

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

In the Matter of:

**JERRY L. HEFNER,**

Respondent.

Proceeding Nos. D2016-21  
D2015-36

March 23, 2017

**INITIAL DECISION AND ORDER ON DEFAULT JUDGMENT**

On December 5, 2016, the Director for the Office of Enrollment and Discipline (OED Director) for the United States Patent and Trademark Office (USPTO or Office) filed a *Motion for Default Judgment and Imposition of Sanctions* (Default Motion) against Jerry L. Hefner (Respondent).<sup>1</sup> By *Order to Show Cause*, dated December 22, 2016, the Court ordered Respondent to respond to the *Default Motion* on or before January 13, 2017.

**Procedural History**

On December 15, 2015, the USPTO Director sent Respondent a *Notice and Order* pursuant to 37 C.F.R. § 11.25, notifying him that the OED Director was requesting that the USPTO Director impose an interim suspension. The request was based on allegations that, on June 13, 2014, Respondent had been convicted, in California, of possession of a controlled substance and of carrying a loaded firearm and arguing that these offenses constituted violations of the USPTO Rules of Professional Conduct (Rules) justifying an interim suspension.

On December 22, 2015, the OED Director forwarded a copy of the *Notice and Order, Request for Notice, Order, Interim Suspension, and Referral for Further Proceedings Pursuant to 37 C.F.R. § 11.25*, and the *Disciplinary Complaint* (D2015-36) via certified mail to Respondent at the address he provided pursuant to 37 C.F.R. § 11.11, and to addresses where the OED Director reasonably believed Respondent received mail. On January 19, 2016, Respondent filed a *Response* to the *Notice and Order* with PTO. He argued that his violation of California law should not be treated as a felony, but rather a misdemeanor, and should not constitute a serious crime. In support of his argument, Respondent noted that on November 4, 2014, ballot initiative Proposition 47 was passed in California, allowing individuals convicted of certain drug possession crimes, including those that constitute a violation of California Health & Safety Code § 11377(a), to petition the court for resentencing of the crime as a misdemeanor. Respondent further alleged that, on January 14, 2016, he filed with the Superior Court of California, County of Kern, a *Petition* under Proposition 47 for reduction of the violation to a misdemeanor and for

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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.

appropriate resentencing. He also alleged that a hearing on his *Petition* had been scheduled for February 25, 2016.

On March 30, 2016, the USPTO Director issued an *Order* directing Respondent to file an *Amended Response* to the *Notice and Order* that addressed the outcome of the February 25, 2016, hearing on his *Petition*. A copy of the USPTO Director's *Order* was sent via certified mail to the address on file under 37 C.F.R. § 11.1(a), and an address that Respondent had previously used to send and receive mail. Respondent never filed his *Amended Response*.

On June 21, 2016, while the D2015-36 case was in process, the USPTO Director sent Respondent another *Notice and Order* notifying him that the OED Director had filed a request that the USPTO Director impose an interim suspension upon Respondent. The request for suspension alleged that Respondent had been convicted of possession of methamphetamine in the State of Illinois, and argued that this constituted a "serious crime" for purposes of USPTO Rules and justified the interim suspension. 37 C.F.R. § 11.25. A *Request for Notice, Order, Interim Suspension, and Referral for Further Proceedings* and a *Disciplinary Complaint* (D2016-21), were attached to the *Notice and Order*. On July 12, 2016, the *Notice and Order* and attachments were sent to the addresses where the OED Director reasonably believed Respondent received mail and was received and signed for by Ms. Jeannette Rocky at 35046 Oak Way, Julian, CA 92024.

On August 11, 2016, the USPTO Director entered a *Final Order* suspending Respondent from practice before the USPTO on an interim basis, pursuant to 35 U.S.C. § 32 and 37 C.F.R. §§ 11.25 and 11.59. A copy of the *Final Order* was mailed via first class certified mail, return receipt requested, to Respondent to the address provided to the OED Director and to where the OED Director reasonably believed Respondent received mail. On September 22, 2016, the USPTO Director referred the *Disciplinary Complaint* (D2016-21) to this Court for the purpose of conducting a formal disciplinary proceeding pursuant to 37 C.F.R. § 11.25(b)(5).

On September 27, 2016, this Court issued a *Notice of Hearing and Order* which was mailed via first class certified mail, return receipt requested, to Respondent to the address provided to the OED Director and to where the OED Director reasonably believed Respondent received mail. An *Answer* to the *Complaint* was due within 30 days of the date of the *Final Order*, on or before September 11, 2016. The Respondent did not file an *Answer* to the *Disciplinary Complaint*.

On September 29, 2016, counsel for the OED Director sent Respondent a letter by certified mail to the address provided to the OED Director and to where the OED Director reasonably believed Respondent received mail. That letter informed Respondent that no *Answer* to the *Complaint* had been received. Pursuant to 37 C.F.R. § 11.43, the letter further informed Respondent that counsel for the OED Director intended to file a *Motion for Default Judgment and Imposition of Disciplinary Sanction* and invited Respondent to contact her prior to the *Motion* being filed so that they could discuss the possibility of resolving the *Motion* voluntarily. Respondent did not contact counsel.

On November 29, 2016, the Court granted the OED Director's November 22, 2016 *Motion to Consolidate* finding that the cases (D2015-36 and D2016-21) involved common

questions of law and fact and that consolidation would avoid unnecessary costs and promote judicial harmony. *Order Granting Motion To Consolidate*.

As of the date of this *Initial Decision and Order*, Respondent has not filed an *Answer to Complaint* D2016-21, contacted counsel for the OED Director, or responded to the *Order to Show Cause*.

### **Consequences of Failure to Answer Complaint**

The USPTO Rules include a requirement for responding to the *Complaint* and the consequences for not doing so. "Failure to timely file an answer will constitute an admission of the allegations in the complaint and may result in entry of default judgment." 37 C.F.R. § 11.36(e). As a result of Respondent's failure to answer the *Complaint*, Respondent is deemed to have admitted the allegations in the *Complaint* which are set forth below as the Court's findings of fact. See also In re Riley, D2013-04 (USPTO July 9, 2013) (granting Director's Motion for Default Judgment when respondent failed to answer the complaint).

### **Findings of Fact**

Respondent was registered as a patent attorney by the USPTO in January 2003 and assigned registration number 53,009.

Respondent was admitted to the practice of law in the State of California on December 4, 2001. (State Bar of California, <http://members.calbar.ca.gov/fal/Member/Detail/216385>).

On June 23, 2013, Respondent was arrested for violating California Health & Safety Code § 11377(a) (Possession of a Controlled Substance), a felony, and California Penal Code § 25850(a) (Carrying a Loaded Firearm), a misdemeanor.

On May 26, 2014, Respondent committed the offense of Possession of Methamphetamine, a Class 2 Felony in Henry County, Illinois, and knowingly possessed more than 5 grams but less than 15 grams of a substance containing methamphetamine, a controlled substance.

On June 13, 2014, Respondent pled *Nolo Contendere* to violating California Health & Safety Code § 11377(a) (Possession of a Controlled Substance), a felony, and California Penal Code § 25850(a) (Carrying a Loaded Firearm), a misdemeanor.

Respondent was convicted of one count of violating California Health & Safety Code § 11377(a) (Possession of a Controlled Substance) and one count of violating California Penal Code § 25850(a) (Carrying a Loaded Firearm).

On September 9, 2015, Respondent was found guilty of Possession of Methamphetamine, a Class 2 Felony in Henry County, Illinois, pursuant to 720 ILCS 646/60(a) and (b)(2).

### **Conclusions of Law**

Based upon the foregoing findings of fact and as discussed herein, the Court concludes that Respondent violated the USPTO Rules of Professional Conduct.

1. The USPTO Rules, at 37 C.F.R. § 11.804(b), proscribe conduct involving a criminal act or acts that reflect adversely on the practitioner's honesty, trustworthiness, or fitness as a practitioner. Respondent was convicted of criminal acts, illegal possession of controlled substances and carrying a concealed weapon, that reflect adversely on practitioner's honesty, trustworthiness, and fitness in violation of 37 C.F.R. § 11.804(b). *Chaganti v. Lee*, 187 F.Supp.3d 682 (E.D. Vir. 2016) (If a registered PTO attorney fails to comply with his professional obligations, the PTO has the authority to suspend or exclude the practitioner from further practice before the PTO. 35 U.S.C. § 32 and 37 C.F.R. § 11.19. Pursuant to this authority, the PTO has identified various grounds for discipline under 37 C.F.R. § 11.19, 11.24, and 11.804. See *U.S. v. Friedland*, 502 F.Supp. 611 (D. N.J. 1980) (court's policy of summarily suspending members of its bar on the basis of a felony conviction, even though the conviction has not been finalized by completion of the appellate process, is constitutional) and *In re Jones*, 506 F.2d 527 (8th Cir. 1974) (disbarment may be premised upon felony conviction).
2. The USPTO Rules, at 37 C.F.R. § 11.804(d), proscribe conduct that is prejudicial to the administration of justice. Respondent failed to respond to correspondence from OED and to *Orders* from this Court. Respondent's conduct undermines the public's confidence in the profession's ability to regulate itself and is prejudicial to the administration of justice in violation of 37 C.F.R. § 11.801(d). An attorney who fails to even defend himself in these disciplinary proceedings cannot be expected to properly represent the interests of others before the USPTO.

### Sanctions

Having found Respondent violated the USPTO Rules of Professional Conduct, the Court must determine an appropriate sanction. Before sanctioning a practitioner, the Court must consider the following four factors:

- (1) Whether the practitioner has violated a duty owed to 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 the Legal System and Legal Profession**

Respondent violated his duty to the legal system and the legal profession by engaging in illegal, dangerous and inappropriate behavior. As an attorney, he was an officer of the Court and obligated to uphold the laws, not violate them. He placed his potential clients' legal interests at risk by removing himself as viable counsel for them. He has not responded to orders of this Court, showing a blatant disregard for the legal system. Additionally, his conduct and felony convictions tarnish the reputation of the legal profession as a whole.

### **2. Respondent Acted Knowingly and Intentionally**

Respondent has offered no explanation for his actions since his January 10, 2016, response to OED's Order. In his initial response, he acknowledged his actions regarding the California convictions. Since that time, he has not participated in the instant proceedings in any way. The record provides ample support for this conclusion. Communications were sent to Respondent at the location he provided to OED. It seems he has simply chosen not to respond. This Court therefore concludes that Respondent's actions and inactions were deliberate.

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

Although no specific injury has been alleged related to his convictions, Respondent's driving while in the illegal possession of methamphetamine and a loaded firearm and subsequent conviction is certainly behavior that increases the likelihood of potential injury to himself and others. Accordingly, this factor also supports the requested sanction.

### **4. Aggravating Factors and No 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 has utterly failed to address his own misconduct and has not made any attempt to explain his convictions or accept responsibility. Other than his initial argument that the California convictions should be treated as misdemeanors, 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.

Second, Respondent has engaged in a "pattern of misconduct" by way of similar convictions for illegal possession of controlled substances and has repeatedly failed to respond to correspondence from OED and orders from this Court.

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

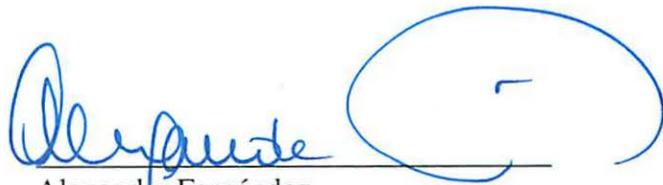
and defend in this matter, Respondent failed to meet that burden. Accordingly, the existence of aggravating factors and the absence of mitigating factors warrants the maximum sanction.

**Conclusion**

Respondent has failed to answer the correspondence and allegations from USPTO, failed to respond to the *Order to Show Cause* or otherwise appear in this matter. Respondent is found in **DEFAULT**. On the basis of the facts heretofore admitted, the Court finds Respondent has violated the USPTO Rules of Professional Conduct, as alleged. 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. Based upon the foregoing analysis of all four enumerated factors, the Court concludes that Respondent's misconduct warrants exclusion.

Accordingly, Respondent shall be **EXCLUDED** from practice before the U.S. Patent and Trademark Office in patent, trademark, and other non-patent matters.

So **ORDERED**,

  
Alexander Fernández  
Administrative Law Judge