

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

In the Matter of:)	
)	
Michael A. Guth,)	Proceeding No. D2010-37
)	
Respondent)	
_____)	

FINAL ORDER

Office of Enrollment and Discipline Director Harry I. Moatz (“OED Director”) and Michael A. Guth (“Respondent”) have submitted a Proposed Settlement Agreement to the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office (“USPTO Director”) or his designee for approval.

The OED Director and Respondent’s Proposed Settlement Agreement sets forth certain stipulated facts, legal conclusions, and sanctions to which the OED Director and Respondent have agreed in order to resolve voluntarily a disciplinary complaint against Respondent.

The Proposed Settlement Agreement, which satisfies the requirements of 37 C.F.R. § 11.26, resolves all disciplinary action by the United States Patent and Trademark Office (“USPTO” or “Office”) arising from the stipulated facts set forth below.

Pursuant to such Proposed Settlement Agreement, this Final Order sets forth the parties’ stipulated facts, legal conclusions, and agreed upon discipline.

Jurisdiction

At all times relevant hereto, Respondent of Santa Cruz, California, has been an attorney registered to practice before the USPTO (Registration Number 45,983) and is subject to the Disciplinary Rules of the USPTO Code of Professional Responsibility set forth at 37 C.F.R. § 10.20 *et seq.* The USPTO Director has jurisdiction over this matter pursuant to 35 U.S.C. §§ 2(b)(2)(D) and 32, and 37 C.F.R. §§ 11.20(a) and 11.26.

Stipulated Facts

1. At all times relevant hereto, Respondent of Santa Cruz, California, has been registered as an attorney to practice before the Office and is subject to the Disciplinary Rules of the USPTO Code of Professional Responsibility. Respondent’s registration number is 45,983. Respondent has also been admitted to practice as an attorney in the State of California since May 29, 2002. (Bar Number 219295).

2. OED received information from the USPTO Office of Finance that Respondent had issued ten (10) checks that were returned for insufficient funds in an aggregate amount of \$15,528.50. As further discussed below, each of these checks was submitted for payment of required fees on behalf of two (2) different clients in eight (8) patent applications between March 14, 2007, and November 14, 2008.

U.S. Patent Application No. 60/918,114

3. On March 14, 2007, Respondent filed Application No. 60/918,114 (the '114 Application) on behalf of Client I, with a check (No. 1053) for \$100 for the basic filing fee. That check was dishonored for insufficient funds. Respondent was first placed on notice of the returned check by a Notice to File Missing Parts of Provisional Application dated March 29, 2007. In the Notice, Respondent was given two months to file the required items and remit a late surcharge of \$25. Respondent was next informed of the returned check by a Miscellaneous Action dated April 6, 2007, stating his check dated March 14, 2007, was returned by the bank as unpaid. Within the latter notice Respondent was informed that "returned checks [were treated] as though the fee for which they were intended was never received." Respondent was required to pay \$100 for filing fees, \$25 surcharge for late filing fee and \$50 fee for processing a returned check, all within the two months allotted, otherwise his "FAILURE TO RESPOND WITHIN THIS PERIOD WILL RESULT IN ABANDONMENT OF THE APPLICATION." On December 12, 2007, a Notice of Abandonment was mailed to Respondent "for failure to timely or properly reply to the Notice to File Missing Parts (Notice) mailed on 03/29/2007." Respondent's "Petition for Revival of an Application for Patent Abandoned Unintentionally under 37 C.F.R. 1.137(b)" filed on February 3, 2009, was dismissed by decision dated March 27, 2009. The client was notified of the dishonored check. Thereafter, the client made an unrelated decision to discontinue this line of products and Mr. Guth was instructed to stop work.

U.S. Patent Application No. 60/918,115

4. On March 14, 2007, Respondent filed Application No. 60/918,115 (the '115 Application) on behalf of Client I, with a check (No. 1054) for \$100 for the basic filing fee. That check was dishonored for insufficient funds. Respondent was first placed on notice of the returned check by Miscellaneous Action dated April 6, 2007, stating his check dated March 14, 2007, was returned by the bank as unpaid. A notice of the returned payment was also sent to Respondent in a Notice to File Missing Parts of Provisional Application dated April 12, 2007. In the Notice, Respondent was given two months to file the required items, including a \$100 basic filing fee for small entity, and a late surcharge for Late Provisional Filing Fee of \$25. On November 13, 2007, the Respondent tendered the late filing fee (then at \$105) and the surcharge (\$25) along with a Request for an Extension of Time of five months, and a check for the required extension fee of \$1,115. His check (No. 1165) in payment amount of \$1,245 was again dishonored for insufficient funds. The client was notified of the dishonored check. Thereafter, the client made an unrelated decision to discontinue this line of products and Mr. Guth was instructed to stop work.

U.S. Patent Application No. 60/918,378

5. On March 15, 2007, Respondent filed Application No. 60/918,378 (the '378 Application) on behalf of Client I, with a check (No. 1055) for \$100 for the basic filing fee. That check was dishonored for insufficient funds. Respondent was first placed on notice of the returned check by Miscellaneous Action dated April 6, 2007, stating his check dated March 15, 2007, was returned by the bank as unpaid. A notice of the returned payment was also sent to Respondent in a Notice to File Missing Parts of Provisional Application dated April 13, 2007. In the Notice, Respondent was given two months to file the required items, including a \$175 basic filing fee for small entity, a surcharge of \$25, and a \$50 fee for the returned check. On November 13, 2007, the Respondent tendered the late filing fee (then at \$105), the surcharge (\$25), and the returned check fee (\$50), a Request for an Extension of Time of five months, and a check for the required extension fee of \$1,115. His check (No. 1166) in the total payment amount of \$1,295 was dishonored for insufficient funds. The client was notified of the dishonored check. Thereafter, the client made an unrelated decision to discontinue this line of products and Mr. Guth was instructed to stop work.

U.S. Patent Application No. 61/068,229

6. On March 4, 2008, Respondent filed Application No. 61/068,229 (the '229 Application) on behalf of Client I, with a check (No. 1220) for \$210 for the basic filing fee. That check was dishonored for insufficient funds. Respondent was first placed on notice of the returned check by a Miscellaneous Action dated March 19, 2008, stating his check dated March 9 [sic]¹, 2008 was returned by the bank as unpaid. A notice of the returned payment was also sent to Respondent in a Notice to File Missing Parts of Provisional Application dated March 20, 2008. In the Notice, Respondent was given two months to file the required items, including a \$180 basic filing fee for small entity, which included a statutory basic filing fee of \$105, a surcharge of \$25 and a \$50 fee for the returned check. The fees due for this application were timely paid thereafter. The returned check surcharge was paid by Mr. Guth and the application is in good standing.

PCT International Application No. PCT/US08/03061.

7. Respondent filed a PCT International Application, No. PCT/US08/03061 ('061 Application), for Client I, on March 7, 2008. Respondent's accompanying check No. 1225, in the amount of \$3,435 for the total fees payable for that application, was returned for insufficient funds. On March 28, 2008, a Notification Concerning Prescribed Fees was sent to Respondent indicating that the fees tendered were not paid due to insufficient funds and informing Respondent that the fees were due within one month in the amount of \$3,437 with an additional fee due in the amount of \$50 for the returned check initially tendered, bringing the amount due in total to \$3,487.

¹ The Miscellaneous Action, dated March 19, 2008, was issued stating that the check was dishonored and dated "March 09, 2008." Check number 1220 was dated on March 4, 2008, when the Application was filed. It appears that the "4" has an almost closed, rounded top and could be confused as a "9" that was not quite completely closed.

8. Respondent failed to make the payment of \$3,487, and the Office then posted an Invitation to Pay Prescribed Fees Together with Late Payments on May 14, 2008, which brought the fees due to a total of \$4,034 after the inclusion of the late payment of \$597. Respondent finally made the payment of \$4,034 by check included with the Response to Invitation to Pay Prescribed Fees Together with Late Payment on June 11, 2008, a full three months after the prescribed fees were originally to be paid and three months after the initial bad check was dishonored. The application is in good standing and the client ultimately decided not to pursue foreign filing based upon this PCT application.

PCT International Application, No. PCT/US08/03407.

9. Respondent filed a PCT International Application, No. PCT/US08/03407 ('407 Application), for Client II, on March 14, 2008. Respondent's accompanying check No. 1235, in the amount of \$3,294 for the total fees payable for that application, was returned for insufficient funds. On April 11, 2008, a Notification Concerning Prescribed Fees was sent to Respondent indicating that the fees tendered were not paid due to insufficient funds and informing Respondent that the fees were due within one month in the amount of \$3,294 with an additional fee due in the amount of \$50 for the returned check initially tendered, bringing the amount due in total to \$3,344.

10. Respondent failed to make the payment of \$3,344 and the Office then mailed an Invitation to Pay Prescribed Fees Together with Late Payments on June 23, 2008, which brought the fees due to a total of \$3,891 after the inclusion of the late payment of \$597. Respondent finally made the payment of \$3,891 by check included with the Response to Invitation to Pay Prescribed Fees Together with Late Payment on June 23, 2008, a full three months after the prescribed fees were originally to be paid and three months after the initial bad check was dishonored. After notification to, and discussion with the client, payment was submitted. The application is in good standing and the client ultimately decided not to pursue foreign filing based upon this PCT application.

PCT International Application, No. PCT/US08/07305

11. Respondent filed a PCT International Application, No. PCT/US08/07305 ('305 Application), for Client I, on March 14, 2008, without any payment of the prescribed fees due for the filing. On June 30, 2008, a Notification Concerning Prescribed Fees was sent to Respondent indicating that the fees were not paid and informing Respondent that the fees were due within one month in the amount of \$3,363. Respondent thereafter failed to make the payment due. The Office then posted an Invitation to Pay Prescribed Fees Together with Late Payments on August 14, 2008, bringing the fees due to a total of \$3,994.50 after the inclusion of the late payment of \$631.50.

12. Respondent purported to pay \$3,994.50 by check number 2119, dated September 15, 2008, included with the Response to Invitation to Pay Prescribed Fees Together with Late Payment. The check and response were filed a full three months after the prescribed fees were originally to be paid. Check, number 2119, was dishonored and, by Notification dated October 3, 2008, the '305 Application is considered to be withdrawn because of the failure to pay the

prescribed fees. A new application was filed claiming the original priority and the application is in good standing. There has been no disclosed adverse effect to the client to date. The client ultimately decided not to pursue foreign filing based upon this PCT application.

U.S. Patent Application No. 12/077,075

13. On March 4, 2008, Respondent filed Application No. 12/077,075 (the '075 Application) on behalf of Client I. The application was filed without any fees. The failure to pay the filing fee prompted a Notice to File Missing Parts dated April 4, 2008. Respondent replied to the notice on November 4, 2008, with a request for a five month extension of time accompanied by check number 2133 in the amount of \$1,755. Check number 2133 was dishonored for insufficient funds.

14. A Notice of Missing Parts was mailed to Respondent on December 8, 2008. The notice required \$660, which included \$270 search fee, \$165 statutory basic filing fee, \$65 surcharge, and \$65 fee for a returned check. Respondent paid the \$660 on December 26, 2008.

Client I

15. Client I was, and continues to be, the main client of Respondent. At all times relevant to these matters, the relationship between Respondent and Client I was subject to a written retainer agreement. The understanding and practice between Respondent and Client I was that Respondent would advance funds representing costs and filing fees on behalf of his client and then bill those advances to the client. In reliance upon that practice, Respondent did not maintain an escrow account during these times and, as such, none of the dishonored checks represented fiduciary funds or funds belonging to anyone other than Respondent.

Client II

16. Client II is an infrequent client for whom Respondent has not had to perform much work on his limited matters. Respondent and Client II did not have a written retainer agreement. The understanding and practice between Respondent and Client II was that Respondent would advance funds representing costs and filing fees on behalf of his client and then bill those advances to the client. In reliance upon that practice, Respondent did not maintain an escrow account during these times and, as such, none of the dishonored checks represented fiduciary funds or funds belonging to anyone other than Respondent.

Legal Conclusions

17. Based upon the foregoing stipulated facts, Respondent acknowledges that his conduct violated the following Disciplinary Rules of the USPTO Code of Professional Responsibility:

- a) Rule 10.23(b)(4), which proscribes engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and 10.23(b)(6), which proscribes engaging in conduct reflecting adversely on a practitioner's fitness to practice, by filing checks with the

Office drawn on Respondent's operating bank account and failing to maintain sufficient funds in the account for when the checks were presented for collection;

b) Rule 10.112(b), which proscribes commingling funds belonging to the practitioner or the practitioner's firm with advanced funds belonging to a client, by failing to deposit unearned client funds in a sequestered account and commingling his personal and business funds with funds of his clients; and

c) Rule 10.77(c), which proscribes neglect of an entrusted legal matter, by failing to timely pay fees to the Office for which the client had advanced funds to Respondent.

Mitigating Factors

18. Respondent has paid the application fees for which the checks were originally presented, as well as fees arising from the untimely payment of those fees.

19. Respondent has paid the Office all outstanding fees required by 37 C.F.R. § 1.21(m) for the processing of dishonored checks.

20. Respondent has not submitted any checks drawn on an account having insufficient funds since November 14, 2008.

21. Respondent immediately undertook the following remedial action upon receipt of notice of the investigation of his handling of client funds to ensure that the conduct herein would never reoccur:

a) Respondent consulted with outside counsel and retained the services of the accounting firm of Fournier to review the financial and bookkeeping practices of his office and to make recommendations and to implement appropriate changes. As a result, Respondent has adopted Lexis-Nexis PCLaw billing and accounting practices and retained the services of the Fournier firm to perform the bookkeeping functions of the office.

b) Respondent opened separate accounts for Operations, Petty Cash and PTO Fees in addition to an Escrow Account to receive client/fiduciary funds. Respondent has formulated and adopted a written protocol for the financial accounting of his practice and submitted it to OED during the course of the investigation. During the time this policy and practice was being developed, Respondent made all payments to the Office by cashier's check to insure against any payments being dishonored.

c) Respondent has adopted a computerized tracking system to monitor all of his pending matters before the Office to insure timely action and rendering of client services.

d) Respondent, upon notice of the investigation, dated December 5, 2008, began a thorough reconciliation of all patent fees paid to the Office for the years of 2007 and

2008, which he completed in January 2009. That reconciliation was submitted to his major client and OED, and it reflects that all costs associated with any delays, other than those caused by the client, were from the funds of Respondent. The reconciliation showed that Respondent had paid \$53,910 of which only \$42,629 were billed to the client after the payments were made and \$11,281 were not billed out or otherwise paid by Respondent. Yet the reconciliation also showed that there was another group of set offs that required adjustment of ultimately \$4,469 in favor of the client and \$2,000 not billed to client to date but prospectively would be. From the reconciliation of these client matters Respondent recognized the need for closer management controls over office billing and time management that resulted in the adoption of the management system used to monitor all legal services performed.

e) Respondent had suffered a serious head injury in late 2003 that took significant time for recovery and which left Respondent with residual and recurring symptoms, not the least of which were severe headache and vision problems. These residual effects persisted until 2008 and contributed to, and compounded with, a work backlog that began with the growth of his practice.

f) Respondent has not heretofore been the subject of any disciplinary history.

Sanctions

22. Respondent agreed, and it is ORDERED that:

a. (i) Respondent be, and hereby is, suspended from practicing patent, trademark, and other non-patent law before the USPTO for twenty-four (24) months commencing on the date the Final Order is signed and (ii) the execution of the term of suspension shall be stayed immediately and remain stayed so long as Respondent serves and successfully completes a twenty-four (24) month probationary period under the following terms and conditions:

(1) Respondent shall, during the period of his probation, not conduct himself in any fashion that would constitute misconduct in violation of the United States Patent and Trademark Office Code of Professional Responsibility.

(2) Respondent shall timely, completely, and successfully comply with the directions of the Final Order.

(3) Respondent shall hire, at Respondent's own expense, a practice monitor acceptable to the OED Director to review Respondent's legal practice and to prepare and submit a report to the OED Director at six months, 12 months, 18 months, and 24 months after the date the Final Order is signed. The report shall indicate whether Respondent is in compliance with the USPTO Rules of Professional Responsibility regarding: a) maintaining funds he receives from his clients in IOLTA accounts, (b) managing his law practice trust and operating accounts, and (c) maintaining and utilizing both the electronic and manual calendaring system to assist in the timely rendering of legal services. If

Respondent is not in compliance, the report shall identify each disciplinary rule implicated and briefly explain the manner in which Respondent's conduct does not comply therewith.

(4) In the event that the practice monitor cannot for any reason continue, Respondent shall promptly provide the OED Director with the name, address, and resume of another law office practice monitor for the OED Director's approval to conduct the review and prepare the required reports. If any proffered monitor is not approved, the Respondent shall promptly proffer another law office practice monitor for the OED Director's approval, and Respondent shall continue to do so until the OED Director approves a consultant. Failure to promptly name and maintain a practice monitor acceptable to the OED Director shall be grounds for issuing a Show Cause order as set forth in subparagraph e., below, if such failure causes a reporting period to pass without an acceptable monitor available for oversight. Nothing herein shall extend the deadlines for Respondent to cause the reports to be timely submitted except that the deadlines may be extended by written agreement of the Respondent and the OED Director.

b. Respondent shall be permitted to practice patent, trademark, and non-patent law before the USPTO during his probationary period unless the stay of the suspension is lifted by order of the USPTO Director or his designee;

c. 37 C.F.R. §§ 11.58 and 11.60 do not apply unless the USPTO Director or his designee lifts the stay of the suspension.

d. If the stay of the suspension is not lifted by order of the USPTO Director or his designee by the end of Respondent's twenty-four month probationary period, Respondent is not required to serve the suspension;

e. Directs:

(1) in the event that the OED Director is of the opinion that Respondent, during the probationary period, failed to comply with any provision of the Final Order or any Disciplinary Rule of the USPTO Code of Professional Responsibility, the OED Director shall:

(a) issue to Respondent an Order to Show Cause why the USPTO Director or his designee should not order that the stay of the suspension be lifted and Respondent be immediately suspended for up to twenty-four (24) months for the violations set forth in paragraph 17, above; and

(b) send the Order to Show Cause to Respondent at the last address of record Respondent furnished to the OED Director pursuant to 37 C.F.R. § 11.11(a); and

(c) grant Respondent fifteen (15) days to respond to the Order to Show Cause;

and

(2) in the event after the 15-day period for response and consideration of the response, if any, received from Respondent, the OED Director continues to be of the opinion that Respondent, during the twenty-four month probationary period, failed to comply with any provision of the Final Order or any Disciplinary Rule of the USPTO Code of Professional Responsibility, the OED Director shall:

(a) deliver to the USPTO Director or his designee: (i) the Order to Show Cause, (ii) Respondent's response to the Order to Show Cause, and (iii) evidence causing the OED Director to be of the opinion that Respondent failed to comply with any provision of the Final Order or any Disciplinary Rule of the USPTO Code of Professional Responsibility during the probationary period, and

(b) request that the USPTO Director or his designee immediately lift the stay of the suspension and suspend Respondent for up to twenty-four (24) months for the violations set forth in paragraph 17, above;

f. If Respondent is suspended pursuant to the provisions of subparagraph e., above:

(1) Respondent shall comply with 37 C.F.R. § 11.58;

(2) the OED Director shall disseminate information in accordance with 37 C.F.R. § 11.59;

(3) the USPTO shall promptly dissociate Respondent's name from all USPTO customer numbers and Public Key Infrastructure (PKI) certificates;

(4) Respondent shall not to use any USPTO customer number or PKI certificate unless and until he is reinstated to practice before the USPTO; and

(5) Respondent may not obtain a USPTO customer number or a PKI certificate unless and until he is reinstated to practice before the USPTO;

g. In the event that the USPTO Director or his designee lifts the stay of the suspension and Respondent seeks a review of the USPTO Director's decision to lift the stay, any such review shall not operate to postpone or otherwise hold in abeyance the immediate suspension of Respondent;

h. Nothing in the proposed Settlement Agreement or the Final Order shall prevent the Office from seeking discipline against Respondent in accordance with the provisions

of 37 C.F.R. §§ 11.34 through 11.57 for the misconduct that caused the stay of the suspension to be lifted;

i. The OED Director shall publish the Final Order at the Office of Enrollment and Discipline's Reading Room electronically;

j. The OED Director shall publish the following Notice of Stayed Suspension in the *Official Gazette*;

Notice of Stayed Suspension

Michael A. Guth of Santa Cruz, California, a registered patent attorney (Registration number 45,983). Mr. Guth has been suspended for twenty-four (24) months with the entirety of the suspension stayed and placed on probation for a period of twenty-four (24) months by the United States Patent and Trademark Office ("Office") for violating 37 C.F.R. §§ 10.23(b)(4) for conduct involving dishonesty, fraud, deceit, or misrepresentation; 10.23(b)(6) for conduct reflecting adversely on a practitioner's fitness to practice before the Office; 10.77(c) for neglecting entrusted legal matters; and 10.112(b) for commingling funds. Mr. Guth is permitted to practice before the Office during his probation unless the stay of the suspension is lifted.

Mr. Guth submitted checks to the Office drawn on his operating account, but he failed to maintain sufficient funds in the account when the checks were presented for payment. Mr. Guth paid the fees for which the checks were issued. Upon receipt of notice of the investigation of his handling of client funds Mr. Guth immediately undertook remedial action to ensure that the conduct herein would never reoccur. No client has reported substantial harm to OED. Mr. Guth has no previous disciplinary record.

This action is the result of a settlement agreement between Mr. Guth and the OED Director pursuant to 35 U.S.C. §§ 2(b)(2)(D) and 32, and 37 C.F.R. §§ 11.20, 11.26, and 11.59. Disciplinary decisions involving practitioners are posted for public reading at the Office of Enrollment and Discipline's Reading Room located at:
<http://des.uspto.gov/Foia/OEDReadingRoom.jsp>.

k. Pursuant to 37 C.F.R. § 11.59, the OED Director shall give notice 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;

l. Pursuant to 37 C.F.R. § 11.20(a)(4), Respondent shall provide, within 30 days of the date of the Final Order, a copy of the Final Order to Client I and Client II, and to file, within 45 days of the date of the Final Order, an affidavit with the OED Director stating that he complied with the requirements of this subparagraph;

m. The record of this disciplinary proceeding, including the Final Order, be considered i) when addressing any further complaint or evidence of the same or similar misconduct brought to the attention of the Office, and/or ii) in any future disciplinary proceeding (1) as an aggravating factor to be taken into consideration in determining any discipline to be imposed and/or (2) to rebut any statement or representation by or on Respondent's behalf; and

n. The OED Director and Respondent shall each bear their own costs incurred to date and in carrying out the terms of this agreement.

FEB 11 2011
Date



MARIA C. CAMPO
Acting Deputy General Counsel for General Law
United States Patent and Trademark Office

on behalf of

David M. Kappos
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office

cc:

Will R. Covey, Acting Director
Office of Enrollment and Discipline
U.S. Patent and Trademark Office

Michael A. Guth
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Paul W. Vapnek
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Counsel for Respondent

Notice of Stayed Suspension

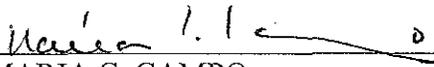
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MARIA C. CAMPO
Acting Deputy General Counsel for General Law
United States Patent and Trademark Office

on behalf of

David M. Kappos
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office