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UNITED STATES
PATENT AND TRADEMARK OFFICE
BEFORE THE ADMINISTRATIVE LAW JUDGE
OF THE DEPARTMENT OF COMMERCE

HARRY I. MOATZ, Director, Office of Enrollment and Discipline	)	
v.	)	Proceeding D2004-05
GEORGE E. KERSEY,	)	
Respondent.	)	

U.S. Patent and Trademark Office-Rules For Disciplinary Proceedings-Reciprocal Discipline-Summary Judgment

Notwithstanding that the statute (35 U.S.C. § 32) and the Rules for Disciplinary Proceedings (37 C.F.R. § 10.130 through 170, in particular § 130(a)) authorizing the Director, after notice and opportunity for hearing, to suspend or exclude from further practice before the PTO any person, agent or attorney shown to be incompetent or disreputable, or who is guilty of gross misconduct or who violates a Disciplinary Rule, make no provision for summary judgment, the Rules for Reciprocal Discipline are firmly established, namely, that in a proceeding considering an attorney's suspension or disbarment based on his suspension or disbarment in another jurisdiction ("reciprocal discipline"), facts found and conclusions reached in the prior proceeding may not be re-litigated in the present proceeding and where the record indicated that the only facts Respondent intended to place in issue at a hearing were that the prior proceedings were based on false statements of fact or misstatements of fact, it was held that Respondent had been given an opportunity for hearing, but had failed to demonstrate that a hearing would be anything other than reiteration of his arguments, and the Director's Summary Judgment Motion excluding Respondent from representing others before the USPTO was granted.

U.S. Patent and Trademark Office-Rules For Disciplinary Proceedings –Mandatory Withdrawal From Employment - Sua Sponte Summary Judgment

Where the record established that after a hearing before an ALJ, Respondent was suspended from further practice before the PTO pursuant to Rule 10.130(a), and Respondent did not withdraw from continued employment as required by Rule 10.140(b)(2), but continued to make filings with the PTO in a representational capacity on behalf of others and Respondent

moved for summary judgment dismissing Count 2 upon the ground, inter alia, that the suspension was not in effect, his argument that the filings did not constitute practice before the PTO because the filings involved administrative matters or responses to direct inquiries from the PTO was rejected as a matter of law, his argument that his appeal automatically stayed the suspension was held to be contrary to the Administrative Procedure Act (5 U.S.C. § 705) and, because he had advanced no facts which would alter an outcome in favor of the Director, it was held that Respondent had not demonstrated that a hearing would serve any useful purpose, the Director was held to be entitled to judgment as a matter of law and summary judgment was entered for the Director sua sponte on Count 2 of the complaint, excluding Respondent from further practice before the PTO.

Appearances:

For the Director: Joseph G. Piccolo
W. Asa Hutchinson III
Sidney O. Johnson, Jr.
Arlington, VA 22215

For Respondent: George E. Kersey
Pro Se
Framingham, MA 01701

Spencer T. Nissen
Administrative Law Judge, EPA[1]

ORDER GRANTING DIRECTOR'S MOTION FOR SUMMARY JUDGMENT, DENYING RESPONDENT KERSEY'S MOTION FOR SUMMARY JUDGMENT, ENTERING SUA SPONTE SUMMARY JUDGMENT FOR THE DIRECTOR ON COUNT 2 AND EXCLUDING RESPONDENT FROM PRACTICE BEFORE THE U.S. PATENT AND TRADEMARK OFFICE

Background

[1]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.

This is a disciplinary proceeding initiated by the Director, Enrollment and Discipline ("Director" of "OED"), U.S. Patent and Trademark Office ("USPTO") pursuant to 35 U.S.C. § 32 and 37 C.F.R. § 10.134. At the time relevant to these proceedings, the Respondent, George E. Kersey, was registered to practice before the USPTO, under Patent Practitioner Registration Number 20,136, and engaged in representing others before the USPTO. Therefore, Respondent is subject to the rules governing the practice of patent and trademark law before the USPTO and the PTO Code of Professional Responsibility, 37 C.F.R. § 10.1 *et seq.*

On June 18, 2004, the Director issued a Complaint and Notice of Proceedings seeking entry of an order excluding Respondent from practice before the USPTO pursuant to USPTO's Rules for Disciplinary Proceedings at 37 C.F.R. § 10.130 through 10.170 ("Rules"). The Rules at 37 C.F.R. § 10.130(a) authorize the Commissioner, now the Director of the United States PTO, after notice and opportunity for hearing, to " (1) reprimand or (2) suspend or exclude, either generally or in any particular case, any individual, attorney or agent shown to be incompetent or disreputable, who is guilty of gross misconduct, or who violates a Disciplinary Rule." The Complaint contained two counts: Count 1 alleged that on February 27, 2004, the New Hampshire Supreme Court disbarred Respondent from practice as an attorney on ethical grounds, which constitutes "gross misconduct" within the meaning of 37 C.F.R. § 10.23(c)(5); and Count 2 alleged that after prior disciplinary proceedings the Director suspended Respondent from practice before the USPTO beginning on November 24, 2002, and that thereafter Respondent filed several documents with the USPTO on behalf of clients, thereby continuing to practice before USPTO after being suspended, and engaging in conduct prejudicial to the administration of justice in violation of 37 C.F.R. § 10.23(b)(5). Additionally, it was alleged that Respondent violated 37 C.F.R. §10.40(b)(2) by failing to withdraw from representing clients before the USPTO when he knew such failure would result in violation of a Disciplinary Rule.

Kersey submitted an answer under date of July 16, 2004, denying the violations alleged in the complaint. In the answer to Count 1, Kersey asserts, inter alia, that his suspension on September 20, 2001, from the practice of law for three months by the Supreme Court of New Hampshire was improper and contrary to law. Although Kersey admitted that on September 20 and December 19, 2001, he was ordered by the New Hampshire Supreme Court to turn over his client files and trust accounts, he says that he responded by pointing out that he had no trust accounts and no client files over which the State of New Hampshire had jurisdiction. He denies that after September 20, 2001, he continued to practice law in New Hampshire State Courts on behalf of any client and denies that he refused to comply with court orders to turn over files. Instead, he alleges that he challenged the order by pointing out that he had no active New Hampshire State Court files. Kersey also admits that on May 6, 2002, he was held in contempt of court by the Supreme Court of New Hampshire, but alleges that this was improper because he had no active New Hampshire state cases. Kersey further admits that on February 27, 2004, he was disbarred by the Supreme Court of New Hampshire, but alleges that this action was based on false determinations that he, inter alia, violated legitimate orders [of the Court]. Kersey denies

that he violated 37 C.F.R.§ 10. 23(c)(5)[2] in that he was improperly disbarred from practice as an attorney on ethical grounds by a duly constituted authority of the State of New Hampshire. As indicated infra, Kersey's argument that he was not practicing law in New Hampshire when he filed two pleadings in matters pending before the New Hampshire Supreme Court because he was the real party in interest was rejected by the Supreme Court of New Hampshire. Kersey has repeated the contention that he was the real party in interest because he was held personally liable for attorney's fees. However, he has produced no document which supports that contention. When the matter of imposing reciprocal discipline and disbarring Kersey from practice before the U.S. Court of Appeals for the First Circuit arose, the court held that it lacked the power to overturn the finding of the New Hampshire Supreme Court that as a matter of New Hampshire law Kersey's activities constituted the practice of law .*In Re George E. Kersey,* 402 F.3d 217 (1st Cir.2005). The same holding is applicable to the Director and the ALJ in this proceeding.

In his answer to Count 2, Kersey acknowledges that the Director brought USPTO disciplinary proceeding D2000-07 against Kersey in 2000, but alleges that these proceedings were improper. Kersey denies that in USPTO Disciplinary Proceeding D2000-07, after a hearing before an Administrative Law Judge, the USPTO Director (1) determined that Respondent violated-(i) 37 C.F.R. § 10.23(c)(5) (being suspended from practice as an attorney on ethical grounds by any duly constituted authority of a State)-, (ii) 37 C.F.R. § 10.23)(c)(20) (knowing practice contrary to applicable Federal conflict of interest laws)-, and (iii) 37 C.F.R. § 10.24 (willful refusal to report knowledge or evidence of his suspension), and (2) suspended Respondent from representing others before the USPTO beginning on November 24, 2002. Kersey denies that since November 24, 2002, he has been suspended from practice before the USPTO. He acknowledges that he has not sought reinstatement pursuant to 37 C.F.R. § 10.160(a) to represent others before the USPTO, but alleges that reinstatement is not necessary.

Kersey denies that his conduct violated the following USPTO Rules of Professional Conduct:

a. 37 C.F.R. § 10.23(b)(5), in that Kersey did [not] engage in conduct that was prejudicial to the administration of justice by continuing to practice before the USPTO after the suspension became effective-, and

b. 37 C.F.R. § 10.40(b)(2) in that Respondent did not withdraw from representing clients before the USPTO when he knew, or it was obvious, that Respondent's continued employment would [not] result in violation of a Disciplinary Rule.

Kersey acknowledges that in eleven separate instances, subsequent to November 24,

[2] The regulation, 37 C.F.R. § 10. 23, is entitled "Misconduct", and provides in pertinent part (b): A practitioner shall not violate (1) A Disciplinary Rule. Section10.23(c) provides that: Conduct which constitutes a violation of paragraphs (a) and (b) of this section includes, but is not limited to: (5) Suspension or disbarment from practice as an attorney or agent on ethical grounds by any duly constituted authority of a State or the United States..

2002, he filed papers with the USPTO concerning patent applications. He contends, however, that these filings involved administrative matters or responses to specific inquiries from the PTO and thus did not constitute practice before the USPTO. Kersey's similar argument that his PTO filings on behalf of private parties while employed by the U.S. Air Force did not constitute practice before the PTO and thus a violation of Federal conflict of interest statutes and of PTO Disciplinary Rules was rejected by the ALJ, *Moatz v. Kersey, Proceeding D00-07,* Initial Decision (November 14, 2001), and by the General Counsel, *Moatz v Kersey, Proceeding No. 00-07,* Final Decision (June 14, 2002).

The Director cites 35 U.S.C. § 2(b)(2)(D providing that "USPTO may govern the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office" (Director's (1) Summary Judgment Motion for Reciprocal Discipline and (2) Response to Judge Nissen's August 4, 2004, Order at 12). The Director asserts that 37 C.F.R. Part 10 implements the foregoing statutory power and that the facts shown in Exhibits 5-15 and in the corresponding Statement of Undisputed Facts for Count 2, and in the complaint, paragraphs 11-21, clearly show that Respondent was representing applicants before the USPTO when he represented six different applicants on eleven submissions to the USPTO (id.). The Director says that in each of these eleven submissions, it is clear that Respondent "represented a party before the Office."

As Affirmative Defenses, Kersey alleges, inter alia, that Disciplinary Proceeding D2000-07 was brought improperly against Kersey by the Director; that in USPTO Disciplinary Proceeding D2000-07, after a hearing before an Administrative Law Judge, the Director (1) falsely determined that Kersey violated-(i) 37 C.F.R. § 23(c)(5) (when Kersey had demonstrated that he was improperly suspended from practice as an attorney on ethical grounds by any duly constituted authority of a state); Kersey had not violated (ii) 37 C.F.R. § 10.23(c)(20) (since he had not knowingly practiced contrary to applicable Federal conflict of interest laws)-, and (iii) 37 C.F.R. § 10.24 (there was no willful refusal to report knowledge or evidence of suspensions because they were improper), and (2) it was improper to attempt to suspend Kersey from representing others before the USPTO beginning on November 24, 2002; Kersey repeats the admission that he has not sought reinstatement under 37 C.F.R. § 10.160(a) to represent others before the USPTO because reinstatement is not needed, and denies that since November 24, 2002, he has been suspended from representing others before the USPTO. Kersey alleges that he did not violate any USPTO Disciplinary Rules of Professional conduct; denies that he violated 37 C.F.R. § 10.23(b)(5) because he did not engage in conduct that was contrary to the administration of justice by continuing to practice before the USPTO because the alleged suspension was improper and contrary to law; and asserts that he did not violate 37 C.F.R. 10.40(b)(2) in not withdrawing from representing others before the USPTO because he knew, or it was obvious, that his continued employment would not result in violation of a Disciplinary Rule.

Each of the parties have submitted prehearing statements and information

required by Rule 10.152(e) and an order of the Administrative Law Judge (ALJ).

Among items of information the parties were directed to provide was a copy of each document or exhibit to be proffered at the hearing and a list of witnesses together with a brief summary of their anticipated testimony (Order, dated August 4, 2004, at 1). Kersey's response was that he proposed to submit all documents relating to the Disciplinary Proceeding in New Hampshire which was in complete violation of Kersey's rights under the Federal Constitution. In particular, Kersey alleges that he was wrongfully disbarred because he challenged the order of the Court to turn over client files over which the State of New Hampshire did not have jurisdiction (Response, dated September 9, 2004, by George E. Kersey ("Kersey") To Order dated, August 4, 2004).

In response to the order to provide a list of proposed witnesses and a summary of their anticipated testimony, Kersey stated [that his witnesses would include] all Massachusetts, New Hampshire and Patent Office personnel involved in the improper disciplinary actions against Kersey. He then proceeded to list ten individuals by name, but did not identify their positions or the entity by which they were employed, much less provide summaries of anticipated testimony.[3] If these individuals are part of the judicial process, they may not properly be questioned as to the bases for decisions rendered or compelled to appear to explain such decisions.[4] Concerning the directive to provide as to each expert witness a statement of the field and subject matter in which the expert will be qualified and a statement of the facts and opinions upon which the expert is expected to testify, Kersey responded that he would testify, as an attorney admitted to practice in New York and New Jersey and all Federal Courts, including the United States District Court for New Hampshire, that the actions by the States of New Hampshire and Massachusetts were completely contrary to law by relying on wrongfully stated alleged facts or misstating the facts (Response at 2). In further responses, Kersey alleges that he responded to a preliminary request from the PTO in 2004, explaining that his responses to the PTO were to documents addressed to

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[3] Kersey cites *Supreme Court of Virginia v. Consumers Union of United States, Inc,* 446 U.S. 719, 731, 734-37 (1980) for the proposition that judicial immunity does not extend to judges promulgating a code of conduct for attorneys, rather the court held that in promulgating such rules the Virginia Supreme Court was acting in its legislative capacity and immune from suit for that reason. This proceeding does not involve promulgation of rules, however, but the normal judicial function of determining whether specified conduct violates established law, rules or regulations. Moreover, the doctrine of judicial immunity has been extended beyond judges and to certain others who perform functions closely associated with the judicial process. *Cleavinger v Saxner,* 474 U.S. 193, 200 (1985). See also *Lowe v. Letsinger, 772 F.2d 308 (7th Cir.1985)* (judicial immunity extended to a court clerk).

[4] Although the APA (5 U.S.C. § 556 (c)(2) provides that an ALJ may issue subpoenas authorized by law, subpoena power is lacking unless the statute under which the proceeding is brought provides subpoena authority. The statute under which this proceeding is brought (35 U.S.C.§ 32), does not provide for subpoena authority. However, 35 U.S.C. § 24 provides that the clerk of any United States court wherein testimony is to be taken in any contested case in the Patent and Trademark Office shall, upon application of any party, issue a subpoena for any witness residing in or being within such district, commanding him to appear and testify before an officer in such district authorized to take depositions and affidavits, at a time and place named in the subpoena. Rule 10.138 provides that upon the filing of an answer by the respondent a disciplinary proceeding shall be regarded as a contested case within the meaning of 35 U.S.C. § 24. However, evidence obtained by a subpoena issued under 35 U.S.C. § 24 shall not be admitted into the record or considered unless leave to proceed under that section was previously authorized by the ALJ..

him, and that in 2003, he pointed out to PTO personnel that since the Director had failed to appeal within the time provided by CFR, the suspension that was ordered was improper. Asked to explain the assertion that the three-month suspension issued by the New Hampshire Supreme Court was improper and contrary to law, Kersey responded that the basic discipline was based on a false statement of fact that Kersey had made no attempt to comply with a [Vermont] contempt order, and New Hampshire completely ignored the evidence that Kersey supplied showing that he had complied [with the Vermont court order]. In this regard, it should be noted that the Supreme Judicial Court of Massachusetts in considering Kersey's appeal from his disbarment referred to Kersey's contention that he was in substantial compliance with the Vermont orders. The court observed, however, that there was no evidence that he had purged himself of contempt in that jurisdiction. *In The Matter of George E. Kersey, 444 Mass.65; 825 N.E. 2d 994 (Mass. 2005).*

The August 4 order also directed Kersey to describe New Hampshire State court cases handled by Kersey and matters, other than those before the PTO, normally constituting the practice of law, i.e., those in which Kersey was involved in a representational capacity, and provide any documents supporting the assertion that these matters were or are closed so as not to be subject to the New Hampshire Supreme Court's order to turn over client files and trust accounts. Kersey responded that he had only one such case, in which the court found that it did not have jurisdiction, but nevertheless imposed attorney's fees for bringing a case over which the court had no jurisdiction. Kersey asserts that he had no New Hampshire trust accounts and did not practice patent law in New Hampshire. Kersey was also directed to explain the denial of the result of the prior disciplinary proceeding, *Moatz v Kersey,* Disciplinary Proceeding D 00-07, Suspension Ordered, Final Decision, June 14, 2002, Reconsideration Denied, October 24, 2002, effective November 24, 2002, and, if Kersey has not sought reinstatement, to explain the basis for the contention that the prior suspension of Kersey's right to practice before the PTO is not in effect. Kersey responded by asserting that the prior suspension was illegal and is on appeal to the United States District Court for the District of Columbia. Kersey was also directed to summarize any facts he would present as a defense to the allegations of the complaint or in mitigation, if a hearing were held in this proceeding. Kersey's response was that he would demonstrate by the witnesses he will call and his own testimony that the allegations in the complaint are completely without merit.

The foregoing makes it evident that Kersey intends to contest facts found in his Massachusetts and New Hampshire suspensions and disbarments and in effect to re-litigate those decisions in this proceeding which, as noted infra, under the doctrines of "reciprocal discipline" and "collateral estoppel" he may not do.

Included with the Director's prehearing exchange was a "Summary Judgment Motion for Reciprocal Discipline" (Motion) requesting an order excluding Respondent from practice before

the USPTO on the basis that Respondent was disbarred in New Hampshire and Massachusetts.[5] In addition, along with the Motion, the Director submitted a "Statement of Undisputed Material Facts" as to both Counts 1 and 2.

Under date of October 19, 2004, Respondent submitted an Opposition to the Motion ("Opposition") and a Motion for Summary Judgment on Count 2. Respondent also submitted a "Statement of Undisputed Material Facts."

The Director filed a Reply to the Opposition, and to Respondent's Motion for Summary Judgment on Count 2. Thereafter, on February 1, 2005, April 12, 2005, June 7, 2005, and August 16, 2005, the Director filed notices of court decisions in disciplinary proceedings involving Kersey: *Kersey v. Undersecretary of Commerce,* Civil Docket No. 02-2331 (D. D.C., January 31, 2005)(denying Kersey's motion for summary judgment and granting Respondent's, Undersecretary of Commerce's, motion for summary judgment); *Kersey v. Undersecretary of Commerce,* Civil Docket No. 02-2331(D. D.C., April 11, 2005) (Notice of Appeal to Federal Circuit dismissed for failure to pay docketing fee); *In the Matter of George E. Kersey*, 825 N.E.2d 994 (Mass., April 21, 2005) (affirming disbarment of Kersey under reciprocal discipline); *Kersey v. Undersecretary of Commerce,* Docket No. 05-1272 (Fed. Cir., Aug. 15, 2005) (rejecting Kersey's brief on basis that case was dismissed). Respondent filed responses to three of those notices, under dates of February 24, 2005, April 18, 2005, and August 24, 2005. In the latter of these responses, Kersey asserted that the decision of the United States District Court for the District of Columbia affirming his November 24 suspension by the U.S. PTO is not final and even if it were, Kersey was entitled to show that it was completely without merit.

Additionally, Kersey contends that Director Moatz's prosecution of Count II, which is based on Kersey's alleged practice before the U.S. PTO subsequent to a November 24, 2002, suspension can have no effect since the improper suspension has been on appeal since August 24, 2005. These assertions are based on two concepts, the first of which has not been shown to be accurate, i.e., that the Federal Circuit will reconsider and reinstate the dismissed appeal,[6] and the second which is simply wrong, that is, appeal of the suspension order automatically stays the suspension. See APA Chapter 7, Judicial Review, and in particular 5 U.S.C. § 705, providing in part that " [w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." See also Fed. R. Civ. P. 62(a)-(d), which makes it clear that generally a party must file a motion with the court in order to stay the enforcement of a

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[5] The complaint, issued on June 18, 2004, of course, makes no reference to the fact that Respondent was disbarred by the Supreme Judicial Court of Massachusetts on July 20, 2004. *In Re: George E. Kersey,* Judgment of Disbarment, Supreme Judicial Court of Massachusetts for Suffolk County, July 20, 2004.

[6] The Director's Notice on Respondent's Former Federal Circuit Appeal., dated December 14, 2005, points out that the Federal Circuit's Pacer System indicates that on November 9, 2005, the Court received a letter from the U.S. District Court for the District of Columbia stating that Respondent " still owes $45.00 for full payment of the docketing fee", citing the attached Pacer printout. The Notice further states that as of this date Pacer does not show any reinstatement of Respondent's once-pending appeal to the Federal Circuit and that at this time the decision by the United States District Court for the District of Columbia, dated January 31, 2005, affirming the November 24, 2002, suspension of Respondent by the United States Patent and Trademark Office does not appear to be on appeal.

judgment or order. [7]

Rule 10.156(c) provides that a single request for reconsideration may be made by the respondent or the Director, if filed within 20 days of the date of entry of, formerly the Commissioner's, presently the General Counsel's decision, and that such a request shall have the effect of staying the effective date of the decision. The General Counsel denied the motion for reconsideration on October 24, 2002, providing that the decision would take effect 30 days from the date of entry of this order (*Moatz v Kersey,* Proceeding No. 00-07, General Counsel USPTO, Memorandum and Order on Reconsideration, October 24, 2002) (Director's Notice of Suspension, November 22, 2002). There being no evidence of a further stay either by the PTO or the U.S. District Court for the District of Columbia, it is concluded that Kersey's suspension became effective on November 24, 2002 and that the six-month suspension began running on that date. Although the six-month period of suspension has expired, there is no evidence that Kersey has sought reinstatement. In this regard, it is noted that 37 C.F.R. § 10.160 **Petition for reinstatement** provides in part: (a) A petition for reinstatement of a practitioner suspended for less than five years will not be considered until the period of suspension has passed.

Undisputed Facts as to Count 1

1. In 1991, Respondent was found to be in contempt of court in Vermont for willful violations of court orders. Motion, Exhibit 1 (*In re Kersey's Case*, 842 A.2d 121 (N.H. 2004), cert denied, __ U.S. __, 125 S.Ct. 97 (2004)).

2. In September 1999, Respondent's license to practice law in Massachusetts was suspended for three months and until he purged himself of the contempt [in Vermont courts]. Motion, Exhibit 1 (*In re Kersey's Case*, *supra*).

3. On September 20, 2001, on a petition for reciprocal discipline, the New Hampshire Supreme Court suspended Respondent from the practice of law in New Hampshire for a period of three months, and ordered Respondent to turn over his client files and trust accounts. Complaint and Answer ¶ 1, 2.

4. Respondent argued to the New Hampshire Supreme Court that he had no [active] New Hampshire State cases. Answer ¶ 2, 3.

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[7] Kersey alleges that in his petition for review in the U.S. District Court for the District of Columbia of the alleged Final Order denying his motion for reconsideration, he asked the court for a preliminary injunction [against the imposition of the suspension] but that as of that date the court had made no decision (Kersey's Statement of Undisputed Material Facts, Appendix II, page 4). The District Court's Memorandum Opinion is silent on any request or motion for a stay of the suspension. Moreover, although Kersey cites 37 C.F.R. § 10.157(b), authorizing the Commissioner [Director] to stay a final decision pending review of the Commissioner's [Director's] final decision, and argues that it was an abuse of discretion not to issue a stay pending review by the District Court, there is no evidence that Kersey ever specifically moved for a stay of the suspension order.

5. On December 19, 2001, the New Hampshire Supreme Court again ordered Respondent to turn over his client files and trust accounts. Complaint and Answer ¶ 2.

6. Respondent did not turn over the files, and on May 6, 2002, the New Hampshire Supreme Court found that he continued to practice law and refused to comply with court orders to turn over his files. Respondent was held to be in contempt of court. Complaint and Answer, ¶¶ 3, 4. The New Hampshire Supreme Court found that Respondent failed to bring to a hearing on January 4, 2002, client files as ordered, namely, files relating to matters in which he currently is performing work for clients, for which he performed work since September 20, 2001, and files for cases pending in state or federal court for which he filed an appearance. *Kersey's Case,* 797 A.2d 864 (N.H. 2002), *cert. denied*, sub nom. *Kersey v. Dehart*, 535 U.S. 906 (2002). The Court disagreed with Respondent's argument that he was the real party in interest in the matters pending before the Federal District Court and Supreme Court of New Hampshire, on the basis that he filed in his capacity as the client's attorney for an award of attorney fees. [8] The Court stated that the issue before it was the violation of its orders and therefore that the validity of the Massachusetts suspension would not be addressed because it was irrelevant. *Id.*

7. On February 27, 2004, the New Hampshire Supreme Court determined that Respondent violated its orders, violated New Hampshire Rule of Professional Conduct 3.4(c) by knowingly disobeying an obligation under the rules of a tribunal without a permissible exception, and violated New Hampshire Rule of Professional Conduct 5.5(a) by continuing to practice law despite being suspended, when he filed two pleadings with the New Hampshire Supreme Court (supra note 7). Based on these findings, the New Hampshire Supreme Court entered an order disbarring Respondent from practice as an attorney. Complaint and Answer ¶ 5; Motion, Exhibit 1. *In re Kersey's Case, 842 A. 2d 121 (N.H. 2004).*

8. The New Hampshire Supreme Court in its February 27, 2004 decision did not revisit Respondent's challenges to the validity of the Massachusetts suspension, justification for not turning over his files, and validity of the findings of contempt, as they were addressed in its prior decision of May 6, 2002, holding Respondent in contempt, *Kersey's Case,* 797 A. 2d 121 (N.H. 2002). Motion, Exhibit 1 (*In re Kersey's Case, supra*).

9. On July 20, 2004, the Supreme Judicial Court for Suffolk County, Massachusetts disbarred Respondent from the practice of law in Massachusetts based on his disbarment in New Hampshire, under the doctrine of reciprocal discipline. Response, Appendix II (Kersey's Statement of Undisputed Material Facts) ¶ 8.

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[8] The history of the federal litigation is summarized in *George E. Kersey ,Appellant. Ferraris Medical, Inc., Plaintiff, Rusch, Inc.,Plaintiff, Appellee.v Azimuth Corporation, Defendant, Appellee,* 90 Fed. Appx; 553; 2004 U.S. App. LEXIS 279 (1st Cir.2004), wherein Kersey's contention that he was a real party in interest was rejected as unproven because there was no evidence that he was personally liable for attorney's fees awarded as part of a settlement and his appeal was dismissed for lack of standing. Similarly, the New Hampshire Supreme Court rejected Kersey's argument that he was not practicing law but merely representing himself when he filed two pleadings in matters pending before that court. *Kersey's Case,* 797 A.2d 864 (N.H. 2002).

10. Respondent appealed the Massachusetts disbarment to the Supreme Judicial Court of Massachusetts. Response, Appendix II (Kersey's Statement of Undisputed Material Facts) ¶ 9 and Appendix I (Appeal Brief).

11. The Supreme Judicial Court of Massachusetts affirmed Kersey's disbarment (Director's Notice of Decision, dated June 7, 2005 (*In the Matter of George E. Kersey*, 825 N.E.2d 994 (Mass. April 21, 2005)).

Arguments of the Parties as to Count 1

The Director asserts that this case "is ripe for decision, without a hearing, in view of New Hampshire and Massachusetts disbarring Respondent from the practice of law on February 20, 2004, and July 20, 2004, respectively," and that such disbarments cannot be genuinely disputed and cannot be re-litigated. The Director cites to case law summarily imposing reciprocal discipline on an attorney after another court has disbarred him. *In re Edelstein*, 214 F.3d 127, 128 (2nd Cir. 2000). The Director points out that after New Hampshire disbarred Respondent, Massachusetts imposed reciprocal discipline disbarring him. The Director points out further that 37 C.F.R. § 10.23(c)(5) provides for reciprocal discipline [without mentioning the term], and argues that when a state court disbars a practitioner, the USPTO Rules (Section 10.23(c)(5)) have been violated, and the practitioner may not re-litigate the earlier disbarment in the USPTO proceeding. The Director cites case law, *inter alia,* prohibiting collateral attack in a second proceeding on issues litigated in the first proceeding, namely *Parklane Hosiery v. Shore,* 439 U.S. 322, 326 n. 5 (1979). The Director also cites to the Supreme Court decision governing reciprocal discipline, namely *Selling v. Radford*, 243 U.S. 46, 51-52 (1917), and to an ALJ decision imposing reciprocal discipline against a patent attorney based on state court disbarment. *Moatz v. Teplitz*, Proceeding No. D2000-10 (USPTO, May 6, 2002).

Respondent counters that this case is not ripe for decision without a hearing, because Rule 10.130 provides for "an opportunity for a hearing," and the New Hampshire court's disbarment was based on violation of his constitutional rights to due process, which decision, as well as the Massachusetts decision, raises disputed questions of fact and are in error. Opposition by Respondent, George E. Kersey (1) to Director's Count I Summary Judgment Motion for Reciprocal Discipline and (2) Kersey's Motion for Summary Judgment on Count II (October 19, 2004). Additionally, Respondent argues that judicial immunity does not extend to judges acting to promulgate a code of conduct for attorneys, citing *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731, 734-37 (1980) (Opposition at 2). Kersey's argument in this respect was considered previously (supra note 3). Respondent points out that he has appealed the Massachusetts decision. As noted previously, however, his disbarment has been sustained by the Supreme Judicial Court of Massachusetts, *In The Matter of George E. Kersey,* 444 Mass. 65; 825 N.E. 2d 994; 2005 Mass. LEXIS 163 (Mass. 2005).

In his Reply, the Director points out that Respondent failed to include summaries of expected testimony of proposed witnesses along with his list of witnesses, as required by the

Order issued in this matter on August 4, 2004, and thereby has limited any possible testimony to his own testimony concerning his arguments. Because he has already presented his arguments in written form, in his Opposition, any hearing would be merely an oral presentation of his arguments. The Director argues that neither Respondent's arguments re-litigating the merits of his disbarment by New Hampshire nor his appeal of the Massachusetts disbarment raise a genuine issue of material fact, because the practitioner may not re-litigate his earlier discipline, and USPTO imposes identical reciprocal discipline. The Director quotes from the Final Decision of the USPTO in the earlier matter suspending Respondent, "The Reciprocal Discipline Rule, which is applied when one court imposes suspension or disbarment after another court has imposed such a penalty, is followed by the USPTO. 37 C.F.R. § 10.23(c)(5)." *Moatz v. Kersey*, Proceeding No. 00-07 (USPTO General Counsel, June 14, 2000)(suspending Respondent for six months, on the basis that Massachusetts and the U.S. Court of Appeals for the D.C. Circuit suspended him for three months, and that Respondent violated other provisions of the Rules).

Discussion as to Count 1

1. Summary Judgment

The Director has not cited any USPTO decision granting summary judgment in favor of the Director and excluding an attorney from practice before USPTO on the basis of the "reciprocal discipline" rule, i.e., he was disbarred by a state. The Rule upon which the Director relies is Section 10.23(c)(5), which provides that "Conduct which constitutes a violation of paragraphs (a) and (b) of this section includes . . . (5) disbarment from practice as an attorney or agent on ethical grounds by any duly constituted authority of a State or the United States." The quoted Rule provides that disbarment of an attorney by a state constitutes "a violation" of a Disciplinary Rule, but does not mandate any sanction for the violation such as exclusion from practice before the USPTO. Moreover, the Rules do not authorize or refer to any procedure for summary disposition or other expedited action where reciprocal discipline is sought to be imposed.[9]

The statutory authority for the Director to suspend or exclude any person from further practice before the PTO is provided in 35 U.S.C. § 32, which provides in pertinent part "The Director may, after notice and an opportunity for a hearing, suspend or exclude . . . from further

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[9] USPTO has proposed a rule providing a particular procedure for reciprocal discipline. Changes to Representation of Others before the [USPTO], 68 Fed. Reg. 69442, 69456, 69534 (Dec. 12, 2003). Upon notification of the OED Director by a practitioner of his disbarment or suspension by a state court, the USPTO Director enters an order of interim suspension from practice before USPTO and opportunity for the practitioner to show cause why identical disciplinary action should not be entered. After an opportunity for the practitioner to respond and the OED Director to reply, the USPTO Director enters an order imposing a disciplinary sanction, as appropriate, or referral to a hearing officer. USPTO has not issued a final rule on this procedure.

practice before the [USPTO], any person . . . shown to be incompetent or disreputable, or guilty of gross misconduct" The Rules at 37 CFR § 10.130 authorize exclusion, suspension or reprimand "after notice and an opportunity for a hearing." It is my conclusion, however, that Kersey has been given notice and an opportunity for a hearing, but has raised no factual issues indicating that a hearing would serve any useful purpose. See, e.g., *Indep. Bankers Assoc. of Georgia v Bd. Of Govenors of the Fed. Reserve System*, 516 F. 2d 1206, 1220 (D.C.Cir. 1975) ("The case law in this Circuit is clear that an agency is not required to conduct an evidentiary hearing where it can serve absolutely no purpose. In such a circumstance, denial of a hearing may be proper even though adjudicatory proceedings are provided for by the statute. The agency, however, carries a heavy burden of justification."). See also *Altenheim German Home v. Turnock, 902 F. 2d 582, 585 (7th Cir. 1990)* ([there is] no right to an evidentiary hearing unless there is a genuine issue of material fact).

The hearing is required by the Rules, at 37 C.F.R. § 10.144, to be conducted in accordance with 5 U.S.C. § 556 of the Administrative Procedure Act, which provides in part that "A party is entitled to present his case or defense by oral or documentary evidence, and to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d). The Rules require that any hearing be an oral hearing, according to 37 C.F.R. §10.144, which provides that "Hearings will be stenographically recorded and transcribed and testimony of witnesses will be received under oath or affirmation." Therefore, under the statute and Rules, a respondent who has been disbarred by a state is entitled to an opportunity for an oral hearing before any sanction is imposed. The statute and the cited Rule presuppose that there are disputed issues of fact and, as noted previously, Respondent has clearly had an opportunity for a hearing. The facts which he wishes to contest, however, are not subject to dispute in this proceeding, i.e., that Respondent substantially complied with the contempt orders of the Vermont court to deliver financial records to his ex-wife, that Respondent turned over client files as ordered by the Supreme Court of New Hampshire and that Respondent continued to practice law in New Hampshire despite being suspended. Additionally, he asserts that a hearing is important for Kersey to demonstrate his affirmative defenses and the factual basis for his counterclaim (Opposition at 4).These, however, are merely reiterations of his arguments discussed above and add nothing to his contention that there are factual matters in dispute appropriate for resolution at a hearing (Answer at 4-8).

A respondent may waive this opportunity to present his case at an oral hearing by failing to file a timely answer to a complaint, by failing to appear at a hearing, by the granting of his motion to dismiss the complaint or his motion for summary judgment, or by expressing a voluntary waiver of an oral hearing. It has been held that a party waives its right to an adjudicatory hearing where it fails to dispute the facts upon which an agency decision rests. Where a respondent does not waive an oral hearing, the Rules do not provide any exception to the requirement in the statute and Rules to provide an oral hearing. *In re Spangler*, Proceeding No. D05-03, slip op. at 5 (ALJ, Order on Motion for Summary Judgment, August 26, 2005) (citing 37 C.F.R. §§ 10.136(d), 10.144(b)). *Spangler* is, however, distinguishable because it was held that there was a genuine issue of material fact as to whether the suspension should commence retroactively.

It is noted that in state and federal bar reciprocal discipline cases, attorneys are not entitled to full oral evidentiary hearings. Courts have defined reciprocal discipline as "disbarment or suspension summarily imposed after some other court has taken such action based on a plenary inquiry." *In re Edelstein*, 214 F.3d 127, 128 (2nd Cir. 2000). Courts have held that due process requires only that respondent be given notice of the charges against him and an opportunity to be heard, and does not require a full evidentiary hearing where the respondent has not come forward with any evidence or a showing of how taking testimony would shed light on the issues in the reciprocal discipline proceeding. *Committee on Grievances v. Feinman*, Docket No. CV-96-5796 (CPS), 2000 U.S. Dist. LEXIS 19785 (E.D. NY March 18, 2000), *aff'd*, 239 F.3d 498 (2nd Cir. 2001), *cert. denied*, 534 U.S. 828 (court disbarred attorney upon review of record of first disciplining court, Committee's charges requesting reciprocal discipline, and response to order to show cause why reciprocal discipline should not be imposed). Due process requirements are met in reciprocal discipline proceedings because the attorney either has had an evidentiary hearing or had the right to one. *In re Zdravkovich*, 831 A.2d 964, 969, 2003 D.C. App. LEXIS 548 (D.C. App. 2003). Federal and state courts generally have local rules which provide procedures for reciprocal discipline, such as presumptively imposing identical discipline unless the attorney demonstrates (by motion, brief, and/or clear and convincing evidence), and/or upon review of the record of the disciplining state, the tribunal determines that a different discipline or no discipline is warranted.[10] *See, e.g., In re Kersey*, 402 F.3d 217 (1st Cir. 2005); *Edelstein,* 214 F.3d at 130; *In re Surrick*, 338 F.3d 224, 231 (3rd Cir. 2003); *In re Wightman-Cervantes,* 236 F. Supp. 2d 618, 619-620 (N.D. Tex. 2002); *In re Attorney Discipline Matter*, 98 F.3d 1082, 1087 (8th Cir. 1996); *In re Zdravkovich*, 831 A.2d 964, 968 (D.C. App. 2003); *In re Selmer*, 595 N.W. 2d 373, 1999 Wisc. LEXIS 72 (Wisc. 1999). Federal and state courts also have rules authorizing summary judgment. *E.g.*, FRCP 56.

As discussed above, there is no particular procedure for reciprocal discipline or summary judgment in USPTO's Rules. The provision in 37 C.F.R. § 10.23(c)(5) that the discipline in a state court is "a violation" supplies an automatic basis for imposing discipline, but the particular sanction or extent of the discipline imposed by the USPTO may be dependent on USPTO's penalty determination factors. Therefore, Federal and state case law has no significant weight on the issue of whether summary judgment is authorized in USPTO disciplinary proceedings.

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[10] Courts are not required to impose the identical discipline. *In re Iulo*, 766 A.2d 335, 2001 Pa. LEXIS 372 (Pa. 2001). While "[m]ost courts extend the reciprocity doctrine to include a practice of imposing a disciplinary sanction that normally will be the same in operative length and severity as that imposed in the first jurisdiction, . . . [a]n inappropriately lenient or severe sanction . . . will not be copied." *Statewide Grievance Committee v. Dey*, Docket No. CV9800631443, 1998 Conn. Super. LEXIS 2757 (Conn. Super. 1998). The Supreme Court has noted that, "Each individual court has autonomous power to discipline the members of its bar" and that a state court's disciplinary action is "not conclusively binding on the federal courts." *Theard v. United States*, 354 U.S. 278, 281, 282 (1957); *In re Ruffalo*, 390 U.S. 544, 547 (1968).

The entitlement to an oral hearing has been sustained for certain types of administrative proceedings even where the criteria for summary judgment are met. [11] The decisions cited (supra note 11) are not controlling here because the legislative history indicates that Congress specifically rejected summary judgment in cases subject to 5 U.S.C. § 7701(a). There is no similar indication that Congress considered summary judgment in enacting 35 U.S.C. § 32, the statute involved here. Cf. *Costle v Pacific Legal Pacific Legal Foundation,* 445 U.S. 1098, 100 S.Ct. 1095 (1980) (regulation requiring that request for hearing on issuance, denial, or modification of permit for discharge of pollutants to navigable waters under Clean Water Act set forth material issues of fact before holding an adjudicatory hearing on the permit, held to comply with CWA § 402 requirement of opportunity for public hearing).

The USPTO General Counsel, in earlier proceedings involving Respondent, stated that "The Reciprocal Discipline Rule, which is applied when one court imposes suspension or disbarment after another court has imposed such a penalty, is followed by the USPTO" (*Moatz v. Kersey*, Proceeding No. 00-07 (Final Decision, June 14, 2002)). Although he did not refer to summarily imposing discipline, it is noted that among the definitions of "reciprocal" is "corresponding, equivalent",[12] and it is reasonable to conclude that the "Reciprocal Discipline Rule" involves more than the determination that a sanction will be imposed based on the discipline assessed by the other jurisdiction. Rather, the discipline imposed by the other jurisdiction or its equivalent will be imposed unless respondent is able to demonstrate that a different discipline or no discipline is warranted (supra at 12, 13).

2. Genuine Issue of Material Fact

In the alternative, the Director's motion for summary judgment may be denied if there is a genuine issue of material fact. To determine which facts are material, a discussion of the standards for reciprocal discipline is necessary.

It is well settled that "a reciprocal disciplinary proceeding does not afford an attorney the opportunity to re-litigate misconduct allegations that have been heard and decided in another jurisdiction or to litigate the validity of the disciplinary proceeding in that jurisdiction." *In re*

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[11] In actions appealable to the Merit Systems Protection Board (MSPB) under 5 U.S.C. § 7701(a), which provides that "an appellant shall have the right to a hearing for which a transcript will be kept," Congress had proposed and then rejected a provision authorizing summary judgment.. The Federal Circuit held that in such actions, the administrative judge has no power to grant summary judgment but must hold oral hearings. *Crispin v. Dep't of Commerce*, 732 F.2d 919, 922-924 (Fed. Cir. 1984)(reduction-in-force appeal concerning appropriateness of employee's competitive level); *see also, Bommer v. Dep't of the Navy, 34* MSPR 543, 1987 MSPB LEXIS 453 (MSPB, August 25, 1987) even where there are no material issues of fact, an oral hearing is required under 5 U.S.C. § 7701(a)); *Beam v. Office of Personnel Management*, Docket No. 300A93023J-I-1, 61 MSPB 1, 1994 MSPB LEXIS 182 (Jan. 24, 1994)(citing to *Bommer*); *Jezouit v. Office of Personnel Management*, Docket No. BN-0831-02-0194-I-1, 2004 MSPB LEXIS 1020 (Aug. 12, 2004)(where case only presented issues of law, statute does not require evidentiary hearing, but does require an oral hearing with a transcript).

[12] Black's Law Dictionary (7th Ed.).

Selmer, 595 N.W. 2d 373, 379 (Wisc. 1999); *Attorney Grievance Commission of Maryland v. Richardson*, 712 A.2d 525, 532 (Md. App. 1998)(the attorney may not revisit, or collaterally attack, either the findings of fact made by the state court or the judgments it rendered). *In re Zdravkovich*, 831 A.2d 964, 969 (D.C. App. 2003)("It is . . . firmly established that principles of collateral estoppel apply in reciprocal discipline cases. . . . Put simply, reciprocal discipline proceedings are not a forum to reargue the foreign discipline."). Collateral estoppel applies when the issue decided in the prior jurisdiction was identical to the one presented in the later action, there was a final judgment on the merits, and the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and the party against whom it is asserted had a full and fair opportunity to litigate the issue in the prior adjudication. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). It applies to reciprocal discipline cases even though the sanction imposed by the original disciplining court may have been based on a different rule of procedure or standard of proof. *In re Benjamin*, 698 A.2d 434, 440 (D.C. App. 1997).

The Supreme Court identified the following factors as grounds not to impose reciprocal discipline from a state court which originally disciplined the attorney:

> (1) the state procedure from want of notice or opportunity to be heard was wanting in due process;
>
> (2) that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject;
>
> or (3) that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do.

Selling v. Radford, 243 U.S. 46, 51 (1917).

The USPTO Rules set forth the factors for determining a penalty which "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." 37 C.F.R. § 10.154(b).

The USPTO General Counsel has affirmed application of the *Selling* factors and the Section 10.154(b) factors in reciprocal discipline cases. *Moatz v. Teplitz*, Proceeding No. D2000-10, slip op. at 6 (Final Decision, April 4, 2002); *Moatz v. Sheinbein*, Proceeding No. D03-14 (Final Decision, May 5, 2005).

In cases of reciprocal discipline before the USPTO, the Director proffers evidence of the original disciplinary proceeding, and the findings from that proceeding become the Director's *prima facie* case. The burden then shifts to the respondent to prove by clear and convincing

evidence that reciprocal discipline should not be imposed on him. 37 C.F.R. § 10.149.

The Director submitted with its Motion, as to Count 1, the decisions of the Supreme Court of New Hampshire and the Supreme Judicial Court for Suffolk County, Massachusetts, disbarring Respondent. Motion, Exhibits 1, 2.

Respondent submitted with its Opposition, as to Count 1, his appeal brief to the Supreme Judicial Court of Massachusetts, dated October 4, 2004, and his Statement of Undisputed Material Facts (Opposition, Appendices I, II).

As discussed above, the issues that would be material to the determination of whether to impose reciprocal discipline on Respondent and whether to exclude him from practice before the USPTO are the *Selling* factors and the penalty determination factors of 37 C.F.R. § 10.154(b). The issues under *Selling* are whether in the original disciplinary proceeding in New Hampshire there was: (1) a deprivation of due process; (2) a lack of adequate proof establishing misconduct; or (3) that the imposition of reciprocal discipline would result in a grave injustice. The issues under Section 10.154(b) that could be relevant to this case are those that weigh against excluding Respondent from practice before the USPTO. The factors of the public interest and the integrity of the legal profession generally would not weigh against exclusion from practice. The factor of seriousness of the violation of the Disciplinary Rule would not weigh against exclusion from practice; disbarment is an absolute - there are no less serious levels of disbarment. The remaining factors of Section 10.154(b) – any extenuating circumstances, and the deterrent effects deemed necessary – could possibly weigh against exclusion from practice, and therefore facts relevant to those factors could be material.

Respondent asserts that the Supreme Court of New Hampshire improperly disbarred him for engaging in unauthorized practice of law. Respondent argues that he was disbarred because he appealed an award of attorney's fees that was imposed against him personally while he was suspended. He argues that such an appeal was not the practice of law for a client but was on his own behalf, and cites to a case holding that when a monetary sanction is imposed against an attorney personally, only the attorney has standing to appeal from an attorney fee award order (*DCPB v. City of Lebanon*, 957 F.2d 913, 919 (1st Cir. 1992)). Opposition at 2.

By this argument, Respondent appears to be attempting "to re-litigate misconduct allegations that have been heard and decided in another jurisdiction or to litigate the validity of the disciplinary proceeding in that jurisdiction." *In re Selmer*, 595 N.W. 2d at 379. Assuming, however, that Respondent is attempting to establish a *Selling* factor of lack of due process or infirmity of proof, Respondent does not submit any documents in support of his argument. In his Prehearing Exchange, he states that he proposes to submit all documents relating to the disciplinary proceeding in New Hampshire "following a resolution of the question of whether Motions for Summary Judgment are to be filed preliminarily." Respondent's Prehearing Exchange ¶ 2. He has not done so to date, and also has not done so in other tribunals in which he made the same argument. In his arguments to the First Circuit Court of Appeals and to the Supreme Judicial Court of Massachusetts, and in his Prehearing Exchange in this proceeding, he

stated merely that the New Hampshire Supreme Court had awarded attorney fees against Respondent personally in a case he brought where the court had no jurisdiction. *Kersey*, 402 F.3d at 218; Appendix I at 8, 9; Respondent's Prehearing Exchange, Further Responses, ¶ 3. The decision of the Court of Appeals for the First Circuit indicates that Respondent did not supply it with the relevant state court documents, such as the award of attorney fees, despite the court's request to do so. *Kersey*, 402 F.3d at 219. The First Circuit therefore could not confirm that the attorney fees award was directed only against Kersey. *Id.* Thus the First Circuit noted that "The [New Hampshire Supreme]court stated, and Kersey has not disputed, that he filed the appeal in his capacity as his clients' attorney" and inferred that "Kersey's intent to appeal only on his own behalf was not apparent from the face of the appellate pleadings." *Id.* ; see, *Kersey's Case*, 797 A.2d 864, 866 (N.H. 2002)("The appeal in question was filed by the respondent in his capacity as his clients' attorney . . ."). A similar inference may be drawn upon Respondent's failure to produce the documents in the present proceeding.

As to the second basis for his disbarment, Respondent asserts that the New Hampshire Supreme Court improperly disbarred him for failing to bring client files to a scheduled hearing before a referee, as ordered. Respondent argues that he had no files over which the State of New Hampshire had jurisdiction, that he challenged the order, that he turned over the files under protest, and that the Court ignored such submittal and justification. Opposition at 2; Appendix II; Respondent's Prehearing Exchange, Further Responses, ¶¶ 2, 3. Again, Respondent appears to be attempting to re-litigate the New Hampshire proceeding, and moreover, he does not submit any documents in support of these arguments. He stated in his appeal brief to the Supreme Judicial Court of Massachusetts that he only had client files in the U.S. District Court for the District of New Hampshire, involving Federal law, and that the only case he had before the New Hampshire State court was dismissed for lack of jurisdiction. Appendix I at 8, 9. He asserts, and he told the attorney to whom the files were to be transferred, that he had no active New Hampshire cases or trust accounts. Respondent's Prehearing Exchange, Further Responses ¶ 3; Appendix I at 8; *Kersey's Case*, 797 A.2d at 865.

Respondent does not explain how his assertions constitute a violation of his rights to due process. He merely alleges in conclusory fashion that the New Hampshire Supreme Court disbarment "falsely states" that he engaged in unauthorized practice of law and refused to turn over client files, that its decision was "clearly in error," that it "wrongfully stated alleged facts" or misstated the facts, and that it wrongly charged and disbarred Respondent. Opposition at 1; Appendix II; Respondent's Prehearing Exchange, Responses ¶ 4. Respondent does not specifically assert, let alone provide supporting documentation, that there was an infirmity or lack of proof to establish misconduct. It has been stated that "The burden of proof on an attorney who would seek to establish the 'infirmity of proof' exception by the requisite clear and convincing evidence is a heavy one," requiring submittal of the evidentiary record of the proceeding along with citations to the claimed deficiencies in the record. *In re Bridges*, 805 A.2d 233, 235 (D.C. App. 2002).

Respondent alleges that the suspension ordered by the Supreme Court of New

Hampshire was improper because it was based on the false statement that Kersey had made no attempt to comply with the [Vermont] contempt order and ignored evidence which he had supplied showing that he had complied.[13] The initial suspension by the New Hampshire Supreme Court was based on reciprocal discipline, i.e., the three-month suspension of Kersey by the Supreme Judicial Court of Massachusetts, which was in turn based on outstanding contempt orders in Vermont. It is not clear whether Kersey is attributing statements and actions to the Supreme Court of New Hampshire which were, in fact, actions of or statements made by the Supreme Judicial Court of Massachusetts. Be that as it may, by disputing the mentioned statements or actions, Kersey is clearly attempting to re-litigate his suspensions, which under the doctrines of reciprocal discipline and collateral estoppel, he may not do.

In his Prehearing Exchange (at 1), he requested deferral of submitting documents "until the question of whether Summary Judgment will be requested," but in his Opposition he did not submit any documents except for his statement of facts and Massachusetts appeal brief. His list of witnesses does not include any summary of testimony, so he gives no clue as to whether any testimony may support his arguments. Respondent's Prehearing Exchange, Responses ¶ 3.

In its reciprocal discipline proceeding concerning Respondent, the First Circuit, similarly faced with these arguments and lack of support, noted that the New Hampshire Supreme Court's finding of violation was based on its determination, as a matter of state law, that Kersey's appeal of an attorney fee award constituted the practice of law. Therefore, the First Circuit deemed Respondent's arguments, essentially the same as those made in the present proceeding, to constitute a request for a determination that the state court misapplied state law, and held that as a federal court it could not render such a determination. 402 F.3d at 219. Similarly, and under the doctrine of collateral estoppel, a federal Administrative Law Judge has no authority to review in this proceeding a state court's application of state law to the facts of its case.

If Respondent believes that excluding him from practice before the USPTO would be a "grave injustice," that there was an infirmity of proof or that he was denied due process in the New Hampshire Supreme Court proceeding, he must at least support his conclusory assertions and arguments with the specific facts and documents such as the relevant state court records. He has failed to do so both in the Prehearing Exchange and in his Opposition to the Motion for Summary Judgment. In this regard, the Supreme Judicial Court of Massachusetts had no difficulty in concluding that the New Hampshire proceedings did not deny Kersey due process ,*In the Matter of George E. Kersey,* 825 N.E. 2d 994 (Mass., April 21, 2005). It should also be noted that when the matter of imposing reciprocal discipline upon Kersey based upon his disbarment in New Hampshire came before the Appellate Division of the New York Supreme Court, the court rejected Kersey's arguments that he was denied due process in the New

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[13] Prehearing Exchange at 2. Some support for Kersey's contention is provided by the reference by the Supreme Court of New York , Appellate Division, to Kersey's efforts to resolve his legal problems in Vermont, which were advanced as one of the reasons for limiting his sanction in that jurisdiction to a public reprimand (*In the Matter of George E. Kersey, 729 N.Y.S 2d 780, 2001 N.Y. App Div. LEXIS 8410 (September 10, 2001).* . See also Initial Decision (November 14, 2001), Findings 30-32 and 34.

Hampshire proceeding, that there was an infirmity of proof of his misconduct in that proceeding, and that imposition of reciprocal discipline would be unjust. *In re George E. Kersey, 2006 NY Slip Op 517, 2006 N.Y. App. Div. LEXIS 679 (*January *24, 2006).The court observed that respondent was not permitted in the context of a* reciprocal discipline proceeding to once again challenge the merits of the determination of a sister state. The court, however, adhered to its previous position that Kersey be publicly censured rather than suspended or disbarred.

Respondent failed to include in his Prehearing Exchange the summaries of expected testimony of proposed witnesses, and the Director's position is that Respondent limited any testimony to his own arguments, so any hearing would be merely a presentation of his arguments. The Order dated August 4, 2004 specifically required Respondent to "Describe or list New Hampshire state cases handled by Kersey . . . and provide any documents supporting the assertion that these matters are or were closed . . . ." and to "Summarize any facts Respondent would present as a defense . . . or as mitigation, if a hearing were to be held in this proceeding." Kersey blithely responded to this requirement without specifying facts, without referring to any New Hampshire state cases, and without submitting documents, stating that "Kersey will demonstrated [sic] by the witnesses he will call and his own testimony that the allegations in the complaint are completely without merit." Respondent's Prehearing Exchange, Further Responses ¶ 4 Any such testimony would perforce be argument because Respondent's disbarments by the Supreme Court of New Hampshire and the Supreme Judicial Court of Massachusetts are established and incontestable facts nor, as noted above, may the facts found by these tribunals be disputed or re-litigated in this proceeding. Furthermore, Respondent did not submit supporting documents despite his burden, of which he is certainly aware as an experienced attorney, in opposing a motion for summary judgment, "not [to] rest upon the mere allegations or denials" but "by affidavits or as otherwise provided" to "set forth specific facts showing that there is a genuine issue for trial." Federal Rule of Civil Procedure 56(e).

It is concluded that Respondent has not raised any genuine issue of material fact as to the allegations or sanction requested in the Complaint and has not demonstrated that a hearing would be anything other than reiteration of his arguments. Respondent's assertion that he has appealed the reciprocal discipline ruling to the Massachusetts Supreme Court is not alleged in the Complaint as a basis for alleged violations, and furthermore, that court affirmed the disbarment of Respondent. *In the Matter of George E. Kersey*, supra. It follows that the Director's Summary Judgment Motion for Reciprocal Discipline will be granted and an order will be entered excluding Kersey from practice before the PTO.

Undisputed Facts as to Count 2

1. In the prior disciplinary proceeding brought by the Director against Kersey, the ALJ in an Initial Decision reprimanded Kersey for failure to withdraw from employment by private clients and continuing to represent such clients before the USPTO, in violation of federal conflict of interest rules and in violation of 37 C.F.R. § 10.23(c)(20); being suspended from practice as an attorney on ethical grounds by a duly constituted authority of a state, in violation of 37 C.F.R.

in Massachusetts and the D.C. Circuit, as required by 37 C.F.R. § 10.24. *Moatz v. Kersey*, Proceeding No. 00-07 (Initial Decision, Nov. 14, 2001).

2. The Rules at 37 C.F.R. § 10.155(a) provide that "Within thirty (30) days from the date of the initial decision of the administrative law judge under § 10.154, either party may appeal to the Commissioner."

3. The Rules further provide at 37 C.F.R. § 10.170(a) that "In an extraordinary situation, when justice requires, any requirement of the regulations of this part which is not a requirement of the statutes may be suspended or waived by the Commissioner or the Commissioner's designee, *sua sponte*, or on petition of any party including the Director or the Director's representative, subject to such other requirements as may be imposed."

4. The Director filed an appeal of the Initial Decision with respect to the penalty imposed, arguing that the penalty of a reprimand was inappropriate, and seeking at least a one year suspension of Respondent. Kersey did not appeal the findings of violation in the Initial Decision. Motion, Exhibit 3 (*Moatz v. Kersey*, Proceeding No. 00-07, 2002 WL 32056608 (Trademark Tr. & App. Bd), 67 U.S.P.Q. 1291, slip op. at 1, 6 (Final Decision, June 14, 2002)).

5. Kersey responded to the Director's appeal, arguing that the penalty factors weigh in his favor, and that he was wrongfully suspended in Massachusetts. He argued in motions related to the appeal, *inter alia,* that the appeal was improperly filed with the Director of the USPTO rather than the Commissioner for Patents. Motion, Exhibit 3 (*Moatz v. Kersey*, Proceeding No. 00-07, slip op. at 7 and n. 4 (Final Decision, June 14, 2002)).

6. USPTO General Counsel James A. Toupin issued a Final Decision upon such appeal on June 14, 2002, ordering that Kersey be suspended from practice before the USPTO for six months. Motion, Exhibit 3 (*Moatz v. Kersey*, Proceeding No. 00-07 (Final Decision, June 14, 2002)).

7. Respondent requested reconsideration of the Final Decision on the grounds that the Director's appeal was untimely and without authority, that the General Counsel lacks authority to decide appeals or issue a Final Decision, and that Kersey did not violate the Disciplinary Rules. Motion, Exhibit 3 (*Moatz v. Kersey*, Proceeding No. 00-07, 2002 WL 32056609 (Trademark Tr. & App. Bd) (Memorandum and Order on Reconsideration, Oct. 24, 2002)).

8. The USPTO General Counsel issued a Memorandum and Order on Reconsideration, denying the request for reconsideration on the basis that Kersey's arguments regarding timeliness and authority of the USPTO Director and General Counsel to decide the appeal had been fully addressed in the Final Decision and provide no basis or justification for modifying the Final Decision, and that Kersey did not appeal the findings of the ALJ as to the violations. The six month suspension was ordered to commence thirty days from October 24, 2002. Motion, Exhibit 3 (*Moatz v. Kersey*, Proceeding No. 00-07 (Memorandum and Order on Reconsideration, Oct. 24, 2002) (Director's Notice of Suspension, November 22, 2002).

9. Kersey has not been reinstated to represent others before the USPTO. Motion at 6; Opposition, Appendix II at 3.

10. On November 22, 2002, Kersey filed a petition for review of the Final Decision in the U.S. District Court for the District of Columbia, arguing that the Director's appeal of the Initial Decision was untimely, that the General Counsel's decision to suspend Respondent was improperly issued, and that Kersey did not violate the Disciplinary Rules. *Kersey v. Undersecretary of Commerce for Intellectual Property*, No. 02–2331 (D.D.C. filed Nov. 22, 2002). Motion n. 4; Opposition, Appendix II at 4.

11. On or about November 30, 2002, in patent application 10/228,386 Kersey filed a "Small Entity Statement" and "Check No. 721 of applicant." Motion at 6 and Exhibit 5; Opposition, Appendix II at 4.

12. On or about November 30, 2002, in patent application 10/241,847, Kersey filed a "Response to Notice to File Corrected Application Papers." Motion at 6 and Exhibit 6; Opposition, Appendix II at 4.

13. On or about December 16, 2002, in patent application 09/537,905, Kersey filed a "Declaration Under 37 C.F.R. 1.68." Motion at 6 and Exhibit 7; Opposition, Appendix II at 4.

14. On or about January 16, 2003, in patent application 09/436,333, Kersey filed an "Amendment to Place Case in Condition for Allowance after Decision of the Patent Office Board of Appeals." Motion at 6 and Exhibit 8; Opposition, Appendix II at 4.

15. On or about January 22, 2003, in patent application 09/901,546, Kersey filed a response to a non-final action. Motion at 7 and Exhibit 9; Opposition, Appendix II at 4.

16. On or about February 5, 2003, in patent application 09/522,886, Kersey filed "Part B-Fee(s) Transmittal." Motion at 7 and Exhibit 10; Opposition, Appendix II at 4.

17. On or about May 2, 2003, in patent application 09/436,333, Kersey filed a response to the USPTO April 18, 2003 notice to file corrected application papers. Motion at 7 and Exhibit 11; Opposition, Appendix II at 5.

18. On or about May 10, 2003, in patent application 09/436,333, Kersey filed "Part B-Issue Fee Transmittal." Motion at 7 and Exhibit 12; Opposition, Appendix II at 5.

19. On or about June 18, 2003, in patent application 09/537,905, Kersey filed a "request for extension of time." Motion at 7 and Exhibit 13; Opposition, Appendix II at 5.

20. On or about November 28, 2003, in patent application 10/241,847, Kersey filed a "Response

20. On or about November 28, 2003, in patent application 10/241,847, Kersey filed a "Response to Examiner." Motion at 7 and Exhibit 14; Opposition, Appendix II at 5.

21. On or about December 27, 2003, in patent application 09/073,022, Kersey filed a "Part B-Fee(s) Transmittal." Motion at 7 and Exhibit 15; Opposition, Appendix II at 5.

22. The United States District Court for the District of Columbia , in an opinion dated January 31, 2005, denied Petitioner Kersey's Motion for Summary Judgment and granted Respondent Undersecretary of Commerce for Intellectual Property's Motion for Summary Judgment. The court rejected Kersey's contentions that the Director's appeal of the Initial Decision was untimely, that the General Counsel's decision to suspend Respondent was improperly issued, and that Kersey did not violate the Disciplinary Rules. Director's Notice of Decision, dated February 1, 2005 (*Kersey v. Undersecretary of Commerce for Intellectual Property*, No. 02–2331, 2005 U.S. Dist. LEXIS 3564 (D. D.C. Jan. 31, 2005), slip op. at 3). In support of its holding that the Director properly requested an extension of time and filed its appeal with the proper official (the USPTO Director), the court quoted from the 1999 PTO Efficiency Act that "any reference in any . . . regulation . . . pertaining to the Patent and Trademark Office . . . to the Commissioner of Patent and Trademarks is deemed to refer to the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office." *Id,*, slip op. at 10, 12-13 (quoting Pub. L. No. 106-113, Div. B, § 1000(a)(9), *as quoted in* 35 U.S.C.A. §1). As to Kersey's argument that the Director's request for extension was improperly granted is not the type of "extraordinary situation" required under 37 C.F.R. § 10.170, the court stated that it does not function as a secondary trier of fact, but only assesses whether there was substantial evidence to support the action of the Patent Office, that a "reasonable mind could have found" that the scheduling conflict of one of three USPTO attorneys working on the matter created circumstances that justified a one week extension of time, and that it could not conclude that the grant of extension was unreasonable or without ample justification. *Id.*, slip op. at 12. As to the argument that the USPTO Director granted a one-week extension of time from the date of the motion until December 18, 2001, the court found that the USPTO Director's order granting the extension of time "clearly states that the '[OED]'s time for filing [its] appeal brief is extended to December 21, 2001,'" and concluded that the appeal was timely filed. *Id.*, slip op. at 12 (quoting the Administrative Record).

23. Kersey filed an appeal of the District Court's decision to the Court of Appeals for the Federal Circuit. That court dismissed Kersey's appeal by Order, dated April 11, 2005, for failure to prosecute, on grounds that Kersey failed to pay the docketing fee within the time permitted by the rules (Federal Circuit Rule 52(a)(1)). Director's Notice of Decision, dated April 12, 2005 (*Kersey v. Undersecretary of Commerce for Intellectual Property*, No. 05–1272, DCT 02-CV-2331 (Fed. Cir. April 11, 2005)).

24. On August 16, 2005, the Director submitted a Notice on Related Litigation, asserting that Kersey's appeal to the Federal Circuit is no longer pending, and enclosing a letter from the Federal Circuit, dated July 20, 2005, addressed to Kersey. The letter states that Kersey's brief "is

This case has been dismissed and is not [sic] longer pending in this Court." Director's Notice on Related Litigation, dated August 16, 2005.

25. On August 24, 2005, Kersey submitted a Response to the Director's August 16 submittal, stating that "Kersey has provided evidence to the Court of appeals (in the form of Docket entries from the District Court) confirming that the appeal fee has been paid. David Cohen, Esq., of the Attorney General's Office has been provided with the evidence of payment, and it is his obligation, in the interest of justice, to have the appeal reinstated." Kersey's Response to Director's Notice of August 16, 2005 on Related Litigation. Enclosed in this Response is a "Request for Reinstatement of Appeal" to the Federal Circuit, from Kersey, dated July 29, 2005. However, Kersey's appeal had not been reinstated as of November 9. 2005 (note 6, supra).

Arguments of the Parties as to Count 2

Respondent requests dismissal of count 2 of the Complaint by summary judgment on the basis that any suspension of Respondent was contrary to law because the Director failed to make a timely appeal in the prior disciplinary proceeding brought against him by the Director. Respondent argues that the time to file a notice of appeal is mandatory, statutory and jurisdictional, citing *Monzo v. Federal Aviation Administration*, 735 F.2d 1335, 1336 (Fed. Cir. 1984). Respondent asserts that the Director's untimely appeal must be treated as a dismissal, arguing that a case must be dismissed when there is non-compliance with a mandatory time period for appeal, citing to *Pinat v. Office of Personnel Management*, 931 F.2d 1544, 1546 (Fed. Cir. 1991) and *Browder v. Director, Illinois Dep't of Corrections*, 434 U.S. 257 (1958). Opposition at 3.

In his Reply, the Director states that the United States District Court for the District of Columbia has not addressed on the merits, and has not upset, the USPTO's November 24, 2002 suspension of Respondent. Thereafter, the Director submitted a Notice of the District Court's decision, dated January 31, 2005, denying Kersey's Motion for Summary Judgment that the Director's appeal of the Initial Decision was untimely, that the General Counsel's decision to suspend Respondent was improperly issued, and that Kersey did not violate the Disciplinary Rules.

Kersey filed a Response, dated February 24, 2005, to the Notice of Decision, asserting that the decision is "completely in error," and that he is appealing it to the U. S. Court of Appeals for the Federal Circuit. The Director on April 12, 2005 filed a Notice of the decision of the Federal Circuit, dismissing Kersey's appeal on grounds that Kersey failed to pay timely the docketing fee.

On April 20, 2005, Kersey submitted a Response to the Notice of the Federal Circuit's decision, asserting that he had filed a Motion for Reconsideration of that decision on the basis that he did in fact remit the appeal fee. Attached to his Response are: (1) a motion for reconsideration to the Court of Appeals for the Federal Circuit, with a certificate of service on

USPTO counsel dated April 20, 2005; (2) an unsigned letter from Kersey to the District Court for the District of Columbia, dated March 22, 2005, stating that he is remitting $105 to supplement the $150 he originally paid for the appeal fee; and (3) a receipt for a postal money order, dated March 22, 2005, in the amount of $105, addressed to the D.C. District Court. However, Kersey's appeal to the Federal Circuit is no longer pending (supra, note 6).

In response to the Director's Notice of the letter from the Federal Circuit dated July 20, 2005, Respondent maintains that the appeal was improperly dismissed, that the USPTO's suspension of him was not final, and that even if it were, he is entitled to show that it is completely without merit, and that the prosecution of this case can have no effect since the suspension has been on appeal.

Discussion as to Count 2

As noted in the discussion above as to Count 1, summary judgment in favor of a respondent in a USPTO disciplinary action is not inconsistent with the applicable procedural rules, 37 C.F.R. Part 10. The respondent waives his opportunity for hearing if his motion for summary judgment dismissing the case is granted. Therefore the Respondent's request for dismissal by summary judgment may be addressed on its merits.

Because the Rules do not include any provision for summary judgment, the principles of summary judgment under Federal Rule of Civil Procedure (FRCP) 56 and federal case law there under provide useful guidance. *PRASA v. U.S. EPA*, 35 F.3d at 607 ("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment."). Summary judgment may be granted "if the pleadings, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). In assessing a record to determine if a genuine issue of material fact exists, the court is required to resolve all ambiguities and draw all permissible inferences in favor of the party against whom summary judgment is sought. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The burden of showing that no genuine issue of material fact exists rests on the party seeking summary judgment. *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 157 (1970). "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied, even if no opposing evidentiary matter is presented." *Id.* at 160. In other words, "where the movant fails to fulfill its initial burden of providing admissible evidence of the material facts entitling it to summary judgment," the motion must be denied. *Gianullo v. City of New York*, 322 F.3d 139, 140-141, n. 2 (2nd Cir. 2003)(where a defendant affirmatively asserts facts without supporting evidence, motion for summary judgment denied).

Neither party has set out the specific facts in regard to Respondent's claim that the Director's appeal was untimely. The U.S. District Court for the District of Columbia has set out

the facts as follows, in its opinion dated January 31, 2005. On December 11, 2001,[14] the Director filed a motion with the USPTO Director, pursuant to 37 C.F.R. § 10.170, for a one week extension of time to appeal the Initial Decision, an extension was granted until December 21, 2001, and on December 21, 2001, the Director filed the appeal with the USPTO Director. *Kersey v. Undersecretary of Commerce for Intellectual Property*, No. 02–2331, slip op. at 3, 9, 11 (D.D.C. Jan. 31, 2005). The Court further stated that on January 4, 2002, Kersey moved to dismiss the appeal as untimely, and alleging that the Director, in violation of 37 C.F.R. § 10.155(a), requested an extension from and appealed to the USPTO Director rather than the Commissioner for Patents. *Id.*, slip op. at 4, 9. On January 6, 2002, Kersey moved for a declaratory judgment that the Initial Decision is the decision of the Commissioner, pursuant to 37 C.F.R. § 10.155(a), on the basis that there was no valid appeal to the Commissioner. *Id.*

The U.S. District Court states further that on January 31, 2002, the USPTO Director delegated authority to issue a final decision on appeal to the USPTO's General Counsel, pursuant to 35 U.S.C. § 3(b)(3)(B). *Id.* On February 28, 2002, the General Counsel denied Kersey's motion for declaratory judgment and held that the Director had properly filed its appeal with the USPTO Director, to whom, under the Patent and Trademark Office Efficiency Act, references to the Commissioner were deemed to refer. *Id.*, slip op. at 4-5. After the General Counsel issued the Final Decision (*Moatz v. Kersey*, Proceeding No. 00-07 (Final Decision June 14, 2002, and Memorandum and Order on Reconsideration, Oct. 24, 2002)), Kersey,on November 22, 2002, filed a Petition for Review in the U.S. District Court for the District of Columbia, requesting review of the Order denying reconsideration of the Final Decision and of the denial of his motion for declaratory judgment. *Id* at 6-7. Kersey argued to the District Court that the Director's appeal was untimely and improperly filed because the request for extension and appeal were made to the USPTO Director rather than the Commissioner, that the extension was improperly granted because it did not present the type of "extraordinary situation" required by Rule 10.170, and that the appeal was not filed within the time granted. *Id.*, slip op. at 9.

Because Respondent has broadly alleged that the District Court's decision "is completely in error" (Kersey's Response, dated February 24, 2005, to Notice of Decision), the facts as stated by the District Court, which are not established by other evidence, cannot be used in support of Kersey's motion for summary judgment. Kersey has not only failed to provide evidence in support of a claim that no genuine issue of material facts exists as to his claim for dismissal, but he has failed to state the material facts to show that he is entitled to a judgment of dismissal as a matter of law. Thus, Kersey has failed to carry his initial burden in support of summary judgment.

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[14] The District Court stated that on December 11, *2002*, the Director filed a motion for extension of time and that the appeal was then filed on December 21, *2001*. The former date appears to be a typographical error. *Kersey v. Undersecretary of Commerce for Intellectual Property*, No. 02–2331, slip op. at 3 (D.D.C. Jan. 31, 2005).

Even assuming that the facts as stated by the District Court were established as true, and assuming that the Federal Circuit has not yet ruled on a motion for reinstatement of appeal filed by Respondent, he has not shown that he is entitled to judgment as a matter of law. As noted above, the District Court stated that the Director filed a motion for extension of time to file the appeal on December 11, 2001, which is within the thirty day period for appeal from the November 14, 2001 Initial Decision; that the extension was granted, allowing the Director until December 21, 2001 to file an appeal; and that the Director filed the appeal on that date. *Kersey v. Undersecretary of Commerce for Intellectual Property*, No. 02–2331, slip op. at 9 (D.D.C. Jan. 31, 2005). The Rules do not expressly or implicitly preclude extensions of time, and extensions of time are encompassed by the language of Rule 10.170, "In an extraordinary situation, when justice requires, any requirement of the regulations of this part which is not a requirement of the statutes may be suspended by the Commissioner or the Commissioner's designee, *sua sponte,* or on petition of any party, including the Director or Director's representative, subject to such other requirements as may be imposed." Therefore, dismissal of the Director's appeal was not mandatory under the Rules where the appeal was filed within the time granted upon a motion for extension of time. Respondent has not made any argument in this proceeding that there was no "extraordinary situation" to justify an extension of time. As noted supra, the court rejected Kersey's similar argument to the court upon the ground that it did not function as a secondary trier of fact, but only assesses whether there was substantial evidence to support the action of the Patent Office. The court held that under the circumstances, it could not conclude that the Director's grant of an extension was unreasonable or without ample justification.

Respondent's citations to federal court opinions do not suggest that an appeal filed after a mandatory deadline must be treated as dismissed regardless of any motion for extension of time. The cases he cites are governed by the FRCP, and under FRCP 4(a)(5), an appeal period may be extended if a party files a motion for extension of time to file a notice of appeal.[15] The cases

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[15] The pertinent text of FRCP 4(a) states:
Appeal in a Civil Case.
(1) Time for Filing a Notice of Appeal.
(A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.
(B) When the United States or its . . . agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.
* * * *
(5) Motion for Extension of Time
(A)The district court may extend the time to file a notice of appeal if:
(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
(ii) regardless of whether its motion is filed before or during the 30 days after the time

cited by Kersey are consistent with FRCP 4(a)(5). In *Monzo v. Federal Aviation Administration*, 735 F.2d 1335, 1336 (Fed. Cir. 1984), the appeal was dismissed as untimely where no motion for extension was filed. In *Pinat v. Office of Personnel Management*, 931 F.2d 1544, 1546 (Fed. Cir. 1991), the MSPB denied a request for an extension of time to file a petition for review where the movant failed to justify the delay in requesting the extension of time after the due date. In *Browder v. Director, Illinois Dep't of Corrections*, 434 U.S. 257 (1958), a motion to reconsider filed past the due date for notice of appeal did not toll the appeal period.

As to Respondent's argument that the suspension imposed on October 24, 2002 was not final, the Rules provide as follows, in pertinent part:

> A single request for reconsideration . . . of the Commissioner's decision may be made by the respondent . . . if filed within 20 days of the date of entry of the decision. Such a request shall have the effect of staying the effective date of the decision. The decision by the Commissioner on the request is a final agency action in a disciplinary proceeding and is effective on its date of entry."

37 C.F.R. § 10.156. Under this Rule, the six month suspension of Kersey was stayed when he filed his motion for reconsideration, but the stay expired under the terms of the Order on Reconsideration thirty days from October 24, 2002, when the suspension was ordered to commence. Motion, Exhibit 3 (*Moatz v. Kersey*, Proceeding No. 00-07 (Memorandum and Order on Reconsideration, Oct. 24, 2002)). No further automatic stay is provided in the Rules, or found in the local rules of the District Court which pertain to appeals of PTO disciplinary actions. U.S. District Court Rules for the District of Columbia, Civil LCvR 83.7 (Review of Orders as to Admission or Exclusion of Practitioners before the Patent Office). The District Court's decision of January 31, 2005, does not refer to or otherwise indicate any stay of the suspension. *Kersey v. Undersecretary of Commerce for Intellectual Property*, No. 02–2331, 2005 U.S. Dist. LEXIS 3564 (D. D.C. Jan. 31, 2005). Respondent has not presented any evidence or other support establishing that the suspension was stayed beyond November 24, 2002.[16]

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[16] Supra note 7 and accompanying text. Case law from state attorney disciplinary proceedings suggests that the commencement of an attorney's suspension from practice is not automatically stayed through every possible appeal or request for reconsideration. *See*, *Eston v. Van Bolt,* 728 F. Supp. 1336, 1337 (E.D. Mich 1990)(while an appeal of discipline imposed automatically stays it, the stay automatically dissolves when the court denies the application for leave to appeal); *Statewide Grievance Committee v. Egbarin*, No. CV 980585474, 2000 Conn. Super. LEXIS 560 (Conn. Super., February 28, 2000)(automatic stay of order suspending attorney from practice makes no sense in attorney disciplinary proceedings in light of compelling interest of court in controlling its procedures and unfettered power of courts to act for the efficient discipline of misconduct); *Statewide Grievance Committee v. Gifford*, 820 A.2d 309 n. 7 (Conn. App. 2003)(automatic stay provisions do not apply to attorney grievance actions).

In summary, Respondent has not stated facts or provided evidence to sustain a claim that his suspension was contrary to law and must be treated as dismissed. He has not established that the suspension was stayed after the suspension was ordered to commence thirty days from October 24, 2002 in the Order on Reconsideration. See note 7, supra and accompanying text. He has not shown that the Federal Circuit has reinstated his appeal and ruled in his favor.

It is concluded that Respondent has not carried his burden on his motion for summary judgment on Count 2, and therefore he has not shown that he is entitled to judgment as a matter of law. Kersey's Motion for Summary Judgment as to Count 2 will be denied.

Kersey, having moved for summary judgment on Count 2, can hardly complain that the rules make no provision for summary judgment. It is well settled that federal district courts possess the power to enter summary judgment sua sponte as long as the losing party was on notice of the obligation to come forth with all of its evidence. *Cellotex Corp. v. Catrett, 417 U.S. 31, 326 (1986).* See also *Employers Ins. Of Wausau v. Petroleum Specialties, Inc.,* 69 F. 3d 98, 105 (6th Cir. 1995) (explaining that "there is no per se prohibition on entering summary judgment, *sua sponte").* In cases where a party moves for summary judgment, the court has the power to deny the movant's motion and sua sponte grant summary judgment for the non-movant. See, e.g., *Caswell v. City of Detroit Housing Commission,* 418 F.3d 615 (6th Cir. 2005) and *Bridgeway Corp. v. Citibank,201 F.3d 134 (2nd Cir. 2000).* Here, Kersey's suspension of the right to practice before the PTO clearly became effective on November 24, 2002, in accordance with the General Counsel's Memorandum and Order on Reconsideration and the Director's Notice of Suspension, dated November 22, 2002, and, although Kersey argues to the contrary, it is equally clear that by filing papers with the PTO in 11 instances on behalf of six different inventors, he was acting in a representational capacity and thus practicing before the PTO. Kersey has not sought reinstatement, alleging that it is unnecessary. This is based on the untenable position that the suspension was not in effect, no stay having been issued or, for all that appears sought, thus placing Kersey in violation of, inter alia, Rule 10.40(b)(2), requiring withdrawal from employment, if the practitioner knows or it is obvious that the practitioner's continued employment will result in violation of a Disciplinary Rule. Kersey's motion for summary judgment on Count 2 having been determined to be without merit, it is concluded that rendering summary judgment *sua sponte* for the Director on that count is appropriate and will be entered.[17] Nothing in the *Selling* factors (supra at 16) or in the PTO penalty determination factors, 37 C.F.R. § 10.154(b), id., warrant a different result. Although Kersey continues to argue that the disciplinary proceedings against him were improper, the record does not support that contention and he has not set forth, let alone provided evidence of, any extenuating circumstances.

[17] It is likely that the Director's reason for not including Count 2 in his motion for summary judgment is because Kersey 's petition for review of his suspension was pending in U.S. District Court for the District of Columbia at the time the motion was filed.

Order

1. The Director's summary judgment motion for reciprocal discipline on Count 1 is **Granted.**

2. Respondent's motion for summary judgment on Count 2 is **DENIED and summary judgment sua sponte is entered for the Director on Count 2.**

3. The result of the foregoing determinations is that pursuant to Rule 10.130(a) Respondent, George E. Kersey, is **EXCLUDED** from practice before the PTO effective as of the date of this order.[18]

Dated this 9th day of March, 2006.

Spencer T. Nissen
Administrative Law Judge

[18] Unless appealed in accordance with Rule 10.155, this decision will become the final decision of the Commissioner [Director].