UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR OF THE
UNITED STATES PATENT AND TRADEMARK OFFICE

In the Matter of:	)	
James L. Lindon,	)	Proceeding No. D2018-39
Respondent.	)	

FINAL ORDER PURSUANT TO 37 C.F.R. § 11.24

Pursuant to 37 C.F.R. § 11.24(b), James L. Lindon ("Respondent") is hereby excluded from the practice of patent, trademark, and other non-patent law before the United States Patent and Trademark Office ("USPTO" or "Office") for violation of 37 C.F.R. § 11.804(h). Respondent is eligible to apply for reinstatement no earlier than at least five years from the effective date of the exclusion, pursuant to 5 C.F.R. § 11.60(b).

I. BACKGROUND AND PROCEDURAL HISTORY

At all times relevant to these proceedings, Respondent has been registered to practice in patent matters before the USPTO. Respondent's USPTO Registration Number is 45,498. Respondent is subject to the USPTO Rules of Professional Conduct set forth at 37 C.F.R. § 11.101 *et seq*. The Director of the USPTO has jurisdiction over this proceeding pursuant to 35 U.S.C. §§ 2(b)(2)(D) and 32, and 37 C.F.R. §§ 11.19 and 11.24.

State Disciplinary Proceedings

On January 30, 2017, the Attorney Discipline Board of the State of Michigan in Case Nos. 16-88-AI and 16-102-JC, disbarred Respondent from the practice of law in that jurisdiction based on ethical grounds.

USPTO Disciplinary Proceedings[1]

On July 10, 2018, the Director of the USPTO's Office of Enrollment and Discipline ("OED Director") served a "Request for Notice and Order Pursuant to 37 C.F.R. § 11.24" ("Request for Notice and Order") on Respondent, including a "Complaint for Reciprocal Discipline Pursuant to 37 C.F.R. §§ 11.24 and 11.34" ("Complaint"). The OED Director requested that the USPTO Director impose reciprocal discipline on Respondent using the procedures set forth in § 11.24 for violating 37 C.F.R. § 11.804(h), by being disciplined on ethical grounds by a duly constituted authority of a State.

On July 12, 2018, the Deputy General Counsel for General Law, on delegated authority by the USPTO Director, issued a "Notice and Order Pursuant to 37 C.F.R. § 11.24" ("Notice and Order"), sent by certified mail (receipt no. 70170660000095939525), giving Respondent 40 days to file a response "containing all information that Respondent believes is sufficient to establish, by clear and convincing evidence, a genuine issue of material fact that the imposition of discipline identical to that imposed by the Attorney Discipline Board of the State of Michigan in Case Nos. 16-88-AI and 16-102-JC would be unwarranted, and the reasons for such claim." *See* Notice and Order. The Notice and Order was delivered to Respondent on July 16, 2018. On August 16, 2018, Respondent timely requested an extension of time to file a Response, which was partially granted.

On August 31, 2018, Respondent filed a timely Response to the Notice and Order ("Response"). In that Response, Respondent contends that that the disciplinary proceedings

[1] On June 13, 2017, the Director of the Office of Enrollment and Discipline filed with Director of the USPTO a "Disciplinary Complaint Pursuant to 35 U.S.C. § 32 and 37 C.F.R. §§ 11.19 and 11.25", and requested that the Director of the USPTO impose an interim suspension upon Respondent. *See In re James L. Lindon*, Proceeding No. D2017-10. By Final Order dated XXX, Proceeding No. D2017-10 was terminated to allow the matter herein to proceed to its conclusion.

conducted by the state of Michigan in case nos. 16-88-AI and 16-102-JC were so lacking in notice or opportunity to be heard so as to constitute a deprivation of due process; there was an infirmity of proof in Michigan case nos. 16-88-AI and 16-102-JC such that the USPTO cannot accept as final the sanction imposed; and the imposition of the same discipline by the USPTO would result in grave injustice. Response, at p. 1-3. Having received the Response, and to assist in consideration of the same, the USPTO Director ordered the OED Director to file a response, and provided Respondent the opportunity to file a reply. On October 12, 2018, the OED Director timely filed a Response To Respondent's "Response To USPTO Paper Dated July 12, 2018" ("OED Response"), and on October 25, 2018, Respondent timely filed his "Response to USPTO paper dated October 12, 2018" ("Reply").

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. *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

A. Notice or Opportunity Was Not So Lacking as to Constitute Deprivation of Due Process under 37 C.F.R. § 11.24(d)(1)(i).

Respondent argues that the disciplinary proceedings conducted by the state of Michigan in case nos. 16-88-AI and 16-102-JC were so lacking in notice or opportunity to be heard so as to

constitute a deprivation of due process. Response, at 1; Reply, at 1. Specifically, Respondent claims that he did not receive notice as to whether and when a hearing was held for his state disciplinary proceeding, and thus was not present to defend himself. Response, at 1. In addition, Respondent also argues that "it would have been improper to require Respondent to appear for the hearing during pendency of an appeal of an underlying criminal conviction." Response, at 1.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *See In re Karten*, 293 F. App'x. 734, 736 (11th Cir. 2008) (quoting *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (internal quotation 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). Due process requirements are met where 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 (6th Cir. 2009) (ellipsis and third alteration in original)).

Respondent has not clearly and convincingly shown that he was denied due process in his disciplinary proceedings before the State of Michigan Attorney Discipline Board. Respondent is required to show that the State of Michigan Attorney Discipline Board failed to follow their due process and service requirements during the disciplinary proceedings. However, Respondent has not proven by clear and convincing evidence that the State of Michigan Attorney Discipline Board failed to comply with their procedures for sending a certified or registered letter to his last address of record. Respondent offers only an unsworn statement that he did not receive the required notice. Response, at 1, 3. The only evidence Respondent produces in his defense is a Notice of Change of Hearing Location Only dated September 27, 2017, for the matter *Grievance Administrator v. Daniel G. Romano*, Case No. 17-77-GA, and an email message dated September 27, 2017 from an employee of the State of Michigan Attorney Discipline Board, and seemingly directed to other government employees, a court reporter, and a person named Daniel G. Romano. Response, at 2, 15 and 17. Further, in his Reply, Respondent also submits a reproduction of two emails from the State of Michigan Attorney Discipline Board regarding a hearing scheduled in the matter *Grievance Administrator v. Daniel G. Romano*. Reply, at 1-2. These documents are dated over seven months after Respondent's disbarment proceedings in Michigan were completed, and therefore, long after Respondent was to have received notice from the Michigan bar authorities. *Id.* It is unknown what these documents intend to show.

In addition, Respondent does not speak to how the disciplinary procedures of the State of Michigan Attorney Discipline Board failed to afford Respondent an opportunity to be heard at a meaningful time and in a meaningful manner. According to the Attorney Discipline Board's Order of Disbarment, Respondent's disbarment was effective on February 21, 2017 after a hearing panel conducted a show cause proceeding held on November 21, 2016. (Exhibit (Ex.) 1).

Respondent appears to have been provided the opportunity to respond to the allegations, and Respondent asserts no violation of due process related to that proceeding. In addition, Respondent could have pressed a challenge at the state appellate level for any deprivation of due process, but Respondent does not offer any proof that he availed himself of any appeals process nor does he make any arguments for why such a challenge was not undertaken. By failing to challenge his disbarment in Michigan, he has waived his right to do so.

Respondent has not established, or attempted to establish, that the State of Michigan's procedures failed to meet due process standards. Thus, Respondent has not clearly and convincingly shown that he suffered a deprivation of due process such that reciprocal discipline is inappropriate.

B. The Resolution of the State Disciplinary Matter Did Not Suffer From an Infirmity of Proof under 37 C.F.R. § 11.24(d)(1)(ii).

A state disbarment creates a federal-level presumption that imposition of reciprocal discipline is proper. *See Selling*, *supra*. A respondent may seek to defeat that presumption by showing by clear and convincing evidence that there was such infirmity of proof establishing the conduct as to give rise to a clear conviction that the Office could not, consistently with its duty, accept as final the state's conclusion on that subject. *See* 37 C.F.R. § 11.24(d)(1)(ii). Respondent argues that there was an infirmity of proof in Michigan case nos. 16-88-AI and 16-102-JC such that the USPTO cannot accept as final the sanction imposed. Response, at 3. Respondent provides as support only a statement that the State of Michigan Attorney Discipline Board failed to consider Respondent's successful completion of a substance treatment program. Response, at 3. However, this is insufficient.

To successfully invoke infirmity of proof as a defense to reciprocal discipline,

Respondent must do more than simply challenge the fact finder's weighing of the evidence. *See In re Zdravkovich*, 634 F.3d at 579. He 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 Order of Discipline would be "[in]consistent with [our] duty." *Id.* (alterations in original). "This is a difficult showing to make. . . ." *Id.*

Here, Respondent does not dispute the core facts on which the Order from the state of Michigan is based. His disagreement is with the fact finder's weighing of Respondent's successful completion of a substance treatment program, which is insufficient to successfully invoke infirmity of proof as a defense to reciprocal discipline. This record presents no "infirmity of proof." Thus, Respondent has failed to show, by clear and convincing evidence, that there was such infirmity of proof establishing the conduct as to give rise to the clear conviction that the Office could not accept the final conclusion.

C. Imposition of a Reciprocal Suspension Would Not Result in a Grave Injustice under 37 C.F.R. § 11.24(d)(1)(iii).

Respondent argues the imposition of the same discipline by the USPTO would result in grave injustice by claiming that his criminal conviction was precipitated by the over-prescribing of opiates by his physician, who he claims did not adhere to Ohio's standard for prescribing opiates. Response, at 3-4; Reply, at 3-4. Respondent also appears to argue that it is improper for the state of Michigan to allow the disbarment to stand following the remand for a suppression hearing, citing Michigan Court Rules, Rule 9.120(B)(1), which states that "[t]he board must set aside the automatic suspension if the felony conviction is vacated, reversed, or otherwise set aside for any reason by the trial court or an appellate court." Response, at 4-5; Reply, at 4-5.

The grave injustice analysis focuses on whether the severity of the punishment "fits" the misconduct and allows for consideration of various mitigating factors. *See In re Thav*, 852 F. Supp. 2d 857, 861-62 (E.D. Mich. 2012); *see also In re Kramer*, 282 F.3d at 727 (on challenge to imposition of reciprocal discipline, "we inquire only whether the punishment imposed by [the first] court was so ill-fitted to an attorney's adjudicated misconduct that reciprocal disbarment would result in grave injustice"); *In re Attorney Discipline Matter*, 98 F.3d 1082, 1088 (8th Cir. 1996) (no grave injustice where disbarment imposed by the state court "was within the appropriate range of sanctions"); *In re Benjamin*, 870 F. Supp. 41, 44 (N.D.N.Y. 1994) (public censure within range of penalties for misconduct and thus censure was not a grave injustice). "As long as the discipline from the state bar was within the range of appropriate sanctions, it is not grave injustice for the [USPTO] to impose reciprocal discipline." *See Persaud v. Director of the USPTO*, No. 1:16–cv–00495, 2017 WL 1147459, at *2 (E.D. Va. Mar. 27, 2017).

Here, Respondent misunderstands the focus of the grave injustice analysis, which is concerned with only whether the discipline imposed falls within the range of sanctions, and not whether the imposition of the sanction was itself unjust. Respondent's conviction that served as the basis for his disbarment "involved five (5) tablets of hydrocodone missing during one shift when I was working in a pharmacy." Response, at 3. Respondent does not dispute committing the misconduct for which he was disciplined for, but merely disagrees with the discipline imposed claiming that his criminal conviction was the result of his physician's alleged failure to adhere to Ohio's standard for prescribing opiates, which resulted in the over-prescribing of opiates to treat Respondent's migraine headaches. *Id.* Respondent makes no arguments whatsoever that his discipline falls outside the range of appropriate sanctions.

Regarding Respondent's argument that it is improper for the state of Michigan to allow

the disbarment to stand following the remand for a suppression hearing, Respondent submits as support only a reproduction of an email from Cindy Bullington of the Michigan's Attorney Grievance Commission, to Allyson Plourde and Mark Armitage of the Attorney Discipline Board for the State of Michigan stating that "the rules require a discipline be vacated when the conviction from which it resulted is set aside." Response, at 5; Reply, at 5. However, the conviction from which the discipline resulted was in fact never set aside by the Cuyahoga County, Ohio Court of Common Pleas, *see* Journal Entry and Opinion, *State v. Lindon*, No. 104902 (Ohio Ct. App. June 22, 2017), and the Attorney Discipline Board of the State of Michigan did not vacate its January 30, 2017 order, nor did it rescind Respondent's disbarment, notwithstanding this email. Thus, Respondent has not established that the imposition of discipline by the state of Michigan was improper.

In conclusion, Respondent has failed to establish by clear and convincing evidence that imposing reciprocal discipline would be a grave injustice.

Analysis

In light of the above, it is hereby determined that there is no genuine issue of material fact under 37 C.F.R. § 11.24(d), and exclusion of Respondent from practice before the USPTO in patent, trademark, and other non-patent matters is the appropriate discipline.

ACCORDINGLY, it is hereby **ORDERED** that:

1. Respondent be excluded from the practice of patent, trademark, and other non-patent law before the USPTO, effective the date of this Final Order;

2. The OED Director publish a notice in the *Official Gazette* materially consistent with the following:

Notice of Exclusion

> This notice concerns James L. Lindon of Cleveland, Ohio, who is a registered patent attorney (Registration Number 45,498). In a reciprocal disciplinary proceeding, the Director of the United States Patent and Trademark Office ("USPTO") has ordered that Mr. Lindon be excluded 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 disbarred from the practice of law by a duly constituted authority of a State.
>
> By order dated January 30, 2017, the Attorney Discipline Board of the State of Michigan disbarred Mr. Lindon after finding that he violated Michigan Court Rule 9.104(5) (professional misconduct that violated a criminal law of a state or of the United States). The Board's order was predicated upon Mr. Lindon's conviction of aggravated theft, drug possession, and tampering with evidence in the matter *The State of Ohio v. James L. Lindon*, Case No. 604473-16-CR, in the Cuyahoga (Ohio) County Court of Common Pleas.
>
> 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: https://foiadocuments.uspto.gov/oed/.

3. 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;

4. Respondent shall comply with the duties enumerated in 37 C.F.R. § 11.58;

5. Respondent shall comply fully with 37 C.F.R. § 11.60 upon any request for reinstatement;

6. The USPTO dissociate Respondent's name from any Customer Number(s) and USPTO verified Electronic System account(s), if any; and

7. Respondent shall not apply for a USPTO Customer Number, shall not obtain a USPTO Customer Number, nor shall he have his name added to a USPTO Customer Number,

unless and until he is reinstated to practice before the USPTO.

11/19/19
Date

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

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Under Secretary of Commerce for Intellectual Property and
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