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

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| **In the Matter of:** | ) | |
| **David C. Plache,** | ) | **Proceeding No. D2014-20** |
| **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 David C. Plache ("Respondent") for three (3) years as reciprocal discipline for violation of 37 C.F.R. § 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 31,189). (Exhibit D, p. 1) (Complaint for Reciprocal Discipline Under 37 C.F.R § 11.24).

By Order dated October 2, 2009, in the *Matter of David C. Plache*, the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, suspended Respondent from the practice of law in the State of New York "for a period of three years, effective April 18, 2008, or until the termination for the term of his probation, whichever first occurs, and until the further order of this Court. . . ." (Exhibit D) (Exhibit A thereto). That Order, finding Respondent guilty of professional misconduct as a result of a guilty plea in connection with a criminal

[1] 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 misconduct 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.

misdemeanor, was based in part on Respondent having filed an answer "admitting material allegations of the Petition." (Exhibit A); (Exhibit D) (Exhibit A thereto, p. 1).

On May 13, 2014, the USPTO Director of the Office and Enrollment and Discipline ("OED Director") served a Complaint for reciprocal discipline on Respondent. (Exhibit D). The OED Director requested that the USPTO Director impose reciprocal discipline on Respondent for violating 37 C.F.R. § 10.23(c)(5) by being suspended on ethical grounds by a duly constituted authority of a State. (Exhibit D, pp. 2-3). The OED Director also filed a Request for Notice and Order Pursuant to 37 C.F.R. § 11.24, asking that the USPTO Director serve a Notice and Order on Respondent. (Exhibit C).

On May 20, 2014, 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 is sufficient to establish a genuine issue of material fact that the imposition of discipline identical to that imposed on October 2, 2009 by the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department in *Matter of David C. Plache*, would be unwarranted" based upon any of the grounds permissible under 37 C.F.R. § 11.24(d)(1). (Exhibit E) ("Notice and Order").

On June 26, 2014, Respondent filed a Response to the Notice and Order. (Exhibit F) ("Response"). Therein, Respondent concedes that "the imposition of the discipline identical to that imposed on October 2, 2009 by the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department in the Matter of David C. Plache, would be warranted. . . ." (Exhibit F, p. 1). However, he avers that a full three year reciprocal suspension would constitute "an additional three year period" as he has voluntarily ceased practice before the USPTO since his October 2, 2009 suspension. (Exhibit F, pp. 1-2). He

argues for a shorter suspension period that would either begin retroactively on December 1, 2013, or that would end on the future date of whenever the New York bar may end his current state suspension. (Exhibit F, p. 3). Additionally, he asserts that New York's October 2, 2009 Order provides a circumstance where the state suspension could be shortened to less than 3 years, and so a reciprocal suspension by USPTO should be shortened.[2] (Exhibit F, p. 2) ("'[R]espondent should be suspended for a period of three years, effective April 18, 2008, or until the termination of the term of his probation, whichever first occurs, and until the further order of this Court.'") (quoting October 2, 2009 Order). Respondent concedes that reciprocal discipline is warranted, though he argues it would be a grave injustice not to allow a retroactive start date of December 1, 2013, or an end date based on whenever New York may lift his ongoing state suspension. (Exhibit F, p. 1). Respondent is currently still under suspension in New York. (Exhibit F, p. 3).

## 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);

[2] As discussed below, however, Respondent currently remains under suspension by New York's October 2, 2009 Order and the total state suspension period now amounts to well over 4.5 years (i.e., far more than 3 years). (Exhibit F, p. 3).

*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 a Reciprocal Three (3)-Year Suspension Would Not Result in a Grave Injustice.

A state disciplinary action creates a federal-level presumption that imposition of reciprocal discipline is proper. *See Sellig, supra.* An attorney respondent may seek to defeat that

presumption by showing by clear and convincing evidence that a "grave injustice" would result under 37 C.F.R. § 11.24(d)(1)(iii). The grave injustice analysis 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). Respondent asserts here that the reciprocal imposition of a 3-year suspension would be a grave injustice, but that assertion lacks legal support and is inconsistent with Respondent's own admissions.

Here, Respondent pled guilty to criminal misconduct, which led to the state suspension for three years. (Exhibit A); (Exhibit B, p. 6); (Exhibit D) (Exhibit A thereto, p. 4). The Order instituting the New York suspension was based in part on Respondent having filed an answer "admitting material allegations of the Petition." (Exhibit D) (Exhibit A thereto, p. 1). Further, Respondent concedes that "the imposition of the discipline identical to that imposed on October 2, 2009 by the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department in the Matter of David C. Plache, would be warranted . . ." (Exhibit F, p. 1).

Respondent's sole argument is that it would be a grave injustice not to shorten the 3-year suspension by starting it retroactively on December 1, 2013 or by ending it on the future date of whenever the New York bar would end his current state suspension. Respondent's argument, however, is unavailing.

First, Respondent claims that he should be given credit because he has not practiced before USPTO since New York's October 2, 2009 Order imposing the three year state suspension.[3] However, voluntary cessation of practice before the USPTO alone has no legal effect on the imposition of reciprocal discipline. While USPTO regulations do allow for reciprocal discipline to be imposed "*nunc pro tunc*" to the date the practitioner voluntarily ceased all activities related to practice before the USPTO, a precondition is that the practitioner has complied with the requirement to give USPTO prompt notice of the state disciplinary action within 30 days. *See* 37 C.F.R. § 11.24(a), (f). Here, Respondent grossly failed to comply with the precondition requirement of 37 C.F.R. § 11.24(a) requiring practitioners to provide prompt notice of the state disciplinary action imposed on Respondent within 30 days. The state discipline was imposed in October 2, 2009, yet Respondent did not provide notice to the USPTO until December 1, 2013, which was over four years late.

Second, Respondent points to a provision in New York's 3-year suspension order that allows New York to reduce the term of the state suspension to less than three years under certain circumstances. That Order states "It is hereby Ordered that [Respondent] . . . be suspended for a period of three years, effective April 18, 2008, or until the termination of the term of his probation, whichever first occurs, *and until the further order of this Court . . .*" (Exhibit D) (Exhibit A thereto, p. 1-2) (emphasis added). Respondent claims that this provision somehow would support an early termination of a federal 3-year suspension as his probation was terminated prior to the expiration of three years. (Exhibit F, p. 2). However, that does not end the matter because a "further order of [the] Court" is still required to end the state suspension–a point overlooked by the Respondent in his argument. In fact, no such order has been issued. As

[3] Respondent has separately admitted to the OED Director that he has not practiced law, including patent law, in nearly two decades for reasons that have nothing to do with his state suspension. (Exhibit B, pp. 1, 3, 7).

Respondent conceded in his Response, New York has continued the state suspension and it has remained in effect for over 4.5 years. (Exhibit F, p. 3).

Respondent claims that a full 3-year reciprocal suspension would be an undue hardship at this point. (Exhibit F, p. 3). However, as already stated, Respondent's four-year delay in notifying the USPTO of his suspension in New York led to a delay in imposing federal reciprocal discipline. *See* 37 C.F.R. § 11.24(a) (practitioner to provide USPTO with notice of any state discipline within 30 days of such discipline.); (Exhibit B, p. 1).

In sum, Respondent has not shown by clear and convincing evidence that imposition of a reciprocal three-year suspension would be a grave injustice. Respondent's claims that the suspension should be limited to a shorter period are unavailing.

ACCORDINGLY, it is:

ORDERED that Respondent is suspended for three (3) years; and

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

**Notice of Suspension**

> This notice concerns David C. Plache of Buffalo, New York, who is a registered patent attorney (Registration Number 31,189). In a reciprocal disciplinary proceeding, the Director of the United States Patent and Trademark Office ("USPTO") has ordered that Mr. Plache be suspended for three years from practice before the USPTO in patent, trademark, and other non-patent matters for violating 37 C.F.R. § 10.23(c)(5), predicated upon being suspended for three years from the practice of law by a duly constituted authority of a State.
>
> On February 4, 2008, Mr. Plache was convicted upon his plea of guilty in the State of New York to a misdemeanor count of endangering the welfare of a child, arising from his conduct toward a patient. Mr. Plache received his license to practice law in 1985 and received his license to practice medicine in 2004. As a result of his misdemeanor plea, Mr. Plache was required to surrender his license to practice medicine and agree to not seek reinstatement of such license.

> The Grievance Committee of the Fourth Judicial Department of the Supreme Court of the State of New York filed a petition alleging acts of misconduct by Mr. Plache. After Mr. Plache filed an answer admitting certain allegations and stipulating to others, Mr. Plache was found to have violated DR 1-102(a)(3) (engaging in illegal conduct that adversely reflects on his honesty, trustworthiness or fitness as a lawyer) and DR 1-102(a)(7) (engaging in conduct that adversely reflects on his fitness as a lawyer).
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> By Order dated October 2, 2009, Mr. Plache was suspended from the practice of law in the State of New York for a period of three years effective April 18, 2008, or until the termination of his probation, whichever comes first, and until the further order of the Court.
>
> 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: 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 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 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.

SEP 24 2014

Date

Sarah Harris
General Counsel
United States Patent and Trademark Office

on behalf of

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