UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE ADMINISTRATIVE LAW JUDGE

In the Matter of: THOMAS J. WHITNEY, Respondent.	Proceeding No. D2018-48 March 14, 2019

INITIAL DECISION ON DEFAULT JUDGMENT

This matter arises from a disciplinary complaint filed by the Director for the Office of Enrollment and Discipline ("OED Director") for the United States Patent and Trademark Office ("USPTO" or "the Office") against Thomas J. Whitney ("Respondent") pursuant to 35 U.S.C. § 32 as implemented by 37 C.F.R. Part 11.[1] The OED Director has filed a *Motion for Entry of Default Judgment and Imposition of Disciplinary Sanction* ("Default Motion") seeking a default judgment and an order excluding Respondent from practice before the Office.

PROCEDURAL HISTORY

On September 26, 2018, the OED Director filed a *Complaint and Notice of Proceedings Under 35 U.S.C. § 32* ("Complaint") against Respondent pursuant to 37 C.F.R. §§ 11.32 and 11.34 alleging violations of the USPTO Rules of Professional Conduct (37 C.F.R. §§ 11.101 *et seq.*). The same day the *Complaint* was filed, the OED Director attempted to serve it upon Respondent pursuant to 37 C.F.R. § 11.35(a)(2)(i) by sending him three copies of the *Complaint* via U.S. certified mail, with return receipt requested, as detailed below.

The first copy was mailed to Respondent's official address of record with the OED Director,[2] namely: Whitney Legal Group LLC, 300 South Wolcott Street, Suite 315, Casper, Wyoming 82601. The U.S. Postal Service returned this copy to USPTO in October 2018 with the notation "moved left no address." The second copy was mailed to an address at which the OED Director reasonably believed Respondent received mail, namely: Thomas J. Whitney, 4009 Medicine Man Trail, Cheyenne, Wyoming 82001. This copy was also returned to USPTO in November 2018 with the notation "unclaimed being returned to sender." The third copy was mailed to another address where the OED Director reasonably believed Respondent received mail, that of Respondent's current employer, namely: BSC Striping and Sweeping, 4614 Thomas Road, Cheyenne, Wyoming 82009. The U.S. Postal Service tracking history reflects that this

[1] Pursuant to an Interagency Agreement in effect beginning March 27, 2013, Administrative Law Judges of the U.S. Department of Housing and Urban Development are authorized to hear cases brought by USPTO.

[2] 37 C.F.R. § 11.11(a) requires a registered practitioner such as Respondent to notify the OED Director of the postal address for the practitioner's office and to provide written notice of any address change within 30 days of the change.

copy has been "in transit" since October 4, 2018. USPTO sent an additional copy to this address via regular mail on October 29, 2018. Although no response was received, the Court draws the permissible inference that this additional copy was received by Respondent.

Unable to affirmatively verify service by mail, the OED Director served Respondent with notice of the *Complaint* by publication pursuant to 37 C.F.R. § 11.35(b), which requires publication in USPTO's Official Gazette for two consecutive weeks. A notice was published in the Official Gazette on November 27, 2018 and December 4, 2018. However, Respondent failed to file an answer within the time allotted under 37 C.F.R. § 11.35(b).[3]

On January 3, 2019, counsel for the OED Director sent a letter to Respondent's three known addresses notifying Respondent that the OED Director intended to file a motion for default judgment and for imposition of sanctions. The letter invited Respondent to contact counsel on or before January 10, 2019, to discuss resolving the default motion voluntarily pursuant to 37 C.F.R. § 11.43. Respondent did not respond to this letter.

On February 13, 2019, the OED Director filed the *Default Motion*. Pursuant to the *Notice of Hearing and Order* issued by this Court on September 27, 2018, any party opposing a motion before this Court must file his opposition within ten days after the motion is docketed, meaning that a response to the *Default Motion* was due on February 23, 2019. However, Respondent did not respond to the *Default Motion* by that date.

As of the date of this decision, Respondent has not answered the *Complaint* nor the *Default Motion*, nor sought an extension of time to do so, nor otherwise appeared in this matter. In short, the Court has received no communication from or on behalf of Respondent.

APPLICABLE LAW

USPTO Disciplinary Proceedings. USPTO 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). This authority flows from 35 U.S.C. § 2(b)(2)(D), which empowers USPTO to establish regulations governing patent practitioners' conduct before the Office, and 35 U.S.C. § 32, which empowers USPTO to discipline a practitioner who is "shown to be incompetent or disreputable, or guilty of gross misconduct," or who violates USPTO's regulations. The practitioner must receive notice and opportunity for a hearing before such disciplinary action is taken. 35 U.S.C. § 32. Disciplinary hearings are conducted in accordance with USPTO's procedural rules at 37 C.F.R. part 11, subpart C, and with section 7 of the Administrative Procedure Act, 5 U.S.C. § 556, by a hearing officer appointed by USPTO. See 37 C.F.R. §§ 11.39(a), 11.44. The OED Director has the burden of proving any alleged violations by clear and convincing evidence. 37 C.F.R. § 11.49.

[3] 37 C.F.R. § 11.35(b) provides that an answer is due within thirty days after the second publication of the notice, meaning that in this case, the answer was due on January 3, 2019. However, on December 22, 2018, a lapse in appropriations occurred that caused a partial federal government shutdown, resulting in the closure of this Court until January 28, 2019 due to lack of funds. In a February 4, 2019 status report, the OED Director indicated that he considered the shutdown to have extended Respondent's deadline to file an answer to February 6, 2019. Regardless, by any measure, Respondent has not timely filed an answer, as he has yet to respond to the *Complaint*

Consequences for Failure to Answer Complaint. USPTO's procedural rules set forth the requirement for answering the *Complaint* and the consequences for failing to do so: "Failure to timely file an answer will constitute an admission of the allegations in the complaint and may result in entry of default judgment." 37 C.F.R. § 11.36(e).

FINDINGS OF FACT

As a result of Respondent's failure to answer the *Complaint*, Respondent is deemed to have admitted the allegations in the *Complaint*, which are set forth as follows as the Court's findings of fact.

At all times relevant to the *Complaint*, Respondent has been registered to practice before USPTO as an attorney (Registration No. 56,470). Respondent was conditionally admitted to the Wyoming State Bar on February 12, 2016.[4] He established a law office in Casper, Wyoming and signed up for the Wyoming State Bar's Modest Means Program ("Wyoming MMP"). On July 12, 2017, his Wyoming bar membership was suspended on an interim basis pending final resolution of formal ethics charges that had been lodged against him. On October 10, 2017, his conditional membership was terminated for failure to comply with certain administrative requirements, and the Wyoming State Bar did not pursue the ethics charges.

I. Respondent's Representation of Heidi Roylance

On December 2, 2016, Respondent executed an engagement agreement to represent Heidi Roylance, who had been referred to him through the Wyoming MMP, in a bankruptcy matter. Ms. Roylance paid Respondent advances of $500 for legal services and $340 to cover the filing fee for a bankruptcy petition. Between December 2016 and May 2017, Ms. Roylance was served with collection papers and with notice that her wages would be garnished. She contacted Respondent multiple times during this period to notify him of these developments, provide him with relevant documents, and seek guidance. Respondent led Ms. Roylance to believe he was going to file a bankruptcy petition on April 10, 2017. He advised her to ignore the collection papers and told her that collection efforts would be stayed by the bankruptcy filing. However, he never filed a bankruptcy petition for Ms. Roylance and ceased communicating with her entirely on or about May 9, 2017.

After visiting the bankruptcy court and learning that Respondent had not filed anything on her behalf, Ms. Roylance emailed him on May 23, 2017 in inquiring about her case and wrote him on May 24, 2017 terminating him as her attorney. When she tried to hand-deliver the termination letter to Respondent, she found that his office was closed and locked, and the U.S. postal service later returned a copy of the letter that she attempted to send via certified mail. She recovered $500 from Respondent's malpractice insurance. However, she did not recover the $340 bankruptcy court filing fee she had paid. In addition, her wages were garnished until she was able to hire another attorney, and she was not able to recover the garnished amounts. Further, Respondent never returned Ms. Roylance's file.

[4] Respondent was previously admitted to practice law in the state of New York in 2005, but his New York license is currently described as "Due to reregister within 30 days of his birthday" with the next registration date of "Dec. 2017." In addition, Respondent was admitted to practice law in New Jersey in 2004, but has been administratively ineligible to practice law in that state since June 4, 2018.

II. Respondent's Representation of Olutola Akiode and Sina Adeniji

On April 14, 2017, Dr. Olutola Akiode and her husband Sina Adeniji retained Respondent and paid him a $2,000 advance to represent them as defendants in a civil lawsuit in Wyoming state court. Wyoming's rules of civil procedure obligated Dr. Akiode and Mr. Adeniji to file an answer in the lawsuit by April 25, 2017. On April 26, 2017, a default was entered against Dr. Akiode and Mr. Adeniji because Respondent had not timely filed an answer. That same day, Dr. Akiode asked Respondent about the filing deadline. He told her the deadline was not that day, leaving her with the impression that there was still time to file. The following day, April 27, 2017, Respondent untimely filed an answer.

Because the answer was untimely filed and a default had been entered, the court scheduled a June 6, 2017 hearing on a motion for default judgment. Further, a lien was placed on Dr. Akiode and Mr. Adeniji's house. When they informed Respondent of these developments and sought guidance, he told them that the default was a clerical error and that he would fix it with the court. However, on or about May 18, 2017, he stopped communicating with them.

Approximately two days before the June 6, 2017 hearing, Dr. Akiode and Mr. Adeniji retained a new attorney. Respondent did not return their file or provide it to the new attorney. However, he later returned the $2,000 they had paid him after the Wyoming State Bar opened an investigation into his conduct.

III. Respondent's Representation of Deborah Purdy

On March 25, 2017, Respondent executed an engagement agreement to represent Deborah Purdy, who had been referred through the Wyoming MMP, in matters involving her ex-husband's bankruptcy proceeding in New Jersey. These matters included filing a claim as a creditor in the bankruptcy proceeding, defending against a motion to dismiss a judgment involving amounts her ex-husband owed her, ensuring that money in her children's college funds was not lost or dispersed during the bankruptcy, securing payment for medical insurance for one of the children, and collecting on prior judgments against the ex-husband. Ms. Purdy paid Respondent $500 in advance to represent her.

The confirmation hearing for Ms. Purdy's ex-husband's bankruptcy plan was scheduled for May 17, 2017, with prehearing filings due May 11, 2017. Before the hearing date, Ms. Purdy provided Respondent with numerous documents related to her case and contacted him on multiple occasions requesting updates, noting concerns about deadlines, and requesting to receive drafts of documents he planned to file in the proceeding. On May 9, 2017, Respondent emailed Ms. Purdy that he was "finalizing the form of the objection to the plan that we will be filing" and would email it later that day. Ms. Purdy emailed him on May 10 and 11, 2017, to inform him that she had not received a copy of the filing and did not see it on PACER. Respondent replied that he had experienced "tech difficulties" but was clearing them up. He also emailed her an objection he claimed to have served on her ex-husband's attorney. The following day, May 12, 2017, Ms. Purdy emailed Respondent informing him that her ex-husband owed not just hundreds or thousands, but tens of thousands, including a $189 weekly obligation and

"probably more than $20,000 total between all the separate judgments still remaining and owed." She also asked how they would be videoconferencing into the bankruptcy hearing. Respondent replied that he would work out the logistics and let her know.

On May 17, 2017, the morning of the hearing, Ms. Purdy emailed her ex-husband's attorney the objection Respondent had sent her, stating that she wanted to be sure he saw it because it was not on PACER yet. The attorney informed her that, to his knowledge, no objection or proof of claim had been filed; that no documentation was attached to the objection to support the argument made; and that he would not be appearing at the hearing because he had already been advised the trustee would recommend confirmation of the bankruptcy plan. As it turned out, Respondent had not served the objection on the ex-husband's attorney or filed it with the bankruptcy court. In fact, he had never even entered an appearance in the proceeding.

After hearing from her ex-husband's attorney, Ms. Purdy immediately emailed Respondent to express her concern, remind him of the amounts she stood to lose, and seek guidance. Respondent did not reply. Respondent's paralegal, Janet Brooks, told the OED Director that Ms. Purdy called Respondent's office seven times on the day of the hearing, but Respondent was not in the office and did not return her calls. "We don't need difficult clients like her anyway. Just ignore her," he told Ms. Brooks.

Respondent never returned Ms. Purdy's file, the binder of personal information she had provided him, nor the $500 she had paid. Ms. Purdy remains unrepresented because she cannot afford an attorney on her own and the Wyoming MMP cannot find another attorney qualified to represent her in bankruptcy matters in New Jersey.

IV. Respondent's Abandonment of his Law Practice in Casper, Wyoming

Respondent stopped communicating with his clients as early as May 17, 2017, and no later than Memorial Day weekend, May 26-29, 2017, at which time he closed his office in Casper and ceased practicing law without advance notice to his clients. He terminated his paralegal on May 25, 2017, but she continued to receive phone calls from his clients because his telephone system linked to her personal phone. She recommended that the abandoned clients contact the Wyoming State Bar. Respondent's clients complained to counsel for the Wyoming State Bar that they had paid attorney fees but received no services and that Respondent had closed his practice and ceased communication. Respondent did not respond to the Bar counsel's attempts to contact him.

V. OED Director's Investigation

In October 2017, the OED Director learned of Respondent's Wyoming State Bar suspension and began an investigation of his conduct. On March 15, 2018, the OED Director mailed a Request for Information and Evidence under 37 C.F.R. § 11.33(f) ("RFI") by certified mail to Respondent's office address in Casper and to his home address in Cheyenne, Wyoming. The U.S. Postal Service returned both copies to USPTO as unclaimed.

On May 17, 2018, the OED Director sent a Lack of Response Notice to Respondent's office and home addresses. The Notice informed Respondent of his obligation to cooperate with the OED investigation and that failure to respond to a request from OED would violate USPTO's Rules of Professional Conduct. The copy of the Notice that was sent to Respondent's home address was delivered on May 21, 2018 by United Postal Service ("UPS"), although UPS did not require a signature. In a June 11, 2018 phone call with OED, Respondent confirmed his home address and stated that this was where he was most likely to receive mail. However, he did not respond to the Notice.

During the June 11 phone call, Respondent had told OED that he could be reached at the address of his employer, BSC Striping and Sweeping ("BSC"). Accordingly, OED told Respondent that it would be sending letters to his addresses, and subsequently sent second and third Lack of Response Notices both to Respondent's home address and to BSC's address via certified mail. Both Notices that were sent to Respondent's home address went unclaimed. BSC's owner received and signed for one of the Notices that was sent to BSC. The owner told OED during a July 20, 2018 phone call that he supposed he had given the Notice to Respondent but did not specifically remember. However, the other Notice that was mailed to Respondent at BSC's address was "refused by the addressee" on July 23, 2018. Respondent never responded to any of the OED Director's correspondence and never provided a reason for failing to do so.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Court concludes that Respondent violated the USPTO Rules of Professional Conduct as alleged, for the following reasons.

Counts I, II, and III (misconduct relating to representation of clients)[5]

a. 37 C.F.R. § 11.103 provides that a practitioner "shall act with reasonable diligence and promptness in representing a client." Respondent violated this provision as charged in Counts I, II, and III when he (1) failed to file a bankruptcy petition for Ms. Roylance or request a hearing to prevent garnishment of her wages; (2) failed to timely file an answer on behalf of Dr. Akiode and Mr. Adeniji; and (3) failed to file documents on Ms. Purdy's behalf in her ex-husband's bankruptcy proceeding to protect her child support payments and other debts her husband owed her.

b. 37 C.F.R. § 11.104(a)(3) provides that a practitioner shall keep the client reasonably informed about the status of the client's matter. Respondent violated this provision as charged in Counts I, II, and III when he (1) failed to keep Ms. Roylance reasonably informed of the actual status of her bankruptcy matter, instead falsely implying that he would file a bankruptcy petition and, later, allowing her to falsely believe that he had done so when he had not; (2) did not inform Dr. Akiode and Mr. Adeniji about the untimely filing of their answer, the entry of default against them, or the default judgment hearing and did not inform them that he could not correct the default because it was due to his untimely filing of the

[5] Count I relates to Respondent's representation of Ms. Roylance. Count II relates to his representation of Dr. Akiode and Mr. Adeniji. Count III relates to his representation of Ms. Purdy. Because Respondent is charged with violating the same Rules of Professional Conduct with respect to each client, the Court will consider the three Counts together.

answer; and (3) did not keep Ms. Purdy reasonably informed about the deadlines for filing objections and claims in her ex-husband's bankruptcy proceeding, or about the status of her written objections and claims; did not inform Ms. Purdy that he had not filed or served the objections in the bankruptcy proceeding; did not keep her informed about appearing remotely at the May 17, 2017 bankruptcy hearing; ceased to respond to her communications on May 17, 2017; and instructed his paralegal to cease communicating with her.

c. 37 C.F.R. § 11.104(a)(4) provides that a practitioner shall "[p]romptly comply with reasonable requests for information from the client." Respondent violated this provision as charged in Counts I, II, and III when he (1) failed to respond to or communicate with Ms. Roylance after May 9, 2017 despite her repeated requests for information, including a May 23, 2017 email in which she asked about the filing of her bankruptcy petition and the garnishment of her wages; (2) ceased to respond to or communicate with Dr. Akiode and Mr. Adeniji after May 18, 2017, specifically by not responding to emails from Dr. Akiode dated May 26 and May 30, 2017; and (3) failed to promptly respond to Ms. Purdy's requests to receive drafts of any objections he planned to file in her ex-husband's bankruptcy case; failed to timely respond to her requests for updates on the status of any objections and claims in the bankruptcy case; told her that he had served the objections on her ex-husband's attorney when he had not done so; and ceased to communicate with her after May 17, 2017.

d. 37 C.F.R. § 11.115(d) provides that a practitioner shall promptly deliver to the client any funds or other property that the client is entitled to receive. Respondent violated this provision as charged in Counts I, II, and III by (1) failing to return Ms. Roylance's $500 advance for legal fees or the $340 she gave him to cover the bankruptcy court filing fee; (2) failing to return Dr. Akiode's and Mr. Adeniji's file; and (3) failing to return Ms. Purdy's file and binder of personal information.

e. 37 C.F.R. § 11.116(d) provides that upon termination of a representation, a practitioner "shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." Respondent violated this provision as charged in Counts I, II, and III when he (1) failed to give Ms. Roylance reasonable notice that he was closing his law practice or allow her reasonable time to hire new counsel, and did not promptly return her $500 advance for legal fees or her $340 bankruptcy court filing fee; (2) did not inform Dr. Akiode and Mr. Adeniji that he was closing his law practice, left them with only a few days to find new counsel to represent them at their June 6, 2017 hearing, and did not return the file for their legal matter; and (3) did not inform or give reasonable notice to Ms. Purdy that he was closing his law practice; did not allow her an appropriate or reasonable amount of time to hire new counsel; ceased to represent her by not filing objections or claims in her ex-husband's bankruptcy proceeding; failed to serve objections on her ex-husband's attorney; failed to appear at the May 17, 2017 bankruptcy hearing; and did not return her file and binder of personal information.

f. 37 C.F.R. § 11.804(c) provides that it is professional misconduct for a practitioner to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Respondent violated

this provision as charged in Counts I, II, and III by (1) failing to file Ms. Roylance's bankruptcy petition despite executing a retainer agreement and receiving $500 in advance to do so; leading her to believe that he would file the bankruptcy petition on or about April 10, 2017, but not doing so; telling her to ignore the collection papers she had received and that the bankruptcy petition would stay collection efforts, even though he knew he had not actually filed the bankruptcy petition; and accepting and failing to return the $340 that Ms. Roylance paid to cover a bankruptcy court filing fee that Respondent never actually incurred; (2) not informing Dr. Akiode and Mr. Adeniji that he had missed the due date to file the answer in their legal matter; leading Dr. Akiode to believe that they had more time to file the answer; not informing Dr. Akiode and Mr. Adeniji that he had filed the answer late; and falsely stating that the default was a clerical error by the court that he would fix; and (3) signing an engagement agreement and accepting a $500 advance fee from Ms. Purdy but not performing the services he was hired to do; telling Ms. Purdy that he had served objections on her ex-husband's attorney when he had not done so; telling her that he was working out technical difficulties in filing her objections with the bankruptcy court when he did not actually file the objections; telling her that he would attend the bankruptcy hearing remotely, but failing to attend the hearing; and telling his paralegal to ignore Ms. Purdy's attempts to contact them.

g. 37 C.F.R. § 11.804(i) states that it 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." The OED Director alleges that Respondent violated § 11.804(i) by "engaging in the acts and omissions set forth above that do not violate another provision of the USPTO Rules of Professional Conduct." However, the Court has already found that Respondent's acts and omissions set forth above violated the Rules of Professional Conduct, including § 11.804(c), and the OED Director has not identified any "other conduct" that would separately violate § 11.804(i). The Court therefore has no basis to find a violation of this regulation. See In re Flindt, Proceeding No. D2016-04, slip op. at 39 (USPTO Aug. 4, 2017) (stating that, if the same conduct violates other provisions of § 11.804, it cannot violate § 11.804(i)); In re Campbell, Proceeding No. D2014-11, slip op. at 7-8 (Apr. 29, 2014) (default order) (finding no violation where OED Director failed to allege "other conduct" of the sort envisioned under § 11.804(i)).

Count IV (misconduct relating to abandonment of law practice)

a. As noted above, 37 C.F.R. § 11.104(a)(4) requires a practitioner to promptly comply with clients' reasonable requests for information. Respondent violated this provision as charged in Count IV by abruptly closing his law practice without informing his clients on or about May 26-29, 2017, and thereafter failing to communicate with his clients or provide them with the status of their case matters.

b. As noted above, 37 C.F.R. § 11.115(d) requires a practitioner to promptly deliver to the client any funds or other property that the client is entitled to receive. Respondent violated this provision as charged in Count IV by failing to return files and unearned fees to clients upon the closure of his practice.

c. As noted above, 37 C.F.R. § 11.116(d) requires a practitioner to take reasonable steps to protect a client's interests upon termination of the representation. Respondent violated this provision as charged in Count IV by abruptly closing his law practice without informing his clients, thereby failing to allow his clients reasonable time to find other representation, and by not returning his clients' files or unearned fees.

d. As noted above, 37 C.F.R. § 11.804(i) proscribes "other conduct that adversely reflects on the practitioner's fitness to practice before the Office." When Respondent shuttered his law office and abandoned his clients without warning and without formally terminating the attorney-client relationship, he left his phone system linked to his paralegal's personal phone. Respondent's paralegal continued to receive calls from his clients, whom she advised to contact the Wyoming State Bar. By leaving a non-lawyer to field calls from his clients and advise them how to proceed, Respondent engaged in "other conduct that adversely reflects on [his] fitness to practice," in violation of § 11.804(i).

Count V (failure to cooperate in OED investigation)

a. 37 C.F.R. § 11.801(b) proscribes, among other things, failing to cooperate with an OED investigation and knowingly failing to respond to a lawful demand or request for information from an admissions or disciplinary authority. Respondent violated this provision as charged in Count V by failing to respond to OED's March 15, 2018 RFI and multiple Lack of Response Notices despite being provided ample notice, time, and opportunity to do so.

b. 37 C.F.R. § 11.804(d) provides that it is professional misconduct for a practitioner to engage in conduct that is prejudicial to the administration of justice. When a practitioner is the subject of an OED disciplinary investigation, his failure to cooperate in the investigation undermines the integrity of the disciplinary system and weakens public trust in the bar's ability to police itself. For these reasons, Respondent's failure to cooperate with the OED investigation amounted to conduct prejudicial to the administration of justice, in violation of § 11.804(d).

SANCTIONS

The OED Director asks the Court to sanction Respondent by entering an order excluding him from practice before USPTO. In determining an appropriate sanction, USPTO regulations require the Court to consider the following four factors: (1) whether the practitioner has violated a duty owed to a client, the public, the legal system, or the profession; (2) whether the practitioner acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the practitioner's conduct; and (4) the existence of any aggravating or mitigating factors. 37 C.F.R. § 11.54(b).

1. Violation of Duties Owed to Client and Legal Profession

The practitioner-client relationship is a fiduciary relationship in which the practitioner owes the client a duty to represent his or her interests diligently and in good faith. In this case, Respondent breached the fiduciary duty he owed his clients by accepting money for services he

failed to perform, by misleading his clients and failing to keep them informed about the status of the matters he was supposed to be handling on their behalf, and by abruptly closing his practice and abandoning his representations without notice to the clients and without regard for how their cases would be affected. Respondent acted in direct opposition to his clients' interests when he failed to return their money or their files or even to notify them that the attorney-client relationship was ending so that they would have the time and opportunity to seek new representation. Instead, he simply stopped performing his duties as their representative without formally terminating the attorney-client relationship.

Aside from violating his fiduciary duty to his clients, Respondent also violated the specific duties imposed by USPTO's laws and regulations. Each attorney licensed to practice before USPTO must sign an oath or affirmation that he will observe the laws and rules governing USPTO practice. Respondent violated this oath when he failed to adhere to the USPTO Rules of Professional Conduct and failed to cooperate in the disciplinary investigation, thereby violating the duty he owed both to his clients and to the legal profession (specifically, the patent bar) to act in a professional manner in accordance with the patent bar's rules and standards and with the oath he had signed.

2. Whether Respondent Acted Intentionally, Knowingly, or Negligently

Respondent's abandonment of his law practice was knowing and intentional, as evidenced by the fact that he stopped communicating with his clients in or around May 2017, in one case even telling his paralegal to ignore a client's calls and fired his paralegal on May 25, 2017.

Respondent's misconduct with respect to the clients named in the *Complaint* was negligent, knowing, and intentional. His failure to perform the work for which they had hired him was, at best, negligent and knowing. The facts further indicate that he intentionally deceived his clients by making self-serving representations that he must have known to be false or misleading. He led Ms. Roylance to believe that he would file and had filed her bankruptcy petition on a certain date, even though he never actually filed it. He informed Dr. Akiode and Mr. Abeniji the day after their answer was due that the deadline was "not that day," leading them to believe the deadline had not yet passed, then late-filed their answer and falsely told them that the entry of default against them was a clerical error. When the deadline arrived for Respondent to file the objections he had agreed to prepare for Ms. Purdy in her ex-husband's bankruptcy proceeding, he told her he was dealing with "tech issues" with PACER and sent her a document he purported to have served on opposing counsel, when in fact he had not filed, served, or adequately prepared the objections. Then, when Ms. Purdy contacted him in distress on the day of the hearing after learning from opposing counsel that Respondent had done nothing to prepare for the hearing, Respondent instructed his paralegal to ignore Ms. Purdy. All these factors indicate intentional and knowing misconduct.

In addition, Respondent's failure to cooperate in the OED investigation was knowing. During a June 11, 2018 phone call with OED, Respondent confirmed his mailing addresses and learned that OED had sent him an RFI and planned to send additional correspondence. Yet he

still wholly failed to respond to OED's inquiries, and apparently even refused to accept one of the Lack of Response Notices that was mailed to the work address he had provided OED.

3. Injury Caused by Respondent's Conduct

Respondent's actions caused significant injury to his clients. He failed to return $1,340 in unearned fees he had received from Ms. Roylance and Ms. Purdy and failed to return Dr. Akiode and Mr. Abeniji's $2,000 advance until the Wyoming State Bar initiated proceedings against him. He also failed to return any of these clients' files or notify them that he had effectively stopped representing them. His misconduct resulted in Ms. Roylance's wages being garnished, Dr. Akiode and Mr. Abeniji being subjected to default and a lien on their home and finding themselves scrambling to hire a new lawyer two days before their hearing, and Ms. Purdy learning on the day of hearing that Respondent had not filed anything in the proceeding or taken any steps to represent her interests. And although the *Complaint* mentions only these three clients, Respondent's abrupt abandonment of his law practice may have caused similar harm to any other clients he may have been representing at the time.

4. Aggravating and Mitigating Factors

Citing § 9.22 of the American Bar Association's STANDARDS FOR IMPOSING LAWYER SANCTIONS (2005), the OED Director contends that the following aggravating factors warrant a more severe sanction in this case: a dishonest or selfish motive; a pattern of misconduct; multiple violations; bad faith obstruction of the disciplinary proceeding; refusal to acknowledge the wrongful nature of the misconduct; vulnerability of the victim; indifference to making restitution; and substantial experience in the practice of law. The OED Director asserts that, despite Respondent's lack of prior disciplinary infractions, the serious misconduct at issue in this case warrants the sanction of exclusion.

The Court has already found that Respondent displayed dishonest motives with regard to his clients, as he made self-serving statements that intentionally misled them about the status of the work he had been hired to perform. In addition, he could only have had a selfish motive for keeping the unearned fees they had paid him.

The facts show that Respondent engaged in a pattern of misconduct by repeatedly accepting fees for services which he then failed to perform in a timely and competent manner, if at all, before eventually ceasing communication with the client entirely. By engaging in this pattern of behavior, Respondent committed multiple violations of USPTO's Rules of Professional Conduct and harmed multiple clients.

Some of Respondent's clients were particularly vulnerable, as they had been referred to him by the Wyoming MMP, which is intended to help those with modest means. Also, Respondent left all three of the clients named in the *Complaint* in very vulnerable positions, as he affirmatively misled them about the status of their matters and of the time-sensitive work he was supposed to be performing such that they did not discover the harm his misconduct had caused until it was too late to undo many of the problems he had wrought.

The Court finds all of the foregoing to be aggravating factors. These factors, along with the injury Respondent caused to his clients, the knowing and intentional nature of his conduct, and the fact that he violated duties owed to his clients and his profession, warrant the severe sanction of exclusion.

CONCLUSION

Because Respondent has failed to answer the *Complaint* or otherwise appear in this matter, Respondent is found to be in **DEFAULT**. Based on the facts thereby admitted, the Court finds that Respondent has violated the USPTO Rules of Professional Conduct as alleged.

After analyzing the factors enumerated in 37 C.F.R. § 11.54(b), the Court concludes that Respondent's misconduct warrants the sanction of exclusion. Accordingly, Respondent shall be **EXCLUDED** from practice before the U.S. Patent and Trademark Office in patent, trademark, and other non-patent matters.[6]

So **ORDERED**,

J. Jeremiah Mahoney
United States Administrative Law Judge

Notice of Required Actions by Respondent: Respondent is directed to refer to 37 C.F.R. § 11.58 regarding his responsibilities in case of suspension or exclusion.

Notice of Appeal Rights: Within thirty (30) days of this initial decision, either party may file an appeal to the USPTO Director pursuant to 37 C.F.R. § 11.55.

[6] An excluded practitioner is eligible to apply for reinstatement no earlier than five years from the effective date of the exclusion. See 37 C.F.R. § 11.60(b). Eligibility is predicated upon full compliance with 37 C.F.R. § 11.58.