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

In the Matter of:	)	
	)	
Allen D. Brufsky,	)	**Proceeding No. D2013-12**
	)	
Respondent	)	
	)	

FINAL ORDER UNDER 37 C.F.R. § 11.24

Pursuant to 37 C.F.R. §§ 11.19 and 11.24(d), the Director of the United States Patent and Trademark Office ("USPTO" or "Office") hereby orders the suspension of Allen D. Brufsky ("Respondent") for ninety-one (91) days as reciprocal discipline for violation of 37 C.F.R. § 10.23(a) and (b) via 10.23(c)(5)(i).[1]

I. BACKGROUND AND PROCEDURAL HISTORY

At all times relevant to this matter, Respondent has been registered to practice in patent matters before the USPTO (Registration Number 21,056). (Exhibit F, p. 1) (Complaint for Reciprocal Discipline Under 37 C.F.R § 11.24).[2]

By Order dated November 4, 2010, in the matter of *The Florida Bar v. Allen D. Brufsky* (Case Number SC10-1765), the Supreme Court of Florida approved an uncontested referee's report in which Respondent "agreed to a stipulated resolution" set forth in a Conditional Guilty Plea for Consent Judgment. (Exhibits A, B). In accordance with that report, Respondent consented to having been found

[1] Similarly, on April 30, 2011, the United States District Court of the Southern District of Florida suspended Respondent for ninety-one (91) days in reciprocal disciplinary proceedings predicated on the same state discipline, i.e., the Florida Supreme Court's November 4, 2010 Order. (Exhibit D) (*In Re: Allen David Brufsky*, Admin. Order 2011-32 (April 30, 2011)).

[2] On June 14, 2012, the USPTO removed Respondent from the Register of Patent Attorneys and Agents for failure to respond to an Office of Enrollment and Discipline (OED) survey, as required by then 37 C.F.R. § 10.11. *See* 1380 OG 107 (July 10, 2102). The reciprocal ninety-one (91) day suspension herein does not affect Respondent's removal from the Register nor any other OED matter.

guilty of violating Rule 4-1.4 (failure to communicate with client); Rule 4-1.7 (conflict of interest – current client); and Rule 4-1.8 (conflict of interest – transactions with client). (Exhibit A).

Relying on the referee's report, the Supreme Court of Florida ordered Respondent suspended from the practice of law for ninety-one (91) days. (Exhibit B). On November 16, 2010, the Supreme Court of Florida effectuated Respondent's suspension from the practice of law for ninety-one (91) days. (Exhibit C). Respondent's suspension was predicated on the following:

> Beginning in October 2003, Respondent represented F & G Research with regard to certain claims to enforce intellectual property rights. Over the course of the litigation, Respondent assumed corporate roles in addition to his role as attorney. Respondent failed to advise the client of the conflict of interest issue inherent in his assuming corporate roles and, as a result, failed to obtain proper consent from the client for the assumption of those roles. In addition, as various litigation matters ensued, Respondent failed to keep the client informed of the progress of the litigation and took action on behalf of the corporation beyond that which he was properly authorized to take.
>
> (Exhibit A).

On September 12, 2013, the USPTO Director of the Office and Enrollment and Discipline ("OED Director") served a Complaint for reciprocal discipline on Respondent. (Exhibit E). The OED Director requested that the USPTO Director impose reciprocal discipline on Respondent for violating 37 C.F.R. § 10.23(a) and (b)(6)[3] via 37 C.F.R. § 10.23(c)(5)(i), by being reprimanded on ethical grounds by a duly constituted authority of a State. (Exhibit F, pp. 2-3).

On September 20, 2013, the Deputy General Counsel for General Law, on behalf of the USPTO Director, issued an Order giving Respondent an opportunity to file within 40 days a response "containing all information that Respondent believes clearly and convincingly establishes a genuine issue of material fact that the imposition of discipline identical to that imposed by the Supreme Court of Florida would be unwarranted" based upon any of the grounds permissible under 37 C.F.R. § 11.24(d)(1). (Exhibit G) ("Notice and Order").

On October 29, 2013, Respondent filed a Response to the Notice and Order. (Exhibit H)

[3] Effective May 3, 2013, the USPTO Rules of Professional Conduct, 37 C.F.R. §§ 11.101 through 11.901, apply to persons who practice before the Office. Since the alleged conduct occurred prior to May 3, 2013, the USPTO Code for Professional Responsibility that was in effect in 2011 is applicable in this case. *See* 37 C.F.R. §§ 10.20-10.112.

("Response"). Therein, Respondent disputed the imposition of reciprocal discipline, arguing that the Florida Board suffers from an infirmity of proof since, in his view, the grievance that gave rise to the state disciplinary proceeding was merely a vehicle to coerce a settlement in a separate civil matter. (Exhibit H). Further, in that separate civil matter, a settlement was reached with the Grievant and the settlement stated that Grievant was withdrawing the disciplinary grievance. He argued that since the grievance was withdrawn, the Florida Supreme Court should not have imposed discipline in the first place and as a result it would be a grave injustice to institute reciprocal discipline here. (Exhibit H). Finally, Respondent claimed that a "lack of due process and imperfection of the proof process" in the state proceeding counsel against the imposition of reciprocal discipline. (Exhibit H, p. 2).

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)).

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.

To prevent the imposition of reciprocal discipline, Respondent is required to demonstrate that he meets one of these criteria by clear and convincing evidence. *See* 37 C.F.R. § 11.24(d)(1). As discussed below, however, Respondent has not by clear and convincing evidence satisfied any of the factors set forth in 37 C.F.R. § 11.24(d)(1).

II. ANALYSIS

A. Imposition of Reciprocal Ninety-One (91) Day Suspension Would Not Be Based On An Infirmity of Proof.

Respondent asserts, under 37 C.F.R. § 11.24(d)(1)(ii), that in the state proceedings there was an infirmity of proof that gives rise to a clear conviction that the Office could not, consistent with its duty, accept the state's Order of Discipline. (Exhibit H, p. 4). In support thereof, Respondent claims that the grievance which resulted in the imposition of discipline was resolved in a settlement of civil litigation between the Grievant and the Respondent, thereby mooting the grievance.[4] (Exhibit H, p. 4). Thus, he alleges that bar counsel's decision to decline to close the grievance "lead[s] to an

[4] Effective July 18, 2008, Respondent entered into a settlement of a separately pending contract and fraud litigation with parties that included the Grievant in the state level disciplinary proceedings. (Exhibit H) (Exhibit A thereto). That settlement agreement contained provisions referencing the state level disciplinary proceedings. It stated that "[Grievant] Agrees to Withdraw the Bar Grievance against [Allen Brufsky]." (Exhibit H) (Exhibit A thereto, document entitled "Settlement Agreement", p. 5). The Agreement also stated that the parties agree that "the reasons for any potential misconduct complained of in the Bar Grievance will no longer exist upon the execution of this Settlement Agreement and that [Grievant] forever releases any grievance or claim there under by directing the withdrawal of same and that the Bar give no further consideration to same. . . ." (Exhibit H) (Exhibit A thereto, document entitled "Settlement Agreement", p. 8). The State Bar was not, however, a party to this settlement.

infirmity in proof in the bar proceeding as we could only infer from the Grievant's actions the real reasons for the grievance." (Exhibit H, p. 4).

To successfully invoke infirmity of proof as a defense to reciprocal discipline, Respondent must demonstrate that there was "such an infirmity of proof" establishing the charges against him "as to give rise to the clear conviction" that accepting the Order of Discipline would be "inconsistent with [our] duty." *See In re Zdravkovich*, 634 F.3d at 579. "This is a difficult showing to make. . . ." *Id.* For reasons set forth below, Respondent's arguments fail to satisfy the requirements of 37 C.F.R. §11.24(d)(1)(ii).

Respondent does not challenge the core facts on which the Orders that establish his suspension are based. Rather, he merely argues that those facts were "mooted" by the civil settlement that required the Grievant to withdraw the disciplinary grievance. However, Respondent cites no authority that binds bar counsel to the terms of a private civil settlement. To the contrary, Florida case law suggests that bar counsel is not so bound and Respondent was so informed of that fact. *See e.g. Florida Bar v. Arcia*, 848 So.2d 296 (Fla. 2003) (Supreme Court of Florida imposed discipline on practitioner despite language in civil settlement agreement that opposing party shall not "initiate contact or provide any further evidence to the Florida Bar in connection with the Bar Complaint instituted against [Arcia.]"); *Florida Bar v. Frederick*, 756 So.2d 79 (Fla. 2000) (practitioner suspended ninety-one (91) days despite language in separate, civil settlement that "we agree to not write the Florida Bar and if we have already, we agree to voluntarily withdraw it"). The record herein shows that bar counsel alerted Respondent to these cases. (Exhibit H) (Exhibit G, thereto). Additionally, and importantly, Respondent consented to the state discipline in resolution of the grievance. (Exhibits A, B, C). That stipulated resolution includes specific findings of fact to support the ninety-one (91) day suspension. (Exhibit A). Having consented to these findings, he cannot now successfully claim an infirmity of proof for the discipline imposed.

In sum, the core facts on which the Orders entering and effectuating Respondent's suspension are based are agreed to and support the Order. Respondent consented to the Order, including its findings, and

the discipline it imposed. The record contains no indication of any appeal by Respondent from the state discipline. A federal district court has now imposed the same reciprocal discipline. Accordingly, 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 . . ." of the state discipline. 37 C.F.R. § 11.24(d)(1)(ii).

B. Imposition of a Reciprocal Ninety-One (91) Day Suspension Would Not Result in a Grave Injustice.

Respondent also argued that reciprocal discipline would result in a grave injustice. In support of that position, Respondent avers that "Respondent has been the subject of overzealous prosecution, predisposed by questioning the authority of the Florida Bar to act in light of the withdrawal of the grievance as a result of the civil litigation . . . ." (Exhibit H, p. 5).

The grave injustice analysis, however, focuses on whether the severity of the punishment "fits" the misconduct. *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"); *Matter of 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). Here, suspension is one tool within the range of penalties for attorney sanctions in the state of Florida, including for misconduct involving conflicts of interest. *See* Fla. Rules for Imposing Lawyer Sanctions, rule 4.3 (2000). Where, as here, a lawyer's misconduct is serious enough to warrant a suspension from practice, Florida rules state that the lawyer should not be reinstated until rehabilitation can be established. *See* Fla. Rules for Imposing Lawyer Sanctions, rule 2.3 (2000). And while the Florida rules state that it is "preferable to suspend a lawyer for at least six months in order to insure effective demonstration of rehabilitation," here Respondent's suspension was for considerably less than six months, i.e., only ninety-

one (91) days. *See* Fla. Rules for Imposing Lawyer Sanctions, rule 2.3 (2000). Accordingly, the Florida discipline was not a grave injustice.

Also, as already stated, bar counsel is not bound by the terms of settlements to which it is not a party. Here, Respondent consented to the state suspension and there is no indication of any appeal. Respondent had an opportunity to make his arguments in the state proceedings and ultimately decided instead to consent to the findings and discipline. A federal district court has already imposed the same reciprocal discipline as here. In sum, Respondent has not shown by clear and convincing evidence that reciprocal discipline would result in a grave injustice.

C. There Was No Deprivation of Due Process In the State Disciplinary Proceedings.

Respondent's last contention is that he suffered a "deprivation of due process and imperfection of the proof process" during the state disciplinary proceedings. Specifically, he argues that the Grievant "could not be subpoenaed and forced to testify" and that bar counsel threatened to seek disbarment unless Respondent consented to a suspension as a resolution to the pending disciplinary grievance. (Exhibit H, p. 2). There is no support, however, for the proposition that Respondent suffered a deprivation of due process.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *In re Karten*, 293 Fed. Appx. 734, 736 (11th Cir. 2008) (citing *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, as here, 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) (citing *Ginger v. Circuit Court for Wayne County*, 372 F.2d 620, 621 (6th Cir. 1967)); *see also In re Zdravkovich*, 634 F.3d 574 (D.C. Cir. 2011) (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 a hearing at which counsel had the opportunity to call and cross-examine witnesses, make arguments, and submit evidence). Due process requirements are 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 (citing *In re Cook,* 551 F.3d 542, 550 (6th Cir. 2009)).

Respondent has not clearly and convincingly shown that he was denied due process during the pendency of the state disciplinary proceedings. Respondent does not contend that he lacked notice of the charges. To the contrary, he fully participated in the disciplinary proceedings, as plainly evidenced by the documents Respondent submitted with his response. (Exhibit H, attachments). These documents include the various pieces of correspondence between bar counsel and Respondent concerning the grievance proceedings. (Exhibit H, attachments). Further, Respondent has stipulated that he "participated fully in [the State] proceeding." (Exhibit A). In sum, there was no deprivation of Respondent's due process rights.[5]

Respondent asserted that bar counsel threatened to seek disbarment unless Respondent consented to a suspension as a resolution to the pending disciplinary grievance. (Exhibit H, p. 3). Respondent characterizes these actions as "coercion" that deprived him of due process. (Exhibit H, p. 4). However, ordinary negotiations do not constitute a deprivation of due process. Also, a review of the correspondence that Respondent submitted with his Response does not support his argument. Rather, that correspondence suggests a discussion of bar counsel's view of the case against Respondent and possible sanctions, and evidences the normal give and take of settlement negotiations.

In sum, Respondent admitted that he fully participated in the disciplinary proceedings. (Exhibit A). Further, he agreed to a consent Judgment that included a guilty plea in connection with case SC10-

[5] Complaining witnesses are not a party to Florida disciplinary proceedings, which are a quasi-judicial administrative proceeding. *See* Rule 3-7.6(e) and (k), Procedures Before a Referee. Florida rules are clear that "[n]either unwillingness nor neglect of the complaining witness to cooperate, nor settlement, compromise, or restitution, will excuse the completion of an investigation." *See id.* As Respondent suffered no loss of entitlement under the applicable Florida rules by being unable to subpoena Grievant, there can be no deprivation of due process.

1765. (Exhibit A). The record does not show any appeal from the state discipline and a federal court already has itself imposed the same reciprocal discipline. In sum, there is no support for any alleged lack of due process. Accordingly, Respondent has not clearly and convincingly shown that he suffered a deprivation of due process such that reciprocal discipline is inappropriate.

ORDER

ACCORDINGLY, it is:

ORDERED that Respondent is suspended for ninety-one (91) days; and

ORDERED that the OED Director shall make public the following Notice in the Official Gazette:

Notice of Suspension

This notice concerns Allen D. Brufsky of Naples, Florida, who is a registered patent attorney (Registration Number 21,056). In a reciprocal disciplinary proceeding, the Director of the United States Patent and Trademark Office ("USPTO") has ordered that Mr. Brufsky be suspended for ninety-one (91) days from the practice of patent, trademark, and other non-patent law before the USPTO for violating 37 C.F.R. § 10.23(a) and (b) via 37 C.F.R. § 10.23(c)(5)(i) predicated upon being suspended on ethical grounds by a duly constituted authority of a State.

On November 16, 2010, the Supreme Court of Florida effectuated the suspension of Mr. Brufsky from the practice of law for ninety-one (91) days. The suspension is based on Mr. Brufsky's representation of a corporate client with regard to certain claims to enforce intellectual property rights. Over the course of a litigated proceeding, Mr. Brufsky assumed corporate roles in addition to his role as attorney. He failed to advise the client of the conflict of interest issue inherent in serving in both capacities and, as a result, failed to obtain proper consent from the client. In addition, as various litigation matters ensued, Respondent failed to keep the client informed of the progress of the litigation and took action on behalf of the corporation that exceeded his authority. Mr. Brufsky's conduct violated Rule 4-1.4 of the Rules Regulating the Florida Bar (failure to communicate), Rule 4-1.7 (conflict of interest – current client), and Rule 4-1.8 (conflict of interest – transactions with client.)

This action is taken pursuant to the provisions of 35 U.S.C. § 2(b)(2)(D) and 37 C.F.R. § 11.24. Disciplinary decisions are available for public review at the Office of Enrollment and Discipline's Reading Room, located at: http://e-foia.uspto.gov/Foia/OEDReadingRoom.jsp.

ORDERED that 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;

ORDERED that the USPTO dissociate Respondent's name from any Customer Numbers and the public key infrastructure ("PKI") certificate associated with those Customer Numbers; and

ORDERED that Respondent shall not apply for a USPTO Customer Number, shall not obtain a USPTO Customer Number, nor shall she have her name added to a USPTO Customer Number, unless and until she is reinstated to practice before the USPTO.

Pursuant to 37 C.F.R. § 11.57(a), review of this 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, in accordance with 35 U.S.C. § 32.

FEB 4 2014

Date

Shira Perlmutter
Chief Policy Officer and Director for
International Affairs
United States Patent and Trademark Office

on behalf of

Michelle Lee
Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office