

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

<b>HARRY I. MOATZ,</b>	)	
<b>Director, Office of</b>	)	
<b>Enrollment and Discipline,</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
v.	)	<b>Proceeding No. D02-14</b>
	)	
<b>GEORGE A. BODE,</b>	)	
	)	
<b>Respondent.</b>	)	

**INITIAL DECISION**

**DATE:** AUGUST 21, 2003

**JUDGE:** SUSAN L. BIRO, CHIEF ADMINISTRATIVE LAW JUDGE, EPA<sup>1</sup>

**APPEARANCES:**

For Complainant:	C. Edward Polk, Jr., Esquire Sidney O. Johnson, Jr., Esquire Associate Solicitors U.S. Patent and Trademark Office Office of Enrollment and Discipline P.O. Box 16116 Arlington, VA 22215
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For Respondent:	George A. Bode, Esquire, <i>Pro Se</i> 2314 Broadway New Orleans, Louisiana 70125
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<sup>1</sup> The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the United States Department of Commerce, Patent and Trademark Office, pursuant to an Interagency Agreement effective for a period beginning March 22, 1999.

## I. PROCEDURAL HISTORY

On June 5, 2002, Harry I. Moatz (“Complainant”), Director of the Office of Enrollment and Discipline, United States Patent and Trademark Office, Department of Commerce (“PTO”), issued a Complaint against Respondent George A. Bode (“Respondent” or “Mr. Bode”) pursuant to 37 C.F.R. § 10.134. The Complaint charged Respondent with seven counts of professional misconduct sufficient to warrant suspension or exclusion from practice, by reason of violating the Regulations governing the Representation of Others Before the Patent and Trademark Office, 37 C.F.R. Part 10.<sup>2</sup>

On or about June 21, 2002,<sup>3</sup> Respondent, acting *pro se*, submitted an Answer to the Complaint, denying the violations and requesting a hearing.<sup>4</sup> In accordance with the Order Scheduling Prehearing Procedures and Hearing dated July 29, 2002, Complainant submitted his Prehearing Exchange on August 16, 2002 and Respondent submitted his Prehearing Exchange on or about August 23, 2002.<sup>5</sup>

On August 14, 2002, Complainant submitted a Motion to Amend the Complaint to add eight new factual assertions to support the allegations made against Respondent in Count 3. Noting that no opposition to the Motion had been timely received from Respondent, an Order

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<sup>2</sup> The Complainant also requests that Respondent be required to pay all or a portion of the costs and expenses, not to exceed \$1,500, of the disciplinary proceeding that led to the suspension. *See*, Complaint ¶ 70 and footnote 49, *infra*.

<sup>3</sup> June 21, 2002 is the mailing date reflected on the certificate of service accompanying the Answer. However, neither Complainant nor this Tribunal received the copy of the Answer purportedly mailed on that date. Rather, Complainant received his copy of Respondent’s Answer by facsimile on July 17, 2002, and forwarded a copy of the same to this Tribunal by facsimile the following day. Although the Answer was not filed timely, no steps towards defaulting Respondent were taken.

<sup>4</sup> In his Answer, Respondent also listed certain “Affirmative Defenses.” However, upon review it is clear that those “defenses” are merely further denials of the allegations in the Complaint and not truly affirmative defenses.

<sup>5</sup> August 23, 2002 is the date reflected on the certificate of service accompanying the Respondent’s Prehearing Exchange. However, this Tribunal first received the Respondent’s Prehearing Exchange by facsimile on September 5, 2002, in response to a request made when the copy of the exchange allegedly mailed to it by Respondent on August 23<sup>rd</sup>, was not timely received. A mailed copy of the exchange was received by the undersigned on September 9, 2002.

Granting Leave to File Amended Complaint was issued on September 9, 2002.<sup>6</sup> Respondent submitted an Answer to the First Amended Complaint on or about September 16, 2002.<sup>7</sup>

On September 12, 2002, Complainant submitted a Second Motion to Amend the Complaint and a Motion to Amend the Director's Prehearing Statement. The Second Motion to Amend the Complaint sought to add 13 additional counts to the Complaint based upon newly discovered evidence. Respondent served an opposition to the Second Motion to Amend and an Amended Prehearing Exchange Statement on September 18, 2002.<sup>8</sup> By Order dated October 2, 2002, Complainant's motions to amend the Complaint and prehearing exchange were granted and, in light of the amendments, the hearing date postponed to provide Respondent with an adequate opportunity to respond to the additional allegations of violations. Respondent was ordered to file his Answer to the Second Amended Complaint on or before October 12, 2002, and any amended prehearing exchange statement on or before November 15, 2002.

Upon failing to receive from Respondent his Answer to the Second Amended Complaint by the established deadline of October 12, 2002, on October 21, 2002 an Order to Show Cause was issued to Respondent. A copy of Respondent's Answer was received by mail by the

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<sup>6</sup> In the Order of September 9, 2002 permitting amendment of the Complaint, it was noted that the previously issued Prehearing Order had established a 15 day response time for motions and that a response to the Motion to Amend filed on August 14, 2002 had not been received from Respondent within the designated period. Subsequently, on September 12, 2002, the undersigned received by mail Respondent's Opposition to the Motion to Amend which was allegedly mailed on September 5, 2002. The Opposition offered no excuses for its late filing and proffered no arguments warranting reconsideration of the Order granting leave to amend. Furthermore, because of the delay in receiving filings in a timely manner from Respondent, and the impending hearing date then set of October 8, 2002, included in the Order granting leave to amend was the requirement that all further pleadings filed in this matter be served on the undersigned, simultaneously, by facsimile as well as first class mail.

<sup>7</sup> A copy of the Answer was received by the undersigned from Respondent by facsimile on September 23, 2002. The copy of the Answer sent by mail was received on October 1, 2002. The envelope containing the Answer was metered with a date of September 23, 2002, although the certificate of mailing was dated September 16, 2002.

<sup>8</sup> Despite the prior Order, Respondent did not serve a copy of the Opposition on the undersigned by facsimile. Rather, Complainant forwarded the copy of Respondent's Opposition, which Complainant had received the day before by facsimile, to the undersigned on September 26, 2002. The undersigned also received by mail a copy of Respondent's Amended Prehearing Statement on September 26, 2002.

undersigned the next day, on October 22, 2002.<sup>9</sup> On October 25, 2002, by facsimile, Respondent filed his Answer to the Order to Show Cause. Based upon receipt of these pleadings, on October 29, 2002, the undersigned issued an Order essentially dismissing the Order to Show Cause.<sup>10</sup>

On December 20, 2002, Complainant submitted a second motion to amend his prehearing statement. No response to this Motion was ever received from the Respondent. On January 6, 2003, the Motion was granted.

A hearing was held in this matter before the undersigned on January 14th and 15th, 2003, in Washington, D.C.<sup>11</sup> The Complainant testified at the hearing and also presented the testimony of five additional witnesses: Bradley Hanssen, Halford Harris, Earle Wilson, Lawrence Anderson, and Frank Ippolito. Respondent testified on his own behalf at the hearing. Complainant premarked for identification a volume of exhibits, each page of which was individually numbered as an exhibit from 1-712. Tr. 13-14. In addition, Complainant marked for identification, separately, exhibits numbered 713-723. Complainant's exhibits number 1-723, with the exception of those numbered 394, 413-14, 438, 717-722, were offered and admitted into evidence (hereinafter cited as "C's Ex. \_\_\_"). Respondent marked for identification at the hearing three exhibits, none of which were offered or admitted into evidence.

The transcript of the hearing was received by the undersigned on February 6, 2003. The parties were given the opportunity to file post-hearing briefs. Tr. 8, 675-81. Complainant filed his post-hearing brief on April 1, 2003. Respondent did not file a post-hearing brief by the due date for his brief of May 1, 2003. Thus, record closed with the filing of Complainant's brief on April 1, 2003.

## **II. STANDARDS FOR IMPOSITION OF SANCTIONS**

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<sup>9</sup> The Answer was received by the undersigned in a United States Postal Service "Priority Mail" envelope bearing Respondent's postage meter-mark indicating it was mailed from Lakeland, Florida and was accompanied by a certificate of mailing, both dated October 4, 2002. Testimony of a Postal Service representative at the hearing reflected that priority mail, costing more, is intended to provide faster delivery than regular first class mail and has an intended guaranteed delivery time of 1-3 days depending on delivery location. *See*, Transcript of Hearing held on January 15, 2003, page 558.

<sup>10</sup> In that Order, the undersigned noted the unusual and lengthy delays involved in receiving pleadings mailed by Respondent, using as an example the 18 day delay in receiving the Amended Answer allegedly sent by "Priority Mail," to sustain the requirement, over Respondent's objection thereto, of service by facsimile as well as mail.

<sup>11</sup> Citation to the transcript of the hearing will be in the following form: "Tr."

A. Disciplinary Rules

The Regulations governing the representation of others before the Patent and Trademark Office provide at 37 C.F.R. § 10.130(a), in pertinent part, that “[t]he Commissioner may, after notice and opportunity for a hearing, (1) reprimand or (2) suspend or exclude, . . . any individual [or] attorney . . . shown to be incompetent or disreputable, who is guilty of gross misconduct, or who violates a Disciplinary Rule.”<sup>12</sup>

Complainant has alleged that Mr. Bode violated the PTO’s Disciplinary Rule 10.23 which provides in relevant part that:

(b) A practitioner shall not:

\* \* \*

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

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

(6) Engage in any other conduct that adversely reflects on the practitioner’s fitness to practice before the Office.

(c) Conduct which constitutes a violation of paragraph[] . . . (b) of this section includes . . .

\* \* \*

(8) Failing to inform a client . . . of correspondence received from the Office . . . when the correspondence (i) could have a significant effect on a matter pending before the Office, (ii) is received by the practitioner on behalf of a client or former client and (iii) is correspondence of which a reasonable practitioner would believe under the circumstances the client or former client should be notified.

\* \* \*

(9) Knowingly misusing a “Certificate of Mailing or Transmission” under § 1.8 of this chapter.

\* \* \*

(16) Willfully refusing to reveal or report knowledge or evidence to the

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<sup>12</sup> 37 C.F.R. §10.20(b) indicates those sections of the Code considered “Disciplinary Rules,” which are defined as being “mandatory in character and state the minimum level of conduct below which no practitioner can fall without being subject to disciplinary action.”

Director contrary to § 10.24 or paragraph (b) of § 10.131.<sup>13</sup>

37 C.F.R. § 10.23.

Further, Complainant has alleged that Respondent violated Disciplinary Rules 10.77(c) and 10.84(a)(2) which provide that -

A practitioner shall not:

(c) Neglect a legal matter entrusted to the practitioner.

37 C.F.R. §10.77(c).

(a) A practitioner shall not intentionally:

\* \* \*

(2) Fail to carry out a contract of employment entered into with a client for professional services . . .

37 C.F.R. §10.84(a)(2).

#### B. Standard of Proof

The function of a standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423 (1979), quoting *In re Winship*, 397 U.S. 358 (1970) (Harlan, J., concurring).

Regarding the standard of proof in these proceedings, the Regulations governing the representation of others before the Patent and Trademark Office, provide at 10 C.F.R. § 10.149, that -

In a disciplinary proceeding, the Director shall have the burden of proving his or her case by clear and convincing evidence and a respondent shall have the burden of proving any affirmative defense by clear and convincing evidence.

*See also, Jaskiewicz v. Mossinoff*, 822 F.2d 1053 (Fed. Cir. 1987).

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<sup>13</sup> Section 10.24 requires a practitioner to disclose unprivileged knowledge of violations of Disciplinary Rules to the Director and section 10.131(b) provides that a practitioner shall cooperate in connection with investigations by the Director of possible Disciplinary Rule violations. 37 C.F.R. §§ 10.24 & 10.131(b).

This "intermediate standard of clear and convincing evidence" lies "between a preponderance of the evidence and proof beyond a reasonable doubt." *Addington*, 441 U.S. at 425.

The clear and convincing standard of proof has been variously defined ... as evidence which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

*Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 285 n.11 (1990) (alteration in original) (internal quotation omitted).

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Respondent, George A. Bode, is an attorney licensed to practice law in Louisiana, Florida, New Jersey and Colorado. C's Exs. 341, 342, 398-99. During his legal career, Mr. Bode specialized in the practice of patent, trademark and copyright law and, since at least 1980, has been registered as an attorney practitioner before the PTO, having been assigned Registration No. 30,028. *Id.* At times relevant hereto, Mr. Bode maintained his main office for the practice of law in New Orleans, Louisiana, with additional offices in Pensacola and Lakeland, Florida. *Id.*, Tr. 29, 376-77.

The allegations of violation against Mr. Bode fall into various categories. He is alleged to have: (A) misused three Certificates of Mailing (counts 1-3); (B) failed to respond to two Requirements for Information (counts 4 and 5); (C) improperly claimed priority on a patent application (count 6); and (D) failed to keep clients informed regarding PTO correspondence concerning the status of their applications (counts 3, 8-10, and 17-20).<sup>14</sup> Each of the alleged violations will be discussed in turn below.

#### **A. Misuse of Certificates of Mailing**

Counts 1, 2 and 3 of the Amended Complaint all arise out of allegations involving Respondent's alleged misuse of certificates of mailing in connection with matters pending before

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<sup>14</sup> At the initiation of the hearing, Complainant withdrew Counts 11-16 of the Second Amended Complaint. Tr. 9-10. In his Post-hearing Brief, Complainant withdrew the claim of violation set forth in Count 7 as well as the claim that Respondent violated 37 C.F.R. § 10.84(a)(2) in Counts 1-3 of the Second Amended Complaint. *See*, Complainant's Brief at 34, n.1.

the PTO.<sup>15</sup> With regard to certificates of mailing, PTO Rule 1.8(a) provides in pertinent part that:

. . . correspondence required to be filed in the Patent and Trademark Office within a set period of time will be considered as being timely filed if the procedure described in this section is followed. The actual date of receipt will be used for all other purposes.

(1) Correspondence will be considered as being timely filed if:

(i) The correspondence is mailed or transmitted prior to expiration of the set period of time by being:

(A) Addressed as set out in § 1.1(a) and deposited with the U.S. Postal Service with sufficient postage as first class mail; or

(B) Transmitted by facsimile to the Patent and Trademark Office in accordance with §1.6(d); and

(ii) The correspondence includes a certificate for each piece of correspondence stating the date of deposit or transmission. The person signing the certificate should have reasonable basis to expect that the correspondence would be mailed or transmitted on or before the date indicated.

37 C.F.R. § 1.8(a).

Thus, this Rule provides that the PTO will deem the date a practitioner places on his certificate of mailing, as *the filing date*, for most documents filed with it, regardless of the when the PTO actually receives the document in its offices for placement in the official government file. Tr. 364-65.

In *Small v. Weiffenbach*, 1989 Commr. Pat. LEXIS 3, 10 U.S.P.Q.2D (BNA) 1898 (1989), it was noted that –

The [certificate of mailing] practice permits attorneys appearing before the PTO in patent and trademark cases to file papers in a timely fashion anywhere in the United States by merely depositing the paper in a U.S. Postal Service mail box. The need to retain “local” counsel to hand-deliver papers to the PTO has ceased and has eliminated a considerable expense for applicants and others having business before the PTO who reside far from PTO’s facilities in Arlington,

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<sup>15</sup> Count 3 also includes an allegation regarding Respondent’s failure to keep a client informed regarding correspondence received from the PTO. That allegation will be addressed in section (D) below.

Virginia. The practice also provides an important tool for practitioners to avoid possible mail delays. It is apparent, however, that there are those who have taken advantage of 37 CFR 1.8 . . . [noting three cases of backdating].

Complainant alleges that Respondent is also one of those who have taken advantage of 37 C.F.R. § 1.8 by not truthfully dating his certificates of mailing, asserting that Respondent submitted to the PTO three certificates which bore dates which were substantially earlier than the actual dates the filings were deposited with the U.S. Postal Service. Complainant asserts such misdating constitutes a violation of Disciplinary Rules 37 C.F.R. § 10.23(b)(4) (engaging in conduct involving dishonest, fraud, deceit, or misrepresentation) citing *In re Richards*, 755 N.E. 2d 601 (Ind. 2001) and *Oklahoma Bar Ass'n v. Colston*, 777 P.2d 920 (Okla. 1989)); 37 C.F.R. § 10.23(b)(6) (engaging in conduct that adversely reflects upon fitness to practice) citing *Florida Bar v. Adler*, 505 So.2d 1334 (Fla. 1987); 37 C.F.R. § 10.23(c)(9) (knowingly misusing certificates of mailing); and 37 C.F.R. § 10.77(c)(neglecting a matter entrusted) citing *Klein v. Peterson*, 866 F.2d 412 (Fed. Cir. 1989). See, Complainant's Brief at 38-39.

The first allegation in this regard is made in Count 1 and involves Patent Application No. 09/433,095 filed on behalf of inventor Gilbert Gibson on November 3, 1999.<sup>16</sup> C's Exs. 208-265, 716. In regard thereto, on June 14, 2000, the PTO issued an Office Action setting a response deadline to the issues raised therein of three months, that is, until September 14, 2000.<sup>17</sup> C's Exs. 234-241, 716; Tr. 383-84. Having received no response to the Office Action by that deadline, on January 11, 2001, the PTO issued a notice of abandonment of the application. C's Exs. 247, 716. Subsequently, on March 22, 2001, the PTO received from Respondent a Response to the July 14, 2000 Office Action as well as a Revocation and Substitution-Power of Attorney. C's Exs. 249-257, 716; Tr. 615-16. That Response was accompanied by a certificate of mailing,<sup>18</sup> signed by

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<sup>16</sup> The patent application was filed on Mr. Gibson's behalf by another patent practitioner, Peter Loffler. C's Exs. 213, 716; Tr. 615. On August 28, 2000 Mr. Loffler faxed to the PTO a Notice of Withdrawal as attorney of record. C's Exs. 242-43, 245, 716. The PTO's Notice of its acceptance of the Notice of Withdrawal was issued September 12, 2000. C's Exs. 246, 716.

<sup>17</sup> The Office Action was sent to Peter Loffler, Esquire. It noted that patent claims 1-8 were being rejected because the Examiner objected to the drawings. C's Exs. 234-355, 716; Tr. 615. The Office Action provided the name and telephone and fax numbers of the examiner and his supervisor to contact with regard the communication. C's Exs. 239, 716. Mr. Bode testified at the hearing that Mr. Gibson brought the outstanding Office action to him when Mr. Gibson hired him to handle the case. Tr. 616.

<sup>18</sup> The certificate of mailing reads as follows:

I hereby certify that this correspondence is being deposited in the United States Postal Service as first class mail in an envelope addressed to:

(continued...)



three months that is, until January 4, 2001.<sup>21</sup> C's Exs. 190-92, 715; Tr. 381-82. Subsequently, on March 16, 2001, the PTO received a response to the October 4, 2000 Office Action. C's Exs. 162-167, 715. That filing was accompanied by a certificate of mailing signed by Respondent and dated December 29, 2000, *that is 77 days before receipt*.<sup>22</sup> C's Exs. 167, 715; Tr. 382-83.

The last count in this regard, Count 3, involves Patent Application No. 09/221,377 filed on December 28, 1998 by Respondent on behalf of inventor Bradley Hanssen. C's Exs. 1-62, 395; Tr. 41, 583. In response to that application, on December 9, 1999, the PTO issued an Office Action setting a response deadline to the issues raised therein of three months, that is until March 9, 2000.<sup>23</sup> C's Exs. 51-56, 375-76. Subsequently, on April 10, 2000, the PTO received a response to the October 4, 2000 Office Action. C's Exs. 37-43. That filing was accompanied by a certificate of mailing signed by Respondent dated March 2, 2000, *that is 38 days before receipt*. C's Ex. 43; Tr. 378-79.<sup>24</sup>

In support of his assertion that these certificates of mailing were not accurately dated by Respondent, at the hearing Complainant introduced the testimony of Frank Ippolito, a consumer research analyst with the United States Postal Service's Consumer Affairs Department. Tr. 495-97. Mr. Ippolito testified that the Postal Service has generally committed to various levels of first class mail delivery service depending on the distance the mail is sent. Local first class mail is to be delivered either overnight or within one day; two day service is provided for mail sent within 200-300 miles of its origin; and three day service is provided for mail sent beyond that distance. Tr. 501-02, 505-506. All times relevant hereto, Mr. Ippolito said that first class mail sent from Respondent's offices in New Orleans, Louisiana, Lakeland, Florida or Pensacola, Florida, to the

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<sup>21</sup> The Office Action indicated that all the application's pending claims were being rejected upon the Draftsperson's Patent Drawing Review as being obvious from a prior patent previously issued. C's Exs. 190-1, 191, 715.

<sup>22</sup> Subsequently, on March 26, 2001, the PTO received from Respondent a Transmittal Letter dated March 20, 2001, accompanied by a Revocation and Substitution-Power of Attorney dated December 29, 2000. There does not appear to be a certificate of mailing on this document. C's Exs. 168-171, 715. The PTO accepted the March 16<sup>th</sup> filings and in response issued a Notice of Allowability in regard to some of the patent claims. C's Exs. 199, 715. Respondent subsequently submitted additional documents on the applicant's behalf (C's Ex. 204) and the patent was approved for issuance as Patent No. 6287242. C's Exs. 136, 715.

<sup>23</sup> The Office Action indicated that some of the claims were being rejected and the balance were being objected to by the PTO.

<sup>24</sup> Although the filing was received late, the PTO acted upon it, and on April 19, 2000, issued a Notice of Allowance and Issue Fee Due. C's Exs. 48-50. However, it subsequently issued a Notice of Abandonment in regard to the application based upon the failure to pay the issue fee due. C's Exs. 48, 57, 58. *See*, discussion *infra*, section (D)(1).

PTO in Washington D.C., was within the three day standard of delivery. Tr. 502, 506-07.

Further, Mr. Ippolito testified that the Postal Service uses its “External First Class Mail Management System” to test the efficiency of its mail delivery. Tr. 498, 500, 507. Such testing involves tracking and confirming delivery periods for sample test mail pieces sent from various locations. Tr. 507-08. The results of such testing for mail destined for the Washington, D.C. area, as reported for the third quarter of the Postal Services’s fiscal year 2000 (2/26/00-5/19/00) and first through third quarters of FY 2001 (9/9/00-5/19/01), reflected that mail within the three day mail delivery zone was, in fact, delivered within 3 days over 83.5% of the time, and within 5 days of mailing over 96.8% of the time.<sup>25</sup> Tr. 514-15, 518-24, 528-29; C’s Ex. 723.

Additionally, Mr. Ippolito testified that *all* mail for the Washington, D.C. area is processed through the Postal Service’s Brentwood facility, except during those periods after October 2001 (*i.e.*, after the time period relevant here), when that facility was closed due to anthrax contamination. Tr. 509-12. Mr. Ippolito said he was not aware of any significant processing delays in Brentwood prior to October 2001. Tr. 514. He also testified that prior to October 2001, the PTO maintained a post office box at the Brentwood facility for receipt of the mail addressed to it and that each business day, PTO personnel would come to Brentwood and pick up the mail for the PTO’s Offices in Virginia. Tr. 513.

Complainant, Mr. Harry Moatz, testified at hearing that the PTO receives about a million pieces of mail a year. Tr. 358. Most of the mail sent through the Postal Service addressed to the patent office (as compared to the trademark office), is picked up from the Brentwood Post Office facility by PTO personnel and brought to the PTO’s Office of Initial Patent Examination (OIPE). In OIPE, the mail is broken down into piles which are stamped with the date it is received by that facility. Subsequently, OIPE staff open each envelope and stamp the correspondence within it with the date it was received by the PTO as shown on the date of the pile, and sort it for distribution. Tr. 357-363, 399, 409-10. While he did not believe that the Patent Office maintains statistics regarding average hiatuses between the Certificate of Mailing date and the receipt date, he suggested that “hiatuses” of three or more weeks “would seem to be unusual.” Tr. 374, 407-08. He noted the Certificates of Mailing filed by Mr. Bode in the Gibson, Fray and Hanssen matters at issue here all had hiatus periods of 30 days or more. Tr. 374-75.

In contradiction to the implications suggested by this evidence, Mr. Bode testified that he personally prepares, prints and mails all his correspondence with the PTO and that, while he had no explanation for the attenuation in delivery times for the three specific mailings at issue, he was certain that the dates shown on the certificates of mailing reflected the actual dates that those filings were deposited by him with the Postal Service. *See*, Tr. 618-19, 655, 657-58.

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<sup>25</sup> Mr. Ippolito testified that mail to the PTO’s 20231 zip code was not included in the sampling process because that zip code applies to mail addressed to governmental offices which have their own mailrooms, and such mailrooms can cause delay in receipt of mail to its final destination, which the Post Office does not want factored into its test results. Tr. 527, 551-52.

Nevertheless, after careful consideration of the record as a whole, I find by clear and convincing evidence, that Respondent's certificates were not accurately dated.

First, as to Count 3 at least, there is direct evidence of backdating.<sup>26</sup> At the hearing, Mr. Hanssen testified that "[w]e got the first application back and resubmitted it in *April of 2000.*" Tr. 77 (italics added); *see also* Tr. 35, 61. The PTO, in fact, received the response on April 10, 2000, although it bore a certificate of mailing dated March 2, 2000. Mr. Bode did not challenge Mr. Hanssen's recollection in this regard on cross-examination and introduced at the hearing no documentary evidence challenging his recollection, such as a bill for services for February or March 2000 reflecting that the response was prepared before its mailing date.

Second, the record reflects that other, less time sensitive filings, made by Respondent by first class mail in regard to the patent applications at issue in these particular counts *were* routinely received by the PTO in a timely manner. For example, it appears from the record that Respondent filed the Hanssen application with the PTO by sending it by mail on December 23, 1998. *See*, Exs. 27-27 (R's Transmittal Letter). The record evidences that the PTO received the application on December 28, 1998, five days later. *Id.* In addition, using a Certificate of Mailing dated July 24, 2001, Respondent filed a Transmittal Letter to the Official Draftsman in the Fray application, which the PTO received on July 27, 2001, three days later. C's Exs. 204-05. The PTO also received from Respondent in the Fray case a Transmittal letter accompanied by a Revocation and Substitution - Power of Attorney on March 26, 2001, within six days of its mailing on March 20, 2001. *See*, C's Exs. 168-171.

Third, the record also shows that correspondence sent by Respondent in connection with other applications was timely received by the PTO. *See*, C's Exs. 483-84 (Harris Patent Application No. 09/244,829, mailed February 1, 1999 and received by the PTO February 4, 1999 (three days later)); C's Exs. 307-09 (Request for Division Application in regard to Harris application no. 09/244,829, mailed April 1, 2000 and received by the PTO on April 7, 2000 (six days later)); C's Exs. 505-510 (Response to Examiner's Action in 09/244,829 application mailed February 11, 2000 and received by the PTO on February 22, 2000 (eleven days later)); C's Ex. 534 (Petition of Assignee regarding patent application of Cleat Tech, Inc. No. 09/507644 mailed February 15, 2000 and received by PTO February 22, 2000 (seven days later)); C's Exs. 610-12

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<sup>26</sup> Unfortunately, the record does not contain the envelopes in which the three mailings at issue were sent by Respondent to the PTO nor any testimony regarding what if anything relevant to the date of mailing was reflected on such envelopes. Such envelopes, if they bore postage dates and/or over-cancellation marks affixed by the Postal Service could provide evidence as to dates of mailings. However, Mr. Ippolito testified that postage affixed using a postage meter, such as that used by Respondent in connection with filing his pleadings in this case, are not over cancelled. Tr. 559-562; *Cf.* C's Ex. 189 (envelope from attorney Loffler to PTO bearing over-cancellation mark). Moreover, there were questions raised at the hearing as to whether the date affixed along with the postage on such metered mail could be turned backwards; however, no witness testified with certain knowledge in this regard. Tr. 570-71.

(Response to Examining Attorney action in Cleat Tech trademark application no. 75/727,635 mailed March 30, 2000 and received by the PTO on April 3, 2000 (four days)). *See also*, C's Exs. 341, 342 (Data Sheet signed by Respondent on December 5, 1991 and received by the PTO on December 11, 1991 (six days later) and data sheet signed on January 6, 1981 and received by the PTO on January 12, 1981 (six days later)).

In addition, filings made by other patent practitioners from Respondent's geographical area appear to have been received by the PTO in a timely manner. *See e.g.*, **Gibson** application mailed by Peter Loffler, Esq. apparently from Tallahassee, Florida on or about October 26, 1999 and received by the PTO on November 3, 1999 (C's Ex. 211); Request for Filing of Receipt Correction in the Fray application accompanied by Peter Loffler's Certificate of Mailing from Tallahassee, Florida dated February 3, 2000 and received by the PTO on February 7, 2000 (C's Ex. 187).

Moreover, the record contains evidence that certified mail "green cards" signed for at Respondent's address in Louisiana were returned to the PTO by mail in timely manner. *See*, C's Ex. 359 signed for on September 1, 2001, received by PTO September 5, 2001; C's Ex. 383 signed for on December 8, 2001 and received by the PTO on December 11, 2001; C's Ex. 387 signed on March 4, 2002 and received by the PTO on March 12, 2002.

Finally, based upon common experience, as supported by Mr. Ippolito testimony, I recognize that it is possible for an article of mail sent within the three day delivery zone to take 10 days or more to be delivered to Washington, D.C. Moreover, I accept that it is "possible, highly improbable, but possible" for an article of mail to be lost.<sup>27</sup> Tr. 532, 546. However, in this instance, there is simply no persuasive explanation which can be divined from the record as to why all three of the filings at issue here, all allegedly sent within a 10 month period, were *all* received by the PTO so long (38-192 days) after the dates shown on the certificates of mailing, when so many other mailings by Respondent and by others are delivered in a timely manner. Moreover, in each case of delay, the legal effect of having the certificate of mailing date substantially earlier than the actual receipt date was potentially very legally significant - in that the applicant would avoid the adverse consequences of having its application deemed abandoned based upon a failure to timely respond to the PTO's Office actions. It simply defies credibility and common experience that *all* three of these mailings would fall within the very small percentage of mail that is not delivered by the Post Office in a timely manner, but rather is received, *out of the blue*, long after they were

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<sup>27</sup> Mr. Ippolito testified that there is a process for people to file complaints about delays in mail delivery, and if the postal service even received a single complaint from an area it would investigate, numerous complaints would result in high management level response. Tr. 554-555. While Mr. Bode asserted during the hearing that he often does not receive filings from the PTO, there is no allegation nor evidence that Mr. Bode ever filed a complaint about his mail service with the Postal Service.

sent.<sup>28</sup>

Thus, while there is no direct evidence as to backdating in regard to Count 1 and 2, there is significant circumstantial evidence. In *Klein v. Peterson*, 866 F.2d 412 (Fed. Cir 1989), cited by Complainant in his Brief, the Court held that to prove a misdating violation the PTO need not prove intent to mislead with direct evidence; “rather, circumstantial evidence may permit an inference of intent.” *Id.* at 415. *Klein* involved an attorney from New York and Connecticut who was charged with submitting to the PTO eleven backdated certificates of mailing. Relying upon circumstantial evidence regarding exceptionally long mail delays (8 to 50 days) experienced by the Respondent and not others in his firm or other area firms, entries or lack thereof in the firm’s mail log, and dates on checks and client correspondence, the Court found that the PTO had proved by clear and convincing evidence that the Respondent had misdated the certificates.<sup>29</sup> *Id.*

Therefore, upon consideration of all the evidence in the record, I find by clear and

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<sup>28</sup> It is interesting, however, that although all the filings at issue here were made very close to a filing deadline of great import, Mr. Bode chose to neither file them by facsimile as provided by the PTO rules or send them by, for example, express mail to assure their timely arrival, as he filed other papers with the PTO. *See*, C’s Ex. 714 (indicating Mr. Bode send the Mendez application to the PTO by express mail and it arrived that same day). Further, although Respondent was aware of the short time frame for filing his clients’ responses in each of these cases, in none of the them is there any allegation or evidence in the record that he made any effort to confirm the PTO’s timely receipt of the filings by telephone or otherwise or retain independent documentary evidence which, if non-receipt occurred, he could use to prove to the PTO his timely mailing. Moreover, there is also no evidence even as to the **Gibson** case where the response was received over six months late and in the interim a notice of abandonment mailed to Respondent, that Mr. Bode ever made even the slightest effort to challenge the PTO’s determination that a timely filing had not been made.

<sup>29</sup> Unlike *Klein*, neither Complainant nor Respondent offered into evidence in this case, mail logs, checks, or client correspondence regarding the three certificates of mailing at issue here, although there is some evidence in the record suggesting that, like the practitioner in *Klein*, Respondent routinely sent copies of his filings with the PTO, fairly contemporaneously to his clients. *See*, C’s Ex. 395 (letter from Mr. Bode to Mr. Hanssen dated December 23, 1998 stating “Please find enclosed a copy of your above-referenced utility patent application which was mailed today for filing in the U.S. Patent Office.”); C’s Ex. 395 (Mr. Bode reporting to client by letter dated December 8, 1998 on trademark applications filed November 16, 1998); C’s Ex. 432 (letter from Respondent to Mr. Wilson enclosing copy of Response to Patent Office Examiner’s action that was “prepared and mailed today for filing.”); C’s Ex. 433 (correspondence with client enclosing utility patent mailed that day for filing); C’s Ex. 443 (enclosing divisional application mailed “today” for filing). There is, in fact, no documentary or other evidence in the record at all corroborating Mr. Bode’s testimony that the three mailings at issue were made on or before the dates reflected on the certificates.

convincing evidence that the certificates of mailing at issue in Counts 1, 2 and 3 do not accurately reflect the date those filings were mailed and therefore find that in regard thereto Respondent violated Disciplinary Rules 10.23(b) by engaging in conduct involving misrepresentation, 10.23(b)(6) by engaging in conduct that adversely reflects upon his fitness to practice, and 10.23(c)(9) by knowingly misusing certificates of mailing.

As to Complainant's assertion that the misdated documents reflect Respondent's neglect of matters entrusted to him in violation of 37 C.F.R. § 10.77(c), the evidence of record does show that in regard to each case, Respondent did not act promptly to protect his clients' interests upon being retained. For example, in regard to Count 1, Respondent was retained by his client **Gilbert Gibson** in regard to his then pending application on September 5, 2000, that being the date Mr. **Gibson** signed the Revocation and Substitution-Power of Attorney. C's Exs. 249-250. At that point, what was needed to pursue the application and the interests of the client was for a response to the previously issued Office Action to be promptly filed, *i.e.* by the September 14, 2000 deadline. C's Ex. 251. Nevertheless, the response was not filed by Respondent until approximately March 22, 2001 (albeit with a certificate dated September 11, 2000). *Id.* In the interim, Mr. **Gibson's** application was deemed abandoned by the PTO (C's Ex. 247), a determination that Mr. Bode apparently never challenged; he suggested at the hearing that he did not do so because he lost contact with the client. Tr. 615-17.

Similarly, in regard to Count 2, the record shows that Respondent was retained by his client Alex R. Fray on December 29, 2000. C's Exs. 169-70. By virtue of the Office Action issued October 4, 2000, Respondent had only until January 4, 2001 to file a response. Respondent did not do so, however, in that the PTO did not receive his response until March 16, 2001. C's Exs. 162-167. C's Exs. 167: Tr. 382-83. As to Count 3, Respondent was retained by Mr. Hanssen on December 18, 1998 to file the initial patent application. C's Ex. 30. Respondent was aware that he had only until March 9, 2000 to file a response to the office action issued by the PTO on December 9, 1999. C's Exs. 51-56. Nevertheless, Respondent did not submit his response until approximately April 10, 2000, a month after the filing deadline expired. C's Exs. 37-43.

Therefore, the record supports the finding that Respondent neglected matters entrusted to him in violation of 37 C.F.R. § 10.77(c).

#### **B. Failure to Respond to Requirements for Information**

Counts 4 and 5 of the Second Amended Complaint arise out of "Requirements for Information" (RFIs) sent by the PTO's Office of Enrollment and Discipline (OED) to Respondent pursuant to Rule 10.131. That Rule provides in pertinent part that:

- (a) The Director is authorized to investigate possible violations of Disciplinary Rules by practitioners. . . .

(b) . . . A practitioner shall cooperate with the Director in connection with any investigation under paragraph (a) of this section and with officials of the Office in connection with any disciplinary proceeding instituted under § 10.132(b).

37 C.F.R. § 10.131.

A RFI is essentially a discovery device used by OED to gather information in connection with an investigation of possible violations of PTO Disciplinary Rules. It consists of a series of written interrogatories, requiring a written response, directed to a PTO practitioner inquiring into the circumstances surrounding one or more possible violations. Tr. 463-64.

Complainant alleges that Respondent failed to respond to RFIs issued to him by OED and that such failures constitute violations of 37 C.F.R. § 10.23(b)(5)(engaging in conduct prejudicial to the administration of justice), citing *Nebraska State Bar Ass'n v. Rothery*, 619 N.W.2d 590 (Neb. 2000); § 10.23(b)(6)(engaging in conduct adversely reflecting upon fitness to practice before the PTO) citing *Nebraska State Bar Ass'n v. Kirshen*, 441 N.W.2d 161 (Neb. 1989); and § 10.23(c)(16)(willfully refusing to reveal or report knowledge or evidence to the Director), citing *Weiffenbach v. Turner*, 20 USPQ2d 1103 (Comm'r Pat. 1991)

The evidence of record establishes that on April 18, 2001, OED sent a First RFI to Respondent at his office address in New Orleans, by certified mail, return receipt requested.<sup>30</sup> C's Exs. 343-47; Tr. 470. The April 18<sup>th</sup> RFI sought Respondent's input regarding the circumstances surrounding his certificate of mailing in the **Gibson** application which is the subject of Count 1 discussed above. C's Ex. 343. The RFI requested that Respondent reply to it within thirty days.<sup>31</sup> C's Ex. 343; Tr. 471. OED subsequently received through the mail a "green card" evidencing delivery of the First RFI to Respondent's office address on May 12, 2001, although it was signed for on Respondent's behalf by Mr. Bode's neighbor. C's Ex. 353; Tr. 471-72, 492, 619. On June

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<sup>30</sup> Mr. Bode's office address of 2314 Broadway, New Orleans, Louisiana 70125, is the official mailing address which Respondent provided for himself to the PTO on the December 5, 1991 Data Sheet for the Register of Patent Attorneys and Agents. C's Ex. 341, *see also*, Tr. 376-77. It is also the address which Mr. Bode identified for himself on various filing he made with the PTO. *See*, C's Ex. 4 (Hanssen application filed December 28, 1998), C's Ex. 72 (Mendes application filed August 20, 1999); C's Ex. 249 (Revocation and Substitution - Power of Attorney dated September 1, 2000). Further, it is the address used by Respondent in connection with pleadings filed in this matter. *See e.g.*, Respondent's Answer and Answer of Amended Complaint. It appears to be adjacent with the home address of 2312 Broadway which Mr. Bode provided for himself to the PTO in 1980. C's Ex. 342.

<sup>31</sup> The RFI contained a reminder of a practitioner's duty to cooperate in any investigation under 37 C.F.R. §§ 10.131(b) and 10.23(c)(16) and that failing to respond could be construed as a failure to cooperate, subjecting Respondent to disciplinary action. C's Ex. 343.

7, 2001, OED sent Respondent, by certified mail, a "First Notice: Lack of Response," noting that it had not received any response to the April 18<sup>th</sup> RFI and requesting a response within 30 days. C's Ex. 355; Tr. 473-74. The green card for that certified mailing was again returned to OED bearing the signature of someone else who had accepted the mailing on Respondent's behalf on or about June 15, 2001. C's Ex. 356; Tr. 474-75, 493. Two and a half months later, on August 21, 2001, still having received no response to the RFI, OED sent a "Second Notice: Lack of Response" to Respondent concerning the April 18<sup>th</sup> RFI. C's Ex. 358; Tr. 475. The green card on that certified mail was returned to OED on September 5, 2001 bearing a signature dated September 1, 2001 that cannot clearly be identified as Respondent's. C's Ex. 359; Tr. 468-69, 475-76. On September 25, 2001, OED sent to Respondent by certified mail a "Third Notice: Lack of Response" regarding the April 18<sup>th</sup> RFI. C's Ex. 361; Tr. 476. It appears that the OED never received the green card back in response to that certified mailing. Tr. 477.

On October 23, 2001, OED sent by certified mail another, different, First RFI to Respondent at his address in New Orleans, Louisiana. C's Exs. 363-371; Tr. 477-78. The October 23<sup>rd</sup> RFI sought information regarding a number of matters, including the Respondent's certificate of mailing in the Hanssen application (which is the subject of Count 3 above) and Respondent's filing of the Mendez continuation in part application (which is the subject of Count 6 discussed below). *Id.* This RFI also requested a response within 30 days. C's Ex. 364; Tr. 477. OED never received a green card back evidencing Respondent's receipt of this certified mailing nor a response to the RFI. Tr. 478. As a result, on November 28, 2001, OED sent Respondent a "First Notice: Lack of Response" regarding the October 23<sup>rd</sup> RFI. C's Ex. 382; Tr. 478, 480, 487. The green card evidencing receipt of that mailing was returned to OED on December 11, 2001, bearing the signature of someone other than Respondent who signed for the mailing on December 8, 2001 and identified him or herself Respondent's "agent." C's Ex. 383; Tr. 480, 487-88. Again, no response to the RFI was received. Tr. 488. As a result, on December 28, 2001, OED sent Respondent a "Second Notice: Lack of Response" regarding the October 23<sup>rd</sup> RFI. C's Ex. 385; Tr. 488. The green card for that mailing was returned to OED on March 12, 2002 with an unreadable signature for Respondent dated March 4, 2002. C's Ex. 387; Tr. 489. No response to the RFI having been received, a Third Notice was sent to Respondent by the OED by certified mail on February 1, 2002. C's Ex. 388; Tr. 489. No green card was apparently received by OED in regard to the Third Notice. Tr. 490.

Thus, the record contains no documentary evidence clearly confirming Mr. Bode's personal receipt of either of the RFIs or the follow-up notices relating thereto at any point.<sup>32</sup> However,

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<sup>32</sup> At the hearing, Mr. Ippolito of the Postal Service testified that certified mail is handled differently at the delivery point from regular mail. Tr. 531. At the delivery point, the mail carrier is obliged to deliver certified mail to the named recipient and fill in the blank spaces on the "green card" (Form 3811) with the date of delivery and have the recipient sign it. Tr. 537-59. Further, he opined that no one other than the named addressee is supposed to sign for it, unless there is proof of agency. Tr. 544, 547, 550-51. If the addressee of the certified mail article is not at the

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Mr. Anderson, the OED investigator who drafted the RFIs, testified at the hearing that, on November 26, 2001, he personally spoke to Mr. Bode regarding the second RFI issued to him by OED on October 23, 2001. Tr. 461-62, 466, 482-83. Specifically, Mr. Anderson stated that he had telephoned Mr. Bode on that day to advise him that OED had opened a new post office box due to the delay in receipt of mail caused by the closure of the Brentwood Post Office facility as a result of anthrax contamination. Tr. 481-83. Initially unable to reach Mr. Bode in person, he left a voice mail message instructing Respondent to send his response to the RFI to OED's new post office address. Tr. 484. Mr. Anderson testified that, later that same day, Mr. Bode personally returned the telephone call. During that conversation, Mr. Anderson advised Mr. Bode that the OED had not yet received his response to the October 23, 2003 RFI. In response, Mr. Bode did not deny receipt of the RFI and, in fact, claimed to have already mailed to the PTO his response to it. Further, Mr. Bode represented to Mr. Anderson that while he did not have a copy of his response with him at the location where he was at the time of the call, he would have his secretary forward him a copy of the response which he would then forward onto the OED. Tr. 485-86. However, Mr. Anderson testified at the hearing that, to date, the PTO has never received a response to either of the two RFIs or any of the six lack of response notices from Mr. Bode. Tr. 473-478, 487-90. *See also*, Tr. 366 (testimony of Mr. Moatz as to PTO's lack of receipt of responses to the RFIs sent to Mr. Bode).

Moreover, while Mr. Bode asserted at the hearing that he did not receive "some of the documents" relating to the RFIs and that his receipt of some of the other documents was delayed, he did not deny eventually receiving the two RFIs at some point. Tr. 619-20. Moreover, he asserted that he responded to both of the RFIs, separately, probably on the same day they were received by him, but could not recall exactly when he mailed OED his responses. Further, he claimed that he had sent copies of his responses to the RFIs to OED not once, but several times, including in response to a conversation with a person from the PTO, although he did not recall specifically if that person was Mr. Anderson.<sup>33</sup> Tr. 661-668.

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<sup>32</sup>(...continued)

address at the time of delivery, a notice is supposed to be left directing the addressee to pick up the mail. Tr. 532. However, he acknowledged that a number of certified mail items sent to Mr. Bode were not apparently processed in this manner. Tr. 540-41. Mr. Moatz acknowledged at the hearing being "familiar with misdirected mail" from the Patent Office, although he did not know how often that occurred. Tr. 409. He had no explanation for why Mr. Bode may have received a notice of abandonment in a case in which he was not the registered attorney. Tr. 459.

<sup>33</sup> At the hearing, Mr. Bode stated that he made "*in globo*" responses and objections to the RFIs, meaning he responded or objected to everything similar at once, rather than responding separately to the various requests. Tr. 660, 666, 669. In particular, he stated that he objected to some of the requests in the RFIs; those, for example, requesting copies of client communications, on the basis of attorney-client privilege, believing that the ethics rules of the bar prohibited such

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After consideration of the evidence, I find that Complainant has sustained his burden of proof with regard to Respondent not responding to the RFIs sent as part of his investigation into Respondent's alleged violations of Disciplinary Rules. Despite Mr. Bode's claim that he responded to the RFIs and forwarded such responses to the PTO not once, but several times, I credit the consistent testimony of Mr. Anderson and Mr. Moatz, supported by the documentary evidence of record, that the PTO never received any responses to the RFIs from Respondent. In support of this finding I note that Respondent, without explanation therefor, never produced any copies of his alleged responses to the RFIs at the hearing or during the prehearing exchange process, despite being requested to do so.<sup>34</sup> Moreover, he did not produce any evidence supporting his testimony that he had sent such responses to the PTO at any point, such as certificates of mailing or faxing receipts.<sup>35</sup> This, despite the fact that, during his testimony, Mr. Bode asserted that he creates and maintains copies of his outgoing correspondence, including copies of everything he has filed in the patent office or received from the patent office. Tr. 672-674.

Therefore, I find that in regard Counts 4 and 5, Respondent violated Disciplinary Rules 37 C.F.R. § 10.23(b)(5) (engaging in conduct prejudicial to the administration of justice), § 10.23(b)(6) (engaging in conduct adversely affecting his fitness to practice) and § 10.23(c)(16) (wilfully refused to reveal or report knowledge or evidence to OED).

### C. Improperly Claiming Priority on Patent Application

Count 6 asserts Respondent violated 37 C.F.R. § 10.23(b)(6)(actions adversely reflecting on fitness to practice) in connection with his filing of a patent application on behalf of Carlos

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<sup>33</sup>(...continued)

disclosures unless authorized by the client. Tr. 669-71. Mr. Bode stated he never sought authorization from his clients which would have allowed him to release the records. Tr. 671.

<sup>34</sup> Subsection 3(B) of the Order Scheduling Prehearing Procedures and Hearing, issued in this matter on July 29, 2002, specifically asked Respondent to produce copies of any and all documents supporting the denials contained in his Answer of the factual allegations made in paragraphs 28, 31, 35, 38, 47, 50, 54, 57 of the Complaint regarding his failure to respond to the RFI and the notices sent in regard thereto. In his original and amended Prehearing Exchange, Respondent asserted that the documents supporting his denials "are in the prosecution history of each matter at issue," and failed to produce any copies of his alleged responses to the RFIs at any point during this litigation.

<sup>35</sup> In the RFIs, the PTO specifically provided a methodology for Respondent to obtain written confirmation of the PTO's receipt of his responses thereto, by utilizing a returned stamped postcard; however, there is no evidence in the record that Respondent ever attempted to or did utilize this methodology at any point. C's Ex. 344.

Mendes by improperly claiming priority to nine previously filed United States patents and seven previously filed Brazilian patents applications. Respondent admitted in his Answer that he had filed the application and claimed priority therein. See, Amended Complaint paragraphs 67 and 68 and Respondent's Answer thereto ¶¶ 67-68. Thus, the question is whether the priority was improperly claimed, and if so, does claiming priority improperly rise to a level of violation of the Disciplinary Rules.<sup>36</sup>

The record reflects that on August 20, 1999, Mr. Bode filed patent application no. 09/377,936 for a modular fruit juice extraction system on behalf of Mr. Carlos Neto Mendes (application '936). C's Exs. 67-115; Ex. 714. In that application, Mr. Bode claimed that it was a "continuation-in-part application of previous applications by the same inventor." C's Exs. 72-75, 714; Tr. 387, 390. In support of this claim, Mr. Bode submitted with the application a "Declaration in Copending Application," signed by Mr. Mendes, indicating that the applicant was claiming "priority" under 35 U.S.C. § 119 predicated upon nine previously filed U.S. patent applications which were based upon seven previously filed Brazilian patent applications identified in a "Schedule A" attached. C's Exs. 108-111, 714.

Application '936 was subsequently reviewed by a patent examiner. In February 2001, the examiner issued an Office Action Summary and narrative report on his evaluation of the application in which he found, *inter alia*, that none of the nine prior U.S. applications listed on Respondent's Schedule A were "copending" at the time application '936 was filed and that all of the seven Brazilian applications listed were filed more than one year before application '936 was filed. Therefore, the examiner concluded that the application did not meet the statutory requirements for claiming the benefit of an earlier filing date under 35 U.S.C. §§ 119 or 120 and indicated that the applicant was required to cancel the references to the earlier filed applications unless corrective action is taken to make the earlier applications copending. C's Exs. 118, 714; Tr. 391-92. The record indicates that Mr. Bode did not reply to or otherwise appeal the examiner's findings within the time allotted and that application '936 went abandoned on September 21, 2001 as a result thereof. C's Exs. 131-32, 714.

At the hearing, Mr. Moatz explained that under patent law a second, presumably related, patent application filed while a first application is still pending (*i.e.*, copending) is entitled to get the benefit of the filing date of the first application. This "benefit of priority" in time for a subsequently filed application avoids the risk of having intervening references used against the prosecution of the later application or in obtaining any ensuing patent. Tr. 386-387, 391-92, 441-43. Mr. Moatz stated that Respondent claimed the benefit of priority in connection with application '936 although he was not entitled to do so because of a lack of "co-pendency." *Id.*

Mr. Bode's testimony in response to this alleged violation was extremely limited. He

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<sup>36</sup> In the Second Amended Complaint, the Complainant also alleged under Count 6 a violation of 37 C.F.R. § 10.77(c)(neglecting a matter entrusted), but does not pursue such a claim in his Brief. Complainant's Brief at 49-51.

stated merely that --

“Mr. Moatz also talked about the benefit of priority in filing a patent application. I disagree with what he said, I believe that priority is proper in that case, improperly claimed. So, I don’t agree with what he said. I believe he gave a legal opinion and I disagree with him as far as that’s concerned.” Tr. 619.

Respondent did not elaborate further as to what he meant regarding the assertion that “priority is proper,” although “improperly claimed.”

The statutes at issue and the relevant case law appear to support Complainant’s assertion that Respondent could only claim priority on the ‘936 application if the prior related U.S. applications were still pending, *i.e.*, had not yet been abandoned or granted, or if the foreign applications had been filed less than one year before the subsequent U.S. application was filed.

Specifically, 35 U.S.C. §120 provides in pertinent part -

An application for patent for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in an application previously filed in the United States . . . which is filed by an inventor or inventors named in the previously filed application shall have the same effect, as to such invention, as though filed on the date of the prior application, *if filed before the patenting or abandonment of or termination of proceedings on the first application or on an application similarly entitled to the benefit of the filing date of the first application and if it contains or is amended to contain a specific reference to the earlier filed application. . . .* (italics added).

Further, 35 U.S.C. § 119(a), entitled “Benefit of earlier filing date; right of priority” provides in relevant part that --

An application for patent for an invention filed in this country by any person who has . . . previously regularly filed an application for a patent for the same invention in a foreign country . . . shall have the same effect as the same application would have if filed in this country on the date on which the application for patent for the same invention was first filed in such foreign country, *if the application in this country is filed within twelve months from the earliest date on which such foreign application was filed*; but no patent shall be granted on any application for patent for an invention which had been patented or described in a printed publication in any country more than one year before the date of the actual filing of the application in this country, or which had been in public use or on sale in this country more than one year prior to such filing. (Emphasis added).

*See also, In re Costello*, 717 F.2d 1346 (Fed. Cir. 1983) (co-pendency and reference to prior application in subsequent application are statutory requirements for claiming the benefit of

the earlier application's filing date), *Rajchman v. Herbert*, 312 F.2d 926 (C.C.P.A. 1963)(to meet requirements of section 119 patentee must claim priority before patent was granted); *Struthers Patent Corp. v. Nestle Co., Inc.*, 558 F.Supp. 747, 852 (D.N.J. 1981)(for a U.S. application to obtain the benefit of a foreign application date, it must be filed within 12 months of the foreign application).

Without an explanation at hearing and lacking a post-hearing brief, it is impossible to discern from the record exactly what Mr. Bode meant when he said that in regard to application '936 that priority was proper, but improperly claimed. Respondent has proffered no evidence which would support a finding that the PTO examiner's factual findings were erroneous, *i.e.*, that one or more of the U.S. patents listed on Schedule A were, in fact, pending at the time he filed the application '936. In fact, as to three of the nine U.S. applications identified therein, Mr. Bode himself indicated that patents had issued thereon. Further, he indicated on Schedule A that all of the foreign applications were filed at least 12 months prior to the filing of the '936 application.

Respondent's failure to explain to the patent examiner in connection with application '936 or to this tribunal his justification for claiming priority suggests that, at best, he was unaware of or confused as to the regulatory criteria for on claiming priority in 35 U.S.C. §§ 119 and 120 or at worst that he intentionally disregarded such criteria in the hope of obtaining a benefit to his client unwarranted by the facts and regulations.

Although Mr. Bode has neither proffered a good explanation for claiming priority in application '936 nor expressed remorse for having done so at least improperly, either of which would be more appropriate responses than the response he gave at the hearing, I am hard pressed to see this error in filing, with no history of prior or subsequent similar errors, as rising to the level of a violation 37 C.F.R. § 10.23(b)(6) *i.e.*, evidencing an action adversely reflecting on fitness to practice. Mr. Bode did apparently truthfully disclose in application '936 the status and filing dates of the prior applications based upon which he was claiming priority. At most, this would be a small technical violation of little significance since it appears that the error was discovered by the patent examiner and the application went abandoned thereafter. Therefore, I decline to find a violation under Count 6.

#### D. Improperly Providing Legal Services

The Complaint charges Respondent in 8 separate counts (nos. 3, 8-10, and 17-20) with improperly providing legal services to three of his patent application clients - Bradley Hanssen, Halford Harris, and Cleat Tech, Inc. These assertions are discussed in detail below.

##### 1. Bradley Hanssen

In addition to the allegation of misuse of a certificate of mailing, Count 3 also alleges that Respondent violated Disciplinary Rules 37 C.F.R. § 10.23(c)(8)(failing to inform a client of correspondence), § 10.77(c)(neglecting a matter entrusted to him), and §10.84(a)(2)(failing to

carry out a contract of employment) by his failure to inform his client Bradley Hanssen regarding correspondence he received from the PTO concerning Mr. Hanssen's patent application (no. 09/221,377).

Specifically, Complainant alleges and the record shows that on December 28, 1998, Mr. Bode filed a patent application (no. 09/221,377) for a hurricane-resistant storm window assembly on behalf of Mr. Hanssen. C's Exs. 4-36. Almost a year later, on December 9, 1999, the PTO issued an Office Action in response, requiring the submission of additional documentation within three months, *i.e.* by March 9, 2000. C's Exs. 51-56. On April 10, 2000, a month after the deadline expired, the PTO received a response to the December 9<sup>th</sup> Office Action with a certificate of mailing from Mr. Bode dated March 2, 2000. C's Exs. 37-47. Nevertheless, the PTO accepted and acted upon the filing and, on April 19, 2000, it sent to Mr. Bode a Notice of Allowability and Notice of Allowance and Issue Fee Due. The April 19<sup>th</sup> Notices advised Respondent that the application is allowed for the issuance of a patent and that to proceed with issuance, an issue fee of \$605 and new formal drawings must be submitted three months from the mailing date of the Notice, *i.e.* by July 19, 2000. C's Exs. 48-50. The Notice warned that if the issue fee was not paid within the time allotted "THIS APPLICATION SHALL BE REGARDED AS ABANDONED. THIS STATUTORY PERIOD CANNOT BE EXTENDED." C's Ex. 48 (emphasis in original). The PTO did not receive the issue fee within the allotted time and, as a result, on August 28, 2000, the PTO mailed to Mr. Bode a Notice of Abandonment in regard to Mr. Hanssen's application.<sup>37</sup> C's Exs. 58, 62. Complainant alleges that Mr. Bode never informed his client, Mr. Hanssen, about the issue fee due, never paid such fee, and never informed his client of the Notice of Abandonment or that the application could be revived.<sup>38</sup>

Mr. Bradley Hanssen testified at the hearing regarding the circumstances surrounding the filing of his patent application. He stated that he and two partners started up the Secure Lite Window Company with the expectation they would secure patents and trademarks on products that they could then market in response to a new Federal law mandating the use of hurricane-resistant products in Gulf Coast construction. Tr. 36, 40, 73-77. In connection therewith, in May of 1998, he hired Mr. Bode "to walk our patent process [sic] through the patent office from beginning to end to get us a patent and trademark for the Secure Lite impact resistant window," he

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<sup>37</sup> It appears that the PTO provides a methodology for attorneys to have the PTO automatically charge a "Deposit Account" they maintain for certain fees, including issue fees. However, in regard to this application Mr. Bode did not check the box on the form filed with the original application allowing the PTO to withdraw the issue fee from his account. C's Ex. 28. The record reflects, however, that Mr. Bode used his deposit account for such purposes in regard to other accounts. C's Ex. 202 (Fray application).

<sup>38</sup> Mr. Moatz testified at the hearing that it is the practice of the PTO to mail communications regarding applications only to the attorney of record and not to the applicant, and to do so only by regular, not certified, mail. Tr. 625-26, 444. Thus, a patent attorney bares the burden of keeping himself and his client informed of the status of pending applications.

had invented. Tr. 25-26, 34. Mr. Hanssen testified that he advised Mr. Bode that they were in a hurry to get the patent because “[i]t was a hot item and we wanted to get it on the market as quick as possible.” Tr. 36. Pursuant to that employment relationship, Mr. Bode drafted and filed patent application no. 09/221,377 and was paid for such services. Tr. 38, 41-43, 46; C’s Exs. 390-393, 408-409, 411-412. Mr. Hanssen claimed that, although he had advised Mr. Bode that he “wanted to be kept abreast of all activities” concerning his patent and to receive copies of all correspondence received in regard thereto, in April of 2000, shortly after he had approved the submission of an amended patent application, Mr. Bode ceased communicating with him and that Respondent has made no effort to communicate with him since that point in time. Tr. 34-37. At the hearing, Mr. Hanssen testified quite unequivocally that Mr. Bode never provided him with copies of the Notice of Allowance and Issue fee due (C’s Ex. 48), the Notice of Allowability (C’s Ex. 50), or the Notice of Abandonment (C’s Ex. 58), nor did he discuss the significance of those documents with him.<sup>39</sup> Tr. 47-53. He asserted that he first learned of the abandonment when he was contacted by counsel for the Complainant in September 2002. Tr. 79.

In response to this testimony, Mr. Bode admitted filing the patent application on behalf of Mr. Hanssen, receiving the initial Office Action in response, contacting Mr. Hanssen in response thereto, and being authorized by him to amend the application to get certain claims allowed, which he did (C’s Exs. 37). Tr. 583-585. Further, Mr. Bode testified that he considered the PTO Office action rejecting and objecting certain claims “not an uncommon situation,” and, “a good sign [ ] [t]hat tells you that there are allowable claims and there are just some informalities or technicalities which need to be corrected, and a patent will issue.” Tr. 584. However, Mr. Bode emphatically asserted that upon receipt of the April 19, 2000 Notice of Allowability and Notice of Allowance and Issue Fee Due, he *did* contact Mr. Hanssen, advise him of the PTO’s issuance of the allowance, and told him that there would be further expenses to pursue his patent application, including \$280 for formal drawings, an issue fee of \$605, and copy fees of \$30. Tr. 65-68, 586-89. Moreover, Mr. Bode stated that he advised Mr. Hanssen that he needed “a thirty day advance warning” of the filing deadline of July 19, 2000, so he could have the drawings and papers prepared in time. Tr. 589. According to Mr. Bode, Mr. Hanssen responded to this news by expressing uncertainty about “how popular his product was going to be or whether it was worth pursuing.” Tr. 589. Nevertheless, Mr. Bode said he went ahead and had the drawings done, at his own expense of \$280, “relying on the fact that he indicated he’d [Hanssen] work it out somehow.” Tr. 589. Mr. Bode claimed that he made several subsequent calls to Mr. Hanssen in regard to the application and spoke on several occasions with Mr. Hanssen’s wife, who acts as his secretary/partner/shareholder in the family business. Tr. 591-92, 621-22 ; *see also*, Tr. 65-66

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<sup>39</sup> Mr. Hanssen also testified that he hired and paid Mr. Bode to file a trademark application on his behalf. Tr. 54-56; C’s Exs. 410-412. He asserted that Mr. Bode also failed to keep him informed regarding that application, that he never advised Mr. Bode that he wanted to abandon the application, and that he was unaware that it too had gone abandoned until he was contacted in connection with this disciplinary proceeding by Complainant’s counsel in September 2002. In the interim, unaware of the trademark’s abandoned status, he had had brochures and paperwork printed bearing the trademark. Tr. 58-60, 78-79.

(wherein cross-examining Mr. Hanssen, Mr. Bode indicated that he advised Mr. Hanssen in May of 2000, both in writing and via a telephone conversation with Mr. Hanssen's wife/secretary that his "patent was elapsed" and additional fees were due). Mr. Bode testified, however, that Mr. Hanssen "never followed up," "did not come up with the funds to pursue the case," and "the applications went abandoned because he didn't want to pursue them."<sup>40</sup> Tr. 589-590. Mr. Bode said he had only billed Mr. Hanssen for work he had done and had not billed him for the final drawings he did. Tr. 589, 615. Mr. Bode claimed that in his experience, this outcome in a patent proceeding, where a client decides not to expend any additional funds to pursue the patent application to the end because in the interim they have discovered that there is no market for it, is quite common.<sup>41</sup> Tr. 591.

Consistent with Mr. Bode's assertions, Mr. Hanssen's testimony at the hearing did suggest that his efforts to reach Mr. Bode while the application was pending and his interest in the status of the patent application were nominal. Specifically, he testified that after speaking to Mr. Bode in April 2000, he waited a year or so to hear from him because Mr. Bode had advised him that the patent process was slow and he was aware that it took the PTO a year from when the application had first been filed to respond to it. Tr. 77-78. However, after a year of no contact with Mr. Bode, Mr. Hanssen said he became concerned about the applications and so, in June or July of 2001 (at another point in his testimony he indicated it was in August of 2002) he attempted to contact Mr. Bode at his Pensacola office by telephone and found the number was not in operation. Tr. 79, 82. Although aware that Mr. Bode maintained other offices, Mr. Hanssen said he made no further attempts to reach Mr. Bode until he was contacted by the PTO about this case in September 2002 because he was "very busy" and it wasn't that important. Tr. 83-84. Thereafter, he had tried repeatedly to reach Mr. Bode at his Pensacola office, "11 times within the last year," and only reached an answering machine or received a message that the number was no longer in service. Tr. 29, 35-36.

However, in direct contradiction to Mr. Bode's assertions, Mr. Hanssen was quite unambiguous in his testimony at the hearing that he never told Mr. Bode that he wanted to abandon the patent application (tr. 60) and never told Mr. Bode that he was going to think about

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<sup>40</sup> Mr. Bode testified that Mr. Hanssen's trademark application was initially rejected, that there were various steps that could be taken at that point, but that "Mr. Hanson didn't want to pursue that either. So in both cases he did not come up with the funds to pursue the case. And I warned him that it would become abandoned and that's what happened. So he didn't want to pursue it." Tr. 590.

<sup>41</sup> At the hearing, Mr. Moatz said while he did not have exact statistics, his understanding was that about two-thirds of patent applications mature into patents, although he was not sure exactly what type of applications that was based upon (i.e. original, continuation or division applications) and that sometimes an original application is abandoned for a continued application. Applications where the patent claims are rejected by the examiner are also considered abandoned. Tr. 417-422, 450.

whether or not to pursue the patent application. Tr. 68. Moreover, he stated unequivocally that he never received any phone call or correspondence from Mr. Bode suggesting that he was not going to take further steps in processing the application. Tr. 81. Furthermore, he stated that when he discovered the application had gone abandoned in September 2002, in prompt response thereto, in October or November 2002, he filed on his own to have the application revived on the basis that Mr. Bode had not informed him of the need to pay the issuance fee, but his efforts were unsuccessful, and he had recently hired new patent counsel to pursue revival on an alternative basis. Tr. 80, 85-91.

Upon consideration of the sharply conflicting testimony of the witnesses and taking into account their demeanor as I observed it and the other evidence of record, I credit the testimony of Mr. Hanssen and find that Mr. Bode did not adequately advise him regarding the status of his patent application once the Notice of Allowability was issued.

In reaching this conclusion, I note that Mr. Hanssen testified that Mr. Bode ceased communicating with him regarding the patent application after April 2000 and, in fact, all the documents submitted into the record support this assertion, in that the record contains a variety of correspondence from Mr. Bode to Mr. Hanssen, dated May of 1998 through December of 1998, but nothing thereafter. C's Exs. 390-412. This is the case even though Mr. Bode suggested at the hearing that he had advised Mr. Hanssen, *in writing*, in "May 2000" that his "patent was elapsed" and that the issue fee was due, and testified that he creates and maintains files for each of his clients, and that in those files he generally maintains copies of correspondence and notes of communications.<sup>42</sup> Tr. 65, 673-74.

Furthermore, I note that in what was probably very early April 2000, Mr. Hanssen met with Mr. Bode and approved him preparing and filing a response to the PTO's Office action to proceed with the application. Within just a couple of weeks thereafter, in mid-April, the PTO issued its notices regarding the issue fee due. C's Ex. 48; Tr. 49. Mr. Bode suggests that within the interim of those very few short weeks, after expending approximately \$3,780, Mr. Hanssen changed his mind about proceeding with the application and became unwilling to expend the relatively nominal additional sums (\$900) to actually obtain the patent. Tr. 68; C's Exs. 391-93. Such an assertion, without a clear rationale for such a dramatic change of heart, is not consistent with common experience. Moreover, it is belied by the fact that Mr. Bode testified that after receiving the notice regarding the allowability in mid-April, based upon the conversations he had with Mr. Hanssen at the time, at his own expense, he went ahead and had the formal drawings needed prepared to respond to the notice. Further, if such a dramatic change of heart did occur, any reasonably prudent attorney would have documented it with a confirmatory letter to his client or, at least, a note to the file, but there is no evidence in this case that Mr. Bode did anything of the sort.

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<sup>42</sup> It is unclear what Mr. Bode meant by the term "elapsed." At that point in the application process, despite the late filing of a response to the office action, the patent application was proceeding forward and the next deadline to be met was that of July 19, 2000.

Furthermore, I do not find the fact that Mr. Hanssen admittedly failed to actively pursue contact with Mr. Bode regarding the application after April 2000 as evidence of his intent not to proceed. First, I credit Mr. Hanssen's explanation that based upon the prior year period it took the Agency to respond to the initial filings, he had no expectation that a response would be received from the Agency so soon after the April filing. Second, as the client, it was not Mr. Hanssen's responsibility to stay in touch with Mr. Bode regarding the status of the application. Rather, that burden fell upon his attorney to stay in touch with him. I find Mr. Hanssen's prompt action in response to being advised of the abandonment of the patent as clear evidence that at all times relevant hereto, Mr. Hanssen did, in fact, wish to undertake whatever efforts were necessary to obtain the patent for which he had applied.

Therefore, in regard to Mr. Hanssen's patent application, I find Respondent violated Disciplinary Rules 37 C.F.R. § 10.23(c)(8) (failure to inform a client of correspondence), §10.77(c)(neglecting a matter entrusted to him), and § 10.84(a)(2)(failing to carry out a contract of employment) by his failure to inform his client of correspondence received from the PTO concerning application no. 09/221,377.

2. Halford Harris/Cleat Tech, Inc.

Counts 8-10 as well Counts 17-20 of the Second Amended Complaint allege that Respondent violated the same three Disciplinary Rules (37 C.F.R. § 10.23(c)(8)(failure to inform a client of correspondence), §10.77(c)(neglecting a matter entrusted to him), and § 10.84(a)(2) (failing to carry out a contract of employment)) by his failure to inform his clients, Halford Harris and/or the company he was associated with, Cleat Tech, Inc., of correspondence received from the PTO concerning their patent and trademark applications.

The evidence of record shows that, in February of 1999, February of 2000, and April of 2000, respectively, Mr. Bode filed three patent applications (nos. 09/244,829 (count 9); 09/507,644 (count 10) & 09/545,346 (count 8)) on behalf of Mr. Harris, as inventor/assignor and Cleat Tech, Inc. as assignee, for an improved retractable cleat device. C's Exs. 446-530, 531-590, 266-340, 713: Tr. 210-11. In each case, the PTO responded to the application by issuing a notice requiring additional submissions on the part of the applicant within three months. C's Exs. 521-24, 579-83, 333-34. Those notices were not responded to within the time deadline and, as a result, the patent applications went abandoned in August 2000, April 2001, and February 2001, respectively. C's Exs. 525, 585, 338-338-1.

Furthermore, the record reveals that in June of 1999, on behalf of Cleat Tech, Inc., Mr. Bode filed four trademark applications (nos. 75/727,635 (count 17), 75/727,636 (count 18), 75/727,637 (count 19) & 75/727,638 (count 20)). C's Exs. 591-616, 617-651, 652-681, 682-712. In each case, the PTO issued a Notice of Allowance in response to the application setting a six month deadline for submitting either a statement of use or a request for an extension of time to submit such a statement. C's Exs. 616, 644, 674, 704. Neither the statements of use nor requests for an extension were filed within the time allotted and each application was subsequently deemed

abandoned in either September 2000 or August 2001. C's Exs. 592-93, 618, 653, 679, 683, 710; Tr. 402-405.

Mr. Halford Harris and Mr. Earle (Rick) Wilson III both testified at the hearing concerning the circumstances surrounding these patent and trademark applications. Tr. 93, 199. Specifically, they testified that in late 1998, they, along with another gentleman (Don or John Pence), formed the company, Cleat Tech, Inc. Tr. 93-94, 100, 173-78, 200-01, 207, 278. At the time of formation, Mr. Wilson was the company's CEO and President, and Mr. Harris was its Vice President. Tr. 94, 100, 109, 135, 147-48, 199, 200-01. They created Cleat Tech, Inc. with the intent of engaging in the business of manufacturing, marketing and selling an improved retractable cleat or tie down device, which Mr. Harris had invented, used on cargo vehicles such as pickup trucks. Tr. 95-96, 175-76, 200, 209-210. In connection therewith, first in late 1998/early 1999, and then subsequently, Mr. Harris and/or Mr. Wilson hired Mr. Bode to file patent applications for the device and improvements they made thereon.<sup>43</sup> Tr. 96-101, 136-37, 139-40, 201-02, 210-211, 223-25, 244. In addition, at Mr. Harris' request, Mr. Bode contemporaneously prepared and filed with the initial application an assignment of the application from Mr. Harris, as inventor, to the company, Cleat Tech, Inc., in exchange for 51% of company stock.<sup>44</sup> Tr. 102, 136; C's Exs. 427-29, 177-179. Subsequently, Cleat Tech also retained Mr. Bode to apply for registration of four trademarks used by the company. Tr. 202, 251-53, 259-60, 263, 267-68. Both Mr. Harris and Mr. Wilson testified that Mr. Bode had billed them for services and fees related to the patent and trademark applications, and that the company, Cleat Tech, Inc., had paid all those bills, totaling approximately \$6-8,000 (C's Exs. 416-19, 422-24), including paying in advance the issue fee of \$605 for the first patent application (no. 09/244,829) he filed on their behalf. Tr. 98-100, 127-28, 166-68, 171-72, 211-212, 215-16, 218-220, 233-234, 247, 255-56; 260-61, 263-64, 268-69, 314-16.

Further, Mr. Harris testified that he explicitly advised Mr. Bode that he wanted to be "kept up to speed on what response he got as far as the patent application." Tr. 104-05. Mr. Wilson testified, that while he may not have explicitly told Mr. Bode to keep him informed of the status of the applications, he expected the attorney he hired to do so nevertheless. Tr. 203, 208, 215-16, 221, 235, 237, 248, 256-57, 258-59, 262, 266, 271-72. Consistent with this, Messrs. Harris and Wilson both testified that, in fact, initially after they hired him, Mr. Bode did communicate with

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<sup>43</sup> The original application at issue here, application no. 09/244,829, was for an *improved* retractable cleat device in that Mr. Harris had previously obtained at least one patent on a retractable cleat device (U.S. Patent No. 5,106,248). C's Exs. 270, 450; Tr. 95-96. As to the other applications at issue here, application no. 09/507,644 was a continuation-in-part application of application no. 09/244,829 and application no. 09/545,346 was a divisional application of application no. 09/244,829. *See also*, Tr. 223-24.

<sup>44</sup> The document memorializing the assignment, however, does not reflect the stock as the consideration for the assignment. *See*, C's Exs. 573-75. It appears that Mr. Harris as inventor refused to sign the continuation-in-part application (No. 09/507,644), where he was identified as a "co-inventor," but did sign the divisional application (09/545,346). C's Ex. 534-536, 713

them, by telephone and mail, regarding the status of their applications. Tr. 105-07, 112, C's Exs. 415-422, 425-431. However, both Messrs. Harris and Wilson stated that over time Mr. Bode ceased actively communicating with them.

Specifically, Mr. Harris testified that his last contact with Mr. Bode was a telephone call in October of 1999 during which Mr. Bode advised him that he was no longer authorized to discuss Cleat Tech matters with him, told him was no longer Mr. Bode's client, and advised him that if he had any questions regarding the applications, he should speak to Rick Wilson. Tr. 112-113, 131. 151-52. Mr. Wilson testified that the last written communication he received from Mr. Bode regarding the Cleat Tech applications was a letter dated April 1, 2000 regarding the filing that day of one of the patent applications. Tr. 203-04; C's Ex. 443. The last written communication he sent to Mr. Bode was a fax dated June 28, 2000 regarding altering the material out of which the product for which the application was pending would be manufactured, to which Mr. Bode never responded. Tr. 205-06; C's Exs. 444-45. Mr. Wilson suggested at hearing that he may have had a telephone conversation with Mr. Bode in 2001 regarding the applications during which Mr. Bode represented he would check into the status of the patent applications, and recalled that prior to August 2002, he had "attempted to contact him [Mr. Bode] regarding patents, and we played a little phone tag, but I never did get to talk to him." Tr. 207-08, 277-78.

Moreover, both Messrs. Harris and Wilson testified that Mr. Bode never discussed with them the issuance of, nor provided them with copies of, the Office Action Summaries (C's Exs. 333-37, 579-584), Notice of Allowability (C's Exs. 521-24) and Notices of Allowance and Issue Fee Due (C's Ex. 524), Notice of Allowances (C's Exs. 616, 664, 674, 704) or Notices of Abandonment (C's Exs. 338-338-1, 525, 585,) issued by the PTO in regard to the patent and trademark applications. Tr. 121, 123-26, 131-32, 213-216, 221, 234-37, 247-50, 256, 258, 261-62, 265-66, 269-71. Additionally, they asserted that Mr. Bode never made them aware of the need to respond to those Notices by a date certain, nor the effect of failing to do so. Tr. 215, 221, 267. Finally, they both strongly denied ever telling Mr. Bode at any point to not forward information he received from the patent office concerning the applications to them, to not to discuss the documents he received from the PTO with them, or to abandon the applications. Tr. 123, 169-70, 208-09, 271. As to the trademark applications, Mr. Wilson vehemently denied having any discussion with Mr. Bode regarding the need to use the trademarks to keep the applications alive and that specimens of that use along with the affidavit and fee had to be filed. Tr. 303, 312-13. In fact, he strongly denied having any understanding that while the application was pending, Cleat Tech had to do anything in order to proceed to issuance. Tr. 332.

Mr. Harris further testified at the hearing that he first learned that the patent applications had become abandoned for failing to pay the issue fees when he was contacted in connection with this litigation against Mr. Bode by Mr. Polk, Complainant's counsel, in or about September 2002. Tr. 129-30, 158-59. In response, he immediately contacted Mr. Wilson and discovered that he too was unaware the patent applications had gone abandoned. Tr. 157-162. Mr. Harris also promptly contacted an attorney in the patent office to obtain information regarding reviving the patents. Tr. 129-30, 163-64. Within a week of receiving notice of the abandonments, Mr. Harris engaged another attorney to file the requisite papers and fees to revive the patent applications. Tr. 129-30,

Mr. Wilson said that after he was notified by Mr. Harris that their patent applications had gone abandoned, he “was pretty hot.”<sup>45</sup> Tr. 228. He recalled reacting to the news by immediately attempting, on August 16, 2002, to contact Mr. Bode by telephone and, failing to reach him, left messages for Mr. Bode at both his New Orleans and Pensacola offices. However, Mr. Wilson said Mr. Bode never returned these calls. Tr. 207-08, 227-28, C’s Exs. 433-34. He also tried to reach Mr. Bode by telephone at his Lakeland office, but discovered the phone had been disconnected. Tr. 228. Mr. Harris said he then also contacted the PTO directly and was advised that the applications were deemed abandoned in August 2000 for failure to pay the issue fee due. Tr. 229-31. Furthermore, Mr. Wilson confirmed Mr. Harris’ testimony that, in an effort to avoid losing the patents on the products, together they immediately contacted other counsel and instituted an effort to revive the patent application filing the requisite papers and paying the necessary fee by Federal Express. Tr. 130, 133, 165-66. Mr. Wilson also testified at the hearing that he first discovered trademark applications had gone abandoned the day prior to hearing, when so notified by Complainant’s counsel. Tr. 271.

At the hearing, Mr. Bode did not deny filing the patent applications at issue here nor most of the subsequent history of those applications as reflected in the record. Tr. 606-07. The one exception he took to the history was the assertion that he had failed to pay of the issue fee in regard to the original patent application (no. 09/244,829). During his testimony, Mr. Bode acknowledged that he had received from Cleat Tech, in advance, the issue fee in connection with the original patent application. C’s Exs. 442, 524. However, contrary to the Complainant’s assertion, Respondent claimed that he *did* forward the issue fee to the PTO, in a timely manner, although he acknowledged that the PTO file did not reflect that the fee had ever been received. Tr. 646-47. Moreover, he claimed that he had documentation evidencing payment of the issue fee, although he did not offer such evidence at hearing, asserting that he did not have to and because the PTO “would say it was backdated and falsified anyway, just like you’ve done with everything else I’ve done.” Tr. 648-49. Furthermore, while Mr. Bode indicated that he received one notice of abandonment with regard to one of Cleat Tech’s later patent applications, he claimed he never received the August 10, 2000 Notice of Abandonment from the PTO in regard to the original application (no. 09/244,829) and thus, was unaware that the application had gone abandoned due to failure to pay the issue fee until after this action was filed. Tr. 647, 649-51.

Furthermore, in response to Counts 8-10 regarding the three patent applications, Mr. Bode acknowledged that at some point he ceased providing information on the status of the applications to Mr. Harris but claimed he “always considered Cleat Tech [rather than Mr. Harris] to be the

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<sup>45</sup> Mr. Wilson attributed his level of anger at discovering that the applications had gone abandoned to the fact that he had to answer to other persons invested in the company on status of patents, that he “absolutely trusted him [Respondent] implicitly,” and that, unaware that Respondent had let the applications go abandoned, he had thought so well of him he had sent other business to him. Tr. 275-76, 317-19, 324-326.

client.” Tr. 596. Specifically, Mr. Bode explained that Mr. Harris and Mr. Wilson had retained him in their capacities as corporate officers of Cleat Tech, Inc. Tr. 594. He stated that prior to filing the original patent application for Cleat Tech, Inc., Mr. Harris assigned all his individual interest in the device and related applications to the company. Further, he stated that “during my course of dealings with Cleat Tech, Inc., it became apparent that Mr. Harris was not happy with the way some of the other interested parties were handling Cleat Tech. And there was some tension between him and Mr. Wilson and some other shareholders.” Tr. 594; see also, Tr. 149-50, 278-80. Mr. Bode said it was his “preference to deal with one unified voice of the client.” Tr. 626. As a result, he “tried to determine the direction Cleat Tech was going to take. And since Mr. Wilson was the president, as he stated I instructed him or I asked him whether he wanted me to deal only with him. And that was my preference, and he said it was fine. So I instructed Mr. Harris that I was no longer able to discuss Cleat Tech matters with him. And in that interim he had been fired as an officer in the corporation . . . because there was too much conflict, and he was now only a shareholder . . . I told Mr. Harris I couldn’t deal with him anymore, that he actually was never my client. And since he was merely a shareholder he had no authority to act on Cleat Tech’s behalf, that he would have to deal through Mr. Wilson “ Tr. 595-96; *see also*, Tr. 626-28, and Tr. 147-48, (wherein Mr. Harris indicates he ceased being an officer of the company in early 2001) and 281-82 .

At the hearing, Mr. Bode also acknowledged that his contacts with Mr. Wilson diminished with time, but suggested that they did so because of Mr. Wilson’s dwindling interest in the applications. Mr. Bode explained that fairly early on in the process a dispute arose between Cleat Tech and a Mr. Gardener, whom Mr. Bode had determined was a co-inventor of the invention covered by the second application, but who would not agree to sign the application. Tr. 609-10; see also tr. 279-80. He said this dispute over ownership “created . . . quite some complexities for Cleat Tech.” In addition, Cleat Tech never produced a product, or a product it could successfully market, and as time went on “funds were becoming tight.” As a result, Mr. Wilson’s “interest started to wane,” as evidenced to him by the fact that he was in contact with Mr. Wilson in regard to a number of other matters and that Mr. Wilson “never brought up any use by Cleat Tech or what he wanted to do with these other matters or whether he even wanted to spend any other money on it.”<sup>46</sup> Tr. 611-12.

Mr. Bode also acknowledged filing the trademark applications for Cleat Tech, Inc. Tr. 597. However, he explained that the applications were filed on an “intent to use” basis because

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<sup>46</sup> On cross-examination, Mr. Wilson did acknowledge receiving copies of correspondence from and possibly having a conversation with Mr. Bode sometime after October 23, 2002 regarding two trademark applications and/or a patent application Mr. Bode had filed on behalf of Phoenix Fire Systems, of which Mr. Wilson is president. Mr. Wilson could not recall such conversation in detail and did not recall raising other matters during that conversation with Mr. Bode, such as the Cleat Tech applications. Further, Mr. Wilson said he was unaware if the company otherwise responded to Mr. Bode’s correspondence and/or to deadlines established by the PTO on the applications mentioned therein, because those matters were being handled by someone else in the company. Tr. 318-332.

Cleat Tech had no product at the time of the filing. Tr. 598-599. When the time came in the application process for filing a statement of use or requesting any extension of time to do so, Mr. Bode said he advised Mr. Wilson of the requirements and his options and the significance thereof, in two conversations, “[b]ut Cleat Tech wasn’t in a position to keep the application alive,” because at that point “they were having problems with production models and some of the lots that they had made, they didn’t have any money, they didn’t have any employees. And I was . . . basically not given any instructions what to do with this. There was never any intended use related to me and these applications were abandoned.” Tr. 605, 603, *see also* Tr. 312. Mr. Bode testified that he advised Mr. Wilson of the abandonments. Tr. 605-06. Moreover, he stated that the abandonment of the trademark applications did not cause Cleat Tech to lose any rights in the interim because the rights are based upon use and not formal registration. Tr. 604-05.

Once again faced with sharply conflicting testimony, after observing the demeanor of the witnesses, as well as the other documentary evidence admitted into the record, I am convinced that Mr. Bode did not adequately inform his client Cleat Tech of correspondence he had received on its behalf from the PTO, did neglect matters entrusted to him, and failed to adequately and appropriately carry out his contract of employment.

First, as to Mr. Bode’s obligations to Mr. Harris in regard to the patent applications, the record shows that despite the Assignment signed by Mr. Harris in January 1999 (C’s Exs. 573–575), from the time he was retained through at least May 31, 1999, Mr. Bode did treat Mr. Harris as his client in that he corresponded directly with him individually concerning seeking his approval of the original and continuation-in-part applications, and billed Mr. Harris individually for his services in regard thereto. *See*, C’s Exs. 415–431. The testimony of Mr. Wilson and Mr. Harris confirms that there was some type of falling out over the identification of Mr. Gardener as a co-inventor with Mr. Harris on the continuation-in-part application (no. 09/507,644). Tr. 149-50; C’s Ex. 531-575. However, the falling out appears to be as much between Mr. Harris and Mr. Bode, as between Mr. Harris and Mr. Wilson, in that Mr. Wilson said he too did not agree with Mr. Bode’s decision to identify Mr. Gardener as a co-inventor on the continuation-in-part application, although he apparently capitulated to Mr. Bode’s determination whereas Mr. Harris would not. Tr. 279-80, 609-10. Furthermore, while Mr. Wilson admits at some point acquiescing to Mr. Bode’s request to deal directly with him on the applications because he viewed Respondent as “the boss” (tr. 281-82), and Mr. Harris admits that Mr. Bode advised him of this fact, Mr. Bode stated that nevertheless, Mr. Harris continued to contact him about the patents and acknowledges that Mr. Wilson at some *subsequent point* gave Mr. Bode permission to send Mr. Harris copies of documents relating to the applications. Tr. 596, 628. As a result, Mr. Bode said he continued to send to Mr. Harris copies of various documents which he sent to Mr. Wilson on behalf of Cleat Tech, at least, according to Mr. Harris, through October of 1999, which was prior to the filing of the continuation-in-part application. *Id.* At that point, however, it appears that Mr. Bode ceased communicating with Mr. Harris without further explanation or justification. Mr. Harris testified that despite the assignment of his interest in the application and device to Cleat Tech, it was always his understanding that he was authorized to continue to act on behalf of the corporation and that no one in the corporation ever told him otherwise. Tr. 180-81. All this belies the suggestion by Mr. Bode that he ceased all communications with Mr. Harris at the direction of the corporation.

Further, as to Mr. Bode's allegation that he had no obligation to continue to stay in contact with Mr. Harris because Mr. Harris ceased being a corporate officer, the testimony at the hearing showed that event occurred in 2001. Tr. 135, 148. This was at least a year after Mr. Bode ceased communicating with Mr. Harris and thus could not be the basis for the cessation in communications.

Further, even if Mr. Bode could justify terminating his communications at some point with Mr. Harris, he still had an obligation to maintain communications with, provide correspondence to, and seek instructions from someone on behalf of Cleat Tech, Inc. Mr. Bode alleges he had such contacts with Mr. Wilson, which Mr. Wilson vehemently denies. The record supports Mr. Wilson's assertions in that the documents of record reflect that the last written communication between Mr. Wilson and Mr. Bode occurred on June 28, 2000. The record is devoid of any evidence that Mr. Bode ever sent Mr. Wilson copies of any of the Notices of Allowability, Allowance, Issue Fee Due or Abandonment. There is no evidence in the record to support Mr. Bode's assertion that he had any substantive discussions with Mr. Wilson regarding proceeding or abandoning the applications and no evidence that Mr. Wilson consented to or acquiesced in the abandonment of the seven applications. Moreover, such a conclusion is contradicted by the testimony of Mr. Harris, that upon being advised of the abandonments he contacted Mr. Wilson who indicated that he had not instructed Respondent to abandon the applications, was not aware of the abandonments, and said he had not heard from Mr. Bode in a year. Tr. 157-59, 161-163, 169. It is also contradicted by Mr. Wilson's testimony that upon being told of the abandonments, he became "pretty hot" and "livid," and as a result, he immediately attempted to contact Mr. Bode and the PTO, and initiated efforts to have the applications revived. Tr. 227-29, 317. The fact that Mr. Bode could not have, to any significant degree, substantively discussed with Mr. Wilson the issue of filing statements of use regarding the trademark applications is made clear by the fact that even at the hearing, Mr. Wilson credibly testified that he did not understand that the meaning of filing on an "intent-to-use" basis. Tr. 306, 311. Finally, Mr. Bode's assertions in this regard are even contradicted by his own acknowledgment that, upon hearing of the abandonments, Mr. Wilson fired him. Tr. 644-45, 647.

In addition, Mr. Bode's claim that the abandonments occurred because Mr. Wilson's interest in the product and applications began to wane is contrary to all the testimony from Mr. Wilson about his on-going efforts to promote the product. Mr. Wilson testified at the hearing about how after the first \$50,000 of product domestically manufactured in 1999 was found to be too expensive, in August or September 2000, Cleat Tech had the product re-manufactured overseas for less and sold 10,000 of these units nationwide, with the trademark name. Tr. 283-84, 286, 297-98. Mr. Wilson said at the time of the sale he represented to the buyer that the patent was pending. Tr. 293. He stated that he and other investors underwrote the cost of manufacturing the product "at the tune of \$100,000" through bank loans secured by anticipated patents and trademarks, loans which would be coming due shortly. Tr. 272-73. In addition, Mr. Wilson stated that the product with the Pop Eye trade name was on "Websites all over the country" and was advertised on the Outdoor Channel on the TV. Tr. 274, 305. Prior to that, he said, Cleat Tech was using the trademarks on its letterhead. Tr. 305. Mr. Wilson also stated that last year (2002) he was negotiating with another company, Dawes Manufacturing, to sell the product at as much as

25,000 units a month and that company requested proof of patent in regard to the contract. Tr. 272. While Mr. Wilson acknowledged at the hearing that he had not called Mr. Bode to tell him they were selling the product, he presumed Mr. Bode knew that was the intention of having it manufactured. Tr. 285. In fact, the second patent application filed for Cleat Tech (09/507,644) in filing without the signatures of either of the co-inventors, was on the basis that “the assignee has or will in the immediate future offer for sale a device made in accordance with the invention disclosed in the application. C’s Ex. 535. All this activity, geared towards selling the product for which the applications had been filed, supports Mr. Wilson’s and Mr. Harris’ claims that they had every intention of proceeding with the applications through issuance and belies Mr. Bode’s claim that Mr. Wilson’s interest in the product had waned to the point where he agreed to abandon the applications.<sup>47</sup>

As to Mr. Bode’s assertion that the abandonment of the original Cleat Tech patent application (no. 09/244,829) was unintentional, that he did or attempted to pay the issue fee on the initial patent application (as requested by the Notice of fee Due dated March 14, 2000) and advised his client regarding the same, I note there is some support for this in the record. Specifically, the record contains Mr. Bode’s invoice for services dated March 30, 2000 in which he charged Cleat Tech \$200 for the “Preparation and filing of: Issue Fee Transmittal and other formal documents; payment of Issue Fee and advance order copy fee in the above-referenced design patent application.”<sup>48</sup> C’s Exs. 440-42. That Invoice also shows the issue fee of \$605 in regard to application 09/244,829 (referred to by Mr. Bode as “U.3”) as a disbursement. Tr. 442. However, even accepting that Mr. Bode attempted to pay the issue fee he received from Cleat Tech to the PTO in a timely manner, the evidence does not show that he zealously represented his client in this matter or kept his client sufficiently informed. During the hearing, Mr. Bode testified that he was unaware that the application went abandoned as a result of the fee not being received until after this action was filed two years later, in June 2002. Tr. 647. Mr. Bode explained that he did not receive the August 10, 2000 notice of abandonment from the PTO claiming that “[t]here’s many documents that I don’t receive from the Patent Office.” Tr. 650. Accepting this is true, having not received copies of the patent from the PTO in a timely manner, Mr. Bode had an obligation to follow up. It is clear from his testimony that, for over two years after he thought the fee had been paid, he did not do so.

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<sup>47</sup> Mr. Bode admitted at the hearing that under the regulations an applicant for a trademark can request and purchase up to a 24 month extension of filing of a statement of use. Tr. 636. Thus, instead of abandoning the applications, Cleat Tech could have maintained them as pending until August 13, 2003. Tr. 637. According to Mr. Wilson, by that time Cleat Tech would have been able to submit a statement as to use in that it was selling its product with the trademark starting in 2000, within months of the first trademarks becoming abandoned.

<sup>48</sup> It is unclear why the Invoice refers to payment of an issue fee on a “*design*” patent application, since it references application no. 09/244,829 which was a utility patent application (see, C’s Exs. 416, 418, 420, 530) as were the other patent applications filed by Mr. Bode for Cleat Tech. C’s Exs. 266, 590.

Thus, I find that in regard to Respondent's dealings with Mr. Harris, Mr. Wilson, and Cleat Tech, Inc., Mr. Bode violated 37 C.F.R. §§ 10.23(c)(8), 10.77(c), and 10.84(a)(2).

#### F. Summary

Upon consideration of the evidenced proffered in this case, Respondent is found to have committed the violations alleged in Counts 1-5, 8-10, and 17-20.

### IV. SANCTION

The remaining issue in this case is the type of sanction to be imposed for the violations found. The Complainant is requesting suspension or exclusion.<sup>49</sup> See, Amended Complaint; Complainant's Brief at 51-59. Respondent has not offered an alternative sanction he would deem appropriate if found liable. See, Respondent's Answer to Amended Complaint; Tr. 583-674.

"We must keep in mind that the real and vital issue to be determined in disbarment proceedings is whether or not the accused, from the whole of the evidence as submitted, is a fit and proper person to be permitted to continue in the practice of law." *In re Walker*, 254 N.W. 2d 452 (S.D. 1977) citing *In re Van Rushed*, 160 N.W. 1006 (S.D. 1917). "We 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." *Coombs v. State Bar of California*, 779 P.2d 298, 306 (Cal. 1989).

As to factors for determining a sanction, the Rules governing this proceeding provide at 37 C.F.R. § 10.154(b) that, "In determining any penalty, the following should normally be considered: (1) The public interest; (2) The seriousness of the violation of the Disciplinary Rule; (3) The deterrent effects deemed necessary; (4) The integrity of the legal profession; and (5) Any extenuating circumstances."

In support of exclusion, Complainant argues in his Brief that Mr. Bode's conduct is both egregious and cumulative. Complainant's Brief at 51. The Complainant asserts that the public

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<sup>49</sup> The Amended Complaint also contained a prayer that Respondent be required to pay all or a portion of the costs and expenses, not to exceed \$1,500 of the disciplinary proceeding leading to the suspension. However, the Complainant's Brief did not contain a similar request. Moreover, there appears to be no authority for an administrative law judge to impose such a requirement in an initial decision. See 37 C.F.R. § 10.154. Rather, 37 C.F.R. § 10.160(c)(2), provides that as a condition of *reinstatement*, after a practitioner has been duly suspended or excluded, *the Director may require* the individual to pay all or a portion of the costs and expenses not to exceed \$1,500, of the disciplinary proceeding which led to the suspension or exclusion. Therefore, this relief is not addressed further herein.

interest has been violated by Respondent's abuse of the trust placed in him by his clients and his misappropriation of client funds; that the violations are serious because they involve falsification of "official government documents," ignoring the authority of the OED, and causing the clients financial harm. Complainant states that Mr. Bode has shown no remorse for his conduct and made misrepresentations to the OED and that in the interest of maintaining the integrity of the legal profession, exclusion is appropriate, noting Respondent has offered no mitigating factors warranting a reduction in the sanction. *Id.* at 51-59.

After consideration of the whole of the evidence as submitted, I cannot find that Mr. Bode is a fit and proper person to be permitted to continue in the practice of law at this time.

First, in terms of the public interest, I am particularly troubled by the fact that Mr. Bode submitted to the PTO a number of certificates of mailing which were misdated. The PTO is Federal government entity which bears the formidable responsibility of processing all the thousands of patent and trademark applications it receives in a fair and efficient manner for the benefit not only of the applicants individually but the general public as well. The granting of a patent creates a potentially extraordinarily valuable property right for one or more inventors and deprives everyone else of the ability to obtain the same right on the invention. Tr. 433-35, 445-46. In order to achieve its mission and maintain the integrity of the Office, the PTO relies heavily upon the honor of the select bar of attorneys and practitioners allowed to appear before it, in whom it places its trust to deal with it in a forthright manner.<sup>50</sup> By misdating the certificates of mailing, and attempting to rig the system for the benefit of his clients over those of others, Mr. Bode violated that trust and undermined the integrity of the national patent and trademark system.

Further, without a doubt, all of the violations upon which Mr. Bode is found liable herein are serious. However, aside from the misdating of the certificates mentioned above, the most serious appears to me to be Respondent's apparent on-going pattern and practice of failing to communicate with his clients about the work he had been hired by them to perform and his failing

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<sup>50</sup> Mr. Moatz testified that to be admitted to practice before the PTO as a patent attorney requires not only a law degree, but also an undergraduate science degree, good moral character, and passing of a registration examination on procedures, rules and policies. Only approximately 2% of the attorneys in the United States are registered to practice before the PTO. Tr. 410-414. The employees at the PTO work closely with that select bar to process applications. Examiners are supposed to exclusively communicate regarding applications with the attorneys or agent, rather than the client/applicant, and all correspondence regarding applications in process is sent by the agency only to the attorney of record, not the applicant, and then only by regular mail. Tr. 423-256, 444. PTO examiners are expected to advised applicants who contact them directly that they are not going to give them any information. Tr. 541-52. Moreover, the PTO relies upon the truthful representations of those select attorneys in the negotiation which routinely occurs between the applicant's attorney and PTO's examiners in the patent process in order to efficiently process cases. Tr. 415, 422-24, 438-39.

to perform the work he was hired to do.<sup>51</sup> It is clear from the testimony of Mr. Hanssen and Mr. Wilson, that those individuals, and perhaps many, if not most, of Mr. Bode's other clients are unfamiliar with patent and trademark law and because of this, and this area of law's unique complexity and procedures, have no real ability to supervise and evaluate the quality of his ongoing work. As a result, they must place their trust in him to look out for their interests and to attempt in good faith to satisfy their expectations as to outcomes. For example, Mr. Hanssen testified that this was his first experience with the patent application process and he did not know anything about what it involved. Tr. 50, 80. He thought he hired Mr. Bode to handle these applications "from beginning to end." Tr. 26. Based upon Mr. Bode's references and his knowledge in the industry of patent research and patent applications, as represented to him by Mr. Bode orally and in writing (C's Exs. 398-407), Mr. Hanssen stated that he expected that the matters would be brought to a close with the issuance of a patent by the United States Patent Office. Tr. 34. However, looking back, Mr. Hanssen stated that he feels that Mr. Bode did not live up to his expectations because he failed to adequately communicate with him. Tr. 34-36.<sup>52</sup> Mr. Wilson expressed a similar sentiment - that he had no prior experience in patent and trademark matters, was counting on Bode's guidance and expertise, considered him "the boss" regarding handling the patent and followed his advice, and was disappointed. Tr. 203, 282, 312, 313-314.

As to deterrent effects deemed necessary, at the hearing Mr. Bode testified that "Mr. Moatz investigated me at least one on [sic] time before for the same reasons" including hiatuses between dates of documents mailed and received. Tr. 620, 650, 671. That investigation involved the issuance of a letter on April 26, 1988 and an interview conducted by Mr. Moatz of Mr. Bode in his offices in New Orleans. Tr. 651. Mr. Bode stated that "back then [Mr. Moatz] had no basis for bringing the charges, it was dismissed." Nevertheless, when asked what changes he made to his office practices as a result of this issue being raised with him at that time, Mr. Bode said, none. Tr. 671-72. This incident of warning gone unheeded, combined with Mr. Bode's clear lack of contrition, does not suggest he is someone for whom a nominal penalty will deter further

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<sup>51</sup> As to Complainant's assertion that Respondent misappropriated client funds, *i.e.*, filing fees received in advance but not actually transferred to the PTO, I do not see this as a separate violation or as an intentional usurping of client funds by Mr. Bode, but rather part and parcel of Respondent's general neglect of client matters. Unfortunately, Mr. Bode failed to mitigate this issue by offering to reimburse his clients for the misappropriated funds during the course of this proceeding.

<sup>52</sup> There was conflicting testimony at the hearing about whether Mr. Hanssen and Cleat Tech patents and trademarks would have been of value had they not gone abandoned. Tr. 36-37, 40, 72-73, 165-66, 452, 433-35. Success of an invention commercially is not an element of the application process (tr. 452) and whether an application which never ripened into a patent or trademark would have been at some point invaluable or worthless has no real relevance here. As an attorney, it was Mr. Bode's job to zealously pursue his clients interest in obtaining patents and trademarks and to honestly communicate with his clients the status of the work he was doing for them. In terms of a disciplinary action, the magnitude of a violation of the breach of these duties is not measured by the potential worth of the patent or trademark.

violations.

As to the integrity of the legal profession, there is an thread of dishonesty that runs through this whole case. The record reflects that Mr. Bode did not honestly date his certificates of mailing, did not honestly disclose his actions to the OED in his responses to the RFIs or honestly reveal his unwillingness to answer the RFIs, did not honestly reveal the state of his clients' patent applications to them, and he did not honestly deal with this Tribunal.<sup>53</sup> Respondent has demonstrated no remorse for his actions. He never expressed any regret that his clients (Messrs. Hanssen, Wilson and Harris) feel that his work was unsatisfactory. He never expressed any regret that the OED had to go to all this effort including sending him letter after letter after letter, just to have him focus his attention on the seriousness of his actions.

In terms of extenuating circumstances and/or mitigating factors, Respondent testified that he has successfully handled hundreds of cases and this action involves only a "two disgruntled clients . . . that couldn't be successful in their business" and did not want to pursue their applications. Tr. 671-72. While that characterization of the case may not be completely correct, I agree with Mr. Bode that he is an experienced practitioner in the field of patent and trademark law. He also appears to be a bright and capable man. There is no question but that he successfully practiced his profession for many years hitherto, apparently without significant incident. At all times relevant hereto, he has been a solo practitioner having a "small practice with few clients." Tr. 672. He maintains a number of offices in varied locations to and from which he must travel. Why then, did there apparently come a point in time, sometime in mid-2000, when Respondent ceased actively pursuing the work for which he had been hired to do and risk, at the very least, alienating his clientele and reducing the potential legal fees he would earn? I find it difficult to believe it was simply conscious neglect. After hearing all the evidence, I believe there are external circumstances which could explain this matter better. However, Respondent has offered no such explanation and therefore, there is none for me to consider in determining the appropriate penalty to be meted out in this case.

In determining the appropriate penalty to be imposed in this case, I have reviewed similar cases where backdating of certificates of mailing was the primary violation charged, including *In re Klein*, 1987 Commr. Pat. LEXIS 23, 6 U.S.P.Q.2D (BNA) 1547 (Oct. 19, 1987), *aff'd* 696

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<sup>53</sup> This Tribunal experienced either loss or extensive delay in receipt of filings purportedly sent to it by Respondent or to Respondent to a degree never previously experienced in any of the hundreds of cases previously adjudicated. See, footnotes 3, 5-10 above; Tr. 368-73. It was as a result of this unique circumstance that this Tribunal imposed upon Respondent the unusual obligation to simultaneously serve copies of filings on the undersigned by facsimile as well as by mail, a request to which Respondent strenuously objected on the basis of inconvenience and as to which he did not always comply. In addition, there is the matter of Mr. Bode's repeated but completely unsubstantiated representations to this Tribunal, such as his assertion that he answered the RFIs and that he had evidence that he paid the issue fee in the original Cleat Tech application to the PTO.

*F.Supp. 695*, \* *USPQ2d 1434* (D.D.C. 1988), *aff'd 866 F.2d 412* (Fed. Cir. 1989) and *Small v. Weiffenbach*, 1986 Commr. Pat. LEXIS 29 (ALJ 1986), *aff'd 1989 Commr. Pat. LEXIS 3*, 10 U.S.P.Q.2D (BNA) 1898 (Apr. 13, 1989).<sup>54</sup> In both of those cases, the Administrative Law Judge recommended exclusion as a sanction. However, on appeal, in each case the penalty was significantly reduced by the Commissioner of Patents. In *Klein*, although the Commissioner found there were no mitigating or extenuating circumstances, that the Respondent had not cooperated during the course of the proceeding, that he had misleadingly used evidence at the hearing, and that he had made mis-statements of facts in his brief, the Commissioner nevertheless reduced the penalty to what in effect amounted to a two year suspension from practice, followed by five years of probation during which the practitioner was prohibited from using a certificate of mailing. *Klein*, 1987 Commr. Pat. LEXIS 23\*15, 33-34. In *Small*, the Commissioner imposed a higher penalty of a 5 year suspension because the Respondent had involved his secretary in the falsification of mailing dates, was not candid with the PTO when asked about backdating, neglected legal matters entrusted to him, and lacked contrition and remorse.

Were it not for those appellate decisions, like the Administrative Law Judge who heard those cases, I would be inclined to find the appropriate sanction in this case to be exclusion. However, in light of those decisions, a lesser penalty more in line with those imposed in those cases will be considered. In this case, while Respondent denied the charges, he cannot be said to have made any actual affirmative erroneous statements to the OED about backdating in the RIFs since he did not answer them (although he claimed he did), nor did he misuse evidence at hearing (since he offered none), nor did he make any misstatements in his post-hearing brief (since he filed none). No secretary was blamed for the misdating; Respondent took responsibility for all filings. Tr. 657-58. However, like *Small*, he has expressed no contrition or remorse and, as was the case in both *Klein* and *Small*, he neglected matters entrusted to him. All in all, I think the appropriate sanction in this case to be imposed is somewhere between those imposed in *Klein* and *Small*.

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<sup>54</sup> In addition, I reviewed information regarding the *Dula* case cited in the *Small* decision. That case also involved an attorney accused by the Agency of misdating certificates of mailing. The attorney vigorously denied the charge and raised in defense issues regarding problems establishing an independent patent practice, problems he and others had experienced with mail delivery, and actions he had taken to correct those problems. The case was settled with the attorney consenting to essentially a two year suspension, followed by a five year probationary period during which he could not file documents using a certificate of mailing. See, *In re Dula*, 27 BNA's Patent, Copyright & Trademark Journal, No. 658, p. 133 (Dec. 8, 1983).

**ORDER**

After careful and deliberate consideration of the above facts and conclusions as well as the factors identified in 37 C.F.R. § 10.154(b), it is concluded that, in regard to each count for which Respondent is found liable, a seven (7) year suspension, with execution of the last four (4) years suspended and Respondent placed on probation during that period, is appropriate,

**THEREFORE, IT IS HEREBY ORDERED** that Respondent **Bode**, PTO Registration No.30,028, is hereby **suspended for a period of seven (7) years from practice** before the Patent and Trademark Office; execution of the last 4 years is suspended and Respondent is being placed on probation for those (4) years. The sanctions for each count are to run concurrently. The terms of probation are:

(i) Respondent shall comply with all Disciplinary Rules applicable to patent attorneys practicing before the PTO; and

(ii) No document in any patent or trademark application can be filed in the Patent and Trademark Office by or on behalf of Respondent which (a) uses a certificate of mailing under 37 C.F.R. § 1.8, and (b) which indicates on the document that the document was prepared by, worked on, or signed by or on behalf of, Respondent.

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

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

  
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Susan L. Biro  
Chief Administrative Law Judge

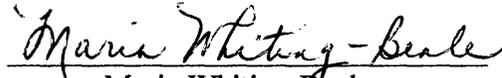
Date: August 21, 2003  
Washington, D.C.

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

In the Matter of Harry I. Moatz v. George A. Bode, Proceeding No. D02-14

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated August 21, 2003, was sent this day in the following manner to the addressees listed below.

  
Maria Whiting-Beale  
Legal Staff Assistant

Dated: August 21, 2003

Copy by Regular Mail to:

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