

**UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE ADMINISTRATIVE LAW JUDGE**

In the Matter of:

Alan R. Stewart,

Respondent.

Proceeding No. D2015-35

December 16, 2015

**INITIAL DECISION AND ORDER ON DEFAULT JUDGMENT**

On October 2, 2015, the *Complaint* in this matter was received and assigned to the undersigned for hearing pursuant to 35 U.S.C. § 32 as implemented by 37 C.F.R. Part 11.<sup>1</sup> Respondent's answer to the *Complaint* was therefore due on or before November 2, 2015. The Court did not receive any response by that date. As a result, on December 2, 2015, the OED Director filed a *Motion for Default Judgment and Imposition of Sanctions* (Default Motion) against Respondent.

On December 3, 2015, the Court issued an *Order to Show Cause* ordering Respondent to respond to the *Default Motion* on or before December 14, 2015. To date, Respondent has not responded to the *Complaint* or the *Default Motion*, and has not communicated in any way with the Court. Accordingly, the *Default Motion* will be **GRANTED**.

**PROCEDURAL HISTORY**

The OED Director sent Respondent the *Complaint* via U.S. certified mail on October 1, 2015. On October 5, 2015, the *Complaint* was delivered to Stewart Intellectual Property Law, 46 Brentwood Lane, Appleton, WI 54915, which is Respondent's address of record. The *Complaint* was and signed for by someone at that address. The *Notice of Hearing and Order* was sent to the same address. On November 13, 2015, counsel for the OED Director sent a letter to that address informing Respondent that the response to the *Complaint* was overdue, and that the *Default Motion* would be filed in the near future. All subsequent correspondence with Respondent has also been sent to that address.

USPTO regulations state that a complaint or other papers may be mailed to a respondent at their address of record provided the delivery service allows for confirmation of delivery. 37 C.F.R. § 11.35(a)(2), § 11.42(b)(2). Service by mail is completed when the document is mailed, not when it is received. 37 C.F.R. § 11.42(f).

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<sup>1</sup> Pursuant to an Interagency Agreement in effect beginning March 27, 2013, Administrative Law Judges of the U.S. Department of Housing and Urban Development are authorized to hear cases for the U.S. Patent and Trademark Office.

## DEFAULT

Section 11.36 of Title 37 of the Code of Federal Regulations states that “[f]ailure to timely file an answer will constitute an admission of the allegations in the complaint and may result in default judgment. 37 C.F.R. § 11.36(e). Respondent in this matter has failed to timely submit an answer after being properly served with the *Complaint*. Accordingly, Respondent is deemed to have admitted each of the factual allegations recounted below.

## FINDINGS OF FACT

1. Respondent was registered by the USPTO as a patent attorney on March 19, 2001. His registration number is 47,974.
2. Respondent has been a member of the state bars of Wisconsin, Kentucky, and Minnesota.
3. He is currently administratively suspended from the practice of law in Kentucky and Minnesota for non-payment of dues.
4. Respondent has been suspended from the practice of law in Wisconsin since February 10, 2015.
5. On July 16, 2015, Respondent changed his status before the USPTO from “patent attorney” to “patent agent.”
6. Respondent’s acts and omissions leading to the violations of USPTO disciplinary rules set forth in this Complaint were willful.

### **Misconduct in Connection with the Representation of Faith Wilfley**

7. Respondent undertook the legal representation of Ms. Faith Wilfley on May 1, 2014. Ms. Wilfley hired Respondent to prepare, file, and prosecute a patent application on behalf of Wilfley Investments, LLC.
8. Ms. Wilfley paid Respondent a total of \$8,000.00 in advance for Respondent’s services.
9. On May 1, 2014, Ms. Wilfley gave Respondent a \$4,000 check, made payable to “Stewart IP Law.”
10. Respondent cashed the check the same day and told Ms. Wilfley he would file her application with the USPTO two or three weeks after receiving her paperwork.
11. Ms. Wilfley sent Respondent her notes and drawings on or about May 1, 2014.

12. On May 22, 2014, Ms. Wilfley e-mailed Respondent to ask about the status of her application.
13. Respondent replied to the e-mail on May 27, 2014, and admitted that he had not worked on her application. Respondent attributed the delay to family medical issues and to injuries he had suffered during a bike accident.
14. Respondent's e-mail indicated he would send Ms. Wilfley a draft application within days, but he did not do so.
15. Ms. Wilfley wrote a check on June 24, 2014, for \$4,000, made payable to "Alan Stewart," and mailed it to Respondent.
16. On or about June 30, 2014, Ms. Wilfley left Respondent a voice message inquiring about the status of her patent application.
17. Respondent did not return Ms. Wilfley's message.
18. On July 9, 2014, Ms. Wilfley e-mailed Respondent to inquire about the status of her application. The e-mail asked Respondent to contact Ms. Wilfley within two days, and to return her \$8,000 if he wished to withdraw as her attorney.
19. Respondent did not reply to the July 9, 2014, e-mail.
20. On July 16, 2014, Ms. Wilfley fired Respondent as her attorney and demanded the return of her \$8,000 advance payment.
21. Respondent did not reply to the July 16, 2014, e-mail. The same day, he cashed the \$4,000 check she had mailed on June 24, 2014.
22. Respondent did not prepare, file, or prosecute Ms. Wilfley's patent application. He did not provide any legal services in connection with her application.
23. Respondent did not earn any of the \$8,000 fee paid to him.
24. Respondent did not return Ms. Wilfley's advance payments.

**Misconduct in Connection with Respondent's Unauthorized Practice of Law**

25. Respondent is currently suspended from the practice of law in Wisconsin, and has not been an active member of any state bar since February 10, 2015.
26. USPTO regulations require that trademark matters be handled by a registered attorney, defined as "an individual who is a member in good standing of the highest court of any State."

27. Respondent has not been qualified to handle trademark matters before the USPTO since his suspension on February 10, 2015.
28. On March 16, 2015, Respondent filed Trademark Application Serial Number 86/565,401 (“the ‘401 trademark application’”) on behalf of Little Rapids Corporation.
29. Respondent was listed as the attorney of record on the ‘401 trademark application and signed it as “Attorney of Record, Wisconsin Bar member.”
30. On March 16, 2015, Respondent filed a Response to Office Action in Trademark Application Serial Number 86/034,044 (“the ‘044 trademark application’”) on behalf of Vacuum, Pump & Compressor, Inc.
31. Respondent signed the Response to Office Action as “Attorney of Record, Wisconsin Bar member.”
32. On April 27, 2015, Respondent filed a Petition to Revive Abandoned Application in Trademark Application Serial Number 86/296,673 (“the ‘673 trademark application’”) on behalf of Optimal Digital Marketing, Inc.
33. Respondent signed the Petition to Revive Abandoned Application as “Attorney of Record, Wisconsin Bar member.”
34. On May 18, 2015, Respondent authorized a trademark examining attorney to amend the description of a proposed mark in the ‘673 trademark application.
35. On June 6, 2015, Respondent filed a Petition to Revive Abandoned Application in Trademark Application Serial Number 86/098,167 (“the ‘167 trademark application’”) on behalf of Little Rapids Corporation.
36. Respondent signed the Petition to Revive Abandoned Application as “Attorney of Record, Wisconsin Bar member.”

**Failure to Cooperate with OED**

37. On November 26, 2014, OED mailed Respondent an initial Request for Information (“the first RFI”) seeking information about his representation of Ms. Wilfley.
38. The first RFI asked Respondent to reply on or before December 26, 2014.
39. The first RFI was delivered to Respondent on November 29, 2014, and signed for by Leslie Stewart.
40. Respondent did not respond to the first RFI.

41. On January 16, 2015, OED mailed a letter (“the January Letter”) to Respondent reminding Respondent that he had not responded to the first RFI. The letter included another copy of the first RFI.
42. The January Letter instructed Respondent to reply on or before February 2, 2015.
43. The January Letter was delivered to Respondent on January 20, 2015, and signed for by Respondent.
44. Respondent did not file any response with OED by February 2, 2015, and did not otherwise contact OED.
45. On May 29, 2015, OED mailed another letter (“the May Letter”) to Respondent reminding Respondent that he had not responded to the first RFI or to the January Letter.
46. The May Letter noted Respondent’s suspension from the practice of law in Wisconsin and informed him that OED intended to change his status from “attorney” to “agent.”
47. The May Letter instructed Respondent to reply on or before June 29, 2015.
48. The May Letter was delivered to Respondent on June 1, 2015, and signed for by Respondent.
49. Respondent did not respond to the May Letter.
50. On June 26, 2015, OED mailed a Request for Information (“the second RFI”) to Respondent seeking information about his practice of trademark law after being suspended from the practice of law in Wisconsin.
51. The second RFI instructed Respondent to reply on or before July 13, 2015.
52. The second RFI was delivered to Respondent on June 30, 2015, and signed for by Respondent.
53. Respondent did not respond to the second RFI.
54. On July 14, 2015, OED mailed another letter (“the July Letter”) to Respondent reminding Respondent that he had not responded to the first RFI, the January Letter, the May Letter, or the second RFI.
55. The July Letter instructed Respondent to reply by July 21, 2015.
56. The July Letter was delivered to Respondent on July 17, 2015, and signed for by Respondent.

57. OED changed Respondent's status from "attorney" to "agent" on July 16, 2015.
58. Respondent did not respond to the July Letter.
59. Respondent has not communicated with OED in any way regarding any of his alleged misconduct.

### **CONCLUSIONS OF LAW**

1. Regulation 37 C.F.R. § 11.103 states that a practitioner shall "act with reasonable diligence and promptness in representing a client."
2. Respondent violated 37 C.F.R. § 11.103 by failing to prepare, file, and prosecute Ms. Wilfley's patent application and by failing to respond to her e-mails and requests for status updates.
3. Regulation 37 C.F.R. § 11.116(d) states that a practitioner shall "take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The practitioner may retain papers relating to the client to the extent permitted by other law."
4. Respondent violated 37 C.F.R. § 11.116(d) by refusing to return to Ms. Wilfley the \$8,000 in unearned fees paid in advance.
5. Regulation 37 C.F.R. § 11.804(c) states that a practitioner may not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
6. Respondent violated 37 C.F.R. § 11.804(c) by refusing to return to Ms. Wilfley the \$8,000 in unearned fees paid in advance.
7. Respondent also violated 37 C.F.R. § 11.804(c) by representing himself to the USPTO as the attorney of record in the '401, '044, '673, and '167 trademark applications despite knowing that he was suspended from the practice of law in every jurisdiction in which he is barred.
8. Regulation 37 C.F.R. § 11.505 states that a practitioner shall "not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction."
9. Respondent violated 37 C.F.R. § 11.505 by continuing to practice trademark law before the USPTO despite not being a member in good standing in any state bar.
10. Regulation 37 C.F.R. § 11.801(b) states that a practitioner shall not "fail to cooperate with the Office of Enrollment and Discipline in an investigation of any matter before

it, or knowingly fail to respond to a lawful demand or request for information from an admissions or disciplinary authority.”

11. Respondent violated 37 C.F.R. § 11.801(b) by refusing to respond to either RFI or to three OED letters.
12. Regulation 37 C.F.R. § 11.804(d) states that a practitioner shall not “engage in conduct that is prejudicial to the administration of justice.”
13. Respondent violated 37 C.F.R. § 11.804(d) by refusing to cooperate with OED’s investigation of his alleged misconduct.
14. Regulation 37 C.F.R. § 11.804(i) states that a practitioner shall not “engage in other conduct that adversely reflects on the practitioner’s fitness to practice before the Office.”
15. Respondent did not violate 37 C.F.R. § 11.804(i) because no “other conduct” has been alleged.
16. Regulation 37 C.F.R. § 10.23(b)(4) states that a practitioner shall not “engage in conduct involving dishonesty, fraud, deceit, and misrepresentation.”

### SANCTIONS

The OED Director requests that the Court sanction Respondent by excluding him from practice before the USPTO in patent, trademark, or other non-patent cases or matters. Before sanctioning a practitioner, the Court must consider the following four factors:

- (1) whether the practitioner has violated a duty owed to a client, to the public, to the legal system, or to the profession;
- (2) whether the practitioner acted intentionally, knowingly, or negligently;
- (3) the amount of the actual or potential injury caused by the practitioner’s misconduct; and
- (4) the existence of any aggravating or mitigating factors.

37 C.F.R. § 11.54(b).

1. Respondent Violated his Duties to Ms. Wilfley, the Legal System, and to the Legal Profession.

Respondent accepted payment from Ms. Wilfley and was therefore obligated to perform the agreed-upon legal services on behalf of her company. He did not do so. Moreover, he ignored Ms. Wilfley’s attempts to inquire about the status of her patent application. Respondent

therefore failed to carry out the most fundamental duties owed to a client. This demands a severe sanction.

Respondent also violated his duty to the legal system and the legal profession by continuing to practice trademark law after being suspended by the Wisconsin state bar. He placed his clients' legal interests at risk by representing them when he was not qualified to do so. Additionally, his dishonest actions tarnished the reputation of the legal profession as a whole.

2. Respondent Acted Knowingly and Intentionally.

Respondent has offered no explanation for his actions, and has not participated in the instant proceeding in any way. He has therefore waived the opportunity to contest the USPTO's assertions as to his state of mind. This Court therefore concludes that Respondent's actions and inactions were deliberate. The record provides ample support for this conclusion. Respondent received the communications sent to him from Ms. Wilfley and OED. He simply chose not to respond. He also cashed Ms. Wilfley's check the same day she terminated their attorney-client relationship. Respondent knew that he had not prepared or filed her patent application at that point. He thus also knew he had not earned the fee he collected. Respondent was also aware of his suspended status when he engaged in the practice of trademark law. This factor supports a maximum sanction.

3. Respondent's Misconduct Caused Actual and Potential Injury.

Ms. Wilfley paid Respondent \$8,000, which has not been returned to her. She has thus sustained actual injury. Her company has also sustained potential injury because Respondent's misconduct may have caused the company to lose potentially valuable patent protection. Accordingly, this factor also supports a maximum sanction.

4. Are there any aggravating or mitigating factors?

The Court routinely looks to the American Bar Association Standards for Imposing Lawyer Sanctions ("ABA Standards") when assessing attorney disciplinary sanctions. See In re Chae, D2013-01 (USPTO Oct. 21, 2013). A review of the record reveals the presence of several aggravating factors and no mitigating factors.

First, Respondent acted with a dishonest and selfish motive by refusing to return Ms. Wilfley's advance payments. He was aware he had not performed any of the work for which he had been paid. He therefore knew he was not entitled to those payments. His failure to return the payments after being specifically asked to do so can only be attributed to greed.

Second, Respondent has utterly failed to acknowledge his own misconduct and has not made any attempt to rectify the damage he has caused. To date, he still has not returned Ms. Wilfley's payment. There is no indication that Respondent recognizes the wrongful nature of his conduct. Nor is there any reason to believe he will refrain from such conduct in the future.



Third, Respondent has engaged in a “pattern of misconduct” by repeatedly refusing to respond to queries, either by Ms. Wilfley or OED. Respondent ignored a voice message and two e-mails left by Ms. Wilfley. He also ignored two RFIs and three letters sent by OED.

The OED Director also contends that Respondent has deliberately obstructed the disciplinary proceeding, which is also considered to be an aggravating factor. However, the conduct that the OED Director bases this on is the same conduct that violated 37 C.F.R. § 11.801(b) and (d). Respondent’s conduct would thus aggravate itself. This would not be a just result.

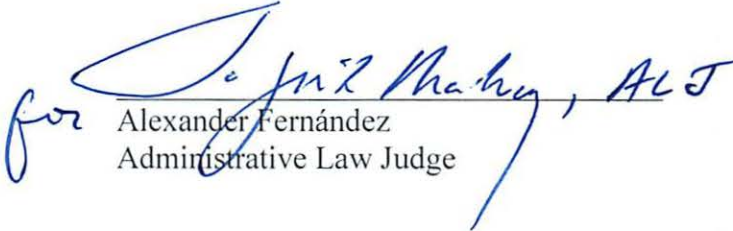
With respect to mitigating factors, the burden is on Respondent to raise any affirmative defenses or mitigating circumstances and specify their nexus to the misconduct, and any reason they may provide a defense or mitigation. 13 C.F.R. § 11.36(c) and 11.49. By failing to appear and defend this matter, Respondent failed to meet that burden. Accordingly, the existence of aggravating factors in the absence of mitigating factors supports a maximum sanction.

### ORDER

On the basis of Respondent’s deemed admissions, and after an analysis of all four enumerated factors, this Court concludes that Respondent’s misconduct warrants the penalty of exclusion. Accordingly, the *Default Motion* is **GRANTED**.

**IT IS HEREBY ORDERED** that Respondent Alan R. Stewart, PTO Registration No. 47,974, be **EXCLUDED** from practice before the U.S. Patent and Trademark Office.

So **ORDERED**.

  
for Alexander Fernández  
Administrative Law Judge

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **INITIAL DECISION AND ORDER ON DEFAULT JUDGMENT**, issued by Alexander Fernández, Administrative Law Judge, in D2015-35, were sent to the following parties on this 16th day of December, 2015, in the manner indicated:

  
Cinthia Matos, Docket Clerk

### VIA FIRST CLASS MAIL:

Alan R. Stewart  
Stewart Intellectual Property Law  
46 Brentwood Lane  
Appleton, WI 54915

### VIA FIRST CLASS MAIL AND E-MAIL:

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