

UNITED STATES PATENT AND TRADEMARK OFFICE

_____)	
In the Matter of:)	
)	
John H. Faro,)	Proceeding No. D2019-09
)	
Respondent.)	
_____)	

AMENDED FINAL ORDER PURSUANT TO 37 C.F.R. § 11.24¹

Pursuant to 37 C.F.R. § 11.24, John H. Faro (“Respondent”) is hereby suspended for 90 days from the practice of patent, trademark, and other non-patent law before the United States Patent and Trademark Office (“USPTO”) for violation of 37 C.F.R. § 11.804(h), having been disciplined by a duly constituted authority of a state.

I. BACKGROUND

1. On January 21, 1986, Respondent was admitted to practice law in Florida (Florida Bar No. 527,459). During the period relevant to this reciprocal discipline matter, Respondent has been registered to practice in patent matters before the USPTO (Registration Number 25,859). He is, therefore, subject to the USPTO Rules of Professional Conduct (“USPTO Rules”) set forth in 37 C.F.R. § 11.101 *et seq.*

2. On October 25, 2013, EPRT Technologies (“EPRT”) filed a malpractice action against Respondent and his law firm before the United States District Court for the Southern District of Florida. *See* Appendix for Respondent’s Response to Office of Enrollment & Discipline Notice to Show Cause Why Imposition of Reciprocal Discipline is Unwarranted” (“Appx”) at 175.² The

¹ The Final Order dated January 8, 2020 incorrectly referenced Respondent’s registration number. That is the only correction made in this Amended Final order Pursuant to 37 C.F.R. § 11.24.

² Respondent provided the Appendix with his Response to Notice and Order filed on June 10, 2019. Therein,

case is styled as *EPRT Technologies, Inc., v. John H. Faro, et al*, 1:13-cv-23893-PCH (“malpractice action”). Appx. at 173-194. Katherine Blake was one of EPRT’s corporate representatives. Appx. at 18, 195. In that malpractice action, EPRT was represented by counsel, and Respondent represented himself. Appx. at 173-174.

3. On May 12, 2014, Ms. Blake filed a grievance against Respondent with the Florida Bar concerning Respondent’s representation of EPRT before the USPTO, including alleging that Respondent allowed a patent application to go abandoned. Appx. at 195-197.

4. On June 12, 2014, the Florida Bar sent a notice letter enclosing a copy of Ms. Blake’s grievance to Respondent. Appx. at 22-23, 199-200. The notice letter stated in part that, “You are further required to furnish the complainant with a complete copy of your written response, including any documents submitted therewith.” Appx. at 22, 199.

5. Respondent filed a response to the grievance with the Florida Bar on or about July 9, 2014. Appx. at 24, 201.

6. On July 10, 2014, Respondent sent an email message from his email address directly to Ms. Blake’s email address, and attached a copy of his response to the Bar complaint, along with a motion to dismiss the second amended complaint in the malpractice action. Appx. at 33, 205.

Below is the contents of the email in its entirety:

- “1. Here is my response to the bar complaint
2. we are free to talk now you, (or more accurately steven greenberg), has filed the bar complaint against me
3. your fla lawyer, steven greenberg is scum, and he and I are presently at loggerheads in another lawsuit – his interest [sic] are not your interests
4. I have told your texas lawyer (another piece of work) my demands to settle this matter - I doubt if my demands have been passed on to you - this bs is going to cost you \$10,000 - my demand to settle
5. when this case is dismissed, I will file a counterclaim for malicious prosecution, and I will be demanding substantially more - you can follow this nonsense on Pacer if you

Respondent provided over 300 pages of documents related to the reciprocal disciplinary proceedings and cited or referenced the Appendix in his pleadings. The Appendix will be referred to as “Appx.” throughout this final order.

want to keep informed - don't rely on greenberg

6. If this case is not dismissed, I will be noticing your depo for Florida soon have a nice day"

Appx. at 33, 205.

7. Respondent admits that he sent the July 10, 2014 email directly to Ms. Blake. Appx. at 225 ("The Florida Bar does not dispute the fact that on July 10, 2014, that Respondent transmitted his *Reply & Motion to Dismiss* to the [grievant] as an attachment to an email."); Appx. at 42, no. 37; 49, no. 37 (Respondent's admitting in his Answer to sending the July 10, 2014 email directly to Ms. Blake); *see also* Response to Notice and Order, at 13. Respondent further admitted that the email related, at least in part, to the malpractice action in that the email "included a '**warning**' or '**cautionary**' statement, as to Greenberg's self-interest, in pursuing a malpractice case and Bar Complaint against Respondent." Appx. at 226.

8. On or about July 22, 2014, counsel for Ms. Blake in the malpractice action (Steven Greenberg) emailed Respondent and advised Respondent that he was "not permitted to communicate with Ms. Blake ... as to do so would violate the provisions of Rule 4-4.2 of the Florida Bar." Appx. at 206.

9. On August 6, 2014, Ms. Blake disclosed to the Florida bar the July 10, 2014 email communication to her. Appx. at 202-205.

10. On September 30, 2014, Respondent sent an email message to Mr. Greenberg, one of Ms. Blake's lawyer in the malpractice action, and sent a copy of the email to Ms. Blake. Appx. at 207. The email read:

"no interest in settlement(sic) - the claim is dischargeable in bankruptcy - simply re-open and list new claim - matured one month after board of appeals decision in 2009 my demand was for EPRT to pay \$10K to me - bs claim and it will be dismissed - Blade knows better bar complaints by greenberg insured no settlement possible - way to go steve - really looking out for client interest as usual

don't waste any more time on this type of nonsense”

Appx. at 207.

Florida Discipline

11. The Florida Bar filed a two-count Complaint against Respondent on August 3, 2016 alleging violations of the Rules Regulating the Florida Bar (“Florida Rules”). Appx. at 34-46. Count One of the Complaint alleged violations related to the original grievance. Appx. at 41-42. Count Two of the Complaint alleged violations based on the July 10, 2014 email communication from Respondent to Ms. Blake. Appx. at 42-43. On February 8, 2016, the Florida Bar voluntarily dismissed Count One of the Complaint. Appx. at 60-61.

12. On May 17, 2017, the Florida Bar filed a Motion for Summary Judgment in relation to Count Two of the Complaint, which alleged violations of the Florida Rules, specifically Rule 4-4.2 (Communication with Person Represented by Counsel) and Rule 4-8.4(d) (Conduct Prejudicial to the Administration of Justice) based on both the July 10, 2014 email communication and the September 30, 2014 communication.³ Appx at 95-208.

13. Respondent filed an Opposition to the Florida Bar’s Motion for Summary Judgment and a Cross-Motion for Summary Judgment on June 2, 2017. Appx. at 209-307.

14. The Referee assigned to handle the Florida Bar Complaint conducted a telephonic oral hearing on the motions for summary judgment on June 16, 2017. Appx. at 308-313. During that hearing, Respondent stated that he was permitted to communicate with Ms. Blake “in regard to the substance of the Bar Complaint.” Appx. at 309 (transcript, p. 5:1-4). Nevertheless, despite his

³ The Florida Bar’s complaint alleged a single violation of Rules 4-4.2 and 4-8.4(d), based only on the July 10, 2014 email. Appx. at 42-43. However, the Florida Bar’s motion for summary judgment alleged violations of the same rules based on both the July 10, 2014 email and the September 30, 2014 email. Appx. at 98, 102. Respondent raises no argument as to this difference. Thus, any arguments rooted in this difference are waived.

arguments to the contrary, the Referee made oral findings that Respondent violated both Rule 4-4.2 and Rule 4-8.4(d) by sending the July 10, 2014 email and the September 30, 2014 email. Appx. at 310. Those findings were reduced to writing in an Order dated June 30, 2017, in which the Referee granted the Florida Bar's Motion for Summary Judgment and denied Respondent's Cross Motion. Appx. at 318-331.

15. A second oral hearing was held regarding sanctions, during which Respondent made arguments and had a character witness testify. Appx. at 332-338.

16. On July 24, 2017, the Report of Referee was issued. Appx. at 3-15. Therein, the Referee concluded that Respondent violated Florida Rules 4-4.2 and 4-4.8(d). Appx. at 10, 15. The Referee recommended a ten-day suspension, and ordered that Respondent pay the costs that the Florida Bar had incurred in those proceedings. Appx. at 16-17.

17. On September 28, 2018, following consideration of the written record and the further briefs of the parties, the Supreme Court of Florida approved the Referee's conclusion that Respondent had violated Florida Rules 4-4.2 and 4-4.8(d), but concluded that a 90-day suspension was warranted. *See* Attachment to OED Director Response.

USPTO Reciprocal Discipline Proceeding

18. The OED Director sent correspondence to Respondent on October 22, 2018, requesting that Respondent explain the facts and circumstances of the Supreme Court of Florida's September 28, 2018 Order. OED Director Response at 7. Respondent submitted a written Response on December 6, 2018. *Id.*

19. The OED Director filed a Request for Reciprocal Discipline pursuant to 37 C.F.R. § 11.24, requesting that the USPTO Director imposes a 90-day suspension, the identical discipline imposed by the Supreme Court of Florida in its disciplinary matter against Respondent. OED

Director Response at 7-8. The OED Director requested the imposition of reciprocal discipline upon Respondent for violating 37 C.F.R. § 11.804(h)(1), by being suspended on ethical grounds by a duly constituted authority of a State. *Id.* at 8.

20. On May 1, 2019 a “Notice and Order Pursuant to 37 C.F.R. § 11.24” (“Notice and Order”) was sent by certified mail (receipt nos. 70172620000001058032 70172620000001058025) notifying Respondent that the Director of the Office of Enrollment and Discipline (“OED Director”) had filed a “Complaint for Reciprocal Discipline Pursuant to 37 C.F.R. § 11.24” (“Complaint”) requesting that the Director of the United States Patent and Trademark Office impose reciprocal discipline upon Respondent identical to the discipline imposed by the Supreme Court of Florida in *The Florida Bar v. John H. Faro*, Case No. SC16-1408. The Notice and Order provided Respondent an opportunity to file, within forty (40) days, a response opposing the imposition of reciprocal discipline based on one or more of the reasons provided in 37 C.F.R. § 11.24(d)(1).

21. On June 10, 2019, Respondent filed a “Respondent’s Response to Office of Enrollment & Discipline Notice To Show Cause Why Imposition of Reciprocal Discipline is Warranted” (“Response to the Notice and Order”), a pleading entitled “Respondent’s Supplemental Response & Supplemental (sic) Citation of Authority to to (sic) Office of Enrollment & Discipline Complaint for Reciprocal Discipline is Unwarranted” (“Supplemental Response”), and an “Appendix for Respondent’s Response to Office of Enrollment & Discipline Notice to Show Cause Why Imposition of Reciprocal Discipline is Unwarranted” (“Appx”). In the Appendix, Respondent provided over 300 pages of documents related to the reciprocal disciplinary proceedings and/or cited in his pleadings.

22. On July 9, 2019, following Respondent’s Unopposed Request to Reset Briefing Schedule,

the USPTO Director ordered the OED Director to respond to the Response on or before August 19, 2019.

23. The OED Director filed a timely response (“OED Director Response”). Although Respondent was permitted to file a Reply to the OED Director’s filing, he did not do so.

II. LEGAL STANDARD

Pursuant to 37 C.F.R. § 11.24(d), and in accordance with *Selling v. Radford*, 243 U.S. 46 (1917), the USPTO has codified standards for imposing reciprocal discipline based on a state’s disciplinary adjudication. Under *Selling*, state disbarment creates a federal-level presumption that imposition of reciprocal discipline is proper, unless an independent review of the record reveals: (1) a want of due process; (2) an infirmity of proof of the misconduct; or (3) that grave injustice would result from the imposition of reciprocal discipline. Federal courts have generally “concluded that in reciprocal discipline cases, it is the respondent attorney’s burden to demonstrate, by clear and convincing evidence, that one of the *Selling* elements precludes reciprocal discipline.” *In re Kramer*, 282 F.3d 721, 724 (9th Cir. 2002); *In re Friedman*, 51 F.3d 20, 22 (2d Cir. 1995). “This standard is narrow, for ‘[a Federal court, or here the USPTO Director is] not sitting as a court of review to discover error in the [hearing judge’s] or the [state] courts’ proceedings.’” *In re Zdravkovich*, 634 F.3d 574, 578 (D.C. Cir. 2011) (quoting *In re Sibley*, 564 F.3d 1335, 1341 (D.C. Cir. 2009)) (second and third alternations in original).

The USPTO’s regulation governing reciprocal discipline, 37 C.F.R. § 11.24(d)(1), mirrors the standard set forth in *Selling*:

[T]he USPTO Director shall consider any timely filed response and shall impose the identical public censure, public reprimand, probation, disbarment, suspension, or disciplinary disqualification unless the practitioner clearly and convincingly demonstrates, and the USPTO Director finds there is a genuine issue of material fact that:

- (i) The procedure elsewhere was so lacking in notice or opportunity to be heard

- as to constitute deprivation of due process;
- (ii) There was such infirmity of proof establishing the conduct as to give rise to the clear conviction that the Office could not, consistently with its duty, accept as final the conclusion on that subject;
- (iii) The imposition of the same public censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification by the Office would result in a grave injustice; or
- (iv) Any argument that the practitioner was not publicly censured, publicly reprimanded, placed on probation, disbarred, suspended or disciplinarily disqualified.

Id.

To prevent the imposition of reciprocal discipline, Respondent is required to demonstrate that there is a genuine issue of material fact as to one of these criteria by clear and convincing evidence.⁴ *See id.* As discussed below, however, Respondent has not shown by clear and convincing evidence that there is a genuine issue of material fact with regard to any of the factors set forth in 37 C.F.R. § 11.24(d)(1).

III. ANALYSIS

Respondent filed a Response to the Notice and Order challenging the imposition of reciprocal discipline. He claims that the imposition of reciprocal discipline would constitute a deprivation of due process. *See* Response to Notice and Order at 4-5; Supplemental Response to Notice and Order at 3. Specifically, Respondent claims that the Referee applied an “expansive” interpretation of Florida Rule 4-4.2 by not providing him “fair notice” that his communications with Ms. Blake, which he characterizes as “authorized” could violate the ethics rules. *See* Response to Notice and Order at 4-5, 18-26; Supplemental Response to Notice and Order at 3. Regarding Florida Rule 4-4.8(h), he claims that the Referee interpreted that Rule in a way that

⁴ In his Response to the Notice and Order, Respondent appears to rely on a standard that is not applicable to these proceedings—whether there is a “substantial departure from the essential requirements of Florida law.” *See* Response at 1, 4, 5, 20, 27. To the extent that Respondent is suggesting that this standard surpasses or replaces 37 C.F.R. § 11.24(d)(1), that argument is rejected.

incorrectly made his privileged opinions about the Ms. Blake's attorney subject to discipline. *See* Response to Notice and Order, at 26. Respondent also claims there was a "manifest infirmity in proof" to support the Referee's summary determination that Respondent violated the Florida rules. *See* Response to Notice and Order at 5-6.

As stated, Federal courts have generally "concluded that in reciprocal discipline cases, it is the respondent attorney's burden to demonstrate, by clear and convincing evidence, that one of the *Selling* elements precludes reciprocal discipline." *In re Kramer*, 282 F.3d at 724; *In re Friedman*, 51 F.3d at 22. Thus, Respondent's recourse to mitigate or negate reciprocal discipline here is limited to arguing that the *Selling* factors preclude reciprocal discipline. He cannot satisfy this burden.

A. Respondent's Reciprocal Discipline Would Not Constitute a Deprivation of Due Process.

Respondent asserts that the imposition or reciprocal discipline would constitute a deprivation of due process. *See* Response to Notice and Order at 4-5; Supplemental Response to Notice and Order at 3. Specifically, he claims that the Referee applied an "expansive" interpretation of Florida Rule 4-4.2 by not providing him "fair notice" that his communications with Ms. Blake, which he characterizes as authorized communications, could violate the Florida Rules. *See* Response to Notice and Order at 4-5, 18-26; Supplemental Response to Notice and Order at 3. Similarly, regarding Florida Rule 4-4.8(h), he claims that the Referee interpreted the Rule in a way that made his privileged opinions about one of Ms. Blake's attorney subject to discipline. *See* Response to Notice and Order at 26. Because these arguments are insufficient under the 37 C.F.R. § 11.24(d)(1), Respondent cannot overcome the presumption that reciprocal discipline is proper on the basis that he was deprived of due process.

The standards governing due process requirements are well-established. "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) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976) (internal quotation marks omitted)). 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). Due process requirements are satisfied where a 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 Cnty*, 372 F.2d 620, 621 (6th Cir. 1967)); *see also In re Zdravkovich*, *supra* (stating that attorney could not satisfy claim of due process deprivation where he was given notice of the charges against him, was represented by counsel, and had hearing at which counsel had the opportunity to call and cross-examine witnesses, make arguments, and submit evidence). Due process requirements are also met where a respondent is given “an opportunity to respond to the allegations set forth in the complaint, testify at length in [his] own defense, present other witnesses and evidence to support [his] version of events . . . , [and is] able to make objections to the hearing panel’s findings and recommendations.” *In re Squire*, 617 F.3d at 467 (quoting *In re Cook*, 551 F.3d 542, 550 (ellipsis and third alteration in original)).

Here, Respondent received notice of the charges against him, and the factual bases for those charges, from the Florida Bar. Appx. at 22-23, 34-46, 199-200. Respondent was provided the opportunity to and did fully contest the charges, including submitting multiple answers and affirmative defenses. Appx. at 47-59; 62-64. He submitted an opposition to motion for summary

judgment and filed his own cross-motion. Appx. at 209-307. He also participated in oral argument on those motions. Appx. at 308-313. After the Referee granted the Florida Bar's motion for summary judgment, Respondent filed a motion for reconsideration that decision. Appx. at 314-317. At the sanctions hearing, Respondent presented a character witness. Appx. at 332-338. Respondent does not dispute that he received notice of the charges or that he fully participated in the Florida disciplinary proceedings. Accordingly, Respondent clearly "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." *Squire*, 617 F.3d at 467.

Despite having receiving sufficient notice of the disciplinary charges, and having fully participated in and advocated for himself in the Florida disciplinary proceedings, Respondent still claims to have been deprived of due process. He claims that the Referee applied an "expansive" interpretation of Florida Rule 4-4.2 by not providing him "fair notice" that his communications with Ms. Blake, which he contends were authorized communications, could violate the Florida Rules. *See* Response to Notice and Order at 4-5, 18-26; Supplemental Response to Notice and Order at 3. In short, Respondent argues that the Referee's interpretation and/or application of Florida Rule 4-4.2, concluding that Respondent used his response to the bar complaint as a pretext to discuss settlement options in the pending malpractice claim (Report of Referee at 6-8; Appx. at 8-10) is contrary to the plain language of Florida Rule 4-4.2. Further, he claims he was entitled to advanced notice the Referee's interpretation of Florida Rule 4-4.2. Having failed to provide him with such "fair notice", in his view, is a deprivation of due process. Response to Notice at Order at 4.

Respondent cites no relevant or dispositive authority in support of his argument that he was

entitled to advance notice of the Referee's interpretation of Florida Rule 4-4.2. That is for good reason. Due process does not require advance notice that specific conduct violates the ethics rules. Due process merely requires that an attorney be notified of the charges against him, and be provided a fair opportunity to contest those charges. *See In re Karten*, 293 F. App'x at 736. Further, Respondent's ignorance as to the parameters of Florida Rule 4-4.2 is not a deprivation of due process. It is every lawyer's professional obligation to be aware of and familiar with the professional conduct rules applicable to them. *See In re Anonymous*, 637 N.E.2d 131, 132 (Ind. 1994).

In sum, and for the reasons set forth above, adequate notice and the opportunity to fully contest the disciplinary charges against him were provided to Respondent here.⁵ Thus, he is unable to demonstrate that there is a genuine issue of material fact that the disciplinary procedure was so lacking in notice or opportunity to be heard as to constitute deprivation of due process under 37 C.F.R. § 11.24(d)(1)(i).

B. Infirmary of Proof

Another avenue available to practitioners to challenge the presumption that imposition of reciprocal discipline is proper is for a practitioner to present clear and convincing evidence that there is a genuine issue of material fact as to whether there was such an infirmity of proof establishing the misconduct as to give rise to a clear conviction that the USPTO could not, consistent with its duty, accept as final the state's conclusion on that subject. *See* 37 C.F.R. § 11.24(d)(1)(ii). Here, Respondent argues there was a "manifest infirmity in proof" associated with the Referee's summary determination that he violated Florida Rules 4-4.2 and 4-4.8(d).⁶

⁵ Respondent also challenges the substance of the Referee's findings, including how the disciplinary rules were interpreted and applied. Such a challenge is not a consideration under the due process analysis and is discussed *infra* at Sec. III.B.

⁶ Respondent repeatedly refers to Rule "4-4.8(h)" in his pleadings. *See e.g.*, Response to Notice and Order at 3-6, 15,

Response to Notice and Order at 5. Specifically, he claims that the “dueling motions” regarding summary judgment precluded summary judgment in favor of the Florida Bar as matter of law. *Id.* at 5-6.⁷ He also generally challenges the Referee’s conclusions that he violated the Florida rules.

To successfully invoke infirmity of proof as a defense to reciprocal discipline, Respondent must demonstrate that there was “such an infirmity of proof” establishing the charges against him “as to give rise to the clear conviction” that accepting the state discipline would be “[in]consistent with [our] duty.” *In re Zdravkovich*, 634 F.3d at 579 (alterations in original). “This is a difficult showing to make. . . .” *Id.* Determinations by the trier-of-fact regarding the credibility of witnesses generally receive deference. *Id.* at 580. Therefore, a disagreement about the credibility of a witness does not establish an infirmity of proof.

As an initial matter, and as the OED Director correctly notes, when there are no remaining factual questions in an attorney discipline proceeding, summary judgment is appropriate. *See* OED Director Response at 12 (citing *State ex rel. Counsel for Discipline v. Petersen*, 725 N.W.2d 845, 850 (Neb. 2007) (granting motion for summary judgment on the pleadings in a disciplinary case, given attorney’s admission of the factual allegations charged); *Air North America v. Dep’t of Transp.*, 937 F.2d 1427, 1438 (9th Cir. 1991) (“[T]he due process clause does not require a hearing when, as in this case, there are no factual questions to resolve.”) (citing, *inter alia*, *Atlantic Richfield Co. v. United States*, 774 F.2d 1193, 1203 (D.C. Cir. 1985) (holding that no adjudicatory 5 U.S.C. § 558(c) hearing is required when there are no factual

20, 23, 26, 32, 35-37. However, Respondent was not charged with violating Florida Rule 4-4.8(h) (stating that a lawyer shall not “willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation.”). Thus, any arguments or statements made that reference such a provision are not addressed here.
⁷ Respondent cites *Reeves v. North Broward Hosp. Dist.*, 821 So. 2d 319, 321 (Fla. Dist. Ct. App. 2002) for the proposition that “dueling motions” for summary judgment precludes a grant of summary judgment. However, *Reeves* does not stand for that broad of a proposition. Rather, that case states the generally understood standards governing summary judgment, including that “[a] trial court may enter summary judgment only when there are no genuine issues of material fact conclusively shown from the record and the movant is entitled to judgment as a matter of law.” *Id.* at 321.

issues in dispute)). Although there were “dueling motions” in the underlying Florida disciplinary matter, the Referee’s grant of summary judgment in favor of the Florida Bar was rooted in uncontested facts. In fact, as discussed further below, the uncontroverted, dispositive facts that support the Referee’s conclusions largely find foundation in either documents that Respondent provided or in Respondent’s own admissions. Further, his collateral attack on that decision to grant summary judgment, insofar as he merely disagrees with the decision, is an insufficient basis to conclude that there is an infirmity of proof. Consequently, the Report of Referee’s conclusions and findings, as approved by the Supreme Court of Florida, is amply supported and does not suffer from an infirmity of proof.

1. Respondent’s Conduct Violated Rule 4-4.2.

Florida Rule 4-4.2⁸ prohibits an attorney from communicating with a represented party about the topic of the representation. If communication is required, the communication is strictly limited to that which is authorized by statute or regulation. *Id.* Here, the Referee concluded that Respondent “was permitted to communicate with Blake regarding her Bar grievance” but that he “strayed well beyond the scope of serving Blake with a copy of his response to her grievance” and “used his response to the Bar complaint as a pretext to discuss the malpractice suite with Blake.” Report of Referee at 7-8; Appx. at 9-10. This was, the Referee concluded, a violation of Florida Rule 4-4.2. Report of Referee at 10; Appx. at 12.

Respondent cannot establish that there was an infirmity of proof to establish a violation of

⁸ The full text of Florida Rule 4-4.2(a) reads as follows:

In representing a client, a lawyer must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, a lawyer may, without such prior consent, communicate with another’s client to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on a person, in which event the communication is strictly restricted to that required by the court rule, statute or contract, and a copy must be provided to the person’s lawyer.

Florida Rule 4-4.2. This is because, as the OED Director noted, the violation of FRPC 4-4.2 can be definitively established by the text of Respondent's July 10, 2014 email to Ms. Blake. Appx. at 33, 205; OED Director Response at 18. The plain language of that email, which Respondent admits to sending, indicates that he knew that Ms. Blake was represented. In that email, Respondent refers to Ms. Blake's counsel as "your fla lawyer" and identifies him by name. Appx. at 33, 205. He also refers to her "texas lawyer." *Id.* Despite acknowledging her representation by counsel, his email goes on to reference pending litigation in Texas and threatens additional litigation ("I will file a counterclaim for malicious prosecution"). *Id.* Respondent admits to sending the July 10, 2014 email. Appx. at 225 ("The Florida Bar does not dispute the fact that on July 10, 2014, that Respondent transmitted his Reply & Motion to Dismiss to the [grievant] as an attachment to an email."); Response to Notice and Order at 13; *see also*, Appx. at 42, no. 37; 49, no. 37 (admitting in his Answer to sending the July 10, 2014 email).

Thereafter, on September 30, 2014, Respondent sent another email, this time to another of Ms. Blake's attorneys, Meredith Chaiken, and copying Ms. Blake. Appx. at 207. This email again references another Ms. Blake's attorney, Mr. Greenberg. *Id.* The subject of the email concerned pending litigation and settlement of that matter. *Id.* Respondent sent this email even though Mr. Greenberg, on July 22, 2014, directly warned Respondent not to communicate with Ms. Blake. Appx. at 206. In sending the September 30, 2014 email, Respondent engaged in another impermissible direct communication with a person that Respondent knew to be represented. Both of these communications, the July 10 and September 30, 2014 emails to Ms. Blake were in violation of Florida Rule 4-4.2, as noted in the Report of Referee, and approved by the Supreme Court of Florida.

Respondent argues that there are “infirmities in proof” in the record of the Florida disciplinary proceeding. Response to Notice and Order at 4-5. But, as discussed below, the factual underpinnings of the Report of Referee are uncontroverted. First, he argues that the clear and unambiguous wording of Florida Rule 4-4.2 is controlling and the Referee is bound by the wording of that Rule. Response to Notice and Order at 18-9. Under the plain language of the Rule, he claims that his communications with Ms. Blake in the emails were authorized communications between the participants in the disciplinary proceeding. *See Id.* Specifically, he states that his communication with Ms. Blake was authorized since Florida Bar Counsel advised him to furnish Ms. Blake, the grievant, with a copy of his written response to the Florida Grievance. Appx. at 22-23; Response to Notice and Order at 18-19, 22-23. As a result of this permission to provide Ms. Blake with a copy of his written response, Respondent contends he was also authorized Respondent to engage in settlement conference with Ms. Blake that was “frank” and “free-wheeling.” Response to Notice and Order at 22-3, 26. In his view the permissible scope of Respondent’s email communications could not violate Florida Rule 4-4.2, *see* Response to Notice and Order at 7, and the Referee’s conclusion to the contrary suffered from an infirmity of proof.

Respondent is correct that the plain language of Florida Rule 4-4.2 controls here. That plain language states a lawyer is permitted to communicate to a represented person about the subject of a representation, if such communication is required by rule or statute. Indeed, Florida Bar counsel reminded Respondent of his duty to provide a copy of his response to Ms. Blake in her letter dated June 12, 2014. Appx. 22-23. “There is no dispute that the bar in its letter conveying the Complaint to respondent told him to contact Blake directly as regards the Complaint.” Referee Report at 4; Appx. at 6. However, that is not the end of the matter.

The Referee acknowledged that Respondent was permitted to communicate with Ms. Blake regarding her bar grievance. Referee Report at 7; Appx. at 9. However, the plain language of Rule 4-4.2(a) carves a very narrow allowance for contact with represented persons. It allows that “a lawyer may, without such prior consent, communicate with another’s client to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on a person, in which event the communication is strictly restricted to that required by the court rule, statute or contract, and a copy must be provided to the person’s lawyer.” Thus, Florida Bar counsel’s reminder to Respondent to forward his response to the grievance to Ms. Blake did not provide any authority for Respondent to stray beyond the grievance in his communications with Ms. Blake. In fact, the Rule states just the opposite, that is, that such communications are limited. And the Referee found that Respondent’s emails were not authorized and went well beyond that permitted by the rule, including that which was necessary to meet the requirements of service. Report of Referee at 8; Appx. at 10. In concluding that Respondent’s communications exceeded that permitted by Florida Rule 4-4.2, the Referee relied not only on the plain text of the Rule, but also comments accompanying that Rule and supportive legal precedent. Report of Referee at 6-10; Appx. at 8-12. As a result, despite his argument that this conclusion was somehow based on an “expansive” or new interpretation of Florida Rule 4-4.2, a review of that Rule and the Referee’s report actually shows that the Referee correctly applied the plain language of the Rule in finding that Respondent violated Florida Rule 4-4.2 by communicating with a represented party without authorization.

As a further defense under the “infirmity of proof” umbrella, Respondent asserts that he cannot have violated Florida Rule 4-4.2 because he represented himself *pro se* in both the malpractice action and in the disciplinary proceedings, and he was therefore not “representing a

client.” *See* Response to Notice and Order at 27-28. Respondent cites no authority in support of this argument. However, the OED Director identified several authorities that have considered this question have found that a lawyer representing himself is still “representing a client” for purposes of determining whether he may contact a represented party regarding the subject of the representation. OED Director Response at 16 n.8.⁹

The Referee, while acknowledging that there was little Florida law directly addressing this question, cited to an opinion from the District of Columbia Bar as persuasive authority. Report of Referee at 9-10; Appx. at 11-2. That opinion, DC Bar Ethics Opinion 258 (1995), concluded that that a lawyer representing himself in a proceeding is precluded from communicating directly with another party who is known to be represented by counsel. Report of Referee at 9; Appx. at 11 (both citing to D.C. Bar Ethics Opinion 258 (1995)). This is because “the prohibition has ‘as its core the concern that lawyers generally are in a better position, by education and training, to overwhelm a lay party and exploit his lack of knowledge in course of communicating directly with the law party.’” Report of Referee at 9; Appx. at 11. In short, *pro se* attorneys retain a “presumptively unfair advantage” over an opposing party. *Id.* That is exactly what the Referee found was attempted here when Respondent engaged in overreaching with the content of the emails to Ms. Blake and attempting utilize the bar complaint as leverage over the pending malpractice suit. As a result, Respondent’s argument that his violation of Florida Rule 4-4.2 should be overlooked on the basis that he was *pro se* is without merit.

Finally, Respondent argues that he cannot be subjected to discipline for his communication with the Ms. Blake because such communication is subject to litigation privilege. *See* Response

⁹ A *pro se* lawyer is “representing a client” for purposes of Florida Rule 4-4.2(a). *In re Disciplinary Proceeding Against Haley*, 126 P.3d 1262, 1269 (Wash. 2006); *see also In re Discipline of Schaefer*, 25 P.3d 191, 199, *opinion modified on denial of reh’g*, 31 P.3d 365 (Nev. 2001)(same); *In re Disciplinary Action Against Lucas*, 789 N.W.2d 73, 76 (N.D. 2010)

to Notice and Order at 13. Respondent cites one disciplinary case in support of the proposition that litigation immunity should shield his communication from the charges of attorney misconduct. *See* Response to Notice and Order, at 6 (citing *Florida Bar v. Ray*, 797 So. 2d 556, 560 (Fla. 2001)). However, the OED correctly notes that this case does not mention or discuss privilege of any kind. *Id.* Further, another case cited by Respondent, *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380, 384 (Fla. 2007), states the opposite conclusion. *Echevarria* states that “disciplinary measures of the state court system and bar association” are specifically identified as an available measures to remedy misconduct that takes place in the course of a judicial proceeding. *Id.* at 384. “[A]dequate remedies still exist for misconduct in a judicial proceeding, most notably the trial court's contempt power, as well as the disciplinary measures of the state court system and bar association.” *Id.* at 384. In other words, his claim that the statements forming the basis for his misconduct are privileged because they reference or were made in connection with a pending legal matter, and therefor he cannot be subjected to discipline for making the communications, is unsupported.

In summary, Respondent raises no argument that disputes or changes the underlying facts of the Florida discipline, as determined by the ALJ. Rather, his arguments are merely disagreement with the legal conclusion that he violated Florida Rule 4-4.2. However, mere disagreement with a state’s conclusions, or determinations regarding the credibility of the witnesses or documents, does not show “infirmity of proof.” *See In re Feng Li*, Proceeding No. D2014-36 (USPTO 2015) at 14 (citing *Zdravkovich*, 634 F.3d at 580) (determinations by the trier-of-fact regarding credibility of witnesses generally receive deference)). Respondent has not proved that there is a genuine issue of fact that his Florida discipline suffered from an infirmity of proof sufficient to prevent the imposition of reciprocal discipline.

2. Respondent's Conduct Violated Rule 4-8.4(d).

Pursuant to Florida Rule 4-8.4(d), a lawyer shall not “engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.” Florida Rule 4-8.4(d). The Referee concluded that “the language of Respondent’s emails of July 10, 2014 and September 30, 2014, disparaged Blake’s counsel in violation of [Florida Rule 4-8.4(d)].” Report of Referee at 10, 13; Appx. at 12, 14. There is ample factual support for that finding.

As with Florida Rule 4-4.2, Respondent’s violation of Florida Rule 4-8.4(d) is clear and unequivocal from the face of the July 10, 2014 and September 30, 2014 emails. In the July 10, 2014 email, Respondent referred to Ms. Blake’s attorney, Mr. Greenberg, as “scum”, he insisted that Mr. Greenberg’s interests do no comport with is own client’s, he claimed Mr. Greenberg was not keeping Ms. Blake adequately informed, and he threatened Ms. Blake with a malicious prosecution counterclaim. Report of Referee at 10; Appx. at 12, 205. The September 30, 2014 email again disparages Mr. Greenberg, stating that the “bar complaint by Greenberg insure no settlement possible – way to go steve – really looking out for your client.” Report of Referee at 10-1; Appx. at 12-13, 207. Significantly, Respondent does not deny the use of such disparaging conduct. Nor could he rely on such a denial as the email are his own words. The types of disparaging comments in these emails clearly supports a violation of Florida Rule 4-8.4(d) and defeats any attempt to prevent reciprocal discipline on the basis of “infirmity of proof.”

In addition to factual support for the Referee’s conclusions, the Report of Referee referenced

case law that supports the conclusion. *See* Report of Referee at 11-12; Appx. at 13-14 (citing *Bedoya v. Aventura Limousine & Transp. Serv., Inc.*, 861 F. Supp. 2d 1346 (S.D. Fla. 2012) (finding a lawyer's ex parte statement to opposing party that he could "afford better representation" followed by an email disparaging opposing counsel, was sanctionable under Rule 4-8.4(d); *The Florida Bar v. Norkin*, 132 So. 3d 77, 85 (Fla. 2013) (attorney disparaged opposing counsel when he called another lawyer's conduct "unprofessional, ludicrous, downright unintelligent," among other communications)).

As stated, Respondent does not deny making disparaging statements about Ms. Blake's attorney. Instead, he claims he could not have violated Florida Rule 4-8.4(d) because his statements were objective, fact-based opinion of Ms. Blake's malpractice litigation counsel and were privileged. *See* Response to Notice and Order, at 31. This argument is plainly without merit, however. Florida Rule 4-8.4(d) contains no exception that would permit a lawyer to disparage another lawyer so long as that disparaging statement was true. The issue of whether or not his statements are privileged—they are not—has already been addressed. *See supra* at Sec. III.B.

C. Respondent's Other Claims Are Insufficient to Prevent Reciprocal Discipline.

Respondent raises a number of other arguments that are not cast in terms of 37 C.F.R. § 11.24 and/or are poorly laid out and argued. One argument that is clearly discerned from his Response to Notice and Order is the assertion that the imposition of discipline was an attempt by the Florida Bar to circumvent the rules regarding amendment of the bar rules. *See* Response to Notice and Order at 5, 17, 35. However, this argument is just a regurgitation of his arguments that the Referee did not apply the plain language of Florida Rule 4-4.2 that was already raised and rejected. *See supra* at Sec. III.B.1. His attempt to raise it again, under the auspices that the

Referee's interpretation amounts to an amendment of the Florida Rule is rejected here. There was no amendment of the Rule and none was needed because, as stated, the Referee applied the plain language of the rule.

As an independent basis for rejection, it is noted that in a reciprocal discipline proceeding, Respondent may only avoid the imposition of reciprocal discipline by raising an issue of material fact as to one of the four factors identified in 37 C.F.R. § 11.24(d)(1) by clear and convincing evidence. Because none of Respondent's remaining arguments are raised pursuant to § 11.24(d)(1), these arguments do not provide a sufficient basis for Respondent to escape the imposition of reciprocal discipline.

ORDER

ACCORDINGLY, it is ORDERED that:

1. Respondent is suspended for 90 days from the practice of patent, trademark, and other non-patent law before the USPTO, effective the date of this Final Order;
2. Respondent shall remain suspended from the practice of patent, trademark, and other non-patent law before the USPTO until the OED Director grants a petition requesting Respondent's reinstatement pursuant to 37 C.F.R. § 11.60;
3. The OED Director shall publish a Notice in the *Official Gazette* that is materially consistent with the following:

Notice of Suspension

This notice concerns John H. Faro of Miami, Florida, who is a registered patent attorney (Registration Number 25,859). In a reciprocal disciplinary proceeding, the Director of the United States Patent and Trademark Office ("USPTO") has ordered that Mr. Faro be suspended for 90 days from practice before the USPTO in patent, trademark, and other non-patent matters for violating 37 C.F.R. § 11.804(h), predicated upon being suspended for 90 days from the practice of law by a duly constituted authority of a State.

On September 28, 2018, the Supreme Court of Florida in *The Florida Bar v. John H. Faro*, SC16-1408, suspended Mr. Faro for 90 days from the practice of law in that jurisdiction for communicating an offer of settlement directly to a represented party and disparaging that party's representative in violation of Florida Bar Rules 4-4.2 and 4-8.4(d), respectively.

This action is taken pursuant to the provisions of 35 U.S.C. § 32 and 37 C.F.R. § 11.24. Disciplinary decisions are available for public review at the Office of Enrollment and Discipline's FOIA Reading Room, located at: <http://e-foia.uspto.gov/Foia/OEDReadingRoom.jsp>;

4. The OED Director give notice pursuant to 37 C.F.R. § 11.59 of the public discipline and the reasons for the discipline to disciplinary enforcement agencies in the state(s) where Respondent is admitted to practice, to courts where Respondent is known to be admitted, and to the public;
5. Respondent shall comply with the duties enumerated in 37 C.F.R. § 11.58; and
5. The USPTO shall dissociate Respondent's name from any Customer Number(s) and USPTO verified Electronic System account(s), if any.

Pursuant to 37 C.F.R. § 11.57(a), review of the final decision by the USPTO Director may be had by a Petition filed with the U.S. District Court for the Eastern District of Virginia under 35 U.S.C. § 32 "within thirty (30) days after the date of the order recording the Director's action." See E.D. Va. Local Civil Rule 83.5.

It is so ordered.

(signature page follows)

(signature page for Final Order Pursuant To 37 C.F.R. § 11.24 – Faro D2019-09)

2/21/2020

Date

A handwritten signature in cursive script, appearing to read "Sarah T. Harris", written over a horizontal line.

Sarah T. Harris
General Counsel
United States Patent and Trademark Office

on delegated authority by

Andrei Iancu
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office