

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE ADMINISTRATIVE LAW JUDGE

In the Matter of:

KLEY ACHTERHOF,

Respondent.

Proceeding No. D2017-24

December 11, 2018

Appearances:

Melinda DeAtley, Esq.
Elizabeth Mendel, Esq.
Associate Solicitors
United States Patent and Trademark Office

Raymond Burrasca, Esq.
Kley Achterhof, Esq.

Before: Alexander FERNÁNDEZ, United States Administrative Law Judge¹

INITIAL DECISION AND ORDER

This matter arises from a *Complaint and Notice of Proceedings under 35 U.S.C. § 32* (“Complaint”) filed by the Director of the Office of Enrollment and Discipline (“OED Director”) for the United States Patent and Trademark Office (“USPTO” or “the Office”) requesting that Kley Achterhof (“Respondent”) be suspended or excluded from practice before the USPTO for violating its disciplinary rules.² The essence of the *Complaint* is that Respondent, who is not a registered practitioner, engaged in the unauthorized practice of law in patent matters before the USPTO, held himself out as being able to provide patent legal services before the USPTO, and advised patent clients to make submissions to the USPTO as *pro se* filers, when they were

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

² Effective May 3, 2013, the USPTO Rules of Professional Conduct apply to persons who practice before the Office. See 37 C.F.R. §§ 11.101 through 11.901. Conduct occurring prior to May 3, 2013, is governed by the USPTO Code of Professional Responsibility. See 37 C.F.R. §§ 10.20 through 10.112 (2012). The allegations of misconduct set forth in the *Complaint* occurred both prior to and after May 3, 2013. Therefore, the Court must consider both the USPTO Code of Professional Responsibility and USPTO Rules of Professional Conduct when determining whether Respondent is liable for violations of the USPTO disciplinary rules.

actually being represented by Respondent. In addition, the *Complaint* claims that Respondent failed to cooperate with the OED's investigation into his alleged misconduct.

PROCEDURAL HISTORY

On July 18, 2017, the OED Director filed the *Complaint* in this matter. Respondent requested a 30-day extension to answer the *Complaint*. Respondent's request was granted but limited to two weeks as the Court determined that Respondent's reported basis for the extension did not warrant more time beyond an August 31, 2017 deadline.

On August 22, 2017, Respondent notified the Court that he would be filing a Complaint and Request for Injunction with the Clerk of Court for the United States District Court for the District of Wyoming. That same day, Respondent also filed an Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. On August 30, 2017, the District Court held a hearing on Respondent's motion. At the hearing, the U.S. District Court dismissed Respondent's case for lack of subject matter jurisdiction.

On August 31, 2017, Respondent filed a timely *Answer* in which he responded to the allegations contained in the *Complaint* and raised several affirmative defenses. Respondent also filed a *Motion to Dismiss*, dated October 3, 2017, *Motion for Judgment on the Pleadings*, dated October 13, 2017, and a second *Motion to Dismiss*, dated October 13, 2017. Many of the arguments contained in Respondent's subsequent dispositive motions were already raised in Respondent's *Answer*. Considering the complexity of the issues involved, and the numerous pleadings filed by the parties, the Court was unable to rule on dispositive motions prior to the commencement of the hearing and held those matters in abeyance.³

The Court held a hearing in this matter from November 14, 2017 through November 16, 2017, in Denver, Colorado. The following witnesses offered testimony: Respondent; Charles Mason; Eckhart Zimmermann; William J. Griffin, OED Deputy Director; Charlema R. Grant, OED staff attorney; Douglas P. Collins; Richard Virgil; David Lawson; Cynthia R. Duncan; Sena Zollar; Rennae Beilke; David J. Mihm; Kenneth Lini; Dale A. Davenport; Robert D. Rose; Phyllis Fogle; Jennifer Arndt; Sara Nowotny; and Kent Stenzel. Following the Court's receipt of the transcript on November 4, 2017, the parties were ordered to file post-hearing briefs and response briefs.

After the parties filed timely post-hearing and response briefs, the Court received a *Petition to Intervene* filed by Rita Z. Crompton. After considering the parties' positions, the Court denied Ms. Crompton's *Petition to Intervene* by *Order* dated May 15, 2018. Ms. Crompton then sought reconsideration of the Court's denial of her request to intervene. Ms.

³ The Court notes that its basis for withholding **judgment** on the pleadings—it required additional time to consider Respondent's arguments—is sufficient to deny the motion as a matter of procedure. See *Boozier v. MCAS Beaufort*, No. 2:14-cv-03312-DCN-JDA, 2015 U.S. Dist. LEXIS 47032, at *4 (D.S.C. Mar. 9, 2015) (“After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings. Courts follow a fairly restrictive standard in ruling on Rule 12(c) motions, as hasty or imprudent use of this summary procedure by the courts violates the policy in favor of ensuring to each litigant a full and fair hearing on the merits of his or her claim or defense.”). The Court conducted a full hearing on the merits and has before it a complete evidentiary record for its consideration. Therefore, Respondent's *Motion for Judgment on the Pleadings* is **DENIED**.

Crompton's *Motion for Reconsideration* was ultimately denied thereby closing the record of this proceeding. This matter is ripe for decision.

APPLICABLE LAW

The USPTO has the "exclusive authority to establish qualifications for admitting persons to practice before it, and to suspend or exclude them from practicing before it." Kroll v. Finnerty, 242 F.3d 1359, 1364 (Fed. Cir. 2001); see Sperry v. Fla. ex rel. Fla. Bar, 373 U.S. 379 (1963) (upholding the USPTO's exclusive authority against challenge from state bar). The Director of the USPTO may suspend or exclude a person from practice before the Patent and Trademark Office if the person is "shown to be incompetent or disreputable, or guilty of gross misconduct," or if the person violates regulations established by the Office. 35 U.S.C. § 32.

The USPTO has duly promulgated regulations governing the conduct of persons authorized to practice before the Office. The USPTO Rules of Professional Conduct (37 C.F.R. §§ 11.101 *et seq.*) apply to persons who practice before the Office and became effective May 3, 2013. For alleged violations of USPTO disciplinary rules occurring prior to May 3, 2013, the USPTO Code of Professional Responsibility (37 C.F.R. §§ 10.20 *et seq.* (2012)) applies.

Section 32 authorizes the USPTO to discipline malfeasant patent practitioners, including by suspending or excluding a person from practice before the Office for violating its rules of conduct. 35 U.S.C. § 32; see also 37 C.F.R. § 11.19(b)(1)(iv). The practitioner must receive "notice and opportunity for a hearing" before such disciplinary action is taken. 35 U.S.C. § 32. Disciplinary hearings are conducted in accordance with USPTO's procedural rules and with section 7 of the Administrative Procedure Act, 5 U.S.C. § 556, by a hearing officer appointed by the USPTO. 37 C.F.R. §§ 11.39, 11.44.

Burden of Proof. The OED Director has the burden of proving the alleged violations by clear and convincing evidence. 37 C.F.R. § 11.49. Thereafter, Respondent has the burden to prove any affirmative defense by clear and convincing evidence. Id.

The clear and convincing standard is applied "to protect particularly important interests . . . where there is a clear liberty interest at stake." Thomas v. Nicholson, 423 F.3d 1279, 1283 (Fed. Cir. 2005). This is an intermediate standard "between a preponderance of the evidence and proof beyond a reasonable doubt." Addington v. Texas, 441 U.S. 418, 424-25 (1979). The standard requires evidence "of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Jimenez v. DaimlerChrysler Corp., 269 F.3d 439, 450 (4th Cir. 2001). "Evidence is clear 'if it is certain, unambiguous, and plain to the understanding,' and it is convincing 'if it is reasonable and persuasive enough to cause the trier of facts to believe it.'" Foster v. Allied Signal, Inc., 293 F.3d 1187, 1194 (10th Cir. 2002) (citing Ortega v. IBP, Inc., 874 P.2d 1188, 1198 (Kan. 1994), disapproved of by In re B.D.-Y., 187 P.3d 594 (Kan. 2008)).

FINDINGS OF FACT

Respondent was admitted to the Wyoming State Bar on November 2, 2007. Respondent took the patent registration examination on August 12, 2013. On August 14, 2013, the OED notified Respondent that he did not obtain a passing score on the patent registration examination. Respondent has not applied to retake the patent registration examination. He is not now, and has never been, registered to practice before the Office in patent matters, nor has he been granted limited recognition to practice in such matters.

However, as an attorney active and in good standing with the highest court of a state, Respondent may represent others before the Office in trademark and other non-patent matters. 37 C.F.R. § 11.14. Respondent did in fact serve as the attorney of record for no less than fourteen trademark applications and began representing clients in trademark matters before the USPTO as early as May 6, 2008. In addition, Respondent appeared before the Trademark Trial and Appeal Board as the attorney of record for a client on October 8, 2013.

I. Respondent's Involvement with the Inventors' Roundtable

Respondent became involved with an organization called the Inventors' Roundtable nearly ten years ago, when Respondent was considering patenting some of his own inventions. The Inventors' Roundtable is a free forum where inventors of all sophistications can meet on a regular basis to discuss their inventions. The Inventors' Roundtable meetings are described as a safe place to discuss the processes its members are going through for turning their ideas into inventions that are sold in the market place. The main goal of the Inventors' Roundtable is to educate inventors as much as possible and the consensus is that its meetings are an invaluable service to small inventors.⁴ Another function of the Inventors' Roundtable is to connect inventors with service providers who may have expertise areas such as drawings, intellectual property, manufacturing, or marketing. It was in this context that Respondent was introduced to inventors and potential clients.

Having studied entrepreneurial law and intellectual law in law school, Respondent asked the founding members if he could attend meetings occasionally. One of the original founders was Rita Crompton. Ms. Crompton also invited Respondent to attend conferences that she helped to organize. For two conferences in 2016, Respondent provided a biography to be posted on the conferences' websites, because he was scheduled to either sit on a panel or speak. The following is Respondent's biography that he provided to the conference organizers:

Mr. Achterhof's practice emphasizes intellectual property (IP) law, entrepreneurial law and the legal needs of new and growing companies. He focuses on patent, copyright, and trademark law...
Mr. Achterhof counsels clients on IP strategy and portfolio management; provides opinions of counsel on patentability,

⁴ A member explained the Inventors' Roundtable meetings had a familial atmosphere where "people share their stories about their progress in the inventing process. They provide support to each other, ask questions about . . . what happens next, how does this work."

infringement and validity; and represents clients with business litigation issues.

When meeting inventors through the Inventors' Roundtable or during conferences, Respondent tells people he is an attorney who works in the fields of intellectual property, business formation, and entrepreneurial law, among other areas. He specifically and expressly instructed others, including Ms. Crompton, not to refer to him as a patent attorney.

II. Respondent's Representation of Charles Mason

In 2009, Charles Mason developed an invention that would prevent shower curtains from creeping in during showers. Later that year, Mr. Mason began attending Inventors' Roundtable meetings. It was at one of those meetings that he met Ms. Crompton.

In 2013, Mr. Mason approached Ms. Crompton about some of his ideas for inventions and, specifically, the invention he developed in 2009 referenced in the preceding paragraph. At Mr. Mason's request, Ms. Crompton put him in touch with Respondent, so Mr. Mason could begin the process of moving forward with a provisional patent application process. At the time, Mr. Mason already knew of Respondent through the Inventors' Roundtable meetings, because Respondent had previously been presented as a service provider with experience in patents.

Ms. Crompton routinely described Respondent to members of the Inventors' Roundtable as being a vetted service provider and at times referred to him as, "our attorney, Kley." Mr. Mason understood Ms. Crompton's references to mean that Respondent was authorized to work on patents and file documents with the USPTO. Mr. Mason did not question whether Respondent was authorized to practice before the USPTO.

On May 29, 2013, Ms. Crompton sent an engagement letter to Mr. Mason through her company FLeCusa International. In the engagement letter, Ms. Crompton explained that FLeCusa International is comprised of legal assignment specialists that would secure Mr. Mason one or more of FLeCusa International's "contract law firms, attorneys or other legal professionals to represent [Mr. Mason] in the various legal matters [Mr. Mason] assigns to them." The letter also detailed the billing and hourly fee schedule that would be implemented. It is through FLeCusa International that Ms. Crompton provides administrative, non-legal services, such as bookkeeping and other "back-office services" to Respondent's law practice.

On July 20, 2013, Ms. Crompton sent Mr. Mason an invoice for the cost of a patent search review that was performed by Respondent. The bill was for \$285 for 90 minutes of work at an hourly rate of \$190. After Respondent performed the patent search review for Mr. Mason, Mr. Mason decided to employ Jeff Schell, a registered practitioner, instead of Respondent. Mr. Schell filed a provisional patent application for Mr. Mason's invention in February of 2014. A year later, on February 9, 2015, Mr. Schell filed the non-provisional patent application for the invention, which was assigned 14/617,479 as its application number.

However, Mr. Mason soon became frustrated with Mr. Schell, who was now operating through Rocky Mountain Patent, and his handling of a response to a request from the USPTO.

Mr. Mason reached out to Respondent on January 28, 2016, for assistance on his non-provisional patent application. Specifically, Mr. Mason requested that Respondent assist him in developing language to respond to an Office Action dated December 15th of the previous year. Following a phone call on February 10, 2016, Mr. Mason and Respondent agreed that Respondent would draft an Office Action Response to be submitted to the USPTO. In addition, Respondent told Mr. Mason that Ms. Crompton would be in touch with instructions for revoking Mr. Schell as power of attorney on the '479 application. The following week, Mr. Mason filed a document with the Office revoking the power of attorney granted to Mr. Schell for the '479 application.

After consulting with Mr. Mason and giving him advice as to the strategy for responding to the December 15 Office Action, Respondent drafted the response. The response contained amended claims and arguments as to the patentability of the invention in the '479 application. Ms. Crompton filed the Letter in Response to Office Action in the '479 application, which was signed by Mr. Mason indicating that he was filing as a *pro se* applicant. However, Mr. Mason did not prepare the document.

On June 13, 2016, the USPTO sent Mr. Mason another Office Action wherein the examiner informed Mr. Mason that certain claims contained in the '479 application remained rejected.⁵ Mr. Mason forwarded the Office Action to Respondent. Around that time, Mr. Mason was seeking investors for his invention. He was introduced to Russ Krajec. In discussions involving Mr. Mason's invention and the '479 application, Mr. Krajec informed Mr. Mason that he could not be *pro se* while having an attorney work on the patent. Mr. Mason then sought the opinion of three other attorneys who confirmed the same.

In an effort to protect the '479 application and any likelihood of its continuance, Mr. Mason took it upon himself to obtain proof that he was misinformed that he could proceed *pro se* and have Respondent work on his patent application. Although Mr. Mason seemingly had a good relationship with Respondent, he decided to secretly record conversations between them and even solicited the help of two friends to do so. During these conversations, Respondent explained to Mr. Mason that filing *pro se* while having a non-registered attorney work on the patent was a "gray area." Respondent represented to Mr. Mason that it was not necessary for Respondent to be registered with the USPTO as long as Respondent was not appearing before the USPTO on Mr. Mason's behalf. After Mr. Mason informed Respondent that he had obtained three opinions that stated otherwise, Respondent stated, "I don't think there's any strong statutory law or case law or inclusion by the Patent Office that, that's the case. . . Because otherwise I wouldn't be doing this. I wouldn't jeopardize my law license if I thought that there was any – any inequitable conduct or anything like that." Still, Mr. Mason informed Respondent that he would have to "disengage" with Respondent, hire a registered patent attorney, and get a refund of his fees in order to prove that he was not "complicit."

Mr. Mason generally did not have any complaints about the quality of Respondent's work. However, understanding that their business relationship could not continue, Mr. Mason informed Respondent that he was terminating their agreement. Mr. Mason told Respondent to

⁵ Because Mr. Mason indicated to the USPTO that he was proceeding *pro se*, correspondence from the USPTO was sent directly to him.

stop working on the '479 application immediately in an e-mail dated July 27, 2016. Respondent refunded his fees to Mr. Mason.

III. Respondent's Representation of David Thomas

After attending an Inventors' Roundtable meeting, David Thomas reached out to Ms. Crompton for Respondent's contact information. In his September 17, 2014 e-mail to Ms. Crompton, he stated that he wanted to get in contact with Respondent about proceeding with a provisional patent application. Ms. Crompton provided Respondent's contact information to Mr. Thomas and, a week later, Mr. Thomas sent Respondent an e-mail that included a description of his invention.

On October 8, 2014, Mr. Thomas sent Respondent a draft of his provisional patent applications via e-mail. The e-mail also solicited Respondent's opinion on "the best course of action" with regards to submitting his application. Upon Mr. Thomas's request, Respondent assisted him in drafting and revising his patent application materials. Mr. Thomas then executed his patent application paperwork indicating he was proceeding *pro se*.

Respondent told Mr. Thomas that he could review the patent search done by Search Quest for infringement issues and patentability issues. Mr. Thomas also consulted with Respondent regarding trademarking his invention after discovering there was a similar app already being sold on the app store under a similar name. Respondent also advised him on non-disclosures and other non-patent legal documents.

IV. Respondent's Handling of Work for Others

Respondent also provided patent legal services to other inventors. At the hearing, one such inventor, David Mimh, testified that Respondent prepared his nonprovisional patent application based on the provisional patent application that Mr. Mimh prepared. Respondent (or Ms. Crompton at Respondent's direction) filed the nonprovisional patent application with the USPTO after Mr. Mimh signed the nonprovisional patent application unknowingly indicating that he was proceeding *pro se*. It was Mr. Mimh's understanding that Respondent would be acting as his attorney and communicating on his behalf with the USPTO. Mr. Mimh was charged \$5,000 for Respondent's services. After his nonprovisional application was received, the USPTO sent two Notices of Missing parts to which Respondent drafted a response on Mr. Mimh's behalf.

Three additional inventors, Dale Davenport, Richard Vigil, and Kent Stenzel, testified that Respondent consulted with them and then drafted their patent applications for filing with the USPTO. In addition, Respondent billed numerous clients between December 2010 through July 2017 for patent legal services that he provided to them. Such work included drafting patent applications, drafting Responses to Office Actions, writing and modifying claims and supporting descriptions, and offering opinions on patentability. As evidenced by the notations on some of

the bills, often after Respondent drafted such documents, he would give them to his clients to sign them as *pro se* applicants before Ms. Crompton would file them with the USPTO.⁶

V. Respondent's Responses to the OED's Requests for Information

On August 1, 2016, the OED received a grievance from Mr. Krajec, who is a registered practitioner. The essence of the grievance was that Respondent was practicing patent law despite not being registered with the USPTO. As a result of Mr. Krajec's grievance, the OED opened an investigation into the allegations and sent Respondent a Request for Information ("RFI") dated September 30, 2016.

The September 30 RFI to Respondent contained six sections: (I) Alleged Information and Evidence; (II) Applicable Law; (III) Requests for Information and Evidence; (IV) USPTO Rules of Professional Conduct; (V) Instructions and Guidance; and (VI) Conclusion. In section III of the RFI to Respondent, OED sought specific information and responses to inquiries in furtherance of its investigation. This section sought substantive responses to, *inter alia*, questions pertaining to Respondent's involvement in the preparation, filing, and prosecution of certain patent applications before the USPTO, along with other questions regarding the services rendered for clients. On December 5, 2016, Respondent, through counsel, submitted a letter to the OED addressing the September 30 RFI. In the letter to OED, Respondent argued that he was not subject to the USPTO "rules of conduct."

The OED sent a Supplemental RFI to Respondent on February 24, 2017, requesting that Respondent fully respond to the September 30 RFI. That RFI also sought answers to additional substantive requests for information and evidence in furtherance of OED's investigation. Respondent did not respond to the February 24 RFI. On March 31, 2017, OED sent a Lack of Response to Requests for Information and Evidence letter ("Lack of Response Letter") to Respondent's counsel. The Lack of Response Letter informed Respondent that OED had not received a full response to the September 30 RFI or the February 24 Supplemental RFI.

Having received the Lack of Response Letter, Respondent sent another letter to the OED stating that it was in response to the February 24 Supplemental RFI from OED. In this letter, Respondent again asserted that OED did not have jurisdiction over him. Therefore, Respondent stated that OED did not have jurisdiction to "conduct a disciplinary investigation" of him. Respondent also argued that he could not respond to OED's specific questions and inquiries because of the attorney-client privilege. However, Respondent did not provide a privilege log for the documents and information OED requested but that Respondent claimed as privileged.

⁶ For example, on invoice # 2599, Ms. Crompton noted to the client, "I need you to mail to me the original copies of what you signed. The uspto won't accept the ones you emailed. Said they were not clear enough... Then I can format them and send again." On invoice # 2613, Ms. Crompton wrote to a different client, "Please confirm that you received the filing documents. I need them signed, scanned and emailed back to me."

DISCUSSION⁷

The OED Director alleges Respondent provided patent legal services to clients despite not being registered before the Office as a patent practitioner. In the course of providing patent legal services, Respondent is alleged to have also held himself out as being qualified to do so with the suggestion that he was registered to practice before the Office. Lastly, the OED Director alleges Respondent refused to answer lawful requests for information sent to him by the OED. Based on these allegations, the OED Director claims Respondent violated the USPTO Rules of Professional Conduct and Code of Professional Responsibility.

- I. The OED Director has proven, by clear and convincing evidence, that Respondent provided patent legal services to clients, advised clients that it was permissible to proceed *pro se*, and refused to cooperate with the OED's investigation.

The *Complaint* first alleges Respondent provided patent legal services to, or on behalf of, at least one of his clients. Such services include preparing and prosecuting patent applications; consulting with or giving advice in contemplation of filing a patent application or other document (such as a response to an Office action) with the Office; drafting the specification or claims of a client's patent application; drafting an amendment or reply to a communication from the Office that requires written argument to establish the patentability of a claimed invention; and drafting a reply to a communication from the Office regarding a patent application.

The OED Director has the burden to prove each violation by clear and convincing evidence. 37 C.F.R. § 11.49. As stipulated by the parties, Respondent consulted with Charles Mason, gave him advice as to strategy for responding to the December 15 Office Action, and drafted a response to the Office Action with Mr. Mason's assistance. Respondent also explained to Mr. Mason that Mr. Mason could revoke registered practitioner Jeff Schell's power of attorney for the '479 application to have more control of his application by indicating to the USPTO that he would proceed *pro se*.

As demonstrated by e-mail exchanges admitted into the record, Respondent also worked on a utility patent application for David Thomas. Respondent claims Mr. Thomas "wrote most of it" but admits that he "assisted [Mr. Thomas] extensively with it as well." The Court also received testimony from various, credible witnesses that Respondent assisted them in drafting their patent applications. Respondent's assistance ranged from translating the clients' language into more technical/legal terminology, to drafting most, if not all, of their patent applications. Many of these witnesses were called by Respondent and Respondent did not dispute that he provided such services to them. In addition, invoices disclosed by Respondent were presented at the hearing demonstrating that Respondent provided patent legal services to several other clients. Based on the foregoing, the Court finds that the OED Director met his burden to prove, by clear and convincing evidence, that Respondent provided patent legal services to clients despite not being registered with the Office.

⁷ The Court has considered all issues raised and all documentary and testimonial evidence in the record and presented at hearing. Those issues not discussed here are not addressed because the Court finds they lack materiality or importance to the decision.

The OED Director also met his burden to prove that Respondent advised clients that it was permissible for them to indicate that they were proceeding *pro se* on patent application documents filed with the Office even though those documents were prepared, in whole or in part, by Respondent. Respondent admitted that he sometimes advised clients that there were two methods of proceeding with their patent applications. The first is the option where a client would hire someone who would sign documents to be filed with the USPTO and appear on the client's behalf before the USPTO. If a client opted for this option, Respondent would inform that client that they would have to seek other counsel as he was not registered with the Office. In the alternative, Respondent told clients they could indicate to the USPTO that they wanted to proceed *pro se* even though Respondent would draft the patent documents. Respondent explained that this is permissible because the clients would be filing the documents on their own. As Respondent has admitted to such conduct, this allegation is proven by clear and convincing evidence.

The OED Director also alleges that Respondent refused to cooperate with the OED's investigation by failing to fully respond to the RFIs. Respondent admits that he did not provide the information requested in the RFI. However, Respondent claims he was not obligated to do so as he is not under the jurisdiction of the OED and, therefore, not obligated to respond to the RFI. Whether Respondent's failure to cooperate was permissible will be addressed below. That notwithstanding, there is clear and convincing evidence that Respondent did not respond to the OED's RFIs.

II. The OED Director has failed to prove, by clear and convincing evidence, that Respondent misled his clients into believing he was registered before the Office.

The OED Director claims Respondent misled his clients into believing that he was registered before the Office. In an attempt to prove such misconduct, the OED Director presented excerpts of biographies that Respondent admits to providing to various intellectual property conferences and groups. In addition, Mr. Mason testified that he believed that Respondent was registered to practice before the Office when Mr. Mason hired Respondent to draft a response to an Office Action. Similarly, Mr. Mimh also testified that he thought he had hired a patent attorney who was registered and would represent him before the Office.

To rebut this allegation, Respondent provided several witnesses who regularly attended Inventors' Roundtable meetings and had interactions with Respondent. Many of the witnesses acknowledged that they were patent clients of Respondent. These witnesses testified consistently that Respondent never told them that he was registered with the USPTO. One witness, Kent Stenzel, specifically recalled a discussion with Ms. Crompton wherein Ms. Crompton explicitly told him that Respondent was not registered with the USPTO before Mr. Stenzel hired Respondent to work on his patent. And, even Mr. Mason and Mr. Mimh admitted that neither Respondent nor Ms. Crompton explicitly told them that Respondent was registered to practice before the USPTO. At best, Mr. Mason and Mr. Mimh fairly assumed that Respondent was registered because he was recommended by the Inventors' Roundtable and had represented many other patent clients in the past.⁸ Still, this is not clear and convincing evidence that

⁸ Mr. Mimh offered the following testimony: "I'll say this: I wouldn't hire the milkman to give me a patent. So when I contacted [Respondent], I assumed [Respondent was] a patent lawyer."

Respondent affirmatively *held himself out* to clients as being registered with the Office or had others do so on his behalf. See Jimenez v. DaimlerChrysler Corp., 269 F.3d at 450 (stating that “clear and convincing” standard requires evidence “of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established”). Accordingly, the Court finds the OED Director has not met his burden to prove this allegation.

III. Respondent violated the USPTO Disciplinary Rules.

The OED Director claims Respondent’s actions constitute violations of the USPTO disciplinary rules.⁹ Respondent, however, claims that the USPTO’s disciplinary rules do not apply to him because they cover only persons who are registered to practice before the Office. Respondent has raised this argument as an affirmative defense, and as a basis both for dismissal of the *Complaint* and for a judgment on the pleadings. This is a threshold issue that the Court must resolve before it can determine whether Respondent’s actions violated the USPTO disciplinary rules.

The disciplinary rules govern “solely the practice of patent, trademark, and other law before the United States Patent and Trademark Office.” 37 C.F.R. § 11.1. “Practice before the Office” covers:

law-related service that comprehends any matter connected with the presentation to the Office or any of its officers or employees relating to a client’s rights, privileges, duties, or responsibilities under the laws or regulations administered by the Office for the grant of a patent or registration of a trademark, or for enrollment or disciplinary matters. Such presentations include preparing necessary documents in contemplation of filing the documents with the Office, corresponding and communicating with the Office, and representing a client through documents or at interviews, hearings, and meetings, as well as communicating with and advising a client concerning matters pending or contemplated to be presented before the Office.

Id. § 11.5(b). A proceeding “before the Office” includes an application for patent, a correction of a patent, an application to register a trademark, an appeal, a petition, or any other matter that is pending before the Office. Id. § 11.1. The Court finds Respondent engaged in “practice before the Office” on both patent and trademark law matters based on the proceeding reasons.

Practice before the Office in patent matters includes, but is not limited to,

preparing and prosecuting any patent application, consulting with or giving advice to a client in contemplation of filing a patent

⁹ The Court applies the Code of Professional Conduct to misconduct that occurred prior to May 3, 2013, and the Rules of Professional Responsibility to misconduct that occurred thereafter. See 37 C.F.R. § 11.901.

application or other document with the Office, drafting the specification or claims of a patent application; drafting an amendment or reply to a communication from the Office that may require written argument to establish the patentability of a claimed invention; drafting a reply to a communication from the Office regarding a patent application . . .

Id. § 11.5(b)(1).

By Respondent's own admission or as credibly testified to by witnesses at the hearing, Respondent prepared numerous patent applications on behalf of clients that were filed with the USPTO. He advised clients on strategies for responding to USPTO correspondence regarding their patent applications. Beyond that, Respondent drafted a Response to an Office Action on behalf of Mr. Mason. Moreover, the record demonstrates that in the course of providing administrative services to Respondent, Ms. Crompton transmitted documents prepared by Respondent, on behalf of his clients, directly to the USPTO. There is, therefore, overwhelming evidence that, with regard to patent matters, Respondent engaged in "practice before the Office" as defined by the regulations.

However, Respondent argues that because his clients indicated that they were proceeding *pro se* on all patent documents that Respondent prepared, he has not actually engaged in "practice before the Office" in patent matters, because he never personally appeared as a representative. This position is unconvincing, because there is no requirement that an individual appear in a proceeding as the patent attorney or patent agent of record in order to engage in "practice before the Office." Accordingly, the Court finds that Respondent engaged in practice before the Office in patent matters thereby subjecting him to the USPTO disciplinary rules.

Moreover, the USPTO disciplinary rules apply to Respondent because he lawfully engaged in "practice before the Office" in trademark matters. "Practice before the Office" in trademark matters includes "consulting with or giving advice to a client in contemplation of filing a trademark application or other document with the Office; preparing and prosecuting an application for trademark registration; . . . or conducting an appeal to the Trademark Trial and Appeal Board." 37 C.F.R. § 11.5(b)(2).

As admitted by Respondent at the hearing, he drafted applications for trademark registrations. He also signed those applications as the attorney-of-record. In addition, he submitted documents on behalf of and before the Trademark Trial and Appeal Board.¹⁰ Accordingly, the Court finds that Respondent engaged in "practice before the Office" in trademark matters. And, more importantly, the Court finds that Respondent is considered a "practitioner" under the USPTO disciplinary rules as a result of his conduct. See 37 C.F.R. § 10.1(r) (2012) and 37 C.F.R. § 11.1 (Practitioner means: an individual authorized under 5 U.S.C. 500(b), or otherwise as provided by § 11.14(a), (b), and (c) to practice before the Office

¹⁰ Respondent seems to argue in his post-hearing brief that because he "never appeared before the Trademark Trial and Appeal Board, itself in-person" he has not practiced before the Office in Trademark matters. The Court rejects this argument.

in trademark matters or other non-patent matters.). And, as a practitioner, Respondent is subject to the USPTO disciplinary rules.

a. Respondent engaged in the unauthorized practice of patent law.

The core of the OED Director's *Complaint* is that Respondent engaged in unauthorized practice before the Office in patent matters in violation of the USPTO Rule of Professional Conduct proscribing the unauthorized practice of law.

Practitioners may not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. 37 C.F.R. § 11.505; see In re Kenneth Paul Campbell, Proceeding No. D2014-11 (USPTO Apr. 29, 2014) (excluding a practitioner who engaged in the unauthorized practice of law by representing a client in a civil and criminal matter before the Colorado courts despite not being a licensed attorney). The USPTO is considered a jurisdiction for the purposes of this rule. See CHANGES TO REPRESENTATION OF OTHERS BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE, 78 Fed. Reg. 20180, 20180-01 (Apr. 3, 2013); see also In Re Discipline of Peirce, 128 P.3d 443, 444 (Nev. 2006) (“We therefore conclude that ‘another jurisdiction’ includes the USPTO. The professional conduct rules are similar, so that what constitutes misconduct before the USPTO is misconduct in Nevada.”).

An applicant may file and prosecute the applicant's own case, or the applicant may give power of attorney to be represented by a patent practitioner. 37 C.F.R. § 1.31. However, “only practitioners who are registered under § 11.6 . . . are permitted to prosecute patent applications of *others* before the Office or represent *others* in any proceedings before the Office.” Id. § 11.10. The following constitute proceedings “before the Office”: an application for patent, a correction of a patent, an application to register a trademark, an appeal, a petition, and any other matter that is pending before the Office. Id. § 11.1. And, the recognition by the USPTO to practice trademark matters shall not be construed as sanctioning or authorizing the unauthorized practice of law in another jurisdiction. Id. § 11.14(d).

Respondent testified that he “helped” or “assisted” clients with their patent applications. He also claimed he did so only at their request. Regardless of the degree or extent that Respondent participated in the drafting of a client's patent application or response to the Office, Respondent's actions constitute the practice of law as defined by USPTO regulations and by common law. See In re Amalgamated Dev. Co., 375 A.2d 494, 499 (D.C. 1977) (citing Sperry and finding that advising inventors as to patentability based on the results of the search, preparing patent applications including the specification of claims, and preparing and filing amendments constitute the practice of law); In re Herren, 138 B.R. 989, 994 (Bankr. D. Wyo. 1992) (the preparation of legal instruments by which legal rights are secured is the practice of law); Kennedy v. Bar Ass'n, 561 A.2d 200, 208 (Md. 1989) (“Advising clients by applying legal principles to the client's problem is practicing law.”).

It is arguable that, if Respondent's conduct was limited to merely transcribing his clients' words onto a patent application, Respondent's conduct would not constitute the unauthorized practice of law. See In re Herren, 138 B.R. at 994 (“A typing service that consists of solely transcribing written information furnished by clients is a service that may be legitimately

provided by non-attorneys.”). However, the important factor here is that Respondent took his clients’ words and, on many occasions, rephrased them with legal ramifications. As found *supra*, Respondent drafted patent applications on behalf of his clients. In addition, Respondent drafted responses to Office Actions and provided opinions on patentability to clients. By performing these acts, Respondent engaged in unauthorized practice before the Office in patent matters in violation of 37 C.F.R. § 11.505.

Respondent’s actions also constitute a violation of 37 C.F.R. § 11.116, which requires that a practitioner shall not represent a client if doing so will result in a violation of the USPTO Rules of Professional Conduct. Because the activities in which Respondent engaged violated the USPTO disciplinary rule proscribing unauthorized practice before the Office in patent matters, Respondent was not permitted to provide his clients with the representation they requested. Accordingly, Respondent also violated this disciplinary rule.

b. Respondent did not have the requisite intent or knowledge to engage in misconduct involving deceit or misrepresentation.

The OED Director claims Respondent’s misconduct involves dishonesty, fraud, deceit, or misrepresentation in violation of the USPTO Code of Professional Responsibility and Rules of Professional Conduct. Specifically, the OED Director claims Respondent engaged in such misconduct by explicitly and implicitly holding himself out and/or allowing himself to be held out as a person who is authorized to practice before the Office in patent matters. In addition, the OED Director claims Respondent engaged in misrepresentations by allowing the USPTO to mistakenly believe that his clients were *pro se* applicants before the Office when, in fact, Respondent was providing legal services to them.

Practitioners shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. 37 C.F.R. § 10.23(b)(4) (2012); 37 C.F.R. § 11.804(c). Deceit is dishonest behavior or behavior that is meant to fool or trick someone. In re Fred Lane, Proceeding No. D2013-07, slip op. at 14 (USPTO Mar. 11, 2014). A misrepresentation is the act of making a false or misleading assertion about something, usually with the intent to deceive, and includes not just written or spoken words but also any other conduct that amounts to a false assertion. Id., slip op. at 14 (citing *Black’s Law Dictionary* (9th ed. 2009)). Therefore “[c]oncealment or even non-disclosure may have the effect of a misrepresentation.” Id.

Here, the OED Director has not presented clear and convincing evidence that Respondent engaged in misconduct that violates USPTO disciplinary rules proscribing conduct involving dishonesty, fraud, deceit, or misrepresentation. There is no testimony that Respondent explicitly held himself out as being authorized to practice before the Office in patent matters. In addition, Respondent testified credibly that he instructed others not to refer to him as a patent attorney. Although some of Respondent’s clients mistakenly believed he was, in fact, authorized to practice before the Office in patent matters, there is not clear and convincing evidence that this mistaken belief was the result of any misrepresentation, or deceit on the part of Respondent. Rather, the evidence tends to show that clients simply assumed Respondent could practice before the Office in patent matters because he provided patent legal services to many clients in the past. In fact, it is doubtful that Respondent knew those clients held that mistaken belief.

Respondent also is not found to have engaged in misrepresentation by allowing the USPTO to mistakenly believe that his clients were *pro se*. Respondent consistently, and credibly, testified that he thought his clients were, in fact, *pro se* based upon his understanding that inventors could file documents on their own behalf. Respondent's belief was wrong. However, it was sincere. Respondent testified that he relied on the holding from a circuit court and on the advice given to him by a patent attorney. That reliance was, undoubtedly, misplaced, and Respondent could have reached the correct conclusion had he simply referred to the USPTO rules or performed additional research. Instead, Respondent got the answer he wanted and proceeded as such. Although this does not absolve Respondent of all liability under the USPTO disciplinary rules, based upon the facts of this case, the Court finds that Respondent did not have the requisite intent or knowledge to engage in the alleged misrepresentation to the USPTO, because he believed his clients were *pro se*. See In re Piccone, Proceeding No. D2015-06 (USPTO June 16, 2016) (finding that OED Director did not present clear and convincing evidence that a respondent's actions were anything more than negligent, and the most that could be inferred is that the respondent simply did not engage in the necessary due diligence.)

Similarly, Respondent cannot be found to have been dishonest with his clients or to have misrepresented his status before the Office to them in violation of 37 C.F.R. § 10.23(b)(4) (2012) or 37 C.F.R. § 11.804(c). There is not clear and convincing evidence that Respondent attempted to conceal from his clients that he was not registered to practice before the USPTO or that he knew his clients held the mistaken belief that he was registered. At best, his clients did not ask him or indicate that they thought he was registered so Respondent did not know that his status before the Office needed to be addressed. Accordingly, the Court finds that there is not clear and convincing evidence that Respondent violated 37 C.F.R. § 10.23(b)(4) (2012) or 37 C.F.R. § 11.804(c).

c. Respondent gave false information regarding the nature of his services to clients.

The OED Director also claims that Respondent violated the USPTO Rules of Professional Conduct by making false or misleading communications about himself or his services.

The USPTO Rules of Professional Conduct proscribe making false or misleading communication about the practitioner or the practitioner's services. 37 C.F.R. § 11.701. Unlike the rule prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation, this disciplinary rule elaborates on what constitutes a violation by explaining that "a communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Id. The Court acknowledges that the rule does not appear to require any intent or knowledge. Therefore, the fact that Respondent claims he was ignorant of the law is not dispositive of this issue.

After Mr. Mason confronted Respondent with the assertion that Mr. Mason could not proceed *pro se* while having Respondent provide patent legal services to him, Respondent informed Mr. Mason that such conduct was permissible. Specifically, Respondent told Mr.

Mason that “there’s been some findings on that, and the Patent Office has come out and said that they’re not going to, you know, enforce anything about that.” The suggestion that the USPTO would not enforce its rules was misleading and resulted in Respondent falsely implying that the manner in which Mr. Mason filed his documents and Respondent provided Mr. Mason patent legal services was acceptable to the USPTO. And, because the rule does not require Respondent to have the intent to deceive, the Court finds that there is clear and convincing evidence that Respondent made false or misleading communications regarding his services to Mr. Mason in violation of 37 C.F.R. § 11.701 because Respondent gave false information about the nature of the services.

d. Respondent’s actions were prejudicial to the administration of justice.

The OED Director claims Respondent engaged in conduct that is prejudicial to the administration of justice thereby violating both the old and new USPTO disciplinary rules found at 37 C.F.R. § 10.23(b)(5), for conduct occurring prior to May and 37 C.F.R. § 11.804(d).

Conduct that is prejudicial to the administration of justice is “conduct which impedes or subverts the process of resolving disputes” or “frustrates the fair balance of interests or ‘justice’ essential to litigation or other proceedings.” In re Friedman, 23 P.3d 620, 628 (Alaska 2001). Generally, an attorney engages in such conduct when his behavior negatively impacts the public’s perception of the courts or legal profession or undermines public confidence in the efficacy of the legal system. Att’y Grievance Comm’n v. Rand, 981 A.2d 1234, 1242 (Md. 2009). Courts have found that the unauthorized practice of law is a serious threat to the effective administration of justice. United States v. Johnson, 327 F.3d 554, 560 (7th Cir. 2003); see also Am. Exp. Co. v. Monfort Food Distrib. Co., 545 S.W.2d 49, 52 (Tex. Civ. App. 1976) (“The purpose of the rule requiring legal matters to be handled by persons trained in the law and familiar with court procedure is to further the efficient administration of justice.”).

The Court has found that both before and after May 3, 2013, Respondent engaged in the unauthorized practice of patent matters before the Office. Although such misconduct was not a standalone violation of the USPTO disciplinary rules prior to May 3, 2013, it was, nonetheless still the unauthorized practice of law. And because the unauthorized practice of law threatens the effective administration of justice, the Court finds that Respondent’s misconduct violated both 37 C.F.R. § 10.23(b)(5) (2012) and 37 C.F.R. § 11.804(d).

e. The OED Director has not established by clear and convincing evidence that Respondent engaged in a criminal act.

The OED Director alleges Respondent violated the USPTO Disciplinary rules by committing a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a practitioner. 37 C.F.R. § 11.804(b). The criminal act alleged is a violation of 35 U.S.C. § 33, which criminalizes the act of falsely holding oneself out as being registered or otherwise qualified to prepare and prosecute patent applications.

As found by this Court, there is not clear and convincing evidence that Respondent held himself out as being registered to practice before the Office in patent matters. Accordingly, Respondent did not violate 37 C.F.R. § 11.804(b) by violating 35 U.S.C. § 33.

f. Respondent did not knowingly fail to cooperate with the OED's investigation.

The OED Director alleges Respondent knowingly failed to respond to a lawful demand or request for information by refusing to respond to substantive portions of the OED's RFIs. In response, Respondent acknowledges that he did not respond to the RFIs, but asserts that the OED does not have jurisdiction over him to require his compliance and that attorney-client privilege prohibited him from responding.

The USPTO Disciplinary rules state that a practitioner, in connection with a disciplinary matter, shall not knowingly fail to respond to a lawful demand or request for information unless disclosure of such information is protected. 37 C.F.R. § 11.801(b). "Knowingly" means having "actual knowledge of the fact in question." *Id.* § 11.1.

The Court finds that Respondent's claim that he could not disclose information due to attorney-client privilege is pretext. As noted by the OED Director, Respondent did not submit a privilege log but rather made a general statement that he could not respond due to attorney-client privilege. The Court has also observed Respondent's overly generous application of this principle when Respondent attempted to redact very general information—such as names of clients—from invoices that Respondent was obligated to disclose pursuant to the Court's order. Respondent's explanation that such information was redacted because "[the OED Director] didn't ask for it," is not a legal basis for asserting attorney-client privilege. See *Tillotson v. Boughner*, 350 F.2d 663, 666 (7th Cir. 1965) ("The authorities are clear that the privilege extends essentially only to the substance of matters communicated to an attorney in professional confidence. Thus, the identity of a client, or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose."). Accordingly, the Court finds Respondent's claim of privilege to be unsubstantiated.

Whether the OED has jurisdiction to investigate Respondent's misconduct is addressed below as an affirmative defense. However, the Court is sufficiently persuaded by Respondent's emphatic, and unrelenting assertion that the OED does not have jurisdiction to find that Respondent did not *knowingly* fail to respond to the OED's lawful demand for information. Even assuming, *arguendo*, that Respondent should have known that the OED has jurisdiction over him, that fact would be insufficient to demonstrate "actual knowledge," which is required by the regulation. Accordingly, the Court finds that there is not clear and convincing evidence that Respondent's refusal to respond to the substantive portions of the OED's RFIs violated 37 C.F.R. § 11.801(b).

Based on the foregoing, the Court finds the OED Director has demonstrated by clear and convincing evidence that Respondent violated 37 C.F.R. § 11.505 when he engaged in the unauthorized practice before the Office in patent matters by drafting patent applications for clients, drafting responses to USPTO patent-related correspondence, and advising clients on strategies for pursuing patents with the USPTO and the patentability of their inventions.

Because the services Respondent provided to patent clients violated the USPTO disciplinary rule proscribing the unauthorized practice of law, Respondent's representation of these clients also constitutes a violation of 37 C.F.R. § 11.116. In addition, Respondent violated 37 C.F.R. § 11.701 by making false or misleading communications to his clients by telling them that it was permissible for them to indicate to the USPTO that they were *pro se* when they were actually receiving legal services from Respondent. Finally, Respondent's unauthorized practice of law is also a violation of the USPTO disciplinary rules proscribing conduct that is prejudicial to the administration of justice. 37 C.F.R. § 10.23(b)(5) and 37 C.F.R. § 11.804(d).

IV. Respondent's affirmative defenses and grounds for dismissal are rejected.

Respondent raised several affirmative defenses in his *Answer* to the *Complaint*. Most of those same arguments were again raised in Respondent's *Motion to Dismiss for Lack of Jurisdiction* ("Motion to Dismiss"), dated October 23, 2017, and Respondent's *Motion for an Order of the Court Dismissing the Complaint* ("Second Motion to Dismiss"), dated October 26, 2017. Desiring sufficient time to adequately consider the parties' positions on the issues raised by Respondent, the Court withheld its ruling on Respondent's *Motion to Dismiss* and *Second Motion to Dismiss* until after the hearing. In the interests of judicial economy, the Court considers Respondent's affirmative defenses and grounds for dismissal in tandem.

a. The USPTO disciplinary rules do not violate the statutory authority vested by Congress.

Respondent's main argument for dismissal is that the USPTO disciplinary rules proscribing Respondent's conduct are invalid because they are inconsistent with the authority granted to the USPTO by Congress.¹¹ Along these lines, Respondent argues that the present proceeding is *ultra vires*, warranting a dismissal of the *Complaint*.

In support of this position, Respondent cites Hull v. United States, a case in which the District of Columbia Circuit Court of Appeals considered the legislative history of the Lanham Act in determining that Congress (1) did not intend to prohibit all work on patent applications by non-registered persons; and (2) was reluctant to make registration with the USPTO "an essential condition of any and all gainful employment in connection with the preparation of patent applications." 390 F.2d 462, 465 (D.C. Cir. 1968).

As a threshold matter, Hull focuses on the legislative history of 35 U.S.C. § 33, while the USPTO's *Complaint* is brought pursuant to 35 U.S.C. § 32. As such, the precedential value of Hull is significantly compromised, if not diminished entirely. In addition, the Second Circuit rejected the court's conclusion in Hull, noting that it was inconsistent with legislative intent to protect inventors from unskilled and unethical practitioners. United States v. Blasius, 37 F.2d 203, 207 (2d Cir. 1968).

More on this point, on August 14, 2008, the *Federal Register* published a final rule from the USPTO, titled "Changes to Representation of Others Before the United States Patent and Trademark Office." 73 Fed. Reg. 47650 (Aug. 14, 2008). In this rule, the USPTO clarified

¹¹ Respondent also raises this issue as an affirmative defense.

distinctions between practice before the office, which distinguish the current USPTO rules from the failed Cramton bills disabling “all-non-registered persons from providing any services with the preparation of a patent application.” In the final rule, the USPTO changed § 11.5 to cover “matters,” rather than the former jurisdiction of “applications.” *Id.* at 47652. Further, the USPTO added a paragraph, § 11.5(b), which defined practice before the Office as “including a law-related service that comprehends any matter connected with the presentation to the Office or any of its officers or employees related to a client’s rights privileges, duties, or responsibilities under the laws or regulations administered by the Office for the grant of a patent or registration of a trademark...” *Id.* Comments 9 and 12 illustrate the USPTO’s intent in promulgating these changes.

Comment 9 stated that § 11.5(b) “places unnecessary and improper restrictions on practitioners” because it limits a practitioner’s ability to work with “invention promoters who may consult or communicate with clients regarding their inventions, so long as legal advice and the filing of patent applications, attending hearings, etc. remain the responsibility of the practitioner.” *Id.* at 47666. The USPTO rejected the comment, noting in their response that “non-practitioners who, for example, provide law related services...must be employed or retained by the practitioner and under the practitioner’s supervision.” *Id.* The USPTO also noted that “transmitting information to the practitioner to use to describe the invention in a patent application is a legal service.” *Id.* Further, “a non-practitioner who is neither employed nor retained by the practitioner, or who is not under the supervision of the practitioner, may not assist the practitioner in matters pending or contemplated to be presented to the Office.” *Id.*

Comment 12 focused on a need “to define exactly what constitutes the practice of patent law subject USPTO jurisdiction, and that the rule be amended to defined practice before the Office as prosecution of patent applications before the Office, preparing assignments and licenses for patent applicants and patentees, and rendering opinions on validity and infringement for clients.” *Id.* at 47669-70. The USPTO declined to define “practice before the Office,” instead noting that practice includes “the performance of those services which are reasonably necessary an incident to the preparation and prosecution of patent application or other proceedings before the Office involving a patent application or patent in which the practitioner is authorized to participate.” *Id.* at 47670. The USPTO rejected limiting language regarding prosecuting patent application because it would be “inappropriately narrow.” *Id.*

Through this notice and comment rule making done pursuant to the Administrative Procedure Act, 5 U.S.C. § 553, the USPTO created its rule regulating authorized practice before the Office. 37 C.F.R. § 11.5. This action was undertaken pursuant to the USPTO’s interpretation of 35 U.S.C. § 2(b)(2)(D), and as such, the USPTO is entitled to deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

Respondent is welcome to challenge the USPTO’s interpretation of the statute, but not in this forum. As an administrative body, this Court is bound by the promulgated regulations and statutes. Therefore, although the Court finds that the USPTO’s jurisdiction to regulate unregistered individuals who practice before the Office is within its authority, Respondent may litigate this issue on appeal after his administrative remedies have been exhausted. Accordingly,

the Court finds that Respondent has not proved this affirmative defense by clear and convincing evidence and dismissal on this ground is denied.

b. The USPTO has disciplinary jurisdiction over Respondent.

Respondent admits to having filed trademarks for clients with the Office. However, Respondent contends that, in practicing before the Office in trademark matters, he did not submit himself to the Office's disciplinary jurisdiction because his conduct was authorized by 5 U.S.C. § 500(b) and not by USPTO regulations. In addition, Respondent claims that during the process of filing a trademark through the USPTO, he was never informed that he would be subjecting himself to the USPTO's disciplinary authority. For these reasons, Respondent claims this matter should be dismissed and that the Court should find that he is not liable for violations of the USPTO's disciplinary rules.

Respondent first claims his authorization to file applications for Federal registration of trademarks with the USPTO is found in the "broad, statutory authority set forth in 5 U.S.C. § 500(b)." Respondent further claims that the language of the statute allows individuals to prepare and file applications for Federal registration of trademarks without requiring them to submit themselves to the jurisdiction of the USPTO's disciplinary rules.

The Administrative Procedure Act generally authorizes licensed attorneys, in good standing, to represent others before Federal agencies, which would include the USPTO. 5 U.S.C. § 500(b). The APA also specifically carves out an exception for attorneys practicing before the USPTO in patent matters and refers such attorneys to chapter 3 of Title 35, which, in pertinent part, authorizes the Director of the USPTO to suspend or exclude any person, agent, or attorney from practice before the Office. 5 U.S.C. § 500(e); 35 U.S.C. § 32. The APA does not, however, "authorize or limit discipline, including disbarment, of individuals who appear in a representative capacity before an agency." 5 U.S.C. § 500(d)(2). Therefore, the APA is not determinative of whether the USPTO has the jurisdiction to discipline attorneys solely by virtue of their practice before the Office in trademark matters.

As noted, *supra*, the Director of the USPTO is authorized to establish regulations which govern the recognition and conduct of agents, attorneys, or other persons representing applicants before the Office. 35 U.S.C. § 2. Those regulations can be found at 37 C.F.R. Part 11, which "govern solely the practice of patent and trademark, and other law before the United States Patent and Trademark Office." 37 C.F.R. § 11.1. Practice before the Office in trademark matters includes "preparing and prosecuting an application for trademark registration . . . or conducting an appeal to the Trademark Trial and Appeal Board." *Id.* § 11.5(b)(2). And, all practitioners engaged in practice before the Office "are subject to the disciplinary jurisdiction of the Office." *Id.* § 11.19. Even "[a] person *not registered or recognized to practice before the Office* is also subject to the disciplinary authority of the Office if the person provides or offers to provide any legal services before the Office." *Id.* (emphasis added). The regulation continues to explain that certain misconduct, "whether or not done in the course of providing legal services to a client, *or in a matter pending before the Office*, constitute[s] grounds for discipline." *Id.* § 11.19(b) (emphasis added).

In other words, once a practitioner engages in “practice before the Office,” the practitioner is subject to the USPTO’s disciplinary authority and any misconduct may be disciplined regardless of whether that conduct occurred in the course of offering legal services to a client or “practicing before the Office.” Indeed, the USPTO has disciplined practitioners who have engaged in misconduct completely unrelated to their “practice before the Office.” See In re Jerry L. Hefner, Proceeding Nos. D2016-21 and D2015-36 (USPTO Mar. 23, 2017) (disciplining the practitioner for his criminal convictions that included possession of controlled substances); In re Kenneth Paul, Proceeding No. D2014-11 (USPTO Apr. 29, 2014) (finding that registered patent agent’s representation of a client in a DUI matter in Colorado constituted the unauthorized practice of law and warranted disciplined by the USPTO.); In re Haigh, Proceeding No. D2009-05 (USPTO Aug. 3, 2009) (Final Order concluding that reciprocal discipline was warranted for a practitioner who violated state law prohibiting sexual conduct with a child under the age of 18 by a custodian); In re Marinangeli, Proceeding No. D95-03 (USPTO Apr. 24, 1997) (finding the respondent’s acts of stealing four credit cards and two bank checks from the mail warranted discipline for illegal conduct involving moral turpitude)¶

Here, Respondent admits to filing trademark applications with the Office. Pursuant to USPTO regulations, he is subject to the disciplinary authority of the Office because he engaged in practice before the Office regardless of whether he is registered with the Office, and regardless of whether the alleged misconduct occurred in the course of providing legal services to his trademark clients or representing clients before the Office in trademark matters. Accordingly, the Court finds that Respondent is within the disciplinary jurisdiction of the Office and this Court.

Respondent also notes that “during the [trademark] filing process, there is no instance where the USPTO asserts disciplinary jurisdiction over the filing attorney, provides any sort of notice that the filing attorney is subjecting himself/herself to the disciplinary authority of the USPTO, or even that the USPTO has any sort of disciplinary authority, ethics rules, or any other powers besides receiving and proceeding trademark application.” In support of this position, Respondent asks the Court to take judicial notice of the online trademark application process and provides the internet address for the system.

The very first question on the electronic application is, “Is an attorney filing this application?” The word “attorney” is displayed in blue and is underlined indicating it is a hyperlink. Selecting the link triggers a pop-up that explains, in part, that “The owner of a trademark may file and prosecute his or her own forms . . . or he or she may be represented by an attorney or other individual authorized to practice before the USPTO in trademark cases.” It is reasonable to assume that a prudent attorney would contemplate what it means to be “an attorney or other individual authorized to practice before the USPTO in trademark cases”—an inquiry that would likely lead to the USPTO rules discussed *supra*. However, if that question does not enter the mind of our hypothetical, prudent attorney, then, there is another hyperlink at the end of that same short paragraph taking the user/filer to an online version of the Trademark Manual of Examining Procedure (TMEP). Specifically, section 601 of the TMEP, which explains who may represent the owner of a mark, is brought to the user’s attention.¹² Two sections later in the

¹² <https://tmap.uspto.gov/RDMS/TMEP/current#/current/TMEP-600d1e12.html>

electronic version of the TMEP manual (and also visible and accessible by the table of contents that is organized in a column on the left side of the page), the user will find the “Standards of Conduct” applicable to attorneys and representatives that cite to 37 C.F.R. § 11.15 and state: “Any practitioner authorized to appear before the Office may be suspended, excluded, or reprimanded in accordance with the provisions of this Part. Any practitioner who is suspended or excluded under this Part is not entitled to practice before the Office in patent, trademark, or other non-patent matters while suspended or excluded.”¹³

It took the Court a mere three mouse-clicks to find this information using the link provided by Respondent. Still, the Court recognizes that perhaps practitioners using the TEAS system to file trademark applications and other documents will not come upon this information as serendipitously as the Court did. For those users, the Court notes that there is still the TMEP itself, which “provides trademark examining attorneys in the USPTO, trademark applicants, and attorneys and representatives for trademark applicants with a reference work on the current law, practices, and procedures relative to the prosecution of applications to register marks in the USPTO.” Respondent, who admits to practicing before the Office in trademark matters, knew or should have known of the contents in the TMEP, and more specifically, the language giving notice that practitioners authorized to practice in trademark matters before the Office are subject to the disciplinary authority of the USPTO.¹⁴ See *In re Piccone*, Proceeding No. D2015-06, slip op. at 19 (USPTO June 16, 2016) (stating that lack of knowledge, such as ignorance of a USPTO rule does not excuse a practitioner “from what should have been self-evident”) (Initial Decision Affirmed by Final Order dated May 25, 2017; Reconsideration of Final Order Denied by Order dated February 9, 2018).

Accordingly, Respondent’s argument that he did not submit to the USPTO’s disciplinary jurisdiction merely because he practiced before the Office in trademark matters is without merit. Respondent’s affirmative defense has not been proven by clear and convincing evidence and dismissal on this basis is denied.

c. The failure to join Rita Z. Crompton does not warrant dismissal.

Respondent also moved to dismiss this matter for failing to join Rita Crompton as an indispensable party before the statute of limitations expired on any allegations of misconduct involving Ms. Crompton. Respondent claimed that dismissal is required because Ms. Crompton is an indispensable party that could not be subject to this proceeding.

Respondent has seemingly abandoned this claim. As noted, *supra*, Ms. Crompton petitioned this Court to intervene in this proceeding. Upon receipt of Ms. Crompton’s pleading, the Court instructed Respondent and the OED Director to file responses to Ms. Crompton’s request. In *Respondent’s Response to Motion to Intervene*, Respondent stated that he “has found no instance where Petitioner is in conflict with Respondent.” This position, taken after Respondent initially claimed Ms. Crompton could not join this proceeding because of the statute

¹³ <https://tmep.uspto.gov/RDMS/TMEP/current#/current/TMEP-600d1e405.html>

¹⁴ The same can be said regarding Respondent’s practice before the Trademark Trial and Appeal Board, which has procedures informing parties that “[p]ractice before the [TTAB] constitutes practice before the Office, subjecting any such attorney to the USPTO Rules of Professional Conduct.”

of limitations, directly conflicts with Ms. Crompton's position that she may intervene in this proceeding. The Court can only resolve this discrepancy by concluding that Respondent has abandoned his argument that dismissal must be granted because the OED Director cannot join Ms. Crompton in this proceeding due to the statute of limitations.

Although the Court finds that Respondent has effectively abandoned this argument, the Court notes, for the sake of argument, that this basis does not warrant dismissal of this proceeding. As noted repeatedly, the Federal Rules of Civil Procedure, although often looked to for guidance, are not binding on this Court. In this regard, the OED Director's failure to join Ms. Crompton does not require dismissal under Rule 19 of the Federal Rules of Civil Procedure. Accordingly, the Court finds that this defense has no merit and dismissal on this ground is denied.

d. Respondent's Constitutional arguments are rejected.

Respondent raises a number of constitutional arguments in his answer and as bases for dismissal. First, Respondent claims he is being unfairly targeted by the USPTO in violation of his Fifth Amendment right to substantive due process, because of the USPTO's "irregular and complacent lack of enforcement over the years ... coupled with the tyrannical and arbitrary and capricious manner in which it administers its rules."

The Fifth Amendment states that "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. V. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." In re Karten, 293 F. App'x 734, 736 (11th Cir. 2008) (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)); see also Fuentes v. Shevin, 407 U.S. 67, 82 (1972) ("The 'root requirement' of the Due Process Clause is that an individual be given an opportunity to be heard before she is deprived of any significant property interest."). In disciplinary proceedings, an attorney is entitled to due process, such as reasonable notice of the charges before the proceedings commence. See In re Ruffalo, 390 U.S. 544, 551 (1968); In re Cook, 551 F.3d 542, 549 (6th Cir. 2009) (procedural due process includes fair notice of the charge). Moreover, a respondent's due process rights are satisfied if the respondent "attended and participated actively in the various hearings, and was afforded an opportunity to present evidence, to testify, to cross-examine witnesses, and to present argument." In re Squire, 617 F.3d 461, 467 (6th Cir. 2010) (quoting Ginger v. Circuit Court for Wayne Cty., 372 F.2d 620, 621 (6th Cir. 1967).

Here, Respondent received notice of the allegations against him in the form of the RFIs that were sent to him. He was given the opportunity to respond to the substantive claims, but elected not to do so because he disputed the jurisdiction of the OED and the USPTO. Respondent also received notice of the allegations in the form of the *Complaint* that was filed with this Court. Respondent filed a timely *Answer* to the allegations and raised several affirmative defenses and grounds for dismissal, which have been considered and are addressed in this *Initial Decision*. Most importantly, Respondent exercised his right to due process by participating in the hearing, testifying at length on his own behalf, introducing numerous exhibits, and calling over a dozen witnesses to testify. The evidence adduced by both parties at

the hearing has also been considered by the Court in reaching this decision. Accordingly, Respondent has not demonstrated that he was denied due process.

Additionally, Respondent claims the USPTO's disciplinary proceedings, which are set forth by federal regulation, are "constitutionally defective" because they do not afford Respondent the opportunity to represent his procedural due process rights under the Fifth Amendment. And finally, Respondent claims the tactics employed during the investigation were invasive and unnecessarily oppressive, in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. These positions are raised as an affirmative defense and also cited as a basis for dismissal.

Constitutional challenges to USPTO regulations and disciplinary actions are not appropriate at this level. *In re Kroll*, Proceeding No. D2016-23, slip op. at 15 (USPTO Dec. 11, 2017) (final order) (concluding that "any relief on constitutional grounds must wait until these administrative proceedings are finished"); *see also Finnerty v. Cowen*, 508 F.2d 979, 982 (2d Cir. 1974) ("Federal agencies . . . have neither the power nor the competence to pass on the constitutionality of administrative or legislative action."). Accordingly, the Court recognizes that Respondent has raised arguments disputing that this disciplinary proceeding is allowed by the Constitution. However, the Court must decline to rule on this issue so that Respondent can raise it in the proper forum.¹⁵

- e. This disciplinary action is not barred by the doctrines of waiver, laches, unclean hands, and estoppel.

Respondent claims the OED Director is precluded from bringing this action by the doctrines of waiver, laches, unclean hands, and estoppel. The underlying basis for Respondent's position is the argument that for over 80 years the USPTO has not taken action against non-registered attorneys, because the USPTO understood that it did not have the power to discipline such individuals. Respondent claims that the USPTO is suddenly changing its position by bringing this action against Respondent.

As noted *supra*, Respondent has the burden to prove affirmative defenses. 37 C.F.R. § 11.49. At the hearing, William Griffin, the Deputy Director for the Office of Enrollment and Discipline for the United States Patent and Trademark Office, was called to testify. During his testimony, Mr. Griffin explained that at least since 1999, when he was first employed with the OED as a staff attorney, the OED has asserted jurisdiction over trademark practitioners, even though such practitioners do not register with the USPTO to practice before the Office. He briefly described two cases where the OED pursued disciplinary measures against unregistered practitioners who provided patent legal services to clients. In addition, Mr. Griffin testified the USPTO's rules state that individuals who practice before the Office are subject to the OED's jurisdiction. Mr. Griffin also stated that, at least since he joined the OED, it has been the OED's position that unregistered individuals who meet the definition of a practitioner fall within the disciplinary authority of the USPTO.

¹⁵ Respondent is permitted to appeal any adverse decision of the USPTO Director's review of the *ALJ's Initial Decision* and raise any constitutional claims to the U.S. District Court for the Eastern District of Virginia upon exhaustion of these administrative proceedings. *Kroll* (citing 35 U.S.C. § 32; 37 C.F.R. § 11.57).

Respondent has not presented any evidence in support of his claim that the USPTO has recently changed its position—that it does not have jurisdiction over unregistered practitioners—in order to pursue this action against Respondent. In fact, based on Mr. Griffin’s testimony, which the Court found to be credible, the USPTO’s jurisdiction to discipline unregistered practitioners has not changed since for nearly 20 years. Accordingly, the Court finds Respondent did not prove this affirmative defense by clear and convincing evidence, and that dismissal is not warranted on these grounds.

Sanction

The OED Director requests that the Court sanction Respondent by entering an order that excludes Respondent from practice before the Office. Before sanctioning a practitioner, the Court must consider the following four factors:

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

37 C.F.R. § 11.54(b).

1. Violations of Duties Owed.

Respondent violated his duties to his clients. In agreeing to provide to clients trademark legal services and patent legal services that included preparing patent applications and responses to USPTO correspondence that were anticipated to be filed with the USPTO, Respondent had an obligation to serve his clients competently. This duty required Respondent to maintain familiarity with the rules of the USPTO, which undoubtedly include the USPTO’s disciplinary rules. However, Respondent did not undertake that responsibility and, instead, settled on the proposition that he was not bound by the disciplinary rules because the USPTO never affirmatively informed him that those rules applied to him. This resulted in Respondent providing false information to his clients.

Respondent also violated his duty to the legal profession (specifically practitioners) by engaging in the unauthorized practice of patent matters before the Office. United States v. Johnson, 327 F.3d 554, 560 (7th Cir. 2003) (“The unauthorized practice of law poses a serious threat to the integrity of the legal profession.”). In addition, Respondent’s failure to cooperate in the OED’s investigation can be perceived to “weaken the public’s perception of the legal profession’s ability to self-regulate” and “undermine the integrity of the attorney disciplinary system.” In re Brost, 850 N.W.2d 699, 705 (Minn. 2014). Accordingly, this factor warrants a severe sanction.

2. Respondent's misconduct was not intentional.

Respondent generally acted pursuant to his belief that the permissibility of his conduct fell within a “gray area.” Respondent’s misunderstanding that the USPTO could not and would not discipline his conduct was largely attributed to Respondent’s reliance on bad information. The Court recognizes that Respondent made a modicum of effort to find a legal basis for his position by consulting a patent attorney and doing a cursory search for applicable case law. However, it appears that as soon as he found information supporting his course of action, Respondent was content to rely upon it when he should have put forth more effort to determine whether his conduct was permissible. And, even after Mr. Mason raised the issue with him and the OED informed him of its concern he was engaged in unauthorized practice before the Office in patent matters, Respondent did not cease providing patent legal services to clients or, at the very least, seek more information into the whether his conduct was sanctioned.¹⁶ His failure to do so deviated from the standard care expected of a lawyer. And, although the Court finds Respondent’s violations of the disciplinary rules were not intentional, Respondent should not be rewarded for his negligence. Accordingly, the Court finds this factor supports a moderate sanction.

3. There is no evidence that Respondent's misconduct caused actual or potential injury.

The OED Director has not proffered evidence of any actual or potential injury caused by Respondent’s misconduct.¹⁷ In fact, none of the witnesses testified that Respondent represented them poorly, and there is no evidence that Respondent’s misconduct negatively impacted his clients’ intellectual property rights. Rather, most of the witnesses testified that Respondent generally did a good job in providing patent legal services to them. On this point, even Mr. Mason testified that his only qualm was that Respondent’s status was not disclosed, because he was deprived of the ability to make an informed decision as to whether he should have hired Respondent. Accordingly, the lack of actual or potential injury should temper the severity of the sanction imposed.

4. Aggravating and mitigating factors exist in this case.

The Court often looks to the ABA’s Standards for Imposing Lawyer Sanctions (“ABA Standards”) when determining whether aggravating or mitigating factors exist. See In re Chae, Proceeding No. D2013-01, slip op. at 4 (USPTO Oct. 21, 2013). A review of the record reveals that both aggravating and mitigating factors exist in this case.

The Court first considers the aggravating factors that are present in this case. They include Respondent’s selfish motive, a pattern of misconduct, multiple offenses, and Respondent’s substantial experience in the practice of law. Respondent’s misconduct was, in part, selfishly motivated. Respondent was paid significant fees for performing services he was

¹⁶ As evidenced by invoices submitted to the Court, Respondent continued working on patent applications after receiving the OED’s RFIs.

¹⁷ Mason testified that Respondent’s misconduct caused him a little financial harm.” However, he did not elaborate and there was no evidence submitted that corroborated or even detailed the extent of that harm. Moreover, Respondent claims he refunded the associated legal fees.

not authorized to perform. And, although Respondent testified that he wanted to distance himself from large law firms that attempted to charge small investors exorbitant fees for patent services, he still, nonetheless, was paid for his work (albeit at an arguably lower rate than competitors).

The evidence in the record also demonstrates that Respondent engaged in unauthorized practice before the Office in patent matters for years representing numerous clients. This demonstrates both a pattern of misconduct and multiple offenses, both of which are aggravating factors.

Last, Respondent's substantial experience in the practice of law is also an aggravating factor. Respondent has been licensed by the Wyoming Bar since 2007. Before that time, Respondent testified that he permissibly worked on patent matters under the supervision of registered practitioners. Respondent's substantial experience in the patent law and matters pertaining to the USPTO is an aggravating factor.¹⁸

The Court also finds that mitigating factors exist in this case. The absence of a prior disciplinary record constitutes a mitigating factor in this case. Respondent proffered that he is an attorney in good standing and has not been disciplined by the Wyoming State Bar. Respondent testified credibly that he believed he was providing a needed service to small investors who had limited resources, and who did not wish to relinquish control of the patent process. He claims his rates were generally lower than those charged by large firms, and that assertion was not challenged. Respondent's actions, although in violation of the USPTO's disciplinary rules, came with good intentions. These factors mitigate the sanction to Respondent.

ORDER

For the reasons set out above, Respondent's *Motions to Dismiss* dated October 13, 2017 and October 23, 2017 are **DENIED**. Respondent is adjudged to have engaged in the unauthorized practice of patent matters before the Office in violation of 37 C.F.R. § 11.505 and 37 C.F.R. § 11.116(a)(1) for conduct occurring after May 3, 2013. Respondent's unauthorized practice of patent law before the Office violated 37 C.F.R. § 10.23(b)(5) (2012) and § 11.804(d), which proscribe engaging in conduct that is prejudicial to the administration of justice. Finally,

¹⁸ The OED Director claims Respondent's refusal to acknowledge his wrongdoing should be an aggravating factor. However, when a party makes a good-faith legal argument, there is not an obligation to admit wrongdoing. Disagreement with the Government's position is not, in and of itself, a basis for aggravation.

Respondent's misconduct also violated 37 C.F.R. § 11.701, which proscribes false or misleading communications regarding a practitioner's services.

The Court has considered the factors for sanctions and finds that Respondent shall be **SUSPENDED** from practice before the U.S. Patent and Trademark Office for a period of not less than eighteen (18) months.¹⁹

So **ORDERED**,


Alexander Fernández
United States Administrative Law Judge

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

¹⁹ Respondent is directed to 37 C.F.R. § 11.58, which sets forth Respondent's duties while suspended. Respondent shall remain suspended from the practice of patent, trademark, and non-patent law before the USPTO until the OED Director grants a petition reinstating Respondent pursuant to 37 C.F.R. § 11.60(c).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **INITIAL DECISION AND ORDER (Corrected)**, issued by Alexander Fernández, Administrative Law Judge, in D2017-24, were sent to the following parties on this 17th day of December 2018, in the manner indicated:

for 
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