

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

In the Matter of:

TYLER R. GOUCHER,

Respondent.

Proceeding No. D2019-36

February 5, 2020

INITIAL DECISION ON DEFAULT JUDGMENT

This matter arises from a disciplinary complaint filed by the Director for the Office of Enrollment and Discipline (“OED Director”) for the United States Patent and Trademark Office (“USPTO” or “the Office”) against Tyler R. Goucher (“Respondent”) pursuant to 35 U.S.C. § 32 as implemented by 37 C.F.R. Part 11.¹ The OED Director has filed a *Motion for Entry of Default Judgment and Imposition of Disciplinary Sanction* (“Default Motion”) seeking a default judgment and an order excluding Respondent from practice before the Office.

PROCEDURAL HISTORY

On May 24, 2019, the OED Director filed a *Complaint and Notice of Proceedings under 35 U.S.C. § 32* (“Complaint”) against Respondent pursuant to 37 C.F.R. §§ 11.32 and 11.34, alleging violations of the USPTO Rules of Professional Conduct (37 C.F.R. §§ 11.101 *et seq.*). The *Complaint* alleged Respondent had engaged in misconduct including neglect of his clients’ patent applications, failure to keep his clients reasonably informed about the status of their matters, failure to respond to his clients’ reasonable requests for information, failure to properly advise his clients to allow them to make informed decisions regarding their applications, failure to promptly return funds paid to him, and failure to protect his clients’ interests upon termination of the attorney-client relationship. The *Complaint* also specifically enumerated the USPTO Rules of Professional Conduct that Respondent was accused of violating.

On the same day the *Complaint* was filed, May 24, 2019, the OED Director, in accordance with 37 C.F.R. § 11.35(a)(2), attempted to serve the *Complaint* on Respondent by sending a copy to him via certified mail to the Park City, Utah address that Respondent had provided to the Office of Enrollment and Discipline (“OED”) pursuant to 37 C.F.R. § 11.11.² The *Complaint* was also sent to two other addresses where the OED Director reasonably believed that Respondent received mail. Ultimately, all of these copies of the *Complaint* were returned to

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 USPTO.

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

the OED Director by the United States Postal Service, as the addresses were no longer valid (as indicated by the Postal Service's notation "forwarding time expired") or no one claimed the mailing.

On May 29, 2019, this Court issued a *Notice of Hearing and Order* requiring Respondent to file his Answer on or before June 24, 2019, and setting other pre-hearing deadlines. However, Respondent did not file an Answer by the specified deadline, nor did he request an extension of time to do so.

Meanwhile, because the OED Director had been unable to serve the *Complaint* upon Respondent by mail, he served notice on Respondent via publication pursuant to 37 C.F.R. § 11.35(b). Notices were published in the USPTO Official Gazette for two consecutive weeks, on July 2, 2019 and July 9, 2019. USPTO regulations mandate that Respondent had thirty days from the date of publication of the second Notice in the Official Gazette to file an Answer to the *Complaint*, thus making his Answer due on or before August 8, 2019. See 37 C.F.R. § 11.35(b). Respondent did not file an Answer, request an extension of time to do so, or otherwise contact counsel for the OED Director or this Court.

On July 3, 2019, counsel for the OED Director filed a *Motion to Vacate Prehearing Deadlines and Hearing Dates* while she was completing service on Respondent. The Court vacated the previously scheduled deadlines and ordered counsel for the OED Director to file periodic status reports. The OED Director filed status reports on August 16, 2019; August 30, 2019; September 13, 2019; September 27, 2019; and October 25, 2019. Each status report was mailed to Respondent at his § 11.11 address, and each notified Respondent that the OED Director intended to file a motion for default judgment and for imposition of sanctions. Respondent did not respond to any of the status reports.

On November 5, 2019, the OED Director filed the *Default Motion*. Thereafter, the Court issued an *Order to Show Cause* directing Respondent to file a proposed Answer to the *Complaint* by November 15, 2019, and to show cause why the *Default Motion* should not be granted. Respondent did not respond to the *Default Motion* or the *Order to Show Cause*.

As of the date of this decision, Respondent has not filed an Answer to the *Complaint* or sought an extension of time to do so, has not responded to the *Default Motion*, and has not otherwise appeared in this matter. In short, the Court has received no communication from or on behalf of Respondent.

APPLICABLE LAW

USPTO Disciplinary Proceedings. 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). This authority flows from 35 U.S.C. § 2(b)(2)(D), which empowers the USPTO to establish regulations governing patent practitioners' conduct before the Office, and 35 U.S.C. § 32, which empowers the USPTO to discipline a practitioner who is "shown to be incompetent or disreputable, or guilty of gross misconduct," or who violates the USPTO's regulations. The

practitioner must receive notice and an opportunity for a hearing before such disciplinary action is taken. 35 U.S.C. § 32. Disciplinary hearings are conducted in accordance with the USPTO's procedural rules at 37 C.F.R. part 11, subpart C, and with section 7 of the Administrative Procedure Act, 5 U.S.C. § 556, by a hearing officer appointed by the USPTO. See 37 C.F.R. §§ 11.39(a), 11.44. The OED Director has the burden of proving any alleged violations by clear and convincing evidence. 37 C.F.R. § 11.49.

In 1985, the USPTO issued regulations based on the ABA Model Code of Professional Responsibility to govern attorney conduct and practice. See Practice Before the Patent and Trademark Office, 50 Fed. Reg. 5158 (Feb. 6, 1985) (Final Rule) (codified at 37 C.F.R. §§ 10.20-10.112). These rules set forth the USPTO Code of Professional Responsibility and “clarif[ied] and modernize[d] the rules relating to admission to practice and the conduct of disciplinary cases.” Id. at 5158. In May 2013, the USPTO replaced the USPTO Code with the USPTO Rules of Professional Conduct, which are fashioned on the ABA’s Model Rules of Professional Conduct. See Changes to Representation of Others Before the United States Patent and Trademark Office, 78 Fed. Reg. 20180 (April 3, 2013) (Final Rule) (codified at 37 C.F.R. §§ 11.101-11.901). By updating its regulations, the USPTO sought to “provid[e] attorneys with consistent professional conduct standards, and large bodies of both case law and opinions written by disciplinary authorities that have adopted the ABA Model Rules.”³ Id. at 20180.

Consequences for Failure to Answer Complaint. The USPTO’s procedural rules set forth the requirement for answering the *Complaint* and the consequences for failing to do so: “Failure to timely file an answer will constitute an admission of the allegations in the complaint and may result in entry of default judgment.” 37 C.F.R. § 11.36(e). The disciplinary *Complaint* served on Respondent also stated: “A decision by default may be entered against Respondent if a written answer is not timely filed.”

FINDINGS OF FACT

Pursuant to 37 C.F.R. § 11.36(e), the following factual allegations recited in the *Complaint* have been admitted by Respondent by virtue of his failure to timely file an Answer and are hereby adopted by the Court as findings of fact.

Respondent was admitted to the practice of law in the state of Utah on October 12, 2005 (Bar Number 10715) and was registered as a patent agent by the USPTO on October 17, 2005. On December 2, 2005, at Respondent’s request, the USPTO changed his status from “agent” to “attorney.” Respondent’s patent registration number is 57,720. In 2016, Respondent was suspended from the Utah bar due to his failure to pay required bar dues.

1. Respondent’s Representation of Bryan Dangott

Bryan Dangott retained Respondent to work on various patent matters between 2010 and 2018. On December 11, 2014, Respondent filed a non-provisional utility application as U.S. Patent Application Number 14/567,431 (the ‘431 application) for Mr. Dangott’s invention,

³ Thus, the USPTO Code, the Comments and Annotations to the ABA Model Rules, and disciplinary decisions and opinions issued by state boards are useful to understanding the USPTO Rules. See 78 Fed. Reg. at 20180.

“Apparatus, System, and Method for Simulating Physical Movement of a Digital Image.” The ‘431 application was filed as a continuation application, claiming the benefit of an earlier non-provisional patent application that had been filed by Respondent on behalf of Mr. Dangott.

Respondent also filed an Application Data Sheet with the ‘431 application, which provided that the practitioners associated with customer number 70621 were the correspondents and representatives in the application. A USPTO-issued customer number is a unique number created by the USPTO that allows a practitioner to easily associate all of his or her filings with a single mailing address, thus eliminating typographical errors or variations in addresses that can make it difficult to receive patent correspondence from the USPTO. Respondent is the only registered patent practitioner affiliated with customer number 70621, and he provided the USPTO with the email address tyler@attorneyut.com for all communications related to the ‘431 application.

On June 20, 2016, Mr. Dangott paid Respondent \$4,500.00. Of that amount, \$1,500.00 was for preparing and filing a response to an Office action in the ‘431 application, and \$3,000.00 was for the preparation and filing of a second continuation application, which was to be filed once the ‘431 application proceeded further.

On September 22, 2016, Respondent participated in an examiner-initiated interview with USPTO regarding the ‘431 application. On the same day, the USPTO issued a non-final Office action concerning the ‘431 application. The Office action included a summary of the examiner-initiated interview and provided that any response was due within three months of the mailing date of the Office action (or on or before December 22, 2016). The USPTO electronically sent a Notice of the Office action to Respondent at his email address tyler@attorneyut.com.

Respondent did not forward the September 22, 2016 non-final Office action to Mr. Dangott or otherwise inform him of it. On September 30, 2016, the USPTO mailed a courtesy postcard to Respondent at his address of record in the ‘431 application, namely: “Goucher Patent Law, PLLC, 50 West Broadway, Suite 1000, Salt Lake City, Utah 84101,” advising him that new correspondence was available for review in the ‘431 application file. Respondent did not file a response to the September 22, 2016 non-final Office action on or before December 22, 2016.

On January 4, 2017, Mr. Dangott sent an email to Respondent to inquire about the status of the ‘431 application. Respondent replied via email and stated: “I have not had any further correspondence. I will let you know when I hear.” In his e-mail, Respondent did not notify Mr. Dangott about the September 22, 2016 non-final Office Action, Respondent’s failure to respond to it, or the consequences of failure to respond.

On April 3, 2017, the USPTO issued a Notice of Abandonment in the ‘431 application because no response had been filed to the September 22, 2016 Office action. The USPTO electronically sent the Notice of Abandonment to Respondent at his email address tyler@attorneyut.com. Respondent did not forward the Notice of Abandonment to Mr. Dangott or otherwise inform him of it.

On May 25, 2017, Mr. Dangott sent an email to Respondent to again inquire about the status of the '431 application. Respondent did not respond to Mr. Dangott's email. Subsequently, on June 13, 2017, Mr. Dangott sent another email to Respondent to inquire about the status of the '431 application. Again, Respondent did not respond. Later, Mr. Dangott independently learned that the USPTO had issued a Notice of Abandonment in the '431 application. On July 13, 2017, Mr. Dangott sent Respondent an email and left a telephone message regarding the abandonment and requested that Respondent contact him. Respondent did not respond to Mr. Dangott's email or telephone call.

On July 27, 2017, Mr. Dangott sent another email to Respondent requesting an update on the status of the '431 application. Later that day, Respondent replied via email and stated: "I started drafting the petition [to revive] last week but I am at the Bar Convention this week. I will file it next week." Mr. Dangott sent three emails to Respondent—on August, 27, 2017; September 8, 2017; and October 3, 2017—requesting the status of the petition to revive the '431 application. Respondent did not respond to any of Mr. Dangott's emails.

On October 20, 2017, Mr. Dangott again sent an email to Respondent to request the status of the '431 application. Respondent replied via email and stated: "I will file the documents this week." On November 1, 2017, Mr. Dangott sent another email to Respondent to ask whether the petition to revive had been filed. Respondent did not respond to the email. On December 4, 2017, Mr. Dangott sent an email to Respondent and stated: "I have not been able to reach you by phone. Can you please call me today?" Respondent did not reply to the email or telephone Mr. Dangott.

Respondent never filed a petition to revive the '431 application, and as of the date of the filing of the *Complaint*, the application status remained "Abandoned." Further, as of the date of the filing of the *Complaint*, Respondent had not refunded any of the \$3,000.00 Mr. Dangott paid him on June 20, 2016 for drafting and filing a second continuation application.

2. The Carlson Representation

Thomas Carlson met Respondent around 2010 when Respondent prepared and filed one patent application for him. Subsequently, Mr. Carlson asked Respondent to prepare and file a second patent application.

On July 8, 2013, Respondent filed U.S. Patent Application No. 13/936,761 ("the '761 application") for Mr. Carlson's invention, "Apparatus and System for Manipulating Soft Tissue." The Application Data Sheet filed with the '761 application provided that the practitioners associated with customer number 70621 were the correspondents and representatives in the application. Respondent is the only registered patent practitioner affiliated with customer number 70621, and he provided the USPTO with the email address tyler@attorneyut.com for all communications related to the '761 application. Mr. Carlson paid Respondent approximately \$10,000.00 to prepare and file the '761 application.

On November 24, 2017, the UPSTO issued an Office action concerning the '761 application, which provided that any response was due within three months of the mailing date of

the Office action (or on or before February 24, 2018). The USPTO electronically sent a Notice of the Office action to Respondent at his email address tyler@attorneyut.com. On December 2, 2017, the Office mailed a courtesy postcard to Respondent at his address of record (namely, Goucher Patent Law, PLLC, 50 West Broadway, Suite 1000, Salt Lake City, UT 84101) notifying him that new correspondence was available in the '761 application file. On December 15, 2017, the USPS returned the courtesy postcard to the USPTO as undeliverable. The USPS stamp on the postcard stated: "Return to Sender – Attempted – Not Known – Unable to Forward."

Respondent did not forward the November 24, 2017 Office action to Mr. Carlson or otherwise inform him of it. Respondent did not file a response to the November 24, 2017 Office action, and the '761 application became abandoned on February 25, 2018. On June 29, 2018, the USPTO issued a Notice of Abandonment in the '761 application because no response had been filed to the November 24, 2017 Office action. The USPTO electronically sent the Notice of Abandonment to Respondent at the email address tyler@attorneyut.com.

Respondent did not forward the Notice of Abandonment to Mr. Carlson or otherwise advise him of it. Mr. Carlson independently discovered that the '761 application had become abandoned, and then contacted Respondent. Respondent told Mr. Carlson that the abandonment was "no big deal" and advised Mr. Carlson that there was "plenty of time" to respond. Respondent further advised Mr. Carlson that he was "very busy" and that it would take him approximately three weeks to prepare a response. Respondent did not accurately communicate to Mr. Carlson the status of the '761 application or advise him that a petition to revive the application would have to be filed in order to respond to the Notice of Abandonment and the underlying Office action.

In or around April 2018, Mr. Carlson spoke to Respondent again and Respondent advised Mr. Carlson that he was very busy because he was moving. Mr. Carlson also spoke to Respondent in May 2018. Respondent never filed a petition to revive the '761 application, nor did he otherwise respond to the November 24, 2017 Office action or the June 29, 2018 Notice of Abandonment.

Subsequently, Mr. Carlson hired new counsel to prosecute the '761 application. On October 8, 2018, Mr. Carlson's new counsel filed a petition to revive the '761 application (including paying the \$500.00 USPTO filing fee to file the petition to revive) and also filed a response to the November 24, 2017 Office action. Mr. Carlson estimates that he paid his new attorneys approximately \$1,000.00 to prepare those filings.

Mr. Carlson advised OED that Respondent had sold his house in Park City, Utah (where Mr. Carlson and Respondent both lived) and left town. As of the date of the filing of the Complaint, Mr. Carlson did not know where Respondent was located.

3. The Yocum Representation

Ken Yocum met Respondent around 2013. Respondent handled various trademark and patent matters for Mr. Yocum between 2013 and 2018.

On November 24, 2015, Respondent filed U.S. Patent Application No. 14/951,388 (“the ‘388 application”) for Mr. Yocum’s invention, “Apparatus, System, and Method for Cooking a Meal.” The Application Data Sheet filed with the ‘388 application provided that the practitioners associated with customer number 70621 were the correspondents and representatives in the application. Respondent is the only registered patent practitioner affiliated with customer number 70621.

On March 23, 2018, Mr. Yocum sent an email to Respondent to ask a question about the status of a trademark matter Respondent was handling on his behalf, and to ask for an “updated status” of his patent matters. Respondent did not respond to Mr. Yocum’s email. On April 5, 2018, Mr. Yocum sent another email to Respondent to ask for any “updates, status with pending and estimate on cost when they come do [sic].” Again, Respondent did not respond to Mr. Yocum’s email.

On April 6, 2018, Mr. Yocum sent yet another email to Respondent, noting that he had an upcoming meeting “and time is running out on getting some information placed in a slide deck for my presentation.” Mr. Yocum specifically asked about the status of his patent applications and wrote: “[t]his is very important to me, also can you give me the courtesy of a reply!” Respondent did not respond to the email.

On May 15, 2018, the USPTO issued an Office action in the ‘388 application. The Office action provided that a response was due within three months of the date the Office action was mailed (or on or before August 15, 2018). The USPTO electronically sent the Notice of the Office action to Respondent at his email address tyler@attorneyut.com. On May 23, 2018, the USPTO mailed a courtesy postcard to Respondent at the address associated with the application (Goucher Patent Law, PLLC, 50 West Broadway, Suite 1000, Salt Lake City, UT 84101) advising him that new correspondence was available for review in the ‘388 application file.

Respondent did not file a response to the May 15, 2018 Office action on or before August 15, 2018. Respondent also did not forward the May 15, 2018 Office action to Mr. Yocum or otherwise advise him of it. On June 4, 2018, the USPS returned the courtesy postcard to the USPTO marked as “undeliverable.” The USPS stamp on the postcard stated: “Return to Sender – Attempted – Not Known – Unable to Forward.”

On July 12, 2018, Mr. Yocum sent an email to Respondent to see whether he had received an “Amazon code” regarding a trademark registration that had issued. Respondent did not respond to this email.

Mr. Yocum did not become aware of the May 15, 2018 Office action in the ‘388 application until he attended a trade show in the fall of 2018. At that time, he spoke to a registered patent agent regarding his invention and pending patent application. Mr. Yocum was advised by the patent agent that the application was “about to go abandoned” because no response had been filed to the May 15, 2018 Office action. Subsequently, Mr. Yocum discharged Respondent and hired new counsel to represent him in the continued prosecution of the ‘388 application.

4. OED's Efforts to Contact Respondent

On September 6, 2018, pursuant to 37 C.F.R. § 11.22(f), OED lawfully issued a Request for Information and Evidence ("RFI") to Respondent that included a copy of a grievance filed by Mr. Dangott. OED mailed the RFI to Respondent at two addresses: (i) the address Respondent had provided to OED pursuant to 37 C.F.R. § 11.11: 7763 Boothill Drive, Park City, UT 84098; and, (ii) the address listed for Respondent on the website of the Utah State Bar and on several documents he filed with the USPTO: 50 W. Broadway, Suite 300, Salt Lake City, UT 84101.

USPS records show that the RFI sent to Respondent's address in Park City, Utah could not be delivered because no authorized recipient was available to sign for the document. The USPS returned the RFI to the OED with a notation that read: "Return to Sender – Unclaimed – Unable to Forward." USPS records show that the RFI sent to Respondent's Salt Lake City, Utah address was "refused." That RFI was also returned to OED.

On September 27, 2018, OED resent the RFI to Respondent at both addresses by regular first class mail. One copy of the RFI was returned to OED with a stamp that read "Not deliverable as addressed, unable to forward." It is not readily apparent to which address this RFI was sent. The other copy of the RFI was not returned to the USPTO. The OED Director reasonably assumes that the copy of the RFI that was not returned to OED by the USPS was delivered to Respondent. Nonetheless, OED never received a response to the RFI.

The Utah State Bar advised OED that it was likewise unsuccessful in its attempts to reach Respondent in a related state bar investigation. Utah Secretary of State records provide that the last registered address for Respondent's law firm is "Goucher Patent Law, PLLC, 50 W. Broadway, Suite 300, Salt Lake City, UT 84101." This is the same address Mr. Goucher supplied to the Utah State Bar and used on several documents he filed with the USPTO. Utah Secretary of State records further provide that the status of Respondent's law firm is "expired" as of August 26, 2013.

CONCLUSIONS OF LAW

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

1. 37 C.F.R. § 11.103 provides that a practitioner "shall act with reasonable diligence and promptness in representing a client." Respondent violated this rule during his representation of Mr. Dangott, Mr. Carlson, and Mr. Yocum by failing to respond to Office actions or Notices of Abandonment issued in their patent applications.

2. 37 C.F.R. § 11.104(a)(3) provides that a practitioner shall "[k]eep the client reasonably informed about the status of the matter." Respondent violated this rule by failing to forward the Office action and Notice of Abandonment to Mr. Dangott in the '431 application; failing to forward the Office action and Notice of Abandonment to Mr. Carlson in the '761

application; failing to forward the Office action to Mr. Yocum in the '388 application; and failing to notify Mr. Dangott and Mr. Carlson that their patent applications had been abandoned.

3. 37 C.F.R. § 11.104(a)(4) provides that a practitioner shall “[p]romptly comply with reasonable requests for information from the client.” Respondent violated this rule by failing to promptly respond to telephone and email messages containing reasonable requests for information from Mr. Dangott, Mr. Carlson, and Mr. Yocum.

4. 37 C.F.R. § 11.104(b) provides that a practitioner “shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Respondent violated this rule by failing to explain the consequences of a failure to file a response to the Office actions issued in the patent applications of Mr. Dangott, Mr. Carlson, and Mr. Yocum.

5. 37 C.F.R. § 11.115(d) provides that a practitioner “shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.” Respondent violated this rule by failing to return to Mr. Dangott the \$3,000.00 in advance fees that Mr. Dangott had paid him for preparing a second continuation application, which Respondent did not prepare or file.

6. 37 C.F.R. § 11.116(d) provides that “[u]pon termination of representation, a practitioner shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.” Respondent violated this rule by causing a *de facto* termination of his representation of Mr. Dangott, Mr. Carlson, and Mr. Yocum without notice; failing to take any reasonably practicable steps to protect his clients’ interests upon termination of the representation; and failing to return to Mr. Dangott the \$3,000.00 in advance fees that Mr. Dangott had paid him for preparing a second continuation application, which Respondent did not prepare or file.

7. 37 C.F.R. § 11.804(c) provides that is professional misconduct for a practitioner to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Respondent violated this rule when he represented to Mr. Dangott that he had received no Office correspondence in Mr. Dangott’s patent application when in fact he had; informed Mr. Dangott on at least two occasions that a petition to revive the ‘761 application had been prepared and would be filed within the upcoming week, but never actually filed a petition to revive; and represented to Mr. Carlson that time remained to respond to the June 29, 2018 Office action when in fact the time to respond had expired and the application had gone abandoned.

SANCTIONS

The OED Director asks the Court to sanction Respondent by entering an order excluding him from practice before the USPTO in patent, trademark, and other non-patent matters. The primary purpose of legal discipline is not to punish, but rather “to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are

unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.” *In re Brufsky*, Proceeding No. D2013-18, slip op. at 8 (USPTO June 23, 2014)⁴ (citing *Matter of Chastain*, 532 S.E.2d 264, 267 (S.C. 2000)).

In determining an appropriate sanction, USPTO regulations require this Court to consider the following four factors: (1) whether the practitioner has violated a duty owed to a client, the public, the legal system, or the profession; (2) whether the practitioner acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the practitioner’s conduct; and (4) the existence of any aggravating or mitigating factors. See 37 C.F.R. § 11.54(b); see also *In re Morishita*, Proceeding No. D2017-25 (USPTO Sept. 28, 2018); *In re Lau*, Proceeding No. D2016-37 (USPTO May 1, 2017); *In re Schwedler*, Proceeding No. D2015-38 (USPTO Mar. 21, 2016).

1. Respondent violated duties owed to his clients, the public, the legal system, and the legal profession.

As discussed above, Respondent violated seven sections of the USPTO Rules of Professional Conduct (“Rules”). By failing to comply with the ethical requirements enumerated in the Rules, Respondent breached duties owed to his clients, the public, the legal system, and the legal profession.

The practitioner-client relationship is a fiduciary relationship in which the practitioner owes the client a duty to represent his or her interests diligently and in good faith. See *Moatz v. Bender*, Proceeding No. D2000-01, slip op. at 20 (USPTO Sept. 30, 2003) (“Respondent owed a fiduciary duty individually to each of his clients.”); *Carter v. ALK Holdings, Inc.*, 605 F.3d 1319, 1325 (Fed. Cir. 2010) (referencing patent practitioner’s expected fiduciary duties to clients); see also *In re Law Examination of 1926*, 210 N.W. 710, 711 (Wis. 1926) (“An attorney occupies a fiduciary relationship towards his client. It is one of implicit confidence and of trust ... There is no field of human activity which requires fuller realization with respect to a fiduciary relationship than that which exists between the lawyer and his client.”). In the instant matter, Respondent breached his fiduciary practitioner-client relationship when he failed to diligently pursue Mr. Dangott, Mr. Carlson, and Mr. Yocum’s patent applications, failed to adequately communicate with his clients, accepted money from Mr. Dangott for services he did not perform, failed to protect his clients’ interests upon termination of representation, and made misrepresentations to Mr. Dangott and Mr. Carlson.

Respondent also violated duties he owed to the public, the legal system, and the legal profession by failing to represent his clients diligently, failing to adequately communicate with his clients or the USPTO, engaging in conduct involving dishonesty, and failing to participate in these disciplinary proceedings. All of these actions decrease public confidence in the integrity and professionalism of persons who practice before the Office and undermine the public’s faith in the bar’s ability to self-regulate. Further, because each attorney licensed to practice before USPTO must sign an oath or affirmation swearing to or affirming, *inter alia*, that he will observe USPTO’s laws and rules of practice, Respondent’s failure to adhere to these rules violated duties owed to his profession.

⁴ All USPTO disciplinary decisions cited in this opinion are available at <https://foiadocuments.uspto.gov/oed/>.

2. Respondent acted knowingly and negligently.

Respondent's acts and omissions were knowing. Respondent accepted the representations of Mr. Dangott, Mr. Carlson, and Mr. Yocum, but knowingly neglected their patent applications by failing to respond to Office communications regarding the applications, which led to all but the latter's application going abandoned. Respondent failed to communicate with Mr. Dangott and Mr. Yocum after he filed the '431 and '388 applications, and did not accurately communicate to Mr. Carlson the status of the '761 application. Respondent failed to return the \$3,000.00 he collected from Mr. Dangott for preparing a second continuation application, even though he knew or should have known that he was obligated to return the money because he had not performed the paid-for services. Lastly, Respondent ignored all communications from the OED relating to this disciplinary proceeding, even though they were sent to multiple addresses—including his address of record under 37 C.F.R. § 11.11(a)—meaning that he should have been well aware of them.

Neglect of client matters is a serious ethical violation. See Comm. on Prof'l Ethics & Conduct v. Freed, 341 N.W.2d 757, 759 (Iowa 1983) (“We view respondent’s retreat from the obligation he assumed as a serious matter, to be equated with the conduct of a surgeon who, without transferring responsibility, drops his scalpel and abandons his patient in the course of an operation.”); In re Jaynes, 278 N.W.2d 429, 434 (N.D. 1979) (stating that client neglect is a “very serious violation”); In re Gardner, 39 A.D.2d 84, 85, (N.Y. 1972) (characterizing client neglect as “a most serious dereliction”). The USPTO considers deserting a client after being paid for legal services to be “a significant ethical violation for which attorneys have been disbarred.” In re Shippey, Proceeding No. D2011-27, slip op. at 12 (USPTO Oct. 14, 2011). The USPTO has suspended and excluded practitioners for abandoning clients or neglecting their clients’ applications. See, e.g., In re Campbell, Proceeding No. D2014-11 (USPTO Apr. 29, 2014); In re Shippey, *supra*; In re Hormann, Proceeding No. D2008-04 (USPTO July 8, 2009).

Practitioners have also been suspended and excluded for allowing patent applications to go abandoned. See In re Hormann, *supra* (excluding practitioner for, *inter alia*, allowing patent applications to go abandoned without the clients’ consent and failing to notify clients of abandonments); In re Day, Proceeding No. D2011-32 (USPTO Aug. 10, 2011) (imposing two-year suspension for, *inter alia*, allowing applications to go abandoned without client consent); In re Frantz, Proceeding No. D2012-32 (USPTO Mar. 5, 2013) (excluding practitioner on consent for neglecting 52 patent and trademark matters by allowing them to go abandoned without the clients’ consent).

A lawyer’s duty to communicate honestly and promptly with clients is also fundamental. When a practitioner fails to communicate with her clients in order to hide the neglect of their legal matters, other jurisdictions have imposed a severe sanction. See Cincinnati Bar Ass’n v. Deaton, 806 N.E.2d 503, 509 (Ohio 2004) (citations omitted) (“[B]ecause respondent also deliberately concealed his neglect to protect his personal interests, thereby sacrificing his clients’ welfare to preserve his own[, w]e view his actions as the equivalent of misappropriating funds from these clients, an offense that, absent sufficiently mitigating circumstances, requires our **most severe** sanction.”) (citations omitted); Iowa Sup. Ct. Atty. Disciplinary Bd. v. Sotak, 706

N.W.2d 385 (Iowa 2005) (suspending lawyer for, *inter alia*, failing to file required pleadings and to inform clients when their cases were dismissed as a result of his neglect.).

The USPTO has also suspended and excluded practitioners who acted knowingly, intentionally or negligently in failing to advise a client of important Office communications in violation of the ethics rules. *See, e.g., In re Myers*, Proceeding No. D2015-33 (USPTO Dec. 31, 2015) (excluding practitioner for, *inter alia*, allowing multiple patent applications to go abandoned without client consent and failing to notify the client of important Office communications); *In re Schaefer*, Proceeding No. D2007-01 (USPTO Apr. 30, 2007) (suspending practitioner for, *inter alia*, failing to inform client of important Office communications); *Moatz v. Rosenberg*, Proceeding No. D2006-07 (USPTO Mar. 7, 2007) (excluding practitioner for same conduct).

The USPTO has also dealt severely with practitioners who fail to take reasonable steps to protect a client's interests upon termination of representation. *See In re Morishita, supra*, (excluding via default judgment a practitioner who, *inter alia*, failed to refund advance payment of fee or expenses that had not been earned or incurred); *In re Walker*, Proceeding No. D2018-04 (USPTO Mar. 23, 2018) (suspending practitioner on consent where he, *inter alia*, agreed to refund client money but did not do so); *In re Schwedler, supra* (excluding practitioner, where among other things, he failed to refund any portion of the unearned fees paid to him in advance by the client).

All of these cases support imposing serious sanctions upon Respondent in view of his knowing and negligent conduct in neglecting client matters, failing to adequately communicate with his clients, and abandoning client representations without warning and without regard for his clients' interests.

3. Respondent caused significant actual or potential injury to his three clients.

Respondent caused injury to his three clients by neglecting their files, failing to communicate about the status of their patent applications, and failing to advise the clients so that they could make informed decisions about their applications and the potential consequences to their intellectual property rights if communications from the Office were not responded to. Respondent's neglect caused both actual and potential injury. His inaction resulted in Mr. Dangott and Mr. Carlson's patent applications going abandoned. Should any of the abandoned applications be revived, the clients may lose valuable intellectual property rights in the form of a shortened patent life. They may also have delays in the marketing and selling of their products as a consequence of Respondent's conduct and the resultant abandonments. In addition, Mr. Carlson had to pay fees of approximately \$1,000.00 to revive his petition on top of what he had paid Respondent. Mr. Dangott lost \$3,000.00 that Respondent failed to return to him for a second application that was never filed. Having caused his clients actual injury, Respondent should receive a significant sanction. *See In re Stecewycz*, Proceeding No. D2015-09 (USPTO Dec. 16, 2015) (excluding practitioner who injured clients by, *inter alia*, abandoning their applications); *In re Coyle*, Proceeding No. D2016-16 (USPTO July 27, 2016) (excluding practitioner who caused actual and potential injury when he abandoned a patent application and failed to return payment for services not rendered).

4. Aggravating and Mitigating Factors Exist in this Case

The American Bar Association's Standards for Imposing Lawyer Sanctions set forth aggravating and mitigating factors for the Court to consider in determining an appropriate sanction. AM. BAR. ASS'N, STANDARDS FOR IMPOSING LAWYER SANCTIONS §§ 9.22, 9.32 (2015) (hereinafter "ABA STANDARDS"); *see, e.g., In re Sheasby*, Proceeding No. D2013-13, slip op. at 9 (USPTO Dec. 31, 2013).

Citing § 9.22 of the ABA STANDARDS, the OED Director contends that the following seven aggravating factors warranted a more severe sanction in this case: a dishonest or selfish motive; a pattern of misconduct; multiple violations; bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of OED; refusal to acknowledge the wrongful nature of his conduct; substantial experience in the practice of law; and indifference to making restitution.

The record does not shed light on Respondent's motives in engaging in misconduct during client representations and failing to participate in the disciplinary proceeding. Accordingly, the Court cannot fairly find that Respondent acted with a dishonest or selfish motive or engaged in bad faith obstruction of the disciplinary proceeding. However, the Court agrees with the OED Director that several aggravating factors are present.

The first aggravating factor is "a pattern of misconduct." *See* ABA STANDARDS § 9.22(c). Respondent engaged in the same conduct with three clients concerning three different applications. Respondent filed the three applications but then did not respond to communications from the Office, or inform his clients of the Office notices, leading to the abandonment of two applications. Indeed, but for a chance encounter with a patent agent at a trade show, Mr. Yocum's application was "about to go abandoned" too. Respondent also did not respond to communications from Mr. Dangott and Mr. Yocum. Because the record shows repeated instances of similar misconduct, Respondent engaged in a "pattern of misconduct" within the meaning of § 9.22(c). *See, e.g., In re Ivey*, Proceeding No. D2013-22, slip op. at 12 (USPTO Mar. 7, 2014) (finding pattern of misconduct when practitioner prepared and filed multiple applications that all went abandoned); *People v D'Acquisto*, 146 P.3d 1041 (Colo. O.P.D.J. 2006) (finding lawyer engaged in pattern of misconduct by failing to professionally represent clients and to appear in court on six separate client matters); *In re Gines*, 869 So. 2d 778, 782 (La. 2004) (finding "consistent pattern of disregard for [lawyer's] obligations under the Rules of Professional Conduct" as well as a pattern of neglect of client matters, failure to communicate, and failure to account for fees, warranting disbarment).

The second aggravating factor is the commission of "multiple offenses." *See* ABA STANDARDS § 9.22(d). Multiple offenses committed in the context of a single disciplinary proceeding may be an aggravating factor. *See In re Fuess*, Proceeding No. D2015-08 (USPTO July 21, 2017). In this case, as explained above, Respondent's misconduct violated seven provisions of the Rules.

The third aggravating factor is a practitioner's refusal "to acknowledge the wrongful nature of his or her conduct." *See* ABA STANDARDS § 9.22(g). Here, Respondent has not

displayed any remorse for his conduct. He never apologized to Mr. Dangott or Mr. Carlson for allowing their applications to become abandoned or to any of his clients for his failure to diligently represent their interests. Instead, he abandoned the representations without notice. To date, Respondent has not expressed any remorse for his wrongdoing, as he has not participated in this disciplinary proceeding.

The fourth aggravating factor is “substantial experience in the practice of law.” See ABA STANDARDS § 9.22(i). Substantial years of practice are an aggravating factor because a lawyer with a great deal of experience should know better than to engage in misconduct. See, e.g., In re Anderson, Proceeding No. D2019-03, slip op. at 18 (USPTO July 1, 2019) (“Respondent has over nine years of experience practicing before the USPTO and should know better than to engage in the misconduct demonstrated in this case.”); In re Theobald, 786 N.W. 2d 834, 837 (Wis. 2010) (finding lawyer’s 14 years of experience to be an aggravating factor in determining sanction). The USPTO registered Respondent as a patent agent in 2005 and he was admitted to the practice of law in Utah in 2005. Thus, Respondent has been licensed to practice before the Office for 14 years. With well over a decade of experience, Respondent surely knew better than to engage in the misconduct described herein.

On the other hand, the OED Director acknowledges that Respondent has no disciplinary history. Absence of a prior disciplinary history constitutes a mitigating factor under the ABA STANDARDS. See ABA STANDARDS § 9.32(a). The Court finds that Respondent’s substantial experience in the practice of law is mitigated by his lack of disciplinary history.

A final aggravating factor is Respondent’s indifference to making restitution. See ABA STANDARDS § 9.22(j); In re Morishita, supra, slip op. at 11 (finding that failure to repay misappropriated funds showed indifference to making restitution); In re Myers, supra, slip op. at 9 (deeming failure to return prepaid filing fees to be an aggravating factor supporting exclusion). Respondent has made no effort to compensate Mr. Dangott and Mr. Carlson for the applications that he allowed to go abandoned. He also took \$3,000.00 from Mr. Dangott for a patent application that he never filed. Thus, Respondent knowingly accepted and kept funds for legal services that he did not earn. Respondent’s failure to provide redress to his clients, and, in particular, to return the \$3,000.00 to Mr. Dangott, indicates an indifference to making restitution.

The Court finds the foregoing considerations, with the exception of Respondent’s substantial experience in the practice of law, to be aggravating factors. These factors, along with the injury Respondent caused to his clients, the knowing and negligent nature of his conduct, and the fact that he violated duties owed to his clients and his profession, warrant the sanction of exclusion.

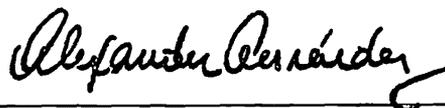
CONCLUSION

Because Respondent has failed to answer the *Complaint* or otherwise appear in this matter, Respondent is found to be in **DEFAULT** and to have admitted all the allegations in the *Complaint*. See 37 C.F.R. § 11.36(e).

Based on the facts hereby admitted, this Court finds that Respondent has violated the USPTO Rules of Professional Conduct as alleged.

After analyzing the factors enumerated in 37 C.F.R. § 11.54(b), this Court concludes that Respondent's misconduct warrants the sanction of exclusion. Accordingly, Respondent shall be **EXCLUDED** from practice before the U.S. Patent and Trademark Office in patent, trademark, and other non-patent matters.⁵

So **ORDERED**,



Alexander Fernández
United States Administrative Law Judge

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

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

⁵ An excluded practitioner is eligible to apply for reinstatement no earlier than five years from the effective date of the exclusion. See 37 C.F.R. § 11.60(b). Eligibility is predicated upon full compliance with 37 C.F.R. § 11.58.