

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

In the Matter of:

MICHAEL J. KELLER,

Respondent.

Proceeding No. D2022-22

April 23, 2023

INITIAL DECISION ON DEFAULT JUDGMENT

This matter arises from a disciplinary complaint filed by the Director of the Office of Enrollment and Discipline (“OED Director”) for the United States Patent and Trademark Office (“USPTO” or “the Office”) against Michael J. Keller (“Respondent”) pursuant to 35 U.S.C. § 32 as implemented by 37 C.F.R. part 11.¹ Currently before the Court is the OED Director’s *Motion for Default Judgment* seeking entry of default judgment and an order excluding Respondent from practice before the Office.

PROCEDURAL HISTORY

On September 19, 2022, the OED Director filed a *Complaint and Notice of Proceedings Under 35 U.S.C. § 32* (“Complaint”) against Respondent alleging violations of the USPTO Rules of Professional Conduct (37 C.F.R. §§ 11.101 *et seq.*) arising from one client matter and from Respondent’s failure to respond to the ensuing OED investigation. The *Complaint* stated that Respondent was required to file a written Answer with the Court within thirty days.

Service on a respondent in a USPTO disciplinary proceeding may be completed by mailing a copy of the Complaint by any delivery service that provides confirmation of delivery or attempted delivery to a respondent who is a registered practitioner at the address provided to OED pursuant to 37 C.F.R. § 11.11.² *See* 37 C.F.R. § 11.35(a)(2). In this case, counsel for the OED Director attempted to serve the *Complaint* on Respondent via certified mail, return receipt requested, to two different addresses: a Pompano Beach, Florida address provided by Respondent to USPTO as his correspondence address under 37 C.F.R. § 11.11, and a Tampa, Florida address at which Respondent had confirmed receiving correspondence via a March 2, 2022 email. The mail sent to the Pompano Beach address was returned to the sender marked “unclaimed/unable to forward.” The mail sent to the Tampa address was delivered, and counsel

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 have been appointed by the Secretary of Commerce and are authorized to hear cases brought by the USPTO.

² 37 C.F.R. § 11.11(a) requires a registered practitioner 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.

for the OED Director received a signed return receipt, but could not confirm the signature was Respondent's.

Counsel for the OED Director also attempted to reach Respondent by sending an email message to an email address known to be used by Respondent, [REDACTED]. The email stated in essence that USPTO had sent confidential correspondence to Respondent and that he could contact counsel to obtain a copy. The message did not bounce back, but counsel did not receive a response.

Counsel for the OED Director also caused a process server to go to Respondent's Pompano Beach address, but the process server was unable to complete service of the *Complaint* at that address.

On September 20, 2022, this Court issued a *Notice of Docketing* requiring Respondent to file his Answer to the *Complaint* on or before October 17, 2022. However, Respondent did not file an Answer or otherwise enter any appearance before the Court by the deadline.

Subsequently, because it was unclear whether Respondent had received the *Complaint*, the OED Director effectuated service of the *Complaint* by publication pursuant to 37 C.F.R. § 11.35(b). Notices were published in the USPTO Official Gazette for two consecutive weeks, on November 29, 2022, and December 6, 2022. USPTO regulations mandated 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*, making his Answer due on or before January 5, 2023. See 37 C.F.R. § 11.35(b). Respondent did not file an Answer by that deadline.

On March 2, 2023, the OED Director filed the *Motion for Default Judgment*. Under 37 C.F.R. § 11.43, a response to the motion was due within 21 days, i.e., by March 23, 2023. However, Respondent has not filed any response.

As of the date of this decision, Respondent still has not filed an Answer to the *Complaint* or requested an extension of time to do so. The Court has received no communication from or on behalf of Respondent.

APPLICABLE LAW

USPTO Disciplinary Proceedings. 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 USPTO to establish regulations governing patent practitioners' conduct before the Office, and 35 U.S.C. § 32, which empowers USPTO to discipline a practitioner who is “shown to be incompetent or disreputable, or guilty of gross misconduct,” or who violates USPTO's regulations governing the conduct of practitioners. 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 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 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.

Default Judgment. The requirement to answer a disciplinary complaint, and the consequences for failing to do so, are stated plainly in 37 C.F.R. § 11.36(e): “Failure to timely file an answer will constitute an admission of the allegations in the complaint and may result in entry of default judgment.” See also *In re Whitney*, Proceeding No. D2018-48, slip op. at 12 (USPTO Mar. 14, 2019)³ (granting default judgment when respondent failed to answer complaint); *In re Morishita*, Proceeding No. D2017-25, slip op. at 12 (USPTO Sept. 28, 2018) (same); *In re Schwedler*, Proceeding No. D2015-38, slip op. at 8 (USPTO Mar. 21, 2016) (same).

FINDINGS OF FACT

Because Respondent failed to answer the *Complaint*, he is deemed to have admitted the allegations therein, which are set forth below as the Court’s findings of fact.

A. Background Facts

At all times relevant to the *Complaint*, Respondent was admitted to practice law in the State of Florida and the State of Georgia and was registered to practice before USPTO. USPTO registered Respondent as a patent attorney on October 25, 1994. His registration number is 38,201. Respondent was admitted to practice law in Georgia on June 18, 1991. As of the date of the *Complaint*, his status in Georgia was “Inactive.” Respondent was admitted to practice law in Florida on April 28, 2000, under registration number 233,640. As of the date of the *Complaint*, Respondent was a delinquent member and ineligible to practice law in Florida due to his failure to complete continuing legal education requirements.

On or about February 19, 2014, Respondent established Keller Life Science Law, P.A., a Florida corporation, in Pompano Beach, Florida. Between February 19, 2014, and the date the *Complaint* was filed, Respondent was primarily practicing law as part of Keller Life Science Law, P.A.

Respondent’s acts and omissions leading to the violations of the USPTO Rules of Professional Conduct set forth in the *Complaint* were willful.

B. Respondent’s Representation of Erimos Pharmaceuticals

At least as early as November 2005, Erimos Pharmaceuticals, LLC (“Erimos”) engaged Respondent to perform patent legal services before USPTO, including filing three applications that were issued as utility patents: U.S. Patent No. 7,728,036 (“the ’036 patent”), issued on June 1, 2010; U.S. Patent No. 8,232,277 (“the ’277 patent”), issued on July 31, 2012; and U.S. Patent No. 8,691,845 (“the ’845 patent”), issued on April 8, 2014. Erimos is the sole owner of the ’277 and ’845 patents and is co-owner of the ’036 patent.

³ All USPTO decisions cited herein are available at <https://foiadocuments.uspto.gov/oed>.

Respondent filed the applications that resulted in the issuance of the '036 patent, the '277 patent, and the '845 patent, and was the practitioner of record from the issuance of those patents until May 2021.

Holders of utility patents must pay maintenance fees as set forth in 37 C.F.R. § 1.20(e)-(g) to maintain a patent beyond 4, 8, and 12 years after the date of the grant. See Manual of Patent Examining Procedure (“MPEP”) § 2504; 37 C.F.R. § 1.20(e)-(g). The Office has no duty to notify patentees when maintenance fees are due, and it is the responsibility of the patentee to ensure that the maintenance fees are paid to prevent expiration of the patent. MPEP § 2575. Generally, communications relating to the payment of a maintenance fee will be directed to the correspondence address used during prosecution of the application, unless a “fee address” for the purpose of payment of the maintenance fee has been designated or a change in the correspondence address has been made. Id. § 2540.

Following the issuance of the '036 patent, Respondent regularly sent invoices to Erimos that included charges for fees associated with the continued oversight of the '036 patent family, including foreign associate fees and annuity fees. On November 20, 2013, a non-lawyer assistant for Respondent notified Jeffrey Khoo, the CEO of Erimos, that the first 3.5-year maintenance fee was due on December 1, 2013. Mr. Khoo instructed the non-lawyer assistant to pay the fee, and the fee was paid.

USPTO sent a reminder of the 7.5-year maintenance fee due for the '036 patent on January 15, 2018, to the address of record, Keller Life Science Law, P.A., P.O. Box 969, Pompano Beach, FL 33061. Respondent failed to notify Erimos that he had received the reminder of the 7.5-year maintenance fee for the '036 patent. Respondent failed to notify Erimos that the 7.5-year maintenance fee was due in the '036 patent prior to the due date.

The '036 patent expired on June 1, 2018, due to non-payment of the 7.5-year maintenance fee. Respondent failed to notify Erimos of the expiration of the '036 patent.

Following the issuance of the '277 patent, Respondent regularly sent invoices to Erimos that included charges for fees associated with the continued oversight of the '277 patent family, including foreign associate fees and annuity fees. However, Respondent failed to notify Erimos that the payment of the 3.5-year maintenance fee was due in the '277 patent prior to the due date.

The '277 patent expired on July 31, 2016, due to non-payment of the 3.5-year maintenance fee. Respondent failed to notify Erimos of the expiration of the '277 patent.

Following the issuance of the '845 patent, Respondent regularly sent invoices to Erimos that included charges for fees associated with the continued oversight of the '845 patent family, including foreign associate fees and annuity fees.

On November 20, 2017, USPTO sent a reminder of the 3.5-year maintenance fee due for the '845 patent to the address of record, Keller Life Science Law, P.A., P.O. Box 969, Pompano Beach, FL 33061. Respondent failed to notify Erimos that he had received the reminder of the

3.5-year maintenance fee for the '845 patent. Respondent failed to notify Erimos that the 3.5-year maintenance fee was due in the '845 patent prior to the due date.

The '845 patent expired on April 8, 2018, due to non-payment of the 3.5-year maintenance fee. Respondent failed to notify Erimos of the expiration of the '845 patent.

On or about February 22, 2021, Erimos transferred responsibility for the '036, '277, and '845 patents from Respondent to another patent attorney, who filed powers of attorney with USPTO with respect to those patents. On or about April 11, 2021, the CEO of Erimos, Mr. Khoo, discovered for the first time that the patents had expired.

On May 6 and 7, 2021, Erimos filed petitions to reinstate the '036, '277, and '845 patents. In July 2021, each of the petitions to reinstate was dismissed with a request for further information. In each instance, USPTO requested information on why Respondent did not provide notification to Erimos of the upcoming maintenance fee due dates.

On August 23, 2021, the attorney representing Erimos sent a letter to Respondent, at the address provided by Respondent to USPTO pursuant to 37 C.F.R. § 11.11, Keller Life Science Law, P.A., P.O. Box 969, Pompano Beach, FL 33061. Within that letter, the attorney representing Erimos requested that Respondent state why he did not provide notification to Erimos of the maintenance fee due dates, and to provide any documentation showing that Respondent received the maintenance fee reminders and forward them to Erimos' representatives. As of the date of the *Complaint*, Respondent had not provided Erimos, or the attorney representing Erimos, with any of the requested information, or otherwise responded to the August 23, 2021 letter in any way.

C. Respondent's Failure to Respond to Requests for Information and Evidence

On December 28, 2021, OED lawfully issued a Request for Information and Evidence Under 37 C.F.R. § 11.22(f) ("RFI") to Respondent seeking information about the allegations made by Erimos. OED sent the RFI by certified mail to two addresses known to be associated with Respondent: Keller Life Science Law, P.A., P.O. Box 969, Pompano Beach, FL 33061 (the correspondence address Respondent had provided to USPTO pursuant to 37 C.F.R. § 11.11), and Keller Life Science Law, PA, 2780 E. Fowler Ave. #501, Tampa, FL 33612.

The RFI sent by certified mail to the Pompano Beach address was held at the post office for pickup between January 4, 2022, and February 18, 2022. The U.S. Postal Service returned that RFI as undeliverable on or after February 28, 2022.

The RFI sent by certified mail to the Tampa address was delivered to that address and left with an individual on January 3, 2022. The signature on the certified mail receipt is illegible.

On February 16, 2022, OED sent a Lack of Response letter by certified mail to Respondent at the Pompano Beach address and the Tampa address. On or about March 11, 2022, the U.S. Postal Service delivered the Lack of Response letter to the Pompano Beach

address. The signature on the certified mail receipt is illegible. The U.S. Postal Service delivered the Lack of Response letter to the Tampa address on February 19, 2022.

On February 11, 2022, the OED Staff Attorney assigned to this matter called the telephone number that Respondent indicated as his telephone number of record. The outgoing message indicated that it was the voicemail box for Mr. Keller at Keller Life Sciences. The OED Staff Attorney left a message requesting a call back and an address to which correspondence could be sent. The OED Staff Attorney did not receive a response.

On February 22, 2022, the OED Staff Attorney sent an email message to Respondent at [REDACTED] indicating that USPTO was attempting to contact him and requesting that he provide an address to which correspondence could be sent. On March 2, 2022, the OED Staff Attorney received an email reply stating the message had been delivered to the recipient's junk folder and that his correspondence address was the Tampa address to which the RFI and Lack of Response letter had been previously delivered. The email reply was signed, "Michael Keller."

On March 25, 2022, the OED Staff Attorney called Respondent and left a voicemail message requesting a call back and an address to which USPTO correspondence could be sent. The OED Staff Attorney did not receive a response to the call.

As of the date of the *Complaint*, OED had not received any response to the December 28, 2021 RFI or the February 16, 2022 Lack of Response letter.

CONCLUSIONS OF LAW

The OED Director's *Motion for Default Judgment* asserts that Respondent violated seven provisions of the USPTO Rules of Professional Conduct. Based on the foregoing findings of fact, the Court agrees that Respondent violated the Rules of Professional Conduct as follows.

1. Respondent violated 37 C.F.R. §§ 11.102(a), 11.103, 11.104(a)(3), and 11.104(b) by failing to abide by his client's objectives and failing to communicate with his client or successor counsel.

Respondent's failure to inform his client, Erimos, that maintenance fees were due in three issued patents for which he was attorney of record, and his subsequent failure to notify his client that the three patents had expired as a consequence of failure to pay those maintenance fees, violated several of Respondent's duties outlined in the USPTO Rules of Professional Conduct.

First, Respondent failed to "abide by [his] client's decisions concerning the objectives of representation" or to "consult with the client as to the means by which they are to be pursued," as required under 37 C.F.R. § 11.102(a). Respondent's client did not become aware that its three patents had expired until April 2021, five years after one of them had expired and three years after the expiration of the other two. The client subsequently filed petitions to revive all three patents, evidencing that the expiration of the patents was not the client's objective. Thus, Respondent not only failed to consult with the client regarding the client's objectives, but also failed to abide by the client's objectives in the representation.

Second, Respondent failed to exercise the “reasonable diligence and promptness” required of USPTO practitioners under 37 C.F.R. § 11.103 when he failed to inform and advise his client about the maintenance fees due on the three patents or to advise that the three patents had lapsed as a result of failure to pay the maintenance fees. See *In re Valadares*, Proceeding No. D2020-19, slip op. at 8 (USPTO Nov. 20, 2020) (holding that such actions violate § 11.103).

Finally, Respondent also failed to keep his client reasonably informed about the status of the client’s matters and explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, as required under 37 C.F.R.

§ 11.104(a)(3) and (b), when he failed to advise the client about the maintenance fees or the expiration of the patents. See *In re Valadares*, slip op. at 8 (holding that such actions violate 37 C.F.R. § 11.104(a)(3) and (b)).

2. Respondent violated 37 C.F.R. § 11.116 by failing to respond to his client’s requests for information about its file.

Respondent failed to protect his client’s interests after the termination of representation by failing to respond to successor counsel’s inquiries in support of a petition to revive. Even after the termination of representation, a practitioner must take reasonably practicable steps to protect the client’s interests, such as by surrendering papers and property to which the client is entitled. 37 C.F.R. § 11.116(d). In this case, after Respondent’s client discovered that its three patents had lapsed, successor counsel filed petitions to revive, but these petitions were not immediately successful because USPTO wanted more information as to why Respondent had not notified his client of the maintenance fee due dates. Successor counsel therefore sent a letter to Respondent asking him to explain why he had not provided such notification and to produce any documentation showing that he had received the maintenance fee reminders and forwarded them to the client. However, Respondent did not respond. A practitioner who fails to carry out the services he was hired to perform, requiring his client to hire other counsel to perform the work, violates 37 C.F.R. § 11.116(d). *In re Gilboy*, Proceeding No. D2019-56, slip op. at 10 (USPTO July 20, 2020).

3. Respondent violated 37 C.F.R. §§ 11.801(b) and 11.1804(d) by failing to respond to the OED Director’s requests for information and evidence.

As set forth in the Findings of Fact above, Respondent failed to respond to the OED Director’s RFI and Lack of Response letter, despite multiple requests to do so, while OED was conducting the disciplinary investigation arising from Respondent’s representation of Erimos. A practitioner has a duty under the USPTO Rules of Professional Conduct to cooperate with an OED investigation. See 37 C.F.R. § 11.801(b). Respondent violated this duty. Failure to cooperate in a disciplinary investigation is prejudicial to the administration of justice, thereby also violating 37 C.F.R. § 11.804(d), because such a failure undermines the integrity of the disciplinary system and weakens public trust in the bar’s ability to police itself. See *In re Shippey*, Proceeding No. D2011-27, slip op. at 9 (USPTO Oct. 14, 2011).

SANCTION

In determining an appropriate sanction for Respondent's misconduct, 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 American Bar Association, STANDARDS FOR IMPOSING LAWYER SANCTIONS (2015) ("STANDARDS") § 3.0.

In this case, the OED Director asks the Court to enter an order excluding Respondent from practice before USPTO. The OED Director notes that the primary purpose of practitioner 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) (citing *Matter of Chastain*, 532 S.E.2d 264, 267 (S.C. 2000)); see also STANDARDS § 1.1. The OED Director asserts that Respondent's behavior demonstrates willful disregard of his obligations to the public, the legal profession, and this Court, and shows that he lacks basic ethical capacities. Thus, the OED Director concludes that Respondent should not be permitted to continue to represent others before the Office.

The Court agrees that exclusion is the appropriate sanction in this case, for the reasons that follow.

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

The practitioner-client relationship is a fiduciary relationship in which the practitioner owes the client a duty to represent the client's 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). Respondent breached the fiduciary duty he owed his client when he failed to advise the client that maintenance fees were due in three issued patents; failed to notify the client when the three patents lapsed due to failure to pay those maintenance fees; and failed to protect his client's interests after the termination of the representation by failing to respond to successor counsel's inquiries.

Respondent also violated the specific duties imposed by USPTO's regulations, and thereby violated duties owed to the legal system, the public, and the profession. Congress bestowed upon USPTO plenary authority to govern the conduct of patent practitioners. See 35 U.S.C. § 2(b)(2)(D). Pursuant to that authority, USPTO established its substantive ethics rules—the USPTO Rules of Professional Conduct (37 C.F.R. §§ 11.101 to 11.901)—and the procedural rules governing disciplinary proceedings (37 C.F.R. §§ 11.19 *et seq.*). Before being admitted to practice before USPTO, each practitioner must sign an oath or affirmation certifying that he will

observe these rules. Respondent violated this oath when he failed to adhere to the USPTO Rules of Professional Conduct and failed to participate in these disciplinary proceedings.

Respondent's failure to participate in the disciplinary proceedings also "weaken[ed] the public's perception of the legal profession's ability to self-regulate" and "harm[ed] the legal profession by undermining the integrity of the attorney discipline system." See *In re Valadares*, slip op. at 10-11 (citing *In re Brost*, 850 N.W.2d 699, 705 (Minn. 2014)). By imperiling the orderly functioning of the disciplinary process and undermining public trust in the integrity of the legal profession, Respondent violated duties he owed to the legal system, the public, and the legal profession.

2. Respondent acted knowingly when he failed to inform his client that maintenance fees were due or that the client's patents had expired, and when he failed to participate in the disciplinary proceedings.

Evaluation of a lawyer's mental state, or *mens rea*, requires a determination as to whether, at the time of the misconduct, the lawyer acted intentionally, knowingly, or negligently. These three mental states address the degree of the lawyer's culpability for disciplinary purposes. See STANDARDS § 3.0; see, e.g., *In re Phillips*, 244 P.3d 549, 555 (Ariz. 2010) ("Intentional or knowing conduct is sanctioned more severely than negligent conduct because it threatens more harm."); *People v. Varallo*, 913 P.2d 1 (Colo. 1996) (indicating that lawyer's mental state is decisive element in determining level of discipline).

In this case, by failing to file an Answer or otherwise defend himself, Respondent has admitted all factual allegations in the *Complaint*, including the allegation that his acts and omissions leading to the violations set forth in the *Complaint* were willful. Willfulness is generally understood to refer to wrongful conduct that goes beyond mere negligence, meaning that the wrongdoer, at minimum, "either knew or showed reckless disregard for the matter of whether [his] conduct was prohibited." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988); see also *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) (finding that willfulness encompasses both knowing and reckless violations).

The other Findings of Fact above support a conclusion that Respondent's conduct went beyond mere negligence. As the attorney of record to whom USPTO directed notices and correspondence on his client's three patents, Respondent knew or should have known that maintenance fees were due, and later knew or should have known that the patents had lapsed due to failure to pay such fees. Yet he neglected to advise his client that the fees were due or notify the client when the patents expired. Respondent also knew or should have known that OED was investigating him, as the OED Staff Attorney assigned to the investigation directed correspondence to him through multiple channels, yet he failed to respond to the RFI or otherwise cooperate in the disciplinary investigation. Accordingly, the record supports a finding that his misconduct was knowing.

3. Respondent's misconduct caused actual harm to his client.

Although a showing of harm is not required to establish a violation of the USPTO ethics rules, in this case, Respondent's neglect and disregard for his client resulted in clear and tangible harm. The client's patents were allowed to expire, and remained expired for five years (in the case of one of the patents) and three years (in the case of the other two) before the client discovered the lapse. The client had to hire successor counsel to file petitions to revive in order to regain its property rights. Then, Respondent ignored successor counsel's request for documentation to support the petitions to revive. Respondent's actions caused substantial harm, as the client incurred a loss of intellectual property rights during the time when the patents were expired and incurred legal fees and expenses when it was required to hire successor counsel and take steps to revive the patents.

4. The relevant aggravating and mitigating factors support imposing a severe sanction.

The STANDARDS contain a list of aggravating and mitigating factors for use in determining sanctions in attorney discipline matters. See STANDARDS § 9.1. These factors are routinely referenced in USPTO disciplinary proceedings. See, e.g., In re Sheasby, Proceeding No. D2013-13 (USPTO Dec. 31, 2013); In re Robinson, Proceeding No. D2009-48 (USPTO May 26, 2010). In this case, the OED Director cites two aggravating factors and one mitigating factor that are relevant to the sanction.

The first aggravating factor is Respondent's "bad faith obstruction of the disciplinary proceeding." See STANDARDS § 9.22(e). Respondent has willfully ignored his obligation to participate in this disciplinary proceeding. The USPTO Director and courts in other jurisdictions have recognized that an attorney's failure to cooperate in his own disciplinary matter is a significant aggravating factor that is indicative of indifference toward or even contempt for disciplinary procedures and demonstrates a lack of professional responsibility. See, e.g., In re Morishita, supra; In re Schwedler, supra; In re Lea, 969 A.2d 881 (D.C. 2009); People v. Barbieri, 61 P.3d 488, 495 (Colo. O.P.D.J. 2000); Matter of Brown, 910 P.2d 631 (Ariz. 1996); People v. Reeves, 766 P.2d 1192 (Colo. 1988). Here, despite clear notice, Respondent failed to participate in the disciplinary investigation or in the proceedings before this Court, in willful disregard of his obligations to do so. This behavior is not indicative of someone who should be practicing patent law before the Office.

The second aggravating factor is Respondent's "substantial experience in the practice of law." See STANDARDS § 9.22(i). The Court can consider substantial years of practice as an aggravating factor because a lawyer with a great deal of experience should know better than to engage in misconduct. STANDARDS § 9.22 annotation at 442. In this case, Respondent was granted recognition to practice before the Office in patent matters in 1994, almost thirty years ago. He surely knew better than to engage in the conduct described herein. See, e.g., In re Theobald, 786 N.W.2d 834 (Wis. 2010) (finding that fourteen years of practice constituted substantial experience for purposes of aggravation).

As for mitigation, the only mitigating factor identified by the OED Director is the absence of a prior disciplinary record. See STANDARDS § 9.32(a). Although Respondent has no

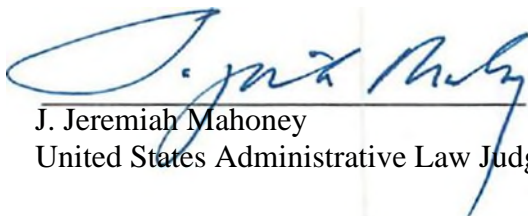
prior disciplinary record, this does not justify his misconduct or overcome the other factors that weigh in favor of imposing a sanction sufficient to protect the public.

CONCLUSION AND ORDER

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

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.⁴

So **ORDERED**,



J. Jeremiah Mahoney
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.

⁴ 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.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **INITIAL DECISION AND DEFAULT JUDGMENT** issued by J. Jeremiah Mahoney, Administrative Law Judge, in D2022-22, were sent to the following parties on this 26th day of April 2023, in the manner indicated:

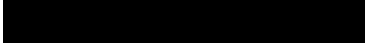


Cinthia Matos, Docket Clerk

VIA FIRST-CLASS MAIL:

Michael J. Keller
Keller Life Science Law PA 2780 E. Fowler Ave #501
Tampa FL 33612-6297

VIA EMAIL:

Robin J. Crabb, Esq.
Hendrik DeBoer, Esq.
Associate Solicitors
Mail Stop 8
Office of the Solicitor
P.O. Box 1450
Alexandria, Virginia 22313-1450


Government's Counsel