

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

_____)
In the Matter of:)

David Leonard Wisz,)

Respondent.)
_____)

Proceeding No. D2022-02

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

Pursuant to 37 C.F.R. § 11.24, David Leonard Wisz (“Respondent”) is hereby suspended for 180 days 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), having been disciplined by a duly constituted authority of a state.

I. BACKGROUND

1. At all times relevant hereto, Respondent of Birmingham, Michigan, has been registered to practice in patent matters before the USPTO as an attorney and is subject to the USPTO Rules of Professional Conduct. Respondent’s USPTO registration number is 46,350.

2. 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

3. On November 13, 2020, the Grievance Administrator of the Michigan Attorney Grievance Commission filed a three-count Formal Complaint against Respondent. *See* OED Response, Exhibit (“Ex.”) WISZ 001-10. Count One alleged that Respondent knowingly filed a false certificate of marriage, which conduct constituted misconduct and violated several Michigan disciplinary rules. *See id.* at WISZ 002-04.

4. Count Two of the Formal Complaint alleged that Respondent engaged in dishonest and criminal conduct during his divorce and custody proceedings with a former spouse. *See* OED Response, Ex. WISZ 004-08. During a break in legal proceedings, Respondent took a notebook from his former spouse's purse, which notebook contained her notes regarding strategy and privileged discussions she had with her attorney. He did not return it. *See id.* at WISZ 004-05. Additionally, in February 2018, after annulment proceeding concluded, Respondent sewed a recording device into his son's clothing, before his son's therapy session with a clinical psychologist, which allowed him to surreptitiously record the session. *See id.* at WISZ 005-06. Finally, Respondent was found to have knowingly and repeatedly disobeyed court orders with regard to his son's therapy, parenting time, use of a private investigator, and the release of his son's information. *See id.* at WISZ 006-07. These actions constituted misconduct and violated several Michigan disciplinary rules. *See id.* at WISZ 007-08. Respondent appealed the order, which was affirmed in its entirety. *See id.* at WISZ 006-07.

5. Finally, Count Three of the Formal Complaint alleged that Respondent provided knowingly false testimony during a May 18, 2016 hearing, concerning a request for a personal protection order against Respondent by his former spouse's romantic partner, which constituted misconduct and violated the Michigan disciplinary rules. *See* OED Response, Ex. WISZ 008-09.

6. On June 16, 2021, Respondent, represented by counsel, entered into a Stipulation for Consent Order of Discipline ("Stipulation"), wherein he pled no contest to the factual and legal allegations set out in the Formal Complaint. *See* OED Response, Ex. WISZ 011-15. Therein, he did not contest "the factual and charging paragraphs in Counts One through Three in their entirety." *Id.* at WISZ 011. Respondent agreed to a 180-day suspension, which became effective on October 1, 2021. *Id.* The Stipulation stated that the parties agreed to apply the ABA Standards

for Imposing Lawyer Sanctions and included consideration of aggravating and mitigating factors. *See id.* at WISZ 011-12. Mitigating factors considered included absence of prior disciplinary record, personal or emotional problems, and cooperative attitude toward proceedings. *See id.* at WISZ 012. Finally, Respondent waived his rights to a hearing, despite having the right and opportunity to do so. *See id.* at WISZ 013-14.

7. By Order dated July 7, 2021, in *Grievance Administrator v. David L. Wisz, P 55981*, Consent Order of Suspension, Case No. 20-79-GA, the Michigan Attorney Discipline Board approved the Stipulation and suspended Respondent from the practice of law in that jurisdiction for one hundred and eighty (180) days, effective October 1, 2021. *See* OED Response, Ex. WISZ 018-23.

USPTO Reciprocal Discipline Proceeding

8. On December 8, 2021, a “Notice and Order Pursuant to 37 C.F.R. § 11.24” (“Notice and Order”) was sent by certified mail (receipt no. 70192970000104912675) notifying Respondent, through counsel, 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 and 11.34” (“Complaint”) requesting that the Director of the USPTO impose reciprocal discipline upon Respondent identical to the discipline imposed by the July 7, 2021 Order of the Michigan Attorney Discipline Board in *Grievance Administrator v. David L. Wisz, P 55981*, Consent Order of Suspension, Case No. 20-79-GA. The Notice and Order provided Respondent an opportunity to file, within forty (40) days, a response opposing the imposition of reciprocal discipline identical to that imposed by the July 7, 2021 Order of the Michigan Attorney Discipline Board in *Grievance Administrator v. David L. Wisz, P 55981*, Consent Order of Suspension, Case No. 20-79-GA, based on one or more of the reasons provided in 37 C.F.R. § 11.24(d)(1).

9. Respondent filed a Response to Notice and Order Pursuant to 37 C.F.R. § 11.24 (“Response to Notice and Order”) on January 17, 2022. In his Response to Notice and Order, Respondent admits to entering into a consent order for a 180-day suspension in the Michigan disciplinary matter on July 7, 2021. Response to Notice and Order at 1-2. Respondent’s suspension became effective on October 1, 2021, and expired on March 29, 2022. *See id.* Respondent admits that his consent suspension violated 37 C. F. R. § 11.804(h). *See id.* at 2. Despite these admissions, Respondent asks that the USPTO impose a suspension of “180 or fewer days” from the practice of patent, trademark, and other non-patent law before the USPTO. *See id.* In support of his request for a “tempered” discipline, he cites various personal circumstances and mitigating factors.

10. The OED Director responded to the Response to Notice and Order (“OED Response”) on February 23, 2022. The OED Director argues that a reciprocal 180-day suspension is appropriate here and disputes that such suspension meets the threshold for a grave injustice. Moreover, the OED Director dismisses Respondent’s other arguments, including his references to his personal situation and third party involvement, and reliance on “mitigating” factors, as irrelevant. The OED Director argues that the fact that Respondent consented to the suspension is dispositive here.

11. Respondent did not file a Reply brief.

II. LEGAL STANDARD

Reciprocal disciplinary proceedings are not in any sense *de novo* proceedings. *See In re Barach*, 540 F.3d 82, 84 (1st Cir. 2008); *In re Surrick*, 338 F.3d 224, 232 (3d Cir. 2003). Rather, 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 alterations 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 the record and shall impose the identical public censure, public reprimand, probation, disbarment, suspension, or disciplinary disqualification unless the practitioner demonstrates by clear and convincing evidence, 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, then, 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 cannot sustain his burden and reciprocal discipline is appropriate here.

III. ANALYSIS

Respondent filed a Response to the Notice and Order on January 17, 2022. Therein, Respondent states that his discipline resulted from a personal matter, that is, a vigorously contested divorce and child custody proceedings. Response to Notice and Order at 3. And although he does not deny, and cannot deny, he was provided due process throughout his disciplinary proceedings, he claims that what happened after the entry of the consent order imposing his suspension creates a grave injustice. *See id.* at 6. Specifically, he alleges various spiteful and vindictive actions of his former spouse and her attorney, such as interfering with his employment, which he claims compounded his punishment. *See id.* at 4, 6. In addition, he refers to various mitigating factors (e.g., his actions were personal in nature, his cooperation with the disciplinary process, absence of prior discipline) that believes should “temper” the discipline imposed. *See id.* at 8-13.

As already stated, however, 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. Because Respondent cannot satisfy this burden, reciprocal discipline is appropriate here.

A. Reciprocal Discipline Would Not Amount to a Grave Injustice.

Despite his stipulation to a 180-day suspension in the state of Michigan, Respondent now

claims that a grave injustice would result from the imposition of reciprocal discipline, claiming that the actions of his former spouse and her attorney, which caused him to lose his job, compounded his punishment. The OED Director argues that Respondent's suspension was within the range of allowable penalties, based on applicable authorities in Michigan and as agreed to by Respondent, and the factors and circumstances cited by Respondent in his Response are irrelevant to the grave injustice analysis.

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." *Persaud v. Director of the USPTO*, No. 1:16-cv-00495, 2017 WL 1147459, at *2 (E.D. Va. Mar. 27, 2017).

Respondent is unable to carry his burden and show that the imposition of a 180-day suspension here would result in a grave injustice. First, the fact that Respondent stipulated to the 180-day discipline is dispositive here. *See In re Feuerborn*, Proceeding No. D2020-23, at 6 (USPTO Dec. 21, 2020). But, even if Respondent's stipulation to discipline were not dispositive, it is concluded that the 180-day suspension will not result in a grave injustice. As the OED

Director notes, and as set forth in the Formal Complaint, the Stipulation, and the July 7, 2021 Order, Respondent engaged in multiple instances of serious dishonesty, including false statements to the court, and multiple criminal acts, including altering official documents that were then filed with the county register of deeds, and larceny. He also disobeyed multiple court orders, interfered with the administration of justice, and tarnished the reputation of the bar. The OED Director notes that Michigan disciplinary authorities, as well as disciplinary authorities in other jurisdictions, have imposed comparable suspensions for misconduct similar to that engaged in by Respondent. OED Response at 9. Contrary to what the OED Director has offered, Respondent offers no case law or authority showing that his suspension was outside the range of appropriate sanctions.

Respondent's argument that the conduct by his former spouse and her attorney after the Michigan disciplinary authorities imposed discipline creates a grave injustice does not alter the conclusion here. Response to Notice and Order at 6-7. As noted already, however, the grave injustice standard focuses on whether or not the punishment, here a suspension for his own admitted misconduct, was within the range of appropriate sanctions. *In re Feuerborn*, Proceeding No. D2020-23, at 6. It is concluded that it was. The actions and/or conduct of third parties, or the personal circumstances of a respondent, are irrelevant to the analysis. Consequently, a 180-day reciprocal suspension is not a grave injustice.

Finally, Respondent spends a significant portion of his response setting out various mitigating factors that he believes should "temper the discipline meted out by the USPTO" in this reciprocal matter. Response to Notice and Order at 8-13. This argument implies that mitigating factors were not considered prior to the imposition of his state suspension. That is not the case. The presence of mitigating factors—including the personal nature of some of the

misconduct, absence of prior discipline, and his cooperation with disciplinary authorities—were already raised, considered in the course of his state disciplinary matter, and stipulated to by Respondent. *See* OED Response, Ex. WISZ 012, 022, 029. In other words, mitigating factors were already considered in connection with the state level suspension. There is no authority, and Respondent does not offer one, to consider them a second time in the context of these reciprocal proceedings to further reduce the penalty.

ORDER

ACCORDINGLY, it is ORDERED that:

1. Respondent is suspended for 180 days 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 Suspension

This notice concerns David Leonard Wisz of Birmingham, Michigan, who is a registered patent attorney (Registration Number 46,350). In a reciprocal disciplinary proceeding, the Director of the United States Patent and Trademark Office (“USPTO”) has ordered that Mr. Wisz be suspended from practice before the USPTO in patent, trademark, and other non-patent matters for 180 days for violating 37 C.F.R. § 11.804(h), predicated upon receiving a 180-day suspension from the practice of law by a duly constituted authority of a State.

By Order dated July 7, 2021, in *Grievance Administrator v. David L. Wisz, P 55981*, Consent Order of Suspension, Case No. 20-79-GA, the Michigan Attorney Discipline Board suspended Respondent from the practice of law in that jurisdiction for 180 days, effective October 1, 2021, for violating various provisions of the Michigan Rules of Professional Conduct (“MRPC”). The Michigan Attorney Discipline Board found that Mr. Wisz knowingly disobeyed obligations under the rules of a tribunal in violation of MRPC 3.4(c); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of criminal law, where such conduct reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b); engaged in conduct that violates a

criminal law of a state or of the United States, an ordinance, or tribal law pursuant to Michigan Court Rules (“MCR”) 2.615, specifically Michigan Compiled Law (“MCL”) 750.248 (making, altering, forging, or counterfeiting a public record), MCL 750.249 (uttering and publishing a forged, false, altered, or counterfeit record), MCL 750.356 (larceny), MCL 750.539c (eavesdropping upon private conversation), and MCL 750.539d (installation, placement, or use of a device for observing, recording, transmitting, photographing, or eavesdropping in a private place) in violation of MCR 9.104(5); engaged in conduct that is prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

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

6. 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.

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.

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David**

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Date

David Berdan
General Counsel for General Law
United States Patent and Trademark Office

on delegated authority by

Katherine K. Vidal
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office