the Washington State Bar Association, nevertheless stating that he would prefer to resolve the matter "directly." DX 6 at 97; DX 35 at 136-38, 338-39. Respondent called Mr. Capeder promptly after receiving this last email, and again promised to send him the draft applications that day, with the intent to file the design patent application the following day and the provisional on Thursday. DX 6 at 98; DX 35 138-40, 339-40. Mr. Capeder sent Respondent an email in response, memorializing the

conversation and noting that he is “90% percent satisfied just filing the design patent tomorrow and getting a copy of the provisional patent to look at.” DX 6 at 98; DX 35 at 138-40, 339-40.

At 3 a.m. the next morning, November 4, 2014, Respondent emailed Mr. Capeder stating he was still at work but would email him his files “as soon as I go home this morning.” DX 6 at 99; DX 35 at 140. Having still received nothing from Respondent, early that afternoon Mr. Capeder emailed Respondent inquiring if he had made it home safe and whether he was still planning to email the patents to him today. Depo. Ex 15; DX 35 at 140-42. He also stated that as Respondent had “mentioned quite a few times that you did this job to [sic] cheap, and I really want to get this job finished and filed, so I am wondering if paying you any more would make any difference and help make things go any faster?” Depo. Ex. 15; DX 35 at 141-42. Mr. Capeder testified that the fact that he had “bid the job too cheap,” was one of the Respondent’s common “litany of excuses,” along with the fact that his charges were far less than that of the AEON firm and his wife was upset for at him for bidding the job too cheap. DX 35 at 141-42. Even though he had paid Respondent in full, Mr. Capeder testified that at this point he saw his options as between paying a new attorney maybe thousands more to finish the applications or having Respondent “shake me down for \$1,000.” DX 35 at 142.

Still receiving nothing from Respondent, Mr. Capeder emailed him again after 5 p.m., inquiring about receiving the draft patents and declaring to him that “[t]his situation is seriously affecting my mental health and well being [sic] and if you could simply email me the drafts I would sure feel better and appreciate it.” Depo. Ex. 16; DX 35 at 142-44. Having received no response, the following morning, he issued another email to the same effect, asking for the patents, expressing the desire to file “as quickly as possible,” offering more money, and requesting to meet. DX 6 at 100; DX 35 at 144-46.

On November 5, 2016, Respondent finally sent Mr. Capeder the “final design patent and accompanying drawings.” Depo. Ex. 17; DX 35 at 146-47. Respondent did not send the draft provisional utility patent, however, and Mr. Capeder promptly shot back a short email in response to remind Respondent of his promise to send both drafts. DX 35 at 147-48; Depo. Ex. 18.

Very early the next morning, [REDACTED], Mr. Capeder contacted Mariana Busse of the Washington State Bar Association and relayed the issues he was having with Respondent. DX 35 at 151-52. He then promptly sent Respondent another very long rambling email reiterating his anger, frustration and sadness at the state of events, demanding copies of the draft patents and their 2010 engagement agreement, asking that that day Respondent file the design patent and send him his provisional application, and advising him to anticipate a call from the Bar Association along with him filing a bar complaint. DX 6 at 68-70; DX 35 at 148-51; Tr. 55. In response, that afternoon, at 1:35 p.m., Respondent electronically filed with the PTO in Virginia Mr. Capeder’s design patent application for a “[REDACTED],” U.S. Design Patent Application No. [REDACTED], along with the Certification of Micro Entity Status Mr. Capeder signed and dated October 16, 2014,¹⁷ and so advised his client. DX 24 at 1, 31, 39; DX 35 at 151, 239-41; Tr. 56-57.

¹⁷ The filing fee of \$190 for the application was paid from the \$225 in advanced filings fees provided by Mr. Capeder to Respondent on October 16, 2014. DX 35 at 238.

Mr. Capeder sent Respondent an email of “thanks” in response, and expressed the hope that “we can just file anything decent for the provisional, and be done with this for both our sakes.” Depo. Ex. 19; DX 35 at 151. The parties talked later that day and Respondent told his client that he needed him to work on “Figure 16.” DX 6 at 101; DX 35 at 153-54. The following day, November 7, 2014, Mr. Capeder sent Respondent yet another email asking him to send the draft provisional application to him today, saying “I don’t care how rough or incomplete it is” and **“I really need to get this patent filed ASAP!”** DX 6 at 101 (emphasis in original); DX 35 at 153. Mr. Capeder testified that despite his professed offers to work with Respondent on the application, what he actually intended was to get the draft so he could take it to another attorney to finish the work on it. DX 35 at 153.

Ms. Busse telephoned Respondent on November 7, 2014, to inquire into the situation with Mr. Capeder. Tr. 57. During this conversation, Respondent advised Ms. Busse that he had sent his client everything he asked for, but that Mr. Capeder might not see it that way. DX 35 at 153-54; DX 6 at 12; Tr. 57-58. Mr. Capeder characterized that this statement by Respondent as “a lie,” in that Respondent had not given him the draft provisional patent application. DX 35 at 154-55.

After being advised that Ms. Busse had called Respondent, Mr. Capeder recalled he “freaked out,” in fear that Respondent would not now file the provisional application that day as he had promised. DX 35 at 156. So, in an effort to circumvent that outcome, immediately thereafter he sent two apologetic emails off the Respondent saying that he had expected the Bar to call him before calling Respondent so he would have had an opportunity to indicate that they “were trying to work things out amicably.” Depo. Exs. 20, 21; DX 35 at 155-56. Later, Mr. Capeder asserted Respondent called and requested that he send him an updated list of the invention’s top ten features, similar to what he sent him in August, three months earlier. DX 35 at 157. Nevertheless, Mr. Capeder promptly responded sending the list again, with one slight variation. DX 6 at 102. In the accompanying email, he stated that the list offered the “protections he was looking for;” that he “want[ed] to get the patent filed by Monday or Tuesday at the very latest even if we leave out claims that are not important;” that he “would have been happier if the patent had been filed in August without any of the new ideas added in;” and that he hoped no one else had filed for a patent encroaching on his ideas in the interim. DX 6 at 102; DX 35 at 158-59. That evening he sent another reminder to Respondent to send him the provisional application. Depo. Ex. 22; DX 35 at 160.

Receiving nothing, the following day, Saturday, November 8, 2014, Mr. Capeder notified Respondent of his intention to file a Bar complaint on Monday, unless Respondent was willing to meet beforehand and “get this done.” DX 6 at 103; DX 35 at 160-61. In response, Respondent called and agreed to meet his client on Monday at 2 p.m. to finish and file the provisional utility patent. DX 35 at 161. Mr. Capeder asked Respondent to send him the draft application prior to the meeting, but he did not do so. DX 6 at 104; DX 35 at 161-62.

They actually met at 3 p.m. on Monday, November 10, 2014, due to Respondent being an hour late. DX 35 at 161-62; DX 6 at 106. Mr. Capeder recalled that Respondent only brought with him to the meeting “some pieces” of a provisional patent application, explaining that he had

been occupied at AEON on a “big job,” involving a \$26,000 weather emoji patent, which he had to finish “or he’d be fired.”¹⁸ DX 35 at 164 DX 35 at 162-63; DX 6 at 106. In order to finish the application, Respondent advised his client that they would need to “redo” all the flowcharts again, as they were not going to work as they are. DX 35 at 165.

Soon after the meeting, Respondent emailed Mr. Capeder what was purportedly his current complete draft the provisional utility application. DX 26; DX 35 at 163, 267-69; DX 6 at 111-14. Upon review, Mr. Capeder noted that pages of the draft application describing an embodiment of the invention, while bearing his name, referred to “linkable” weather emojis, and other references to weather, which had nothing to do with his patent invention. DX 26 at 15; DX 6 at 111, 112; DX 35 at 163-64, 353.

Unbeknownst to Respondent, the next day, Mr. Capeder retained and paid \$2,000 to James Haugen, Esq., another registered patent practitioner, to prepare and file the provisional utility patent application for his [REDACTED] invention.¹⁹ DX 35 at 175, 177. Mr. Capeder testified that on the morning of [REDACTED], he provided Mr. Haugen with the draft application documents he had obtained from Respondent the night before, and worked together with Mr. Haugen for some “14-16” hours to finish and file the application that day, which they did at 11:36 p.m.²⁰ DX 25 at 57 (U.S. Provisional Patent Application No. [REDACTED] [REDACTED]); DX 35 at 177-78, 260-62, 269-70, 296.

Unaware of the filing, over the next couple of days, Respondent continued to exchange emails with his client regarding the flowcharts, with Respondent requesting additional descriptions and modifications. DX 6 at 105; DX 35 at 165-66, 297-98, 348-49; Depo. Ex. 33. Mr. Capeder revised the flowcharts and returned them to Respondent, who advised him they “looked great,” that he would review and revise them and send them back to Mr. Capeder the next day. DX 35 at 166-67; DX 6 at 106. However, Respondent did not send them back as promised, and so on November 13, 2014, Mr. Capeder sent him an angry two-page email, detailing their recent interactions and stating, *inter alia*, “[i]t’s obvious you are just giving me a bunch of busy work,” “I am done playing your game,” and “you tricked me into paying you.” DX 6 at 106-07; DX 35 at 167-69, 345-46, 352. Mr. Capeder testified that he felt Respondent had an “ulterior motive,” for stringing him along for many months and having told him repeatedly the applications were done. DX 35 at 168. Therefore, his intent at this point in continuing to communicate on the

¹⁸ At his deposition in May 2016, Mr. Capeder stated that recently he had discovered via an online search an International Patent Cooperation Treaty (PCT) non-provisional utility patent application (#WO 2015/163937) for a weather emoji filed by Respondent for Klickafy, LLC on October 15, 2014, with a priority date of April 23, 2014. DX 35 at 179-82, 252-57; Depo. Exs. 27, 28. As such, he viewed the explanation for the delay Respondent offered on November 10, 2014, as being untrue. DX 35 at 162-65; DX 6 at 111-14.

¹⁹ In addition, for an additional fee of \$100, Mr. Haugen filed a Power of Attorney and Change of Correspondence Address in regard to Mr. Capeder’s Design Patent Application (No. [REDACTED]), that was originally filed by Respondent on [REDACTED]. DX 24, at 33-34, DX 25.

²⁰ Mr. Capeder testified at his deposition taken in May 2016, that the non-provisional utility patent application for his invention was timely filed in October or November of 2015, before the expiration of the one-year provisional period, and was pending PTO review. DX 35 at 179, 354.

application with Respondent was “to determine exactly what he’s been up to,” “what his endgame is.” DX 35 at 345-46.

Very early the next morning, on November 14, 2014, Respondent sent his client back a lengthy email response, characterizing Mr. Capeder’s angry email as “totally unacceptable” and “abuse in email.” DX 6 at 108-09; DX 35 at 169. He said he was “most disappointed by the bipolar nature of [their] communications,” referencing the swing from working cooperatively to anger in a day. DX 6 at 109. Respondent stated his requests for descriptions were not “busy work,” but rather “critical to enabling the invention,” and while they can file the flowchart as it is, “that is not my professional recommendation.” DX 6 at 108. He further explained that “[d]rafts are sent when they are completed and not before” and, while there had “been several times when I felt like we were close to finishing and indicated as much to you,” he then found something unfinished or improperly described, and so approached Mr. Capeder for additional information “and where necessary trained [him] in how to prepare this information.” *Id.* As to his fees, Respondent asserted that “I have worked very hard to help you complete both of your projects at a steeply discounted rate,” and that “normally . . . the ENTIRE fee for a project of this size is due BEFORE work even begins,” citing to their original engagement letter and the 2010 typical fee sheet. *Id.* at 109 (emphasis in original). Further, Respondent declared that “I have easily spent much more than 20 hours working on this provisional application with you.” *Id.* Respondent offered his client three options for proceeding, two involving Mr. Capeder completing the description to the flowchart, and the third involving Respondent refunding the balance of the provisional filing fee remaining, “forgiv[ing] any overage that might be owed,” and “withdraw[ing] from all cases.” *Id.* at 108; DX 35 at 170.

Mr. Capeder explained that he took Respondent’s reference to “overages” as a “shakedown” for more money, “when it clearly was a flat-fee patent,” and that he felt instead that Respondent should have apologized and offered to refund him some money. DX 35 at 171. As a result, on November 14, 2014, he emailed Respondent back asking for a detailed bill, as he had never previously received any bill. Depo. Ex. 23; DX 35 at 171-73. Five days later, on November 19, 2014, Respondent answered Mr. Capeder’s request confusingly acknowledging the flat fee arrangement and denying making any claim for “overages,” but also stating that he would charge for an itemized bill, with “the real possibility that the resulting bill will be much more than 15 hours,” and in such case “I am less willing to forgive any overages.” Depo. Ex. 24; DX 35 at 173-74. A few days later, Respondent sent Mr. Capeder an invoice, with a summary of services provided on the patents, reflecting a \$2,500 charge (not including filing fees) less a \$500 “family and friends discount” for the design patent, plus a total of \$8,575 for the provisional patent application, less a \$7,575 credit for “Mutual Representation Termination Settlement,” reflecting no net balance due upon his refund of the \$65 balance of filing fees accompanying the invoice. DX 6 at 115-16; DX 35 at 175-76

On November 19, 2014, Mr. Capeder filed a grievance against Respondent with the Washington State Bar Association (WSBA).²¹ DX 32. A few weeks later, on or about December

²¹ Respondent filed a lengthy written Preliminary Response to the grievance on December of 2014. DX 19 at 6. On July 9, 2015, the WSBA Office of Disciplinary Counsel deferred its investigation of the grievance until the resolution of the instant matter pending before the PTO. DX 32.

9, 2014, Mr. Capeder filed a lengthy complaint with the OED regarding the services rendered to him by Respondent.²² DX 35 at 183. After issuing a series of Requests for Information regarding his interactions with Mr. Capeder, to which Respondent did not fully respond, the OED Director instituted this action on December 15, 2015. DX 20-23.

VI. COUNT I

A. Respondent failed to prepare and file a provisional utility patent application in a diligent manner in violation of 37 C.F.R. § 11.103

“A practitioner shall act with reasonable diligence and promptness in representing a client.” 37 C.F.R. §11.103. “Reasonable . . . when used in relation to conduct by a practitioner means the conduct of a reasonably prudent and competent practitioner.” 37 C.F.R. § 11.1.

1. The OED Director’s Position

In his initial Post-Hearing Brief, the OED Director declares that “[t]he evidence is overwhelming that Respondent failed to prepare and file Mr. Capeder’s provisional utility patent application in a diligent manner.”²³ Director’s Initial Post-Hearing Brief (“DB”) at 20. In support, the Director argues that in June 2014, Respondent told Mr. Capeder that his patent applications would be prepared and filed within one to two months. DB at 21 (citing Tr. 129, 147, 159). Nevertheless, five months later, Respondent still had not finished and filed the provisional utility application. Rather on November 10, 2014, all he could provide his client with was a draft thereof consisting of some random pages and descriptions to be included in the application. *Id.* (citing DX 35 at 161-162). As further evidence of the unreasonableness of the delay, the Director cites Respondent’s testimony estimating that it usually takes about 20 hours to complete a provisional utility patent application and that his final bill ultimately claimed that he only spent a total of 35 hours working on both the design and utility patent applications for Mr. Capeder. *Id.* (citing Tr. 138; DX 6 at 115-116).

Respondent bears responsibility for the delay, the Director further asserts, in that the work on the application “immediately got off to the wrong start” because Respondent did not reliably and timely convey communications between and/or among himself, the draftsman, and his client. DB at 21. As such, the Director notes, the initial set of drawings was not completed until July 29, 2014, almost two full months after the initial June 4, 2014 meeting where Mr. Capeder hired Respondent. DB at 21-22 (citing Depo. Exs. 6, 7). In addition, Respondent accepted this extra work while already employed full-time at the AEON law firm and having a lengthy commute to

²² At the time of Mr. Capeder’s filing, the OED was investigating Respondent with regard to actions he had taken in connection with his representation of two other clients before the PTO. DX 5. On June 10, 2015, the OED terminated that investigation, issuing a letter of warning to Respondent reminding him of his obligations to act with reasonable diligence and communicate promptly and adequately with a client. DX 5.

²³ The Director appears in his brief to be limiting the allegation of this violation to Respondent’s preparation of the provisional utility patent, excluding from consideration any issue of his diligence in preparation of the design patent. DB at 20.

and from work, meaning he could only work on Mr. Capeder's applications "after hours and on weekends," and his daytime access to communications and documentation in regard thereto was limited. DB at 22 (citing Tr. 28-30). The Director advises that "attorneys have a duty to refrain from accepting representation if doing so will impair the attorney's ability to provide competent representation, to act with reasonable diligence, and to keep the client reasonably informed." *Id.* (citing *State ex rel. Missouri Pub. Def Comm'n v. Waters*, 370 S.W.3d 592, 607 (Mo. 2012)). "[O]ne of the highest duties of an attorney is to act with reasonable punctuality and promptness in advancing his client's interests and protecting his rights Procrastination and delay in handling of legal affairs not only induces a client to lose confidence in his attorney, but reflects badly on the profession and the courts, and may foster an impression in the public mind that the highly-vaunted standards of professional ethics are no more than a sham." *Id.* at 22-23 (quoting *Office of Disciplinary Counsel v. Kagawa*, 622 P.2d 115, 119-120 (Haw. 1981)), and (citing *inter alia*, *In re Exley*, 769 S.E.2d 390, 391 (Ga. 2015) (lawyer engaged in professional misconduct, in part, by delaying sending documents to a client, despite client's repeated requests, and failing to file documents on the client's behalf with the court)). The Director suggests that efficiency was of particular significance in this case given Mr. Capeder's poor financial condition and his urgency in proceeding with the project. DB at 23 (citing Tr. 29, 92, 135, 136; DX 6 at 3).

2. Respondent's Position

Respondent counsels in his Brief that the "particular circumstances must be considered" when evaluating whether a practitioner acted with the due diligence required. Respondent's Post-Hearing Brief ("RB") at 1. In this case, he advises, due to financial constraints, Mr. Capeder "eschewed" hiring Respondent to perform the work through his full-time employer, the AEON law firm, and so was aware the work would be done on the side. *Id.* at 1-2. Further, in order to further minimize the cost, Mr. Capeder indicated that he was willing to do much of the descriptive writing necessary for preparation of the provisional application. *Id.* at 2.

Further, Respondent avers that promptly after his initial meeting on June 4, 2014, he took Mr. Capeder's disclosure and drawings, and arranged for professional drafting. *Id.* As a result, Mr. Capeder received a "fileable set of [five] drawings on June 26, 2014." RB at 2. However, these drawings, Respondent explains, did not include "phantom lines," an addition he recommended, and thereafter the "'perfect' design or best mode" of Mr. Capeder's invention successively changed up until the design application was finally filed on [REDACTED] with sixteen drawings of the keyboard layout, *i.e.*, "over 3 times the size of the original design." *Id.* The drawings filed were "version 6b," Respondent observes, and included "phantom keys," allowing Mr. Capeder to "change the position of particular alphanumeric keys [] without invalidating the design patent for the keyboard layout." *Id.* Respondent states that to reduce costs and improve the quality of the drawings in the provisional application, he and Mr. Capeder had planned at their initial meeting in June to use the drawings created for the design application for the provisional application as well, along with others. *Id.* at 3. Mr. Capeder eventually identified "over 30 possible figures" requiring block diagrams and flow diagrams for use in the provisional application, Respondent claims. *Id.* (citing DX 26 at 4-6). However, he never received sufficient "written disclosure" from Mr. Capeder for these diagrams. *Id.* Nevertheless, he continued to work with Mr. Capeder "in good faith," Respondent alleges, although unbeknownst to him his client had hired another attorney to file the provisional application on [REDACTED]. *Id.*

Thereafter, Mr. Capeder led him to believe that he was still working on the description for these flowcharts, Respondent decries, characterizing this conduct by his client as “fraudulent.” *Id.* (citing Depo. Ex. 33 at 1-4). Finally, on this point, Respondent opines in his brief that “there is no benefit to quickly filing a provisional application that is missing an enabling written description of the invention,” noting that the priority of the provisional application only extends to the information included therein and not missing material. *Id.* at 3-4.

Additionally, Respondent argues that the Tribunal should take into consideration the circumstance that just 15 days after his initial June 4, 2014 meeting with Mr. Capeder, the Supreme Court handed down its decision in *Alice Corp. v. CLS Bank International*, 134 S. Ct. 2347 (2014), holding that “a computer-implemented method of an abstract idea is ineligible for patent protection.” *Id.* at 4. He suggests that after this decision Mr. Capeder’s digital keyboard invention needed written support to meet this higher standard and demonstrate that it was not merely an abstract idea being implemented on a computer. *Id.* Further, Respondent argues the patent statute requires that the application include a “full, clear, concise and exact” description of the invention and the “best mode” of carrying it out, and at least one difference with prior art. *Id.* at 4-5 (citing 35 U.S.C. §§ 112, 103). To meet these requirements, the application needed an “enabling written description” or disclosure for the flow diagrams and communication diagrams, which Mr. Capeder never provided. He notes that the only “new” figures in the filed application, as compared to his draft application, are the flow diagrams found in Figures 19-22. *Id.* (citing DX 25 at 51-54).

3. The OED Director’s Reply

In Reply, the Director criticizes Respondent for attempting to place the blame for his failure on his client. Director’s Post-Hearing Reply Brief (“DRB”) at 2. That placement, the Director declares, is inconsistent with both the understanding Respondent had with his client and his ethical obligations as an attorney to decline the representation and the payment that went with it, if he could not perform the work in a timely and diligent manner. *Id.* (citing *State ex rel. Missouri Pub. Def Comm’n v. Waters*, 370 S.W.3d 592, 607 (Mo. 2012)).

Second, the Director protests that Respondent’s argument in his Brief regarding how Mr. Capeder’s design changes caused the delay in the design application’s filing, is not based on any testimony in the record or any exhibits, noting that a party may not rely on evidence or testimony which was not presented at trial. *Id.* at 3 (citing *In re Aredia and Zometa Products Liability Litigation*, 2010 WL 5136138 (M.D. Tenn. 2010) (The court cannot rely upon assertions of a party for which the evidence is not in the record.)). Moreover, Respondent’s claim that Mr. Capeder never provided him with sufficient information to file an enabling non-provisional application, ignores the critical differences in cost and time between filing a provisional and a non-provisional application, the Director asserts. *Id.* at 3-4. “A provisional patent application is designed to provide a lower-cost first patent filing in the United States, to give U.S. applicants the means to establish an early effective filing date, and to allow applicants to sooner describe their invention as ‘Patent Pending,’” the Director explains. *Id.* at 4. As such, a provisional application does not need to comply with all the requirements of a non-provisional patent application, such as an abstract, an oath or declaration, a set of patent claims, or formal drawings. *Id.* (citing 35 U.S.C. § 111 and Manual of Patent Examination Procedure § 601). There is also no need for an

Information Disclosure Statement, “since provisional patent applications are not examined.” *Id.* Moreover, while the provisional patent application itself does need a detailed and enabling description of the invention, the applicant has one year after the provisional patent application filing date to prepare and finalize the formal requirements of a non-provisional application. *Id.* This one-year delay for formalizing the non-provisional patent application permits an applicant to have an earlier filing date and defers the often substantial cost of formal drawings, a set of patent claims, an Information Disclosure Statement, and more expensive filing fees. *Id.* In addition, the Director asserts, the statement in Respondent’s Post-Hearing Brief that: “[t]here is no benefit to quickly filing a provisional application that is missing an enabling written description of the invention” is contradicted by Respondent’s own testimony that he could have filed the provisional application in June 2014 with the information he had been provided by Mr. Capeder. *Id.* (citing Tr. 145).

Third, the Director vehemently objects to what he characterizes as Respondent’s offering of “unauthorized expert testimony” regarding Mr. Capeder’s invention, and the effect of the decision in *Alice* on Mr. Capeder’s proposed patent. *Id.* at 4-5 (citing RB at 4-5). In this regard, the Director indicates it is referring to Respondent’s characterization of Mr. Capeder’s invention as potentially nothing more than an “abstract idea,” noting this claim is made without citation to the record. *Id.* at 5. Respondent is not entitled to present or rely on new evidence or offer expert opinion testimony at this point, the Director notes, as the deadline for doing so has passed, and the Director would be severely prejudiced by having no opportunity to rebut. *Id.* at 5. Accordingly, the entire invention and *Alice* discussion in Respondent’s post-hearing brief should be ignored, the Director asserts. *Id.* In any case, the Director claims, regardless of the holding in *Alice*, Respondent was required to prepare the provisional application in a timely manner, and if needed additional written description from Mr. Capeder in order to do so, then he should have requested it early on, but he did not. *Id.*

4. Discussion

After review of the totality of the record, it is found that the Director has proven this violation by clear and convincing evidence.

The evidence indicates that the timing of the filing of the provisional application was always of significant import to Mr. Capeder. Timing was discussed by the parties on June 4, 2014, as part and parcel of the terms and conditions upon which Respondent was first hired to do the patent work. Mr. Capeder testified that in June he informed Respondent of his plans to move with his girlfriend to California in July or August 2014,²⁴ and that he wanted to file his provisional application before that time. DX 35 at 44-46. This recollection is buttressed by Mr. Capeder’s text message to his girlfriend dated in early June, stating in relevant part “trying to

²⁴ In the Complaint he filed with the OED on December 9, 2014, Mr. Capeder states that he made Respondent aware that he was “planning to move to California in July.” DX 6 at 5. At his deposition taken in May 2016, Mr. Capeder’s “best recollection” at that point was that his “initial plan was to leave in August,” and that he told Respondent of that plan. DX 35 at 45-46. The inconsistency is of no significance here.

move patent along super fast. [sic] Want it filed before we leave so its [sic] done!”²⁵ DX 6 at 21; DX 35 at 44-45. Respondent advised his client in response that the patent would take “one to two months from the date of that meeting” to be “finished and filed.” DX 35 at 36. At hearing, Respondent essentially conceded making such an explicit representation to Mr. Capeder regarding the time it would take to complete the work stating that “we were both expecting [the applications] to be done sometime in July or August.” Tr. 147. *See also*, Tr. 159 (“my expectation was that we were going to finish within one to two months on it”).

While he may have initially agreed with Respondent that “our primary goal is to do his correctly,” (Depo Ex. 1; Tr. 144),²⁶ Mr. Capeder did not waiver in his interest to expeditiously complete and file his patent application over the time relevant here. Rather, it appears that he became ever more anxious and assertive regarding having Respondent complete and file the patent application as soon as possible, to the extent that he indicated at various points he was willing to forgo including certain suggested improvements to do so or pay Respondent more to expedite the process. *See*, DX 6 at 54 (October 2, 2014 Capeder email to Respondent expressing hope to meet shortly “so we can get this finished.”); DX 6 at 55 (October 3, 2014 Capeder email to Respondent stating “I am really hoping to get things wrapped up ASAP . . .”); DX 6 at 72 (October 25, 2014, Capeder email to Respondent documenting that “I really need to get this patent filed . . . time is really of the essence to me.”); DX 6 at 44 (October 30, 2014 Capeder email to Respondent suggesting he forgo including any changes if it will delay finishing the application); DX 6 at 91 (November 1, 2014 Capeder email to Respondent stating “I wish I knew some way to get you to finish the patent so you can file it . . . I am just hoping you can find a way to at least get me a working draft to review today.”); DX 6 at 45 (November 7, 2014 Capeder email to Respondent stating “**I need to get this application filed ASAP!**”); Depo. Ex. 15 (November 4, 2014 Capeder email to Respondent stating “I am wondering if paying you any more would make any difference and help make things go any faster?”).

In contrast, as the Director suggests, it appears that from the very beginning Respondent was fairly insensitive to the timing concerns of his client with regard to expeditiously completing the application, in that he did not promptly forward to the draftsman all of the design features requested by Mr. Capeder to be included in the drawings sent to him in early June, and did not promptly forward the draftsman’s work to Respondent in a timely manner for review. Depo. Exs. 1-3, 5, 6, 29; DX 6 at 20, 22; DX 35 at 54-58. As a result, the first set of design drawings fully

²⁵ Based on the records cited here, I do not accept the accuracy of Respondent’s recollection at hearing that Mr. Capeder only expressed an urgency regarding timing in October 2014, after his girlfriend moved to California. Tr. 136. This was one of many points Respondent made at hearing which is directly contradicted by the record and which, along with the generalized nature, made his testimony seem less reliable as a whole.

²⁶ Respondent testified that he told Mr. Capeder in June 2014 that he could file immediately for the provisional utility application with what he had given him, but that his client had “said he wanted to do it right,” he wanted a “high quality application,” so he could flip his provisional into a non-provisional patent application. Tr. 144. None of the extensive email correspondence between the parties in the record supports the claim that Respondent actually made such an offer in June or that Respondent made a similar offer at any point over the next five months, despite Mr. Capeder’s obvious persistent interest in filing promptly.

capturing Mr. Capeder's idea for the invention were not completed until August 5, 2015.²⁷ DX 6 at 23.

Moreover, the record suggests that after the parties met on August 13, 2014, and discussed the impact of *Alice*, Respondent's work on the application slowed down and even ceased completely for a period of time, even though Mr. Capeder indicated he wanted to expeditiously proceed and agreed to pay Respondent an additional \$1,000 for the work.²⁸ For example, the record contains, four successive emails sent by Mr. Capeder to Respondent between August 21, 2014 and September 17, 2014, each inquiring if he had "any update on the keyboard patents" and/or if Respondent was "doing OK," based on the lack of response to Mr. Capeder's efforts to reach him, as to which the record is devoid of any evidence of a response on the part of Respondent. *See*, DX 6 at 34-36, Depo. Ex. 10; DX 35 at 78-81 (Capeder testifying that he received no response from Respondent between August 14 and September 17, 2014).²⁹ The documents indicated that Mr. Capeder had also been unable to reach Respondent by telephone during this period. DX 6 at 37.

In addition, thereafter, Respondent began a three-months process, well documented in the record, of repeatedly promising to imminently send Mr. Capeder the draft utility patent for review in anticipation of prompt filing, but never actually doing so. *See*, DX 6 at 37 (September 20, 2014 email from Capeder to Respondent stating that "yesterday" Respondent had promised to send him the patent applications, but that he had done so); DX 6 at 41 (September 20, 2014 Capeder email to Respondent documenting that Respondent had advised him "this morning" that he would be finishing the applications and emailing them, but he had not done so); DX 6 at 47 (September 27,

²⁷ While Respondent claims in his initial Brief that his client Capeder received a "fileable set of drawings" on June 26, 2014, the record suggests that this draft was based solely upon Mr. Capeder's original drawings provided to Respondent during the meeting on June 4, 2014, and failed to include the design changes he requested immediately thereafter. DX 6 at 20, 22.

²⁸ Although the record is not completely clear on this point, and it is not necessary to support the outcome, the record suggests that one reason for Respondent's lack of diligence on the application may be attributable to Mr. Capeder's refusal to accept Respondent's advice to be satisfied with obtaining a design patent, rather than attempting to obtain a utility patent. Tr. 149-50. Respondent testified that at the time Mr. Capeder initially approached him regarding the invention, he was seeking a provisional patent. Tr. 94. However, Respondent encouraged him to apply for a design patent in order to take advantage of what Mr. Capeder had concluded, after much thought and effort, was the "right size" of a keyboard in terms of efficiency. Tr. 94-95. Respondent testified that he believes Mr. Capeder still does not adequately "value" the design patent he acquired, or "understand what he's getting with the provisional." Tr. 94. Respondent states he "fully expect[s] that . . . if the design moves forward, [Mr. Capeder] would get what's called a divisional, that will be divided into multiple patent applications. Tr. 95. I have no reason to doubt the accuracy of Respondent's opinion as to the relative values of the various patents, and it seems eminently reasonable in light of the facts here. However, Mr. Capeder's refusal to take Respondent's advice and abandon the pursuit of the provisional application does not excuse Respondent's dilatory actions under the facts here. At the point at which his client wished to proceed which was different from the advice given, Respondent had a choice to decline to further represent Mr. Capeder or proceed and diligently carry out the work. Accepting the work, but only pursuing it half-heartedly was not an ethical option.

²⁹ In his Answer and at hearing, Respondent claimed that he did not receive some or all of these emails, suggesting that they might have been filtered out as "spam." Tr. 36. As Respondent apparently received Mr. Capeder's almost innumerable other emails, I find this an explanation for failing to respond unconvincing.

2014 Capeder email to Respondent noting he had committed to sending the applications to him “last night,” but did not do so); DX 6 at 51 (September 29, 2014 Capeder email to Respondent documenting that Respondent promised to email the patents “on Saturday,” but did not); DX 6 at 53 (October 1, 2014 Capeder email to Respondent documenting that Respondent promised to email him the applications “this morning,” but did not); DX 6 at 43 (October 13, 2014 Capeder email to Respondent noting that on October 6, 2014 he had said he had “only 30-60 minutes” of work left to do on the patents, but has not sent the applications yet); DX 6 at 60 (October 16, 2014 Capeder text message documenting that yesterday Respondent said he had “draft done” and “only has to review it,” but no draft applications yet received); DX 6 at 72 (October 25, 2014 Capeder email to Respondent documenting that Respondent had suggested at their meeting held on October 16, 2014, that the applications would be filed in the “next couple of days,” but “[n]ow another week has passed” without him receiving the drafts); DX 6 at 82 (October 29, 2014 Capeder email to Respondent noting that on October 27, 2014, Respondent had promised to send the draft application for filing “today or tomorrow,” but had not done so); Depo Ex. 12 (October 30, 2014 Capeder email to Respondent noting that draft application not received by “this morning” as expected); DX 6 at 98 (November 3, 2014 Capeder email to Respondent memorializing telephone conversation wherein Respondent promised to email application “tonight”). *See also*, DX 35 at 87-145 (Capeder testimony regarding unfulfilled promises to produce the draft application made by Respondent).

Five months after being hired, and only after being threatened with disciplinary action, did Respondent finally produce for his client a draft of the utility patent application. DX 6 at 104. The record indicates, however, that despite the passage of such an extended time period, and the fact that Respondent estimated such applications generally take about 20 hours in total to prepare, the draft produced by Respondent at that point remained significantly incomplete. DX 35 at 161-64 (Capeder testimony that Respondent brought to the November 10, 2014 meeting just some pieces of things, flow charts, some things he said he had been working on” and said “[w]e’re going to have to redo all the flowcharts.”); DX 25; DX 6 at 111-14 (pages of the draft application referring to weather emoji and containing asterisks reflecting missing data); Tr. 134 (Respondent testifying that flowcharts still missing as of November).

Moreover, I find the fact that Mr. Capeder and his new counsel were able to complete and file the provisional application in the course of one day particularly persuasive evidence, demonstrating Respondent did not act with reasonable diligence and promptness in representing his client in this case. DX 35 at 177-78, 260-62, 269-70, 296. The record indicates that Mr. Capeder repeatedly and eagerly expressed a willingness over the many months to meet with Respondent in an effort to get the application done. *See e.g.*, DX 6 at 51, 54; DX 35 at 91, 93-94, 161. Nevertheless, at no point did Respondent take a day to do so. To me, that reflects a breach in the standard of professional conduct. Further, Respondent has provided no evidence in the record to establish that that he acted in a reasonably diligent manner. *See Turner*, 1991 Comm’r. Pat. LEXIS 5, at *30 (Comm’r Pat. & Trademarks Mar. 26, 1991) (A party who is arguing they are diligent must submit evidence to support such a claim.).

Respondent raised a number of points at hearing and in his brief to excuse his lack of diligence and promptness, none of which are persuasive. First, at hearing, Respondent stated it was his understanding that he was to be paid in full, and in advance, for his legal services before

to being obliged to work on the patent application, as had been the parties' arrangement with regard to the previous trademark work. Tr. 104, 109-110, 120-21, 123, 132, 150. He noted that he was not paid in full until October 2014, and as such, implied that he had no obligation to produce any work for Mr. Capeder on the patent applications until that point.³⁰ *Id.* In support of this point, Respondent referenced their retainer agreement from June 2010. DX 28 at 2-4. That document does not support Respondent's claim. Rather, it only states that for "projects larger than \$5,000.00" the client "agree to pay 80% of the anticipated costs before work on the project begins." *Id.* at 3. It makes no statement as to the terms of payment for projects smaller than \$5,000. *See* DX 28 at 2-4. Further, the argument that this retainer agreement applies to the patent work is significantly undermined by their actual dealings in regard thereto, which even under Respondent's understanding differed significantly from the terms of the agreement. For example, the agreement refers to firm bills being sent "bi-monthly," and at no point did Respondent send Mr. Capeder any bills or even track his hours apparently for billing purposes.

Nothing in the record suggests that Respondent delayed working on the patent applications after being retained in June, although the fees had not been paid in full, in fact the evidence suggests the opposite. *See* Depo. Ex. 3 (Respondent's June 10, 2014 email to Mr. Capeder forwarding the draftsman's bid and advice on the drawings, inquiring when Mr. Capeder would be "ready to discuss.");³¹ Depo. Ex. 5 (June 30, 2014 email from Respondent to his client and the draftsman); Depo. Ex. 7 (July 30, 2014 email from Respondent to Mr. Capeder advising that he would "look over these [the final keyboard design] and get back to him, asking "are you available to discuss this week."); Depo. Ex. 8 (Respondent's August 2, 2014 email responding to Mr. Capeder's proffer of descriptions for the drawings stating "Looks good. Particular[ly] you[r] discussion of different ways that it can be used." And, "If you can do the same thing for the other figures we should be in good shape!"); DX 6 at 23 (Respondent's August 5, 2014 email to Mr. Capeder with the design specification and drawings for the design patent, stating it "brings up some interesting questions."); DX 6 at 30 (Respondent's August 11, 2014 email to Mr. Capeder indicating that he has some questions regarding the flowchart and drawing, and inquires as to his availability "this Wednesday."). It is further noted that there is not a single reference in any of the correspondence between them prior to October supporting the assertion that Respondent was not proceeding to work on the application or work diligently due to a lack of the advanced payment of the fees in full.

Second, Respondent attributed the delay to the fact that Mr. Capeder was "always making changes" to work previously completed, and "adding new things and new features," requiring Respondent to go back and incorporate those new changes into the work previously done. Tr. 101, 104. While the record certainly suggests that Mr. Capeder periodically made changes to his invention, and the related documents and drawings over time, the record does not suggest the changes or additions instigated by Mr. Capeder were a significant cause of the delay. Depo. Exs.

³⁰ Respondent testified that Mr. Capeder's failure to promptly pay the balance of the fees due suggested to him that perhaps his client was not actually serious about obtaining the patents, recalling that he was familiar with his client "coming up with trademark ideas . . . [and then] [h]e wouldn't go forward with those ideas." Tr. 104, 120.

³¹ Interestingly, while Respondent took credit at hearing for suggesting the inclusion of "phantom lines" in the drawings, the email from the draftsman reflects that *the draftsman* suggested showing the keyboard on the formal drawings using "phantom lines." Depo. Ex. 3.

1, 2, 5, 8, 23, 24, 26, 27, 29, 30; DX 6 at 31-32, 42. Rather, it appears in large measure that the delay was the result of the prolonged process of crafting the application resulting from Respondent unilaterally deciding to request information from his client in small increments, “step by step,” as he characterized it at hearing.³² Tr. 101, 142. In each and every case, it appears that Mr. Capeder did his best to very promptly respond to Respondent’s requests. Depo Ex. 8 (Capeder promises Respondent to work on response “all night” and asking to be told if Respondent needs anything else); DX 6 at 24, 26-27, 31-32 (Capeder’s prompt responses to request for information). Further, to the extent Mr. Capeder unilaterally suggested changes, he generally caveated the request for Respondent to include them only if doing so would not delay completion of the patent. DX 6 at 43 (October 13, 2014 Capeder email to Respondent stating “I am thinking of making a few minor changes but really don’t want to add any more time to this if you are super close to finishing.”); DX 6 at 44 (October 30, 2014 Capeder email to Respondent stating “You said my minor changes were going to take some time so I said repeatedly to forget about my changes and to just use any old sketches at this point, which should have meant you had very little left to do.”). There is no evidence in the record that Respondent ever instructed his client that he should cease suggesting minor changes to expedite the drafting process.

Third, I am not persuaded that the outcome of the *Alice* decision excuses the extensive delay in completing the application.³³ First, I note that Respondent did not promptly meet with his client to disclose and discuss the decision issued on June 19, 2014, until almost two months later on August 13, 2014, even though the PTO promptly issued preliminary guidance with regard to the impact of the decision on June 25, 2014. See U.S. PATENT AND TRADEMARK OFFICE, PRELIMINARY EXAMINATION INSTRUCTIONS IN VIEW OF THE SUPREME COURT DECISION IN *ALICE CORP. PTY. LTD. V. CLS BANK INT’L, ET AL.* (2014).³⁴ This delay by itself evidences, to me, Respondent’s lack of diligence and promptness in handling Mr. Capeder’s patent work. Moreover, Mr. Capeder very promptly responded to Respondent’s request for “ammunition” in regard to fighting the effect of *Alice*, and thereafter Respondent proceeded forward with preparing the application. DX 6 at 32 (August 14, 2014 Capeder email to Respondent with spreadsheet regarding response to *Alice*).

³² Further there is nothing in the record evidencing the truth of Respondent’s claim that Mr. Capeder would get confused if he gave him larger portions to work on and/or that Mr. Capeder was aware that Respondent was doling out work to him over time in incremental amounts.

³³ *Alice*, in brief, held that a computer system designed to facilitate the exchange of financial obligations between two parties was not subject to patent protection because the concept of an intermediated settlement or clearing house to mitigate risk of non-payment is a fundamental economic practice long prevalent in our system of commerce and a building block of the modern economy, and thus an “abstract idea,” not subject to patent under 35 U.S.C. 101. *Alice*, 134 S. Ct. 2347 (2014). The decision noted this holding flowed from a number of previously decided cases, including *Gottschalk v. Benson*, 409 U. S. 63, 67 (claims involving an algorithm for converting binary-coded decimal numerals into pure binary form unpatentable); *Parker v. Flook*, 437 U. S. 584, 594–595 (mathematical formula for computing “alarm limits” in a catalytic conversion process unpatentable); and *Bilski v. Kappos*, 561 U. S. 593 (method for hedging against the financial risk of price fluctuations unpatentable). *Id.*

³⁴ This guidance document is available at: https://cdn.patentlyo.com/media/2014/06/alice_pec_25jun2014.pdf.

Fourth, the fact that Mr. Capeder had perhaps agreed to do some of the work writing the application, in exchange for a reduced fee, does not justify the delay.³⁵ As noted above, the record is replete with evidence suggesting Mr. Capeder responded promptly to requests from Respondent. In addition, it was Mr. Capeder rather than Respondent who appeared to be pressing for quicker movement on production of the application.

Fifth, the fact that Mr. Capeder hired Respondent knowing that he was employed full-time at AEON and therefore had limited time to do moonlighting work on his patent, is of no import in terms of the delay in producing the application. Respondent estimated that his drafting a provisional utility patent application for a client from scratch generally takes him only 20-30 hours. With Mr. Capeder's assistance he initially estimated it would take 10 hours of his review time. Tr. 68, 126. Between June and November, he allegedly spent less than 35 hours on the application. DX 6 at 115. The subsequent attorney spent perhaps an additional 16 hours to complete the application. DX 35 at 41, 177. As such, if one worked promptly and diligently, this is certainly a project one could reasonably accomplish, working part-time, over nights and weekends, in a couple of months—much less five months. Mr. Capeder repeatedly expressed to Respondent a willingness to meet whenever and wherever to work on the application. In any case, as the Director notes, Respondent was obliged to decline the work if he lacked the resources to devote to it.

B. Respondent failed to keep his client reasonably informed about the status of the matter in violation of 37 C.F.R. § 11.104(a)(3) and made false or misleading statements to his client regarding the status of his patent applications in violation of 37 C.F.R. § 11.804(c)

The Complaint alleges in Count I(c) that Respondent violated Rule 11.104(a)(3), which provides that “[a] practitioner shall . . . [k]eep the client reasonably informed about the status of the matter.” 37 C.F.R. § 11.104(a)(3). It is also alleged in Count I(d) that Respondent violated Rule 11.804(c), which provides “professional misconduct for a practitioner to . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation.” 37 C.F.R. § 11.804(c).

1. The OED Director's Position

In his initial Post-Hearing Brief, the Director bases this alleged violation on certain specific instances of Respondent allegedly failing to communicate with Mr. Capeder as well as an alleged general failure to adequately communicate, particularly about his ability to do the work in a timely manner. DB at 24.

Specifically, the Director identifies Respondent's admitted failure to respond to three client emails, those dated August 21, 2014, August 27, 2014, and September 8, 2014; his failure

³⁵ While they dispute whether their arrangement required only “mentoring” or “coaching,” it does appear that they willingly worked together on the application. Further, it appears that, at all points, Respondent was aware that Mr. Capeder was looking to him to form his invention idea into a document suitable for filing as a patent application. Moreover, Respondent's claims that they entered into a “mentoring” or “coaching” agreement with Mr. Capeder, which is a type of working arrangement AEON offered, is belied by the fact that those terms are not mentioned in Inventive Spark's agreement or list of typical fees. Tr. 102; DX 28.

to respond to Mr. Capeder's emails and phone calls on October 25, 2014 (DX 6 at 72, 81); his failure to respond to Mr. Capeder's series of emails on November 1 and 2, 2014, or the phone messages Mr. Capeder left that weekend; and his ignoring two more emails on November 4, 2014. DB at 24 (citing DX 35 at 77-79; Tr. 34-35; Depo. Exs. 15 and 16). The Director notes that Respondent attributes his lack of response to emails to a lack of receipt. *Id.* However, the Director asserts that it was really attributable to a decision not to access his personal emails while at work, and/or his home computer crashing, which occurred in September 2014. *Id.* (citing Tr. 30, 37-38).

As to the more general failure to keep his client reasonably informed, OED states that "Respondent engaged in a pattern of repeatedly failing to do what he said he was going to do, and made false statements or misrepresentations to Mr. Capeder about the status of the work" citing in support the following instances:³⁶

- On September 17, 2014, Respondent told Mr. Capeder that he was going to email him drafts of the patent applications. DX 35 at 80-81. He did not. DX 6 at 38-39.
- On September 26, 2014, Respondent telephoned Mr. Capeder and again promised that he would finish drafting the applications and send them to Mr. Capeder that evening. DX 35 at 87. He did not. DX 6 at 48.
- On October 1, 2014, Respondent called Mr. Capeder and promised he would finish the draft applications that day or the next. DX 35 at 91-92. He did not. DX 6 at 55.
- On October 6, 2014, Respondent told Mr. Capeder that he only needed 30-60 minutes more to finish drafting the applications. DX 35 at 95; DX 6 at 57-58.
- On October 10, 2014, Respondent called Mr. Capeder and told him he was hoping to finish the applications that night. DX 35 at 98; DX 6 at 56. The applications were not completed that night.
- On October 14, 2014, Respondent told Mr. Capeder that the drafting of the applications was complete and he just needed to review them. He again promised to mail the drafts to Mr. Capeder. DX 35 at 99. He did not mail the drafts. DX 6 at 60.
- On October 16, 2014, Respondent telephoned Mr. Capeder and said that both patent applications were "essentially finished." DX 35 at 106.

³⁶ For efficiency, all references to the record in the following list have been changed from the way they appear in the Directors Brief, to match the format in this opinion.

- Later on October 16, 2014, Respondent told Mr. Capeder that he would definitely finish both applications that night. DX 35 at 101.
- Respondent collected the remaining fees owed to him by Mr. Capeder at a meeting on the evening of October 16, 2014, deposited those funds in his IOLTA account and then immediately withdrew them, because in his opinion the work was completed.³⁷ Tr. 75.
- At the October 16, 2014 meeting, Respondent said to Mr. Capeder that he would mail the completed applications to him that night. DX 35 at 105. He did not.
- On October 22, 2014, Respondent told Mr. Capeder that he should be able to finish the provisional patent application and file it by October 24, 2014. DX 35 at 114. He did not.
- On October 27, 2014, Respondent promised Mr. Capeder in a telephone call that he would get him a draft of the applications by October 29. DX 6 at 83. He did not. DX 35 at 121-122.
- On October 30, 2014, Respondent told Mr. Capeder he was “almost Finished” and would send him the draft when he got home that night. DX 35 at 126-127; DX 6 at 87, 90. He did not. DX 35 at 128.
- On November 3, 2014, Respondent agreed to file the design patent on November 4 and send a draft of the provisional patent to Mr. Capeder on November 3. DX 6 at 98. He did neither of these things.
- On [REDACTED], Respondent filed the design patent and told Mr. Capeder he would send him a draft of the provisional patent. DX 24 at 4; DX 35 at 151. He did not.

DB at 25-26.

Based upon the foregoing, the Director argues, that “given the history of Respondent’s representation of Mr. Capeder,” this Tribunal should find Respondent violated 37 C.F.R. §§ 11.104(a)(3) and 11.804(c) of the USPTO Rules of Professional Conduct “by his failure to adequately communicate with Mr. Capeder regarding the status of his matters and repeatedly making false or misleading statements to him regarding his applications.” DB at 28.

³⁷ There is no alleged violation based on an improper withdrawal of funds from the ILOTA Account.

2. Respondent's Position

Respondent does not directly cite or address the regulatory provision 37 C.F.R. § 11.104(a)(3) in his Post-Hearing Brief. However, he does assert at one point in his Brief that Mr. Capeder made misstatements to him, particularly after he hired another attorney. RB at 7-8.

3. Discussion

The record establishes, by clear and convincing evidence, that Respondent did not keep Mr. Capeder reasonably informed about the status of his work on the provisional utility patent application. As cited in detail above, Respondent failed on a number of occasions to respond in a timely fashion to inquiries from his client as to the status of the patent applications. In particular, the record suggests that between August 21, 2014, and September 19, 2014, a period of almost a month, Respondent failed to respond to numerous efforts by his client to reach him both via email and telephone. DX 6 at 34-40; DX 35 at 78-81; Depo. Ex. 10. The excuses offered by Respondent for his failure to respond, involving only computer issues, is simply unsatisfactory, in that if he was having such significant computer issues there were multiple alternative methods of communication by which he could have reached out to his client, especially since he was aware of both of Mr. Capeder's desire to promptly complete the applications and routine of frequently reaching out to Respondent.

Additionally, the record documents that over an extended period of time, Respondent did not keep his client informed as to the status of his work on the applications, in that the information he was providing was unreliable. Specifically, Mr. Capeder credibly testified to Respondent making a series of representations to him as to the status of the applications in terms of both their completion and providing them to him, that were not accurate and falsely led Mr. Capeder to believe that the applications were complete or that they would be with minimal more time expended toward that end. *See e.g.*, DX 35 at 80-81, 135-36; DX 6 at 37-40, 94-96 (a several-page email from Mr. Capeder to Respondent demanding his provisional patent application, and design patent, as well as detailing his frustrations with Respondent's delay in filing). The representations began in late September and continued basically until their relationship ended.

Consequently, I find that the Director has established by clear and convincing evidence that Respondent violated 37 C.F.R. §§ 11.104(a)(3) and 11.804(c) as alleged in Count I(b) and (c) of the Complaint.

C. Respondent did not make false or misleading statements to the Washington Bar in violation of 37 C.F.R. § 11.804(c)

The Complaint alleges in Count I(e) that Respondent violated PTO Rule 11.804(c), which provides that "[i]t is professional misconduct for a practitioner to . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation." 37 C.F.R. § 11.804(c).

1. The OED Director's Position

In his initial Post-Hearing Brief, the Director states that when contacted on November 7, 2014, by Mariana Busse of the Washington State Bar in regard to Mr. Capeder's request for his file, Respondent's statement in reply to the effect that he had sent Mr. Capeder "everything" his client had asked for, was false and misleading. DB at 28 (citing DX 35 at 153-154; DX 6 at 12; Tr. 57-58). Specifically, the OED Director alleges, that "[i]n fact, as of November 7, 2014, when Respondent spoke with Ms. Busse, he had not provided Mr. Capeder with 'everything.' Respondent had still not provided Mr. Capeder with even a first draft of the provisional utility patent application. He did not provide a first draft to Mr. Capeder until November 10, 2014." *Id.* (citing DX 35 at 162, 163, 177). As such, the OED argues Respondent violated Rule 11.804(c). *Id.* (citing *Edelson*, Proceeding No. 02011-13 (USPTO December 15, 2011) (false statements to his client and to the OED)).

Further, the Director suggests a nefarious motive for Respondent's misrepresentation to the Washington Bar, stating that he was attempting to deceive it in order to avoid an investigation. *Id.* at 29. The Director notes that intent to deceive can be shown by an attorney making a statement with reckless disregard for the truth, as well as by actual knowledge of falsity. *Id.* (citing *Iowa Supreme Ct. Bd. of Prof. Ethics & Conduct v. Grotewold*, 642 N.W.2d 288, 293 (Iowa 2002)). See also *Iowa Supreme Ct. Attorney Disciplinary Bd. v. Weaver*, 750 N.W.2d 71, 84 (Iowa 2008)). Likewise, the Director states, "a representation is made with fraudulent intent when it is known to be false" *Id.* (quoting *Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn.1986)). See also *In re Winter*, 770 N.W.2d 463, 467 (Minn. 2009). Finally, the Director argues, "[a]ctual knowledge or intent to deceive need not be established. The element of scienter is made out when the attorney's conduct is reckless, to the extent that he can be deemed to have knowingly made the misrepresentation." *Id.* (citing *Office of Disciplinary Counsel v. Anonymous Attorney A*, 714 A.2d 402, 406 (Pa. 1998)).

2. Respondent's Position

In his Post-Hearing Brief, Respondent denies making any false or misleading statements to Ms. Busse on November 7, 2014. RB at 8. He argues that he had filed Mr. Capeder's design patent the prior day, and that his client had agreed to him going ahead and "just fill[ing] anything decent for the provisional," as evidenced by the email Mr. Capeder sent Respondent that day. RB at 8 (citing DX 35; Depo. Ex. 19). Thus, when Ms. Busse contacted him, Respondent states he "honestly believed the issue had already been resolved." RB at 9. Moreover, he argues, Mr. Capeder had "the exact same belief," citing in support what he characterizes as two "apology emails" Mr. Capeder sent to him after the Bar contact, noting that in one of which Mr. Capeder states "I was planning to tell her we were trying to work things out amicably." RB at 9 (citing DX 35; Depo. Exs. 20; 21). As such, Respondent argues "no False or Misleading Statements were made to Ms. Busse, in fact Respondent gave his honest opinion based on the emails exchanged with Mr. Capeder and the filed status of the design patent application." *Id.*

3. Discussion

While this charge of “dishonesty, fraud, deceit or misrepresentation,” is based upon statements Respondent purportedly made to Ms. Busse in a telephone conversation, Ms. Busse did not testify at hearing, either in person, or by deposition, or even by affidavit, and no contemporaneous evidence memorializing the substance of the conversation between her and Respondent was introduced into evidence. As such, the only evidence of what was said during that conversation in November 2014, is Mr. Capeder’s second hand recollection thereof given by deposition a year and a half later in May of 2016, and Respondent’s first-hand recollection thereof given at hearing almost two years later in September 14, 2016. After weighing the testimony of the witnesses and the other evidence of record, I find that the Director has not sustained his burden of proof on this charge. DX 6 at 93 (Mr. Capeder’s email to Respondent asking for the materials for the provisional patent application); DX 6 at 94-96 (November 2, 2014 email from Mr. Capeder to Respondent detailing his frustrations with the delays, and “demanding a copy of the provisional patent application in its most current state, along with a copy of the design patent in its most current state,”); DX 6 at 98 (November 3, 2014 email from Mr. Capeder to Respondent after a phone call, expressing the hope that the two could finish the design patent “tomorrow” and that they will continue to work on the provisional patent); DX 6 at 101 (November 7, 2014 email reminding Respondent to send the provisional patent draft to Mr. Capeder); Depo. Exs. 17 (Respondent sends Mr. Capeder a copy of the design patent), 19 (Email to Respondent thanking him for filing the design patent).

In his deposition, Mr. Capeder recalled Ms. Busse advising him that Respondent had told her “he had already given me everything I was after.” DX 35 at 155-56. Mr. Capeder said that in response he told her that was “a lie,” that he had been “after two things,” the two patents, and had only received one, the less important of the two. *Id.*

Respondent does not appear to contest stating to Ms. Busse something to the effect that he had given Mr. Capeder everything he “was after.” Tr. 57-58; DX 35 at 155. However, he argues that in his view at the time he made that statement, it was true. His arguments in support are persuasive, in that it appears at that time the parties had reached an understanding and that Mr. Capeder was satisfied with the situation, although he did not yet have the draft provisional application. DX 6 at 98. In particular, I note that in the emails Mr. Capeder sent to Respondent immediately before, and perhaps after the conversation with Ms. Busse, Mr. Capeder states: “Thanks for filing the design patent today, much appreciated Hopefully we can just file anything decent for the provisional, and be done with this for both our sakes.” Depo. Ex. 19. In the second e-mail, he expresses that he would have not had the Bar call Respondent, had he known of its intention to call at this point. Depo. Ex. 19. In a third email, Mr. Capeder refers to his call with Busse, after she spoke to Respondent, and does not mention the “lie”, but rather expresses regret if Respondent felt “blindsided” and states he was planning to tell her before she called Respondent that the parties “were trying to work things out amicably.” Depo. Ex. 21.

As such, the weight of the evidence suggests that at the point in which Respondent spoke to Ms. Busse he could have reasonably believed that he had given Mr. Capeder what he was after at that point. Therefore, the Director has not proven Respondent violated 37 C.F.R. § 11.804(c) by “clear and convincing evidence.”

D. The Director failed to establish violations of 37 C.F.R. § 11.105(b) and 11.804(c) based on allegations that respondent failed to communicate the basis for his fee and made false or misleading statements concerning his fee

The Director charged Respondent in Count I(f) of the Complaint with violating Rule 11.105(b), which provides:

The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation, *except* when the practitioner will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

37 C.F.R. § 11.105(b) (emphasis added). He also charged Respondent in Count I(g) of the Complaint with violating Rule 11.804(c), which provides that “[i]t is professional misconduct for a practitioner to . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation.” 37 C.F.R. § 11.804(c).

1. OED’s Position

In his Post-Hearing Brief, the Director acknowledges that the testimony of both Respondent and Mr. Capeder, as well as contemporaneous emails between them at the time the engagement was entered into in June 2014, are consistent as to the fact that the men initially agreed to a flat fee of \$2,000 for Respondent to prepare and file both the design and provisional patent applications. DB at 30-31 (citing DX 35 at 36-38, 72-73, 221-223, 226-28; Depo. Exs. 1, 2, 24, 30, Tr. 126, 132, 141). It does not appear that the Director disputes that the parties reached a mutual agreement to increase the flat fee to \$3,000 based upon the extent of the actual work involved. *Id.* at 30-31. However, as evidence that Respondent violated 37 C.F.R. § 11.105(b), the Director claims that Respondent ultimately charged Mr. Capeder on an hourly basis. *Id.* at 31-32 (citing DX 6 at 115-116). In support, it cites Respondent’s November 22, 2014 Invoice in which he indicated that he had spent 35.3 hours at an hourly rate of \$250 working on Mr. Capeder’s applications, for a total of \$8,757, but wrote all but \$3,000 off based upon a “mutual representation termination settlement,” even though the parties had never agreed to any settlement of a fee dispute, he states. DB at 32 (citing DX 6, pp. 115-116). The lack of clear communication of the fee arrangement is further evidenced, he suggests, by the fact that Respondent has described the fee charged by a variety of phrases including a “flat fee,” “fixed fee,” “flexible capped flat fee,” *etc.* DB at 30 (citing DX 6, p. 9; Depo. Ex. 24, Tr. 126, 132, 141; DX 28 at 2; Amended Answer at 6, ¶ 11; DX 6 at 115-116).

The Director acknowledges that there is no reported case law on the failure of an attorney to disclose the basis or rate of the fee pursuant to 37 C.F.R. § 11.105(b). DB at 32. However, it refers to an identical provision set forth as Rule 1.5(b) in the ABA Model Rule of Professional Conduct, which has been adopted and discussed by various jurisdictions. DB at 32. The Director suggests that cases based on the identical provision have held that the failure to communicate how

fees will be charged, and the monies received will be applied, is a violation of the rule as are efforts to modify a fee agreement to a lawyer's benefit during the course of the representation. DB at 29-30 (citing *In re Freeman*, 835 N.E.2d 494, 498 (Ind. 2005); *In re Salwowski*, 819 N.E.2d 823 (Ind. 2004), *The Florida Bar v. Vining*, 761 So. 2d 1044, 1046 (Fla. 2000); *Kentucky Bar Ass'n. v. Basinger*, 53 S.W.3d 92 (Ky. 2001); *In re Marshall*, 217 P.3d 291 (Wash. 2009)). Moreover, the Director asserts where the client does not understand the basis of the fee being charged, there is a failure to communicate on the part of the lawyer in violation of this rule. DB at 32 (citing *Idaho State Bar v. Clark*, 283 P.3d 96, 105 (Id. 2012); *Attorney Grievance Comm'n of Maryland v. Stinson*, 50 A.3d 1222, 1245 (Md. App. 2012); *Hanzelik v. Board of Prof'l Responsibility of the Supreme Ct. of Tennessee*, 350 S.W.3d 669, 681 (Tenn. 2012)).

2. Respondent's Position

In response, Respondent emphatically states that he "did not fail to communicate the basis of his fee to Mr. Capeder." RB at 9. Rather, he suggests that beginning on June 17, 2010, his Flindt Law/Inventive Spark engagement letter and accompanying list of Typical Charges for IP Legal Services fee sheet governed his representation of Mr. Capeder, first in regard to the 28 trademark matters, and subsequently as to the patent work. *Id.* at 9-10 (citing DX 28). In support, he notes that while the engagement letter referred to trademark work, it also indicates that "representation may also extend to other related areas including copyrights, trade secrets, licensing, and patents." *Id.* at 10.

As to the 29 initial trademark matters, consistent with the engagement letter, Respondent recalled that it was his general practice to give Mr. Capeder a preliminary oral estimate of the cost of a project. RB at 10. However, such estimates were "not a guarantee of maximum cost." *Id.* (citing DX 28). Further, such fee estimates would not include filing fees associated with the project, as they are often determined at the time of filing depending on how many classes, claims, or even pages are to be filed. *Id.*

Respondent states that he adopted a similar fee arrangement with regard to the patent work, as evidenced by Mr. Capeder's June 9, 2014 and June 10, 2014 emails. *Id.* at 11 (citing Depo. Exs. 1, 2). In the June 9, 2014 email, Mr. Capeder indicates:

To make sure we are on the same page:

- 1) You are going to prepare and file a design patent and a provisional patent.
- 2) We are hoping this can be accomplished for under \$2,000 (not including draftsman fees or filing fees), however we realize it may take more of your time and effort than anticipated, and our primary goal is to do this correctly. If as you work on this you start to anticipate your fees will go above \$2,000, you will let me know before going above the \$2,000 threshold.
- 3) I have already given you a \$1,000 deposit, and I can meet you again this week to pay you more for the draftsman, your fees, filing fees, etc, if necessary.

Id. at 11 (citing Depo. Ex. 1). In the June 10, 2014 email, Mr. Capeder states: "Also, per our conversation, \$2,000 will cover approximately 10 hours of your review time for a provisional

patent, at which time we will meet to discuss whether further work/changes etc. is warranted.” *Id.* (citing Depo. Ex. 2). Respondent further notes that the \$2000 for 10 hours of review time, reflects the discounted rate of \$200/hour that is shown in Mr Capeder’s notes on “Typical Charges for IP Legal Services” fee sheet. *Id.* at 12. He briefly notes that “[a]ll parties agree that the amount was later raised to \$3000.” *Id.* at 12.

Respondent asserts that upon termination of his representation and following several emails between the two parties to reach an acceptable settlement, Respondent sent Mr. Capeder a final Invoice and Cashier’s check refunding the Micro-entity Provisional Filing Fee that was still in trust. *Id.* at 12 (citing DX 6 at 115-16). The invoice he acknowledges lists a cumulative total of over 34 hours and describes work performed on the provisional application for Mr. Capeder, but does not include time spent on the design application. The invoice identifies the filed design patent as a flat fee project (Qty. = 1) and applies a “Friends and Family” discount to the project. The invoice total was \$3000 as agreed, despite the changes made by Mr. Capeder that increased the actual time to more than three times the original estimate. RB at 9-10.

3. The OED Director’s Reply

In Reply, the Director states that Respondent’s position that an engagement letter between the parties, “allegedly” entered into in June 2010 in connection with Respondent being hired to secure trademarks for Mr. Capeder’s book, applied to his representation of Mr. Capeder in relation to his 2014 patent applications, fails for several reasons. DRB at 8. First, there is no evidence that an engagement agreement was ever entered into in 2010, *i.e.*, a signed letter. *Id.* Second, Mr. Capeder “was not sure if the document that was identified as an ‘engagement agreement’ was in fact an engagement letter.” *Id.* (citing DX 35 at 20). Third, Mr. Capeder affirmatively testified that he did not believe that the 2010 letter applied to Respondent’s representation of him in connection with his patent applications in 2014. *Id.* at 8-9 (citing DX 35 at 21, 205-206). The Director questions why the parties would have exchanged emails and telephone calls to confirm their understanding of the fee to be charged in 2014 if the 2010 “engagement letter” was applicable. *Id.* at 9 (citing Depo. Exs. 1, 2). Moreover, the Director asserts, Respondent “concedes in his post-hearing brief that the parties agreed to a different ‘course of action acceptable to both parties’ regarding the 2014 engagement.” *Id.* (citing RB at 11). Respondent’s “bald assertion” in his post-hearing brief that, “[he] and Mr. Capeder both believed at the time they undertook the projects in question . . . they were covered by an existing engagement letter” is not supported by the evidence. *Id.* Fourth, the Director asserts, “the so-called engagement letter is itself contradictory and confusing.” *Id.* at 9. The director argues that “[o]n the one hand it states that normally Respondent will do work on a fixed fee basis, but on the other hand that sometimes they might charge on the ‘basis of value rendered.’” *Id.* (citing DX 28 at 2). Further, the letter states that “bills for our fees will normally be sent to you on a bi-monthly basis.” *Id.* However, Respondent never sent Mr. Capeder a bill until after the representation ended and the letter does not address when Respondent is supposed to be paid in a fixed fee case. *Id.* (citing DX 6 at 115-16; DX 28).

4. Discussion

The Director has not established by clear and convincing evidence that Respondent violated 37 C.F.R. §§ 11.105(b) and 11.804(c) as alleged in Count I(f) and (g) of the Complaint.

First, it is important to note that the Rule does not mandate that the basis of the fees be set forth in a signed agreement or even communicated in writing, only that it is “prefer[able]” that it be written. 37 C.F.R. § 11.105(b). As such, orally communicating the fee arrangement is sufficient, and the absence of a written retainer letter, signed or unsigned, is by itself not evidence of a violation. Second, the Rule explicitly allows for changes in the basis of the fees charged during the course of representation, as long as such changes are “communicated to the client.” *Id.* As such, again, no writing need memorialize the change for the fee arrangement to be lawful. Third, the existence of a prior agreement is only relevant if an attorney takes on new work without conveying the basis of fees in regard thereto orally or in writing. *Id.* Contrary to the Director’s argument and the cases he cites in support, the record shows that Respondent communicated the basis of his fee and that Mr. Capeder understood it.

The evidence here shows that, as the Rule requires, Respondent “before, or within a reasonable time after” being retained to handle Mr. Capeder’s patent work, orally communicated the basis or rate of the fee and expenses for which Mr. Capeder would be responsible. Specifically, Mr. Capeder’s confirmatory emails dated June 9 and 10, reflect that the parties agreed that Respondent would prepare the two patent applications for an estimated flat fee for legal services of \$2,000. DX 35 at 37-38, 221- 222, 226-228; Depo. Ex. 30; Tr. 132. Further, Respondent clearly advised his client that this flat fee sum was based upon his estimation that the work would involve about ten hours of his professional time. Depo. Exs. 1; 2; DX 6 at 4. The parties further agreed that if the work took more time than the ten hours expected and as a result, the fee was going to exceed \$2,000, that Respondent would so advise Mr. Capeder before going over the \$2,000 threshold. Depo. Exs. 1; 2. At the meeting on August 13, 2014, Respondent advised Mr. Capeder that his time exceeded 10 hours, and he requested an additional \$1,000, a request to which Mr. Capeder acceded. DX 35 at 36-37, 72-73; Tr. 133. 71. Respondent guaranteed to Mr. Capeder that the \$3,000 he had agreed to pay would be the total legal fees Respondent would charge to finish and file the patent applications. DX 35 at 72-73, 303-304.

On October 16, 2014, Mr. Capeder paid Respondent the \$2,000 unpaid balance of his fixed fee to complete the work. He also agreed to pay the USPTO filing fees of \$255, for a total of \$2,255. DX 35 at 104. Respondent provided Mr. Capeder with a written receipt, in which he characterized the \$2,255 cash received as “Provisional Patent FLAT FEE and Micro-Entity US PTO Filing Fees (Design/Provisional).” DX 35 at 105; DX 6 at 9.

On November 13, 2014, Mr. Capeder sent Respondent an email confirming the flat fee agreed price of \$3,000 and disputing the sufficiency of Respondent’s services. DX 6 at 106-07. In response, the following day, Respondent sent Mr. Capeder an email delineating his position on the work asking Respondent whether he wished him to proceed. DX 6 at 108-09. He further noted the discounted 2010 rate at which he had taken on the patent work in 2014. *Id.* After receiving additional emails from Mr. Capeder, Respondent replied on November 19, 2014,

clarifying that he is “not claiming ‘overages,’” just stating “the fact” that he has spent in excess of 15 hours on the project, acknowledging that he took it the work on a flat fee basis. Depo. Ex. 24.

Thereafter, Respondent became aware that Mr. Capeder had hired substitute counsel. As such, on or about November 22, 2014, Respondent sent Mr. Capeder an invoice showing fees totaling \$10,575.00 (or \$7,575 more than the \$3,000 in fees already paid by Mr. Capeder), as calculated on an hourly basis. DX 6 at 115-16. However, the November 22, 2014 invoice included a \$7,575.00 credit for “Mutual Representation Termination Settlement.” Hence, the invoice totaled zero dollars. *Id.* Further, Respondent refunded to Mr. Capeder the \$65 in filing fees he had pre-paid in connection with the provisional patent application. DX 35 at 175.

Based upon these facts, it appears that Respondent adequately communicated to Mr. Capeder the amount of the initial legal fees estimated to be charged and the basis therefor, as well as the subsequent slightly modified higher fee. Further, while perhaps the final invoice was not carefully drafted, I find it does not reflect an attempt on Respondent’s part to change or renegotiate the terms of the flat fee arrangement between Respondent and his client. Rather, it acknowledges the revised flat fee limit agreed to of \$3,000 while also reflecting the number of hours of legal work Respondent actually spent on the patent applications, along with an acknowledgement that the parties were parting ways on unamicable terms. Additionally, the record does not show that Respondent made false or misleading statements about the nature or his fee.

Consequently, the Director has failed to establish, by clear and convincing evidence, that Respondent violated 37 C.F.R. §§ 11.105(b) and 11.804(c) as alleged in Count I(f) and (g) of the Complaint.

E. Respondent Did Not Violate 37 C.F.R. § 11.804(i) as Alleged in Count I(h) of the Complaint

The Complaint alleges a violation of 37 C.F.R. § 11.804(i). Compl. at 16. Rule 11.804(i) provides that “[i]t is professional misconduct for a practitioner to: . . . [e]ngage in other conduct that adversely reflects on the practitioner’s fitness to practice before the Office.” 37 C.F.R. § 11.804(i). However, in his post-hearing brief, the OED Director does not address this violation. Consequently, I find the OED Director has withdrawn any allegation that Respondent violated 37 C.F.R. § 11.804(i). And even if he has not, “[t]he PTO’s appellate tribunal has held that ‘to be ‘other’ conduct within the scope [of] Section 10.23(b)(6),³⁸ conduct must not be prohibited by Section 10.23(b)(1)-(5).” *Kelber*, PTO Proceeding No. D2006-13, slip op. at 47 (Sept. 23, 2008) (Initial Decision) (citing *Moatz v. Colitz*, 68 U.S.P.Q.2d at 1102-03). Thus, if Respondent’s conduct is found to violate other provisions of § 11.804, then it cannot violate § 11.804(i). *Cf. Schroeder*, PTO Proceeding No. D2014-08 at 10 n.11; *Johnson*, PTO Proceeding No. D2014-12 at 6; *Lane*, PTO Proceeding No. 99-04, slip op. at 16 (Dec. 3, 2002) (Final Decision). As discussed above, Respondent’s conduct violates 37 C.F.R. § 11.804(c) as alleged in Count I(c) and (d).

³⁸ The text of PTO Code 10.23(b)(6) is identical to PTO Rule 11.804(i) and the structure of the Code and the Rule surrounding those provisions are similar so the case analyzing PTO Code 10.23(b)(6) is useful in understanding PTO Rule 11.804(i). See *Changes to Representation of Others Before the United States Patent and Trademark Office*, 78 Fed. Reg. at 20180, *supra* n.5.

VII. COUNT II

A. Respondent failed to cooperate with a disciplinary investigation in violation of Rules 11.804(b) and 11.804(d)

Rule 11.801(b) provides in pertinent part that:

. . . a practitioner in connection with a disciplinary . . . matter, shall not:

* * *

(b) . . . fail to cooperate with the Office of Enrollment and Discipline in an investigation of any matter before it, or knowingly fail to respond to a lawful demand or request for information from an admissions or disciplinary authority . . .

37 C.F.R. § 11.801(b).

Rule 804(d) provides in pertinent part that:

It is professional misconduct for a practitioner to:

* * *

(d) Engage in conduct that is prejudicial to the administration of justice.

37 C.F.R. § 11.804(d).

1. Discussion

Upon review of the uncontested facts then of record, by Order dated August 15, 2015, Respondent found was in violation of both Rules 11.801(b) and 11.804(d). Order Granting in Part and Denying in Part the Director's Motion for Summary Judgment On Counts II And III of the Complaint (Aug. 15, 2015) ("Summary Judgment Order"). Specifically, this Tribunal concluded:

the uncontested facts establish that, without justification, Respondent failed to fully respond to the OED's RFIs [Requests for Information] and LOC [Lack of Cooperation letter] within the time deadlines set therefor, and that he apparently has continued to fail to do so until the present. These failures were not "unintentional," or unknowingly done, as Respondent suggests; nor are they excusable under the circumstances here. As indicated above, Rule 11.801(b) required Respondent as a PTO practitioner to "cooperate" in disciplinary investigations and respond to RFIs. 37 C.F.R. § 11.801(b). Respondent did not "cooperate" in the PTO's disciplinary investigation, in that the record amply shows he did not make a good faith effort to timely, fully and directly respond to OED's RFIs and LOC. Rule 11.804(d) further provides that it is misconduct for a PTO practitioner to "[e]ngage in conduct that is prejudicial to the administration of justice." 37 C.F.R. § 11.804(d). Conduct which is prejudicial to the administration of justice is not "abiding by the rules set by the court, including the spirit of those rules." *Hadnott v. City of Chi.*, 2009 U.S. Dist. LEXIS 14514, *15, 2009 WL 466808 (N.D. Ill. Feb. 24, 2009) (citing *Grun v.*

Pneumo Abex Corp., 163 F.3d 411, 422 n.9 (7th Cir. 1998)). Respondent did not abide by the PTO Rules, binding upon him as a PTO practitioner, to cooperate in the disciplinary investigation.

Summary Judgment Order at 8. Respondent has not requested reconsideration of the Tribunal's prior ruling nor is there any basis for doing so in the record. *See* RB at 12 (acknowledging the Order).

VIII. COUNT III³⁹

A. Respondent failed to record and retain complete records of trust fund accounts in violation of Rules 11.115(a) and 11.115(f)(1)

In Count III(b), the Director alleges that Respondent failed to maintain complete records of trust fund accounts in violation of Rule 11.115(a), which provides, in pertinent part, that:

[A client's funds shall be kept in a separate account maintained in the state where the practitioner's office is situated Complete records of such account funds and other property shall be kept by the practitioner and shall be preserved for a period of five years after termination of the representation.

37 C.F.R. § 11.115(a).

In Count III(c), the Director alleges that Respondent violated Rule 11.115(f)(1), which provides, in pertinent part, as follows:

All separate accounts for clients or third persons kept by a practitioner must also comply with the following provisions:

(1) *Required records.* The records to be kept include:

(i) Receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement;

(ii) Ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;

³⁹ The OED Director indicated in his Post-Hearing Brief that he was no longer pursuing the charges made in Count III(a) of the Complaint (¶ 143(a)), alleging failure to hold client funds separately from the practitioner's own property and to have a separate and identifiable account in which to deposit client funds, in violation of 37 C.F.R. § 11.115(a). DB at 36, n. 11.

* * *

(iv) Copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

* * *

(vi) Copies of records showing disbursements on behalf of clients;

(vii) The physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;

(viii) Records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and the time the transfer was completed;

(ix) Copies of monthly trial balances and quarterly reconciliations of the client trust accounts maintained by the practitioner . . .

37 C.F.R. § 11.115(f)(1)(i)-(ii), (iv), (vi-ix).

1. The OED Director's Position

In its initial Post-Hearing Brief, the OED contends:

During the OED investigation, Respondent produced no financial records to OED. During the course of this disciplinary litigation, he was asked again to produce his financial records. In response, he produced two deposit slips and some bank statements for his IOLTA account. DX 29, 30, 31; Tr. 82, 84. Respondent testified that there was a delay in obtaining the records since he had to request them from his bank. Tr. 85-86. Respondent originally received paper copies of his IOLTA bank statements, but when he closed his office in Issaquah, he either filed them or shredded them. Tr. 153-154. Based on this testimony, it is clear that Respondent did not maintain the required records for five years as required by the regulation. Therefore, Respondent clearly violated 37 C.F.R. §§ 11.115(a) and 11.115(f)(1) of the USPTO Rules of Professional Conduct.”

DB at 35-36.

The Director additionally notes that while Respondent asserted at hearing that he kept financial records on Quickbooks, “he never produced any Quickbooks records to the OED, nor did he produce them during the course of the litigation.” *Id.* (citing Tr. 82-83, 84-85. “Moreover, even if he did keep Quickbooks, his testimony at the hearing establishes that he did not keep the records required by OED.” *Id.* More specifically, the Director proclaims the

evidence at the hearing establishes that in regard to his IOLTA account, Respondent did not keep receipt or disbursement journals, ledger records, checkbook registers, bank statements, records of deposit, cancelled or substitute checks, or copies of monthly trial balances and quarterly reconciliations. DB at 35 (citing Tr. 83-87).

2. Respondent's Position

Respondent asserts in his Post-Hearing brief that he did maintain the necessary records for his client trust accounts after termination. RB at 14. In support, he explains that Mr. Capeder was the last client of his solo practice as the Flindt Intellectual Property Law Group, PLLC (d/b/a Inventive Spark). *Id.* Respondent says he has produced DX 29-31, which included copies of deposit slips and bank statements showing all his deposits to and withdrawals from his client trust accounts for Mr. Capeder. *Id.* Further, because Mr. Capeder was paying his fees in cash, Respondent took the added precaution of providing Mr. Capeder with a hand-written receipt. *Id.* (citing Depo. Ex. 30).

Moreover, Respondent argues, his invoice demonstrates that he also maintained the required "ledger records" for his client trust account. *Id.* at 15. This invoice, he suggests, provides a ledger for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals and the names of all persons or entities to whom such funds were disbursed. These records along with the others he produced Respondent deposes, shows he fulfilled the requirement of Rule § 11.115(f), as to his final client. RB at 15.

3. Discussion

The evidence admitted at hearing revealed that on June 4, 2014, Mr. Capeder paid Respondent \$1000 in advance for the performance of legal services in connection with obtaining patents on his keyboard invention. DX 19 at 5. On October 17, 2014, Mr. Capeder paid Respondent an additional \$2000 for such legal services, in addition to \$255 to cover Agency filing fees. DX 19 at 6; DX 30. *See also* DX 6 at 116. Respondent "deposited both of Mr. Capeder's payments directly into the IOLTA trust account of Flindt Intellectual Property Law Group, PLLC." DX 19 at 5, DX 29, 30. Upon the termination of the professional relationship, Respondent issued to Mr. Capeder a cashier's check covering the unused filing fees along with an invoice showing a balance due of \$0.00. DX 19 at 13-15.

Respondent produced to the OED during its investigation and/or in the course of this litigation the following records:

- a. Respondent's signed handwritten receipt dated June 4, 2014, stating "I have received \$1,000 as a deposit towards Design and Provisional Patent Applications. This represents a partial payment pending the return of bids, etc. for Inventive Spark. [signed Kyle Flindt]." DX 35 at 38, Depo Ex. 30.
- b. A Chase Bank deposit slip dated June 4, 2014, in the amount of \$1,000, into the Flindt Intellectual Property Law Group, PLLC (IOLTA), #1964279450. DX 29.

- c. A Chase Bank deposit slip dated October 16, 2014, in the amount of \$2255, into the Flindt IP Law Group, PLLC account, #1964279450. DX 30.
- d. A Chase Bank Monthly Account Statement for October 1-31, 2014 Flindt IP Law Group, PLLC account #1964279450, reflecting a beginning balance of \$253, a deposit of \$2255 on October 16, 2014, plus an end of month deposit of \$.03 interest, and three withdrawals, the first in the amount of \$150 on October 14, 2014, and the next in the amount of \$2000 on October 16, 2016, and the last for the interest, leaving a balance of \$358. DX 31.
- e. Inventive Spark Invoice #199 dated November 22, 2014 to Bill Capeder reflecting four entries describing services provided in November 2014, including preparation of Design Patent application and provisional parent application, for a total of \$35.3 hours, at a rate of \$250 per hour with total charges amounting to \$10,575 (including \$500 family & friends discount), reflecting a credit of \$7575 for "Mutual Representation Termination Settlement." The invoice shows payments of \$3255, and a refund due of \$65 for Micro-Entity Provisional Filing Fee. DX 19 at 13-14.
- f. A Chase Bank Cashier's Check dated November 20, 2014 in the amount of \$65 from Inventive Spark to Steven Capeder. DX 19 at 15.
- g. Unsigned Retainer Agreement, with Typical Charges List. DX 19 at 8-11.

While these few records evidence the majority of the transactions involving Mr. Capeder, they do not evidence that Respondent was in complete compliance with the record keeping requirements of the PTO Rules.

First, Rule 11.115(a) requires that Respondent maintain "[c]omplete records" of his IOLTA account with the client's funds for a period of five years after termination of the representation. 37 C.F.R. § 11.115(a). In June of 2014, Respondent accepted a \$1,000 cash advance against fees for services to be rendered to Mr. Capeder with regard to obtaining patents for his keyboard invention. DX 20. Being an advance against his quoted fee, Respondent had not yet earned the money. Therefore, money continued to belong to his client and, as such, was required to be held in a separate trust account until Respondent "earned" it. 37 C.F.R. § 11.115(c) ("A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."); *People v. Carter*, 364 P.3d 1164, 1170 (Colo. 2105) ("A lawyer does not earn flat fees upon receipt. Rather, an attorney earns fees only by conferring a benefit on or performing a legal service for the client."). There is nothing in the record reflecting that the money was consistently held separately in a trust account until Respondent "earned" it. On the contrary, the evidence shows that Respondent withdrew the money sometime prior to October 1, 2014, when neither of the patent applications had been completed to Mr. Capeder's satisfaction, or filed.⁴⁰ See Depo. Ex. 17 (email from Respondent to Mr. Capeder, dated November 5, 2014, with final copy of design patent). Even if, as Respondent asserts, he provided his client with a "fileable" design patent on

⁴⁰ There is no allegation in this case that Respondent violated 37 C.F.R. § 11.115(c).

August 31, 2014, and so “earned” some portion of the flat fee associated with that patent, there are no records showing that he did not withdraw the \$1,000 deposit on the flat fee before that time.⁴¹ Thus, Respondent’s financial records admitted into evidence are incomplete.⁴²

Second, on October 16, 2014, Respondent received from Mr. Capeder \$2,000, the balance of the fixed fees due (plus \$255 in filing fees) and immediately deposited into, and withdrew such sum from, his IOLTA account. Tr. 75; DX 31. He states that he felt entitled to withdraw such sum because “the design patent had been finished” and the “funds had been earned at that time.” Tr. 75. He continued to represent Mr. Capeder through November 2014, at which point he withdrew from the IOLTA account the excess filing fees then in his possession, and returned it to his client. At hearing held in September 2016—less than five years after the termination of Respondent’s relationship with his client—only a single monthly IOLTA bank statement, from October 2014, was admitted into the record; the November 2014 statement was not. While the deposit slips and cashier’s checks evidence transactions involving Respondent’s IOLTA account, they are not adequate substitutes for the monthly bank account statements themselves, and do not together with one monthly statement constitute the “complete records” of Respondent’s IOLTA account during the relevant six-month period that are required by Rule 11.115(f)(1).

Third, Rule 11.115(f)(1) requires that for each IOLTA account, Respondent keep a “[r]eceipt and disbursement journal[,]” a “[l]edger record[,]” “accountings,” “copies of records showing disbursements,” a “physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks,” “[r]ecords of all electronic transfers,” and “monthly trial balances and quarterly reconciliations of the client trust accounts.” 37 C.F.R. § 11.115(f)(i)-(ii), (iv), (vi-ix). A “journal” for financial, accounting, or business purposes is “a book of original entry in double-entry bookkeeping.” Webster’s Third New International Dictionary 1221 (2002). Similarly, a “ledger” is a book containing accounts to which debits and credits resulting from business transactions are posted from books of original entry.” *Id.* at 1288. The entries in such records would have been minimal if Mr. Capeder was Respondent’s only client at the time, still he produced no evidence that he ever created or maintained such records. Specifically, he produced none of the QuickBooks records he alleged he maintained to show “there’s a proper accounting . . . going on” in connection with his firm. Tr. 79, 82-85, 151-52.

Consequently, I find that the Director has established by clear and convincing evidence that Respondent violated 37 C.F.R. § 11.115(a) and (f)(1) of the Rules of Professional Conduct as alleged in Count III (b) and (c) of the Complaint. but not to have violated 37 C.F.R. § 11.801(b).

⁴¹ The understanding that Mr. Capeder had with Respondent appear to neither have allocated the total fixed fee amount agreed upon between the two patents, nor did it establish a benchmark indicating when the fees would be earned, such as when a “fileable application was delivered” or when the applications were actually filed. Respondent testified at hearing that normally he would send a bill at the conclusion of the combined projects, suggesting that would be the point when the fees would have been deemed “earned.” Tr. 70.

⁴² Respondent testified that he had been getting paper bank statements until after the Complaint was filed but did not maintain them in that form once he started working at AEON. Therefore, when the PTO requested such records, he did not have immediate access to them, but had to switch over to electronic statements in order to access his statements going back 5 years. Tr. 153-54.

B. Respondent failed to produce records of his trust accounts in response to the OED's second Request for Information in violation of Rule 11.801(b)

In Count III(d), the Director alleges that Respondent violated Rule 11.801(b), which provides, in pertinent part, that “a practitioner in connection with a disciplinary or restatement matter, shall not . . . knowingly fail to respond to a lawful demand or request for information from [a] . . . disciplinary authority” 37 C.F.R. § 11.801(b).

1. Parties' Positions

The Director argues Respondent's failure to produce records of his trust accounts to the OED as part of its investigation in response to its requests “is more evidence of his failure to cooperate. Respondent produced only limited records and only produced them to counsel for the OED Director after the disciplinary complaint was filed,” the Agency proclaims. DB at 35 (citing Tr. 88-89, 155). “He did not produce the required records to the OED when asked to do so during the investigation of his case. As a result, Respondent violated 37 C.F.R. § 11.801(b).” *Id.*

Respondent states that he “produced to OED all of the requested trust records including deposit slips (DX29 and DX30), IOLTA bank records (e.g., DX31), and invoices (DX19, pages 13-15)” for his client between June 2014 and December 2014. *Id.* at 16.

2. Discussion

The Director alleges a violation of this Rule in Count III(d) based upon Respondent's failure to produce the required bank records during the investigation. While Respondent may have not produced the bank records during the investigation, it appears that he had few records in his personal possession at the time to produce. Moreover, this alleged violation appears in essence to duplicate or be encompassed by the same violation charged in Count II, as to which Respondent has already been found liable based on his total lack of response to the Second RFI.

Consequently, I find that Respondent is not liable for violating 37 C.F.R. § 11.801(b) as alleged in Count III(d) for the same conduct for which he has already been found to be liable under the same Rule as alleged in Count II of the Complaint.

IX. PENALTY

A. Legal Standard

Upon a finding of violation, this Tribunal is authorized to impose an order of suspension, exclusion, reprimand and/or probation and “also may impose any conditions deemed appropriate under the circumstances.”⁴³ 37 C.F.R. § 11.54(a)(2). In determining the appropriate sanction to be imposed, the following four factors “must” be considered, if applicable:

⁴³ The Rules provide that “[p]robation may be imposed *in lieu* of or in addition to any other disciplinary sanction. Any conditions of probation shall be stated in writing in the order imposing probation. The order shall also state whether, and to what extent, the practitioner shall be required to notify clients of the probation.” 37 C.F.R.

- (1) whether the practitioner has violated a duty owed to a client, to the public, to the legal system, or to the profession;
- (2) whether the practitioner acted intentionally, knowingly,⁴⁴ or negligently;
- (3) the amount of the actual or potential injury caused by the practitioner's misconduct; and
- (4) the existence of any aggravating or mitigating factors.

37 C.F.R. § 11.54(b); *Schroeder*, PTO Proceeding No. D2014-08 at 10. The analysis of these four factors is interrelated. *Burmeister*, PTO Proceeding No. D1999-10, slip op. at 10 (Mar. 16, 2004) (Initial Decision).

The ABA Standards for Imposing Lawyer Sanctions, (adopted Feb. 1986, amended Feb. 1992, reaffirmed Sept. 18, 2014) ("ABA Standards")⁴⁵ provide guidance as to the aggravating and mitigating factors in deciding upon the appropriate sanction to impose. *Schroeder*, PTO Proceeding No. D2014-08 at 12. *See also Chae*, PTO Proceeding No. D2013-01, slip op. at 4 (Oct. 21, 2013) (Final Order). According to the ABA Standards, aggravating factors which may justify an increase in the degree of discipline to be imposed are as follows:

- (a) prior disciplinary offenses;
- (b) dishonest or selfish motive;
- (c) a pattern of misconduct;
- (d) multiple offenses;
- (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;
- (j) indifference to making restitution; and
- (k) illegal conduct, including that involving the use of controlled substances.

ABA Standards, Rule 9.22. Similarly, mitigating factors that may justify a *reduction* in the degree of discipline to be imposed are as follows:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;

§ 11.20(a)(4). Further, that when imposing discipline, reinstatement may be conditioned upon the practitioner "making restitution, successfully completing a professional responsibility course or examination, or any other condition deemed appropriate under the circumstances." 37 C.F.R. § 11.20(b).

⁴⁴ In this instance "knowingly" "means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." 37 C.F.R. § 11.1.

⁴⁵ The ABA Standards, as reaffirmed in 2014, are available on the ABA's website at: https://www.americanbar.org/news/abanews/aba-news-archives/2013/08/107_-_adopted_-_reaf.html.

- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;
- (h) physical disability;
- (i) mental disability or chemical dependency . . .;
- (j) delay in disciplinary proceedings;
- (k) imposition of other penalties or sanctions;
- (l) remorse; and
- (m) remoteness of prior offenses.

ABA Standards Rule 9.32. The ABA further indicates that the following factors should not be considered as either aggravating or mitigating:

- (a) forced or compelled restitution;
- (b) agreeing to the client's demand for certain improper behavior or result;
- (c) withdrawal of complaint against the lawyer;
- (d) resignation prior to completion of disciplinary proceedings;
- (e) complainant's recommendation as to sanction; and
- (f) failure of injured client to complain.

ABA Standards, Rule 9.4.

An important function of disciplinary sanctions is to deter others from similar conduct, and general deterrent effects should be considered when analyzing misconduct. *Hill*, PTO Proceeding No. 2001-06, slip op. at 12 (July 26, 2004) (Final Decision). Indeed, “[w]e start from the premise that protection of the public and bar, not punishment, is the primary purpose of attorney discipline and that we must accordingly consider relevant mitigating and aggravating circumstances.” *Burmeister*, PTO Proceeding No. D1999-10 at 11 (quoting *Coombs v. State Bar of California*, 779 P.2d 298, 306 (Cal. 1989)) (internal quotation marks omitted). *See also*, ABA Standards, Rule 1.1 (“The purpose of lawyer discipline proceedings is to protect the public and the administration of justice . . .”). “Honesty and integrity are chief among the virtues the public has a right to expect of lawyers. Any breach of that trust is misconduct of the highest order and warrants severe discipline.” *Ruffenach*, 486 N.W.2d 387, 391 (Minn. 1992) (citing *In Re Schmidt*, 422 N.W.2d 544, 548 (Minn. 1987)). “The ultimate issue to be decided in disbarment proceedings is whether the respondent is fit to practice.” *Greiner*, PTO Proceeding No D2012-25 at 13 (Oct. 18, 2012) (Initial Decision) (citing *Harary v. Blumenthal*, 555 F.2d 1113, 1116 (2d Cir. 1977) (upholding disbarment of certified public accountant from practice before the Internal Revenue Service)). “Attorneys who practice before the PTO have a duty to represent their clients competently and zealously, and to maintain ‘the integrity and competence of the legal profession.’” *Kang*, PTO Proceeding No. D2012-24, slip op. at 8 (Nov. 26, 2012) (Initial Decision on Default), (citing 37 C.F.R. §§ 10.21, 10.76, 10.83); *see also, e.g., Robinson*, Proceeding No. D2009-48, slip op. at 12 (May 26, 2010) (Initial Decision).

B. The OED Director's Position Regarding the Penalty

The OED Director asks the Tribunal in his Post-Hearing Brief to suspend Respondent from practice before the PTO for “for two years, plus a two-year probation.”⁴⁶ DB at 36. Further, he recommends that Respondent be required to take and pass the Multi-State Professional Responsibility Exam (“MPRE”). *Id.* In support, he proffers arguments referencing the regulatory factors in section 11.54(b) identified above.

1. Violation of duties owed to a client, the public, the legal system, or to the profession

As to the first factor, the OED Director observes that the “practitioner-client relationship is a fiduciary relationship.” DB at 37 (citing *In re Bender*, Proceeding No. D2000-01 (USPTO Sept. 30, 2003); *Carter v. ALK Holdings, Inc.*, 605 F.3d 1319, 1325 (Fed. Cir. 2010)). Respondent “plainly violated” this relationship by “failing to diligently prepare and file Mr. Capeder’s patent applications, failing to adequately communicate the basis of his fee (and then trying to change the agreement after the relationship had soured), and misrepresenting to Mr. Capeder the status of the applications,” the Director argues. *Id.* The Director states in support, that “[c]ommunication with a client is critical, but the failure to communicate could be viewed as misconduct rooted in neglect.” DB at 26. Respondent’s “misconduct went beyond the mere neglect of Mr. Capeder’s case. By affirmatively misrepresenting the status of the work, Respondent’s conduct became more severe, in that he deceived or misled his client regarding the status of the work.” *Id.* Therefore, the Director argues, Respondent’s conduct warrants more severe discipline than a simple neglect case. *Id.* The Director points out that this idea is supported by substantial precedent within the USPTO. *Id.* (citing *In re Neeser*, Proceeding No. 2015-16 (USPTO Mar. 9, 2015) (failing to act with reasonable diligence and promptness and failing to notify clients of correspondence); *In re Cepican*, Proceeding No. D2014-01 (USPTO May 22, 2014) (falsely representing to client that “everything was OK” with the client’s patent applications); *In re Riley*, Proceeding No. D2013-04 (USPTO July 9, 2013) (not preparing, filing, and prosecuting patent application after being paid \$2,000 to do so); *In re Kubler*, Proceeding Nos. D2012-04 and D2010-06 (USPTO Feb. 15, 2012) (failing to adequately communicate with clients); and *In re Sylvester*, Proceeding No. 02005-06 (USPTO Mar. 15, 2006) (repeatedly misinforming the client about the status of the application)).

The Director additionally suggests Respondent violated the duties he owed to the legal profession by failing to uphold the oath he signed to become a member of the patent bar regarding observing its rules of practice and engaging in misconduct that decreases the public’s confidence in the integrity and professionalism of patent practitioners. *Id.* at 38. Respondent also violated his duty to the legal profession “by making misrepresentations to the Washington State Bar Association and failing to cooperate with the OED investigation,” the Director claims. *Id.* at 38.

⁴⁶ The Director’s proposed sanction is predicated on Respondent having been found liable on all the counts charged and allocates eighteen months of the two-year sentence to his lack of diligence, failure to communicate with his client, failing to communicate the basis for his fee, making misrepresentations to his client and the Washington State Bar Association, failing to keep the required financial records, and the aggravating factors discussed below; and six months for failing to cooperate with OED. DB at 36.

2. Acting intentionally, knowingly, or negligently

The Director characterizes three of Respondent's "acts and omissions," as specifically "mislead[ing] his client in an effort to conceal his lack of diligence;" "disregard[ing] the requests for information from OED;" and "fail[ing] to keep the financial records required by the USPTO," as "intentional." DB at 38-39. Further, OED alleges that Respondent "knowingly" both attempted to change the basis for the fee he was charging Mr. Capeder at the conclusion of the representation from a flat fee to a fee based on an hourly rate, and mislead the Washington State Bar Association investigator to avoid a possible disciplinary investigation. *Id.*

3. Causing actual or potential injury

As to actual damages, the Director notes that due to Respondent's failure to promptly prepare and file his client's utility patent application, "Mr. Capeder had to retain successor counsel to represent him, incurring actual financial losses of at least \$2,100." DB at 40 (citing DX 35 at 175; Depo. Ex. 25). Furthermore, the Director characterizes that the potential injuries resulting from Respondent's misconduct, specifically failing to promptly prepare and file his client's utility patent application, as "significant." DB at 39. In support, he cites the "first-inventor-to-file" provision of the Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 3, 125 Stat. 284, 285 (2011) (codified as amended in scattered sections of 35 U.S.C.) ("AIA"). *Id.* Under that provision "delay in filing is imprudent," as it "may lead to more art being prior art that, in turn, may serve as potential grounds for the Office to reject the patent application," resulting in a loss of intellectual property rights. *Id.* The Director argues that a lack of actual harm is "not a defense to a charge of lack of competence, inadequate client communication or other misconduct of the USPTO Rules of Professional Conduct," and that he "need not establish that a client was actually harmed by a practitioner's misconduct in order to establish a violation." *Id.* (internal citation omitted). As such, the Director alleges, Mr. Capeder has potentially lost valuable intellectual property rights due to Respondent's delay in filing his applications. *Id.* at 40.

4. Aggravating and Mitigating Factors

In support of the proposed penalty, the Director identifies four aggravating factors:

The first factor is a "pattern of misconduct," stating that Respondent has a prior history of professionally failing to communicate adequately and lacking diligence, as demonstrated by a prior warning letter with regard to another client sent to him by OED in June 2015.⁴⁷ DB at 40-41 (citing DX 5). As further evidence of the pattern, OED recalls that in this case, Respondent filed an incomplete answer to the Complaint, then failed to timely file an amended answer and his Prehearing Statement, then ignored the Director's Motion for Summary Judgment on Counts II and III of the Complaint, and finally, appeared a half hour late to hearing. DB at 41-42 (citing Tr.

⁴⁷ The Director states the conduct discussed in the letter cannot be considered "prior discipline," which is another aggravating factor, because it occurred about the same time as Respondent was representing Mr. Capeder. The warning letter was sent during the course of the OED's investigation into Respondent's representation of Mr. Capeder.

12). Further, the Director asserts, Respondent failed to respond to the OED's inquiries appropriately or in a timely manner. "He did not answer the questions asked, and completely ignored the Second RFI." DB at 42 n. 16. He promised to produce documents to OED but never did. "This is all part of the same pattern of failing to attend to deadlines or timely respond to requests (from clients, the court, and OED)," the Director proclaims. *Id.*

Second, is "bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency." DB at 42 (citing ABA Standards § 9.22(e)). The Director offers that Respondent received letters from the OED requesting certain information, but nonetheless, intentionally, actively, and in bad faith chose to disregard the requests. DB at 42-43. Such conduct is not acceptable, he proclaims. *Id.* (citing *Matter of Brown*, 910 P.2d 631 (Ariz. 1996); *People v. Reeves*, 766 P.2d 1192 (Colo. 1988); *In re Lea*, 969 A.2d 881 (D.C. 2009); *In re Houdek*, 497 N.E.2d 1169 (Ill. 1986); and *In re Brody*, 357 N.E.2d 498 (Ill. 1976)).

Third, is Respondent's refusal to acknowledge the wrongful nature of his conduct, show any remorse for his conduct in this matter, or rectify his errors. DB at 43 (citing ABA Standards § 9.22(g)). These failures are a weighty factor in aggravation, the Director claims. DB at 43 (citing *Weber v. State Bar*, 764 P.2d 701 (Cal. 1988); *In re Disciplinary Action against Kalla*, 811 N.W.2d 576 (Minn. 2012); *Dayton Bar Ass'n v. Hunt*, 987 N.E.2d 662 (Ohio 2013)). As such, the Director recommends that Respondent be required to take and pass the MPRE, "so that he can learn and understand his ethical responsibilities," and that a probationary period be imposed, "to ensure that Respondent complies with the ethics rules if he seeks reinstatement." DB at 43.

The last aggravating factor cited by the Director is Respondent's "substantial experience in the practice of law." DB at 43 (citing ABA Standards § 9.22(i)). He advises that Respondent has been admitted to practice since 1998, has substantial experience in the practice of law and, as such, should be expected to understand the ethics rules and conform his behavior to those rules. *Id.*

The Director suggests in his Brief that there are no mitigating factors are applicable here. DB at 43.

C. Respondent's Position on Penalty

Respondent did not directly address the factors relevant to penalty or the Director's proposed sanction in his post-hearing brief. However, with respect to Count II, Respondent "requests leniency," stating he did not "knowingly fail to cooperate with the OED investigation." RB at 12. In support, he claims he provided documents, emails, invoices, IOLTA accounts, and other materials to the OED and states he continues to be willing to provide information. *Id.* at 12.

Respondent also argued at hearing that Mr. Capeder actually benefited from the delay in filing because, in Respondent's view, if he had filed before *Alice*, his utility patent application

may have been rejected on the basis that it was only an abstract idea.⁴⁸ Tr. 99, 144, 148. Further, Respondent claimed that Mr. Capeder's invention and idea improved with time spent on the applications because he was able to add flowcharts, and "new things and new features" like touch typing and directional typing, which Respondent "view[ed] as being a positive." Tr. 104, 144.

D. Discussion, Findings and Conclusions on Penalty

After solemn and very extensive consideration of the totality of the record and the parties' arguments, this Tribunal concludes that the appropriate sanction for the violations upon which Respondent was found liable is a one year suspension, with the imposition thereof stayed, and that Respondent be placed on probation for a period of two years, with the following conditions imposed and to be completed during the probationary period: Respondent shall: (1) make restitution to Mr. Capeder of fees in the amount of \$2,000; (2) undergo a professional neuropsychological assessment covering executive functioning; and (3) undertake a course of treatment for any significant dysfunctions identified in the assessment. *See* 37 C.F.R. § 11.20 (granting this Tribunal broad authority to issue sanctions); *Greiner*, PTO Proceeding No D2012-25 at 13 (Oct. 18, 2012) (Initial Decision) (Ultimately, it is the Tribunal's duty to determine if Respondent is fit to practice) (citing *Harary v. Blumenthal*, 555 F.2d 1113, 1116 (2d Cir. 1977) (upholding disbarment of certified public accountant from practice before the Internal Revenue Service))). The basis for the assessment of this particular penalty is as follows:

1. Violation of duties owed to a client, the public, the legal system, or to the profession

The finding of liability on the Counts as set forth above clearly evidences that Respondent violated duties he owed to his client, the public, the legal system and the profession. Respondent's liability on Count I for failing to act with reasonable diligence and failing to keep his client reasonably informed, both represent violations of duties owed to a client. Respondent's liability on Counts II and III, for failing to cooperate in the disciplinary investigation, engaging in conduct that is prejudicial to the administration of justice, and maintain records of client funds, represent violations of duties owed to the legal system and the profession.

2. Acting intentionally, knowingly, or negligently

After a great deal of consideration, I have concluded that Respondent's violative acts breaching his duties to his client set forth in Count I were negligently committed, rather than intentionally or knowingly, in that the weight of the evidence suggests that Respondent did not intend to breach his duties to his client nor did he act knowingly. Negligence is the failure to take reasonable care. *See Liberty Mut. Fire Ins. Co. v. JM Smith Corp.*, 602 Fed. Appx. 115, *120 (4th Cir. 2015) (a failure to take reasonable care is the hallmark of a negligence claim). In regard to his dealings with Mr. Capeder, the record shows that Respondent had a long-standing, positive, personal and professional relationship with Mr. Capeder at the time he agreed to assist him with

⁴⁸ This Tribunal has already expressed its view that it does not believe the decision in *Alice* excuses Respondent's delayed actions. *See supra* note 35 and accompanying text.

the patent applications. Respondent viewed Mr. Capeder as a “close friend.” Tr. 91-92. *See also*, Tr. 119-20 (Respondent attended a “friends and family investigation” for Mr. Capeder when he was first exploring his patent idea); DX 6 at 115-16 (Respondent applied a “family and friends” discount to Mr. Capeder’s account for billing purposes). As such, he was cognizant of both Mr. Capeder’s great desire to obtain the patents and concomitant minimal financial resources. Attempting to help his friend while not unduly burdening himself, Respondent offered to do the patent work at a discount if Mr. Capeder would do the “legwork” and get Respondent everything he needed to file the applications. DX 35 at 30-31, 219, 226-27; DX 6 at 109 (Respondent did the work for a “steeply discounted rate.”).

Unfortunately, it appears that Respondent failed to adequately grasp the substantial effort the patent work would involve on his part and his own significant limitations in terms of time and capability, and thus, bit off more than he could chew. *See e.g.*, DX 35 at 140; DX 6 at 99 (Respondent emailed Mr. Capeder at 3:00 a.m. informing him that he was unable to send his files because he was still at his AEON office); Depo. Ex. 9 (Respondent indicating he did not send Mr. Capeder’s drafts because he had been at work at AEON all night). Further it appears that his job at AEON imposed pressure on him to perform or be fired. DX 35 at 163, 179-82, 252-57; Depo. Exs. 27, 28. As a result, he was unable to complete Mr. Capeder’s applications in a timely manner and to honestly and adequately assess and communicate the status of the applications to his client. These failings arose from a good intent badly executed, rather than any intentional or knowing effort to not complete the work or to mislead.

Similarly, I find Respondent’s violations of the Rule provision alleged in Count III to be negligent. The record shows that as of the time the violations occurred, Respondent had essentially closed his private practice, with the work he took on for his friend Mr. Capeder thereafter being the only work he was providing under such auspices. Tr. 29 (Respondent started working for AEON before taking on this patent work and Mr. Capeder was Flindt Law’s only client). Respondent honestly and properly documented, via receipts and bank statements, all the sums he received from his client and deposited into his IOLTA account. Tr. 29, 73-75, 76, 77, 79-80; DX 29-31. However, the record evidences that Respondent failed to fully grasp the full extent of his record-keeping requirements under the Rules, even in the circumstances where one has but a single client. Tr. 79-81. There is no evidence that such failures to abide by the Rule’s record-keeping requirements were intentional or knowing, rather than negligent.

On the other hand, I find Respondent’s violations of the Rule provisions alleged in Count II to be intentional. As indicated in the Order on Summary Judgment, although given multiple opportunities, extensions of time, and warnings of the potential consequences by the OED, Respondent did not make a good faith effort to timely, fully and directly respond to the OED’s RFIs and LOC, and thus did not fully “cooperate” in the PTO’s disciplinary investigation of this matter as required. *See* Order on Summary Judgment at 8. In so egregiously and persistently failing his duty to cooperate, he is found to have also intentionally engaged in conduct that is prejudicial to the administration of justice. *Id.*

3. Causing actual or potential injury

Respondent's actions violating his duties to his client, resulted in Mr. Capeder incurring actual monetary damages, albeit the extent of such injury was limited and can be rectified by restitution. As a result of their friendship, in 2014 Respondent agreed to help Mr. Capeder complete and file applications for both a design and utility patent for a combined total fee for services of \$3,000. Tr. 71, 132 (Respondent agrees to work on the patents for a flat fee of \$2,000); 70, 136-37 (the flat fee of \$2,000 became \$3,000). This sum was significantly reduced even from Respondent's discounted charges for similar work granted friends and family as of 2010. DX 6 at 110 (design application \$2,000; provisional application \$3,000). *See also* DX 35 at 34 (the original agreement was that both patents would be completed for \$2,000 with the understanding that the price could go up as needed), 37-38 (\$3,000 was the final amount agreed to). According to his invoice, Respondent spent over 35 hours on these matters and completed the design application, but not the utility application. As a result, to complete and file the provisional utility application, Mr. Capeder was obliged to pay another attorney an additional \$2,000. DX 35 at 175, 177; DX 24 at 33-34; DX 25. Therefore, restitution in the sum of \$2,000 makes Mr. Capeder whole in regard to his actual out of pocket monetary losses resulting from the violations relating to him.⁴⁹

In addition to the foregoing, the Director asserts in his Post-Hearing Brief that as a result of Respondent's actions, Mr. Capeder has potentially lost valuable intellectual property rights due to the AIA provision granting patent rights to the "first-inventor-to-file." DB at 39-40. *See also* 35 U.S.C. § 102. However, there is no evidence in the record of any patent application being filed in the several-months period of delay in completing the applications, which in any way impact Mr. Capeder's patents,⁵⁰ and given the relatively short period of time involved, a delay of only a few months, the potential loss seems likely to be non-existent. 35 U.S.C. § 102. Moreover, I give no credence to Mr. Capeder's attribution of some nefarious motive on Respondent's part to give the benefit of his invention to another client. DX 6 at 14-15. As Respondent made clear at the hearing, the provisional international utility was filed before Respondent started on Mr. Capeder's patents and was merely turned into a non-provisional application in April of 2014, as was Mr. Capeder's application at some point. Tr. 96-97 (Respondent's work on the linkable emoji application was completed before Respondent met with Mr. Capeder regarding his patents), 144 (the patent description cannot be extended past the provisional application).

⁴⁹ I do not see the fee of \$100 for changing counsel on the design application as damages in this case as that was done by the choice of Mr. Capeder after the application was filed.

⁵⁰ This Tribunal realizes that evidence of the impact of other patent applications filed in the relevant period may not yet be publicly available even though Mr. Capeder has already filed his application for a non-provisional application. Tr. 33 (a non-publication requested application may take years to be published). *See* [REDACTED]

(the provisional application has expired); USPTO, *Patent Application Information Retrieval*: [REDACTED] available at: <https://portal.uspto.gov/pair/PublicPair> (the Design Patent Application is not yet publically available).

4. Aggravating and Mitigating Factors

As indicated above, the ABA standards list numerous factors which may be considered aggravating in cases involving lawyer misconduct. ABA Standards, Rules 9.22, 9.32. After consideration of the facts in the record, I find that several aggravating factors are present.

First, Respondent has substantial experience in the practice of law. *See* ABA Standards, Rule 9.22(i). Respondent graduated from law school in 1999, passed the Bar in both Utah and Washington, and has held a series of jobs in Utah, Oregon, Florida and Washington, primarily focusing on intellectual property work. Tr. 16-22; DXs 2, 3, 4. In addition, there is evidence that prior to and/or during the time Respondent was working on Mr. Capeder's applications, he was also filing a very complex application for another client through AEON. *See* DX 35 at 179-82; Depo. Exs. 27, 28. One can only consider an attorney who had has practiced law full-time for nearly 20 consecutive years, "experienced."

Second, there is evidence in the record to establish some nominal "pattern of misconduct." *See* ABA Standards, Rule 9.22(i). On June 10, 2015, the OED issued to Respondent a "warning" arising out of certain actions Respondent took in 2009 and 2010. DX 5. Such warning included a reference to Respondent's obligation to act with reasonable diligence in representing a client under 37 C.F.R. §11.103 and to keep his client reasonably informed under 37 C.F.R. §11.104, both sections he is found herein to have violated. While such warning letter was issued after Respondent completed his provision of services to Mr. Capeder, it does indicate an inclination, if not a lengthy pattern, of Respondent being insufficiently sensitive to his obligations under those rule provisions.

Third, there is Respondent's refusal to acknowledge the wrongful nature of his conduct, particularly in regard to his interactions with regard to his client. *See* ABA Standards, Rule 9.22(i). At the end of their relationship, Mr. Capeder sent respondent a number of lengthy emails expressing his feelings of aggravation as a result of the Respondent's delay in completing the provisional application and misleading representations to him in regard thereto. DX 35 at 95; DX 6 at 55 (email from Oct. 3, 2014, expressing Mr. Capeder's frustrations with Respondent's constant delays in finishing and filing the applications), 92-93 (emails from November 1 to Respondent asking for drafts, and explaining Mr. Capeder's concerns and frustrations), 94-96 (a three-page email from November 2 demanding his applications, expressing frustration, and highlighting a list of false assurances from Respondent), 102 (email from November 7 expressing frustration, and hope that the patent will be filed on "Monday or Tuesday"), 103 (email from November 8, indicating Mr. Capeder intends to file a Bar complaint against Respondent), 106-07 (a two-page email from November 13, inquiring as to Respondent's intentions); Depo. Ex. 12 (email from October 29 asking why the work has not been finished yet). If not at the time he received that correspondence, certainly by the time of the hearing and having had the benefit of years of hindsight, Respondent should have been able to step back and acknowledge the delay and his erroneous representations, and express regret therefor, both to his client and this Tribunal. Unfortunately, he never has. Had Respondent sincerely expressed to Mr. Capeder his limitations and/or regret, based on the parties' lengthy prior relationship and Mr. Capeder's general nature, this Tribunal believes it is very likely he would not have found himself in the position he is in now.

Fourth, this case involves the multiple offenses committed. This Tribunal finds Respondent guilty of violating 37 C.F.R. §§ 11.103 (failing to act with reasonable diligence and promptness), 11.104(a)(3) (failing to keep the client reasonably informed), 11.801(b) (failing to cooperate with the OED or knowingly failing to respond to lawful demands for information), 11.804(d) (engaging in conduct prejudicial to the administration of justice), 11.115(a) (failing to keep records of separate client account funds for five years after termination of representation), and 11.115(f)(1) (failing to keep complete financial records).

I do not, however, find evidence of a prior disciplinary offenses, dishonest or selfish motive, a bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency, submission of false evidence, false statements, or other deceptive practices during the disciplinary process, vulnerability of victim, indifference to making restitution, or illegal conduct. In particular, as to a bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency, which OED considers an aggravating factor, while Respondent is found to have intentionally failed to respond to OED RFIs, this Tribunal does not find that he acted in “bad faith” and with an intent to “obstruct” the investigation.

Additionally, I find the following mitigating factors present:

First, to his credit, there is no evidence of a prior disciplinary record for the Respondent, despite his almost twenty years of practicing law.

Second, all of Respondent’s violative actions stem from an initial commitment made in a good faith effort to help a friend in need, and not out of a dishonest or selfish motive. *See* Tr. 91-92 (Respondent calls Mr. Capeder a “close friend,”); DX 35 at 30-31, 219, 226-27; DX 6 at 109 (knowing Mr. Capeder’s financial situation, Respondent did the work for a “steeply discounted rate”); DX 35 at 15, 31, 219-20, 282 (Mr. Capeder was not a lawyer nor a “computer guy”); Tr. 145-46 (Respondent expected to have to teach Mr. Capeder what he would need to do at each stage). Moreover, a fair reading of the record suggests that Mr. Capeder was a challenging client. By his own admission, for some year and a half, eschewing all remunerative work, Mr. Capeder fervently focused solely on developing his patent idea, despite his meager financial circumstances. DX 35 at 27-30. He frequently communicated with Respondent regarding the patent idea via email and phone, often sending multiple unsolicited messages in a single day. *See e.g.*, DX 6 at 37-41, 45-46, 61-63, 87-88, 91-93, 101-02. Mr. Capeder made numerous changes to his invention during the patent application process. Tr. 101, 104 (Mr. Capeder was constantly making changes to work already done); DX 6 at 31-32, 42, 43 (emailing Respondent with some minor changes); Depo. Exs. 1, 2, 5, 8, 23, 24, 26, 27, 29, 30. Moreover, he ignored much of the seemingly reasonable advice and guidance given by Respondent, his friend and legal counselor, as to the type of patent which would be of value, the need for remunerated employment, and the realistic possibility of bringing his invention to fruition. Tr. 94 -95 (Mr. Capeder didn’t understand the value of the Design Patent), 135 (Respondent encouraged Mr. Capeder not to spend all his time on the applications, and to look for a job).

Third, the record as a whole evidence to this Tribunal the existence of certain significant personal problems on the part of Respondent. ABA Standards, Rule 9.32 (c). The chronology of events and documents of record, suggest Respondent has difficulty with his ability to efficiently and effectively plan, organize, prioritize, and complete tasks. He failed to efficiently forward emails from his client onto the draftsman, and from the draftsman onto his client. DX 35 at 54; DX 6 at 20, 22; Depo. Exs. 4, 5. He often worked late to the early hours of the morning. *See e.g.*, DX 6 at 108-09 (Respondent sent Mr. Capeder an email at 1:37 a.m.); Depo. Ex. 9 (Respondent was still at the office at 3:30 a.m.). He lost track of documents on his computer. DX 35 at 81-82. He appeared late and not fully prepared for meetings. DX 35 at 161-63 (Respondent was an hour late to a meeting with his client, and only brings “some pieces” of a patent application which appeared thrown together); DX 6 at 106. He failed to retain adequate records. Tr. 79 (misunderstanding of record keeping requirements), 81-84 (Respondent had patchy Quickbooks records), 153-55 (Respondent didn’t have some bank records because he “switched” from paper to electronic statements with the bank).

These organizational challenges on the part of Respondent likely also were responsible for his negative interactions with the OED, particularly his failure to fully and timely respond appropriately to the RFIs. The issues also seemed to have clearly expressed themselves, to Respondent’s detriment, during this disciplinary litigation, as Respondent initially filed only a partial answer to the Complaint, filed his amended answer untimely, failed to file any prehearing statement, did not respond to the Director’s Motion for Summary Judgment on Counts II and III, appeared late to hearing, and failed to cite to any mitigating factors or defenses in his Post-Hearing Brief. Tr. 12; *Supra* Part I; DX 5.⁵¹

Further, this Tribunal finds it appropriate to consider the effects that the proposed penalties may have on Respondent. While the Rules of Professional Conduct are important and must be upheld, the penalty assessed should be proportionate to the violation committed. *Ruffenach*, 486 N.W.2d 387, 391 (Minn. 1992); *In Re Disciplinary Proceedings Against Kuvara*, 149 Wn.2d 237, 256 (Wash. 2003) (proportionality of a penalty to the violation of ethical rules is a factor to be considered in assessing the penalty). In this case, Respondent has been an attorney since 1999. Tr. 19; DX 2. Despite a fairly long legal career, Respondent has not, until recently, maintained a steady job. Tr. 16-22; DX 4. The record indicates that Respondent is still employed by AEON, however, he credibly testified that should he be suspended, he would likely lose that job. Tr. 156-57. This is particularly significant because Respondent is the primary wage earner for his family, and that his wife suffers from illness. *Id.* While this Tribunal certainly does not take lightly violations of the rules governing professional conduct, it also does not seek to ruin the lives of those who come before it and the families who depend upon them.

While the Director recommended a two-year suspension, along with a two-year probationary period and the requirement that Respondent pass the MPRE, this Tribunal has broad authority to impose the sanction it deems most appropriate, and is satisfied that the penalty imposed herein is more appropriate than that recommended by the Director. *See* DB at 36 (describing the Director’s penalty proposal). Particularly, in consideration of the ABA Standards,

⁵¹ In raising these observations regarding Respondent, this Tribunal intends in no way to impugn Respondent’s knowledge, expertise and reputation as a patent law practitioner or to professionally diagnose Respondent with any mental health condition.

and the aggravating and mitigating factors, this Tribunal finds that the penalty assessed will adequately punish Respondent, while also protecting the public and the profession, and deterring future violations. *See Hill*, PTO Proceeding No. 2001-06, slip op. at 12 (July 26, 2004) (Final Decision) (an important aspect of penalties is deterrence); *Burmeister*, PTO Proceeding No. D1999-10, slip op. at 11 (Mar. 16, 2004) (Initial Decision) (it is important when considering penalties to start with the idea that the ethical guidelines are in place to protect the public and the Bar). Should Respondent not fully comply with the conditions imposed during the probationary period, the one-year suspension will take effect from that point.

ORDER

After careful and deliberate consideration of the above facts and conclusions as well as the factors identified in 37 C.F.R. § 11.54(b):

IT IS HEREBY ORDERED that Respondent Kyle H. Flindt, PTO Registration No. 42539, is suspended for a period of one (1) year from practice before the Patent and Trademark Office, with such suspension STAYED, and probation for a two-year period imposed in lieu thereof, conditioned on compliance with all of the following conditions:

- A. Within 90 days of the issuance of this Decision, Respondent shall make restitution in the amount of two thousand dollars (\$2,000.00) to Steven Capeder;
- B. Within 90 days of the issuance of this Decision, Respondent shall undergo, at his own expense, a full professional neuropsychological assessment covering executive functioning skills. Within 30 days of receiving the results of such assessment, Respondent shall promptly initiate a course of treatment or remediation for any significant dysfunctions identified in the assessment, with a goal of fully completing such treatment prior to the end of the probationary period;
- C. Respondent shall not be found to have engaged in any other violations of the USPTO disciplinary rules during the probationary period; and
- D. Respondent shall contemporaneously provide the OED with evidence of his compliance with the conditions imposed.

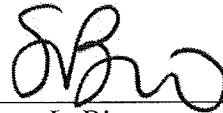
If Respondent fails to satisfactorily comply with *any* of the conditions imposed herein during the probationary period, the stay on the one-year period of suspension shall be automatically lifted and the one-year suspension period shall immediately go into effect, beginning to run from the date Respondent is found by the OED Director to have not complied with the conditions imposed.

Respondent's attention is directed to 37 C.F.R. § 11.58 regarding the duties of suspended practitioners, and 37 C.F.R. § 11.60 concerning petition for reinstatement.

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

Under 37 C.F.R. § 11.55, any appeal by Respondent from this Initial Decision, issued pursuant to 35 U.S.C. § 32 and 37 C.F.R. § 11.54, must be filed with the U.S. Patent and Trademark Office at the address provided in 37 C.F.R. § 1.1(a)(3)(ii) within 30 days after the date of this Initial Decision. Such appeal must include exceptions to the Administrative Law Judge's Decision and supporting reasons therefor. Failure to file such an appeal in accordance with 37 C.F.R. § 11.55 will be deemed both an acceptance by Respondent of the Initial Decision and that party's waiver of rights to further administrative and judicial review.

SO ORDERED.



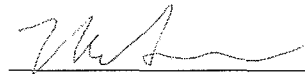
Susan L. Biro
Chief Administrative Law Judge
Environmental Protection Agency

Dated: August 4, 2017
Washington, D.C.

In the PTO Matter of Kyle H Flindt, Respondent.
Proceeding No. D2016-04

Certificate of Service

I hereby certify that copies of the foregoing **Initial Decision**, dated August 4, 2017, were sent to the following in the manner indicated.



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Paralegal Specialist

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Dated: August 4, 2017
Washington, D.C.