N0. 19-1471

United States Court of Appeals For The Federal Circuit

LOUIS A. PICCONE,

Petitioner – Appellant,

v.

UNITED STATES PATENT AND TRADEMARK OFFICE, TEN UNKNOWN U.S. PATENT AND TRADEMARK OFFICE EMPLOYEES, ET. AL.

Respondents -Appellees.

On Appeal from The United States District Court
For the Eastern District of Virginia
In Case No. 1:18-cv-00307, Judge Leonie M. Brinkema

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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STATEMENT UNDER FEDERAL RULE OF APPELLATE PROCEDURE 35(b) AND FEDERAL CIRCUIT LOCAL RULE 35(b)

The Panel Decision conflicts with multiple case holdings of the United States Supreme Court that represent binding precedent which, **if followed, would exonerate Mr. Piccone of <u>any</u> misconduct**[1]. Consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions as follows:

The Panel Decision finding that the USPTO OED Director may violate federal law and delegate his signature authority conflicts with *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954) that holds that an Agency must comply with it's own regulations;

This Court's Panel decision erroneously holds that *U.S. v. Telecom Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir 2004) supercedes Supreme Court precedent including *Cudahy Packing Co. of Louisiana v. Holland*, 315 U.S. 357, 62 S.Ct. 651, 86 L.Ed. 895 (1942);

The Supreme Court's holding in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247, 248 (2010) that U.S. law only applies within it's territorial limits was ignored by the Panel Decision;

The Panel's decision that USPTO attorneys may avoid regulations requiring the disclosure of material exculpatory evidence conflicts with *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954);

The Panel Decision also conflicts with 200 years of American Law, including, *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) that requires every significant legal wrong has a legal remedy.

[1] Every issue in this brief has been more fully developed and briefed in previously filed documents. The reader is encouraged to review those other filings for significantly more detail on any given issue.

ARGUMENT

I. An En Banc Court Should Review The Erroneous Panel Decision Holding That USPTO Employees Have Presumptive Authority To Violate Federal Statute And Regulations

By holding that mid-level executive branch USPTO employees have the presumptive authority to willfully violate federal regulation and statute, this Court's November 20, 2019, panel decision ("Panel Decision") overturns the body of the US patent laws, as unenforceable. In it's own wisdom and judgement the USPTO enacted 37 C.F.R. § 11.34(5), requiring the OED Director to personally sign disciplinary complaints[2], and, the U.S. Congress passed 35 U.S.C. § 26 with the clear intent of requiring the USPTO to comply with it's own regulatory signature requirements. By waiving these legal requirements, the Panel Decision invites chaos by begging questions such:1) may all 15,000 USPTO patent examiner employees presumptively disobey statutory signature requirements? and, 2) What effect will defective signatures have on the millions of documents filed with the USPTO if the regulations and statutes governing USPTO conduct are ignored? Denying Mr. Piccone written and oral discovery on these issues compounds the problem and creates the appearance, however mistaken, that the USPTO is hiding the extent and consequences of this illegal and unethical conduct by it's attorneys.

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[2] See also, 37 C.F.R. §1.4, § 2.193, and, § 11.18.

The Panel Decision avoids the clear solution that the federal courts have effectively used to stop this problem in it's tracks by holding such illegal actions ultra vires and letting the public pursue appropriate remedies against the offending government entities. See, *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992).

II. Mr. Piccone Did Not Engage In Unauthorized Practice In Massachusetts

Mr. Piccone admittedly prepared complaints for filing by three (3) pro se litigants in the U.S. District Court for the District of Massachusetts ("USDCMA"). The Panel Decision first correctly notes that Mr. Piccone was never admitted pro hac vice to practice before the USDCMA, but then inaccurately finds that Mr. Piccone somehow "represented" three pro se litigants Babeau, Hohn and Doe before that Court[3]. Using these mistaken facts, the Panel then decided that Mr. Piccone could not have been aiding pro se litigants for purposes of benefiting from the safe harbor provisions of Massachusetts Rule of Professional Conduct 5.5, because Mr. Piccone was actually illegally representing these litigants. The Panel's entirely new finding, never before raised in the record in this case, is contrary to the following undisputed facts in this case: 1) each of Babeu (2799), Hohn (A2478), and, Doe (A2556), identified themselves as Pro Se on each of three complaints at issue in compliance with Local Rule 83.5.2(b) of the USDC District

[3] See, panel Decision page 9.

of Massachusetts (See, A2494); 2) the District Court found each of Babeu, Hohn and Doe to be pro se litigants unrepresented by counsel (for Doe, see, A2561, for Hohn and Babeu see, *Pease v. Burns et al.*, 679 F.Supp., 2d 161 (2010)); 3) the District Court and State rules do not allow an out of state attorney to represent clients unless they are admitted pro hac vice (See, *Pease v. Burns et al.*, 679 F.Supp., 2d 161 (2010)); 4) Mr. Piccone's unopposed testimony that he was not representing them and that he could **not** represent them unless he was admitted pro hac vice (A5705); and, 5) the USPTO charged Mr. Piccone with preparing the subject complaints initiating the litigation, and **never**, alleged that Mr. Piccone was "representing" any of these litigants (See, A217-A241).

The Panel Decision errs by making the entirely new charge that Mr. Piccone was somehow "representing" these litigants using false information, completely unsupported by the record, that Babeu, Hohn and Doe, were somehow not pro se litigants, to erroneously obviate Mr. Piccone's justified reliance upon the authority conferred by Rule 5.5 as a defense to the unauthorized practice of law. By changing the nature of the charges against Mr. Piccone, the Panel denied Mr. Piccone the notice and opportunity to defend against these new allegations before the Panel issued it's decision, raising the same due process violations the Supreme Court condemned in, *In re Ruffalo*, 390 U.S. 544 (1968).

All charges related to Babeu, Hohn, and, Doe, as being dependent on and arising from the unauthorized practice charges, are baseless as a matter of law. In view of it's applicability to the bulk of the charges against Mr. Piccone, the District Court's failure to even mention Rule 5.5[4] in that Court's decision, is clear legal error requiring reversal.

III. Whether Actions Taking Place Outside the Territorial Boundaries of the United States Are Subject To Disciplinary Enforcement of USPTO Ethical Standards.

Under a consistent line of Supreme Court caselaw, Mr. Piccone's actions in Canada cannot violate any USPTO ethics rule because U.S. law, and specifically U.S. Patent Law (See, *Brown v. Duchesne*, 60 U.S. 183, 195 (1856), is only applicable within the territorial boundaries of the United States. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), *Foley Bros., Inc. V. Filardo*, 336 U.S. 281, 285 (1949), and, *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247, 248 (2010). Mr. Piccone asserted this defense to each action he took from outside the borders of the United States. Contrary to the findings made, other than Mr. Piccone's confidential communications with private individuals, he had no other involvement with those administrative or Court matters, and any filing, and any conduct of administrative or judicial proceedings taking place in the

[4] Mr. Piccone argued actual innocence under 2 different provisions of Rule 5.5, but because of space limitations is unable to fully brief that second defense here. Mr. Piccone continues to assert his innocence of the charged misconduct under that second defense.

United States was done entirely by the pro se parties themselves. The Panel Decision erred by failing to evaluate, comment upon, or, decide a defense completely exonerating Mr. Piccone from many of the allegations against him.

Neither the panel decision, nor any lower tribunal has evaluated this issue from the necessary context that, if Mr. Piccone's actions, or inactions, in preparing documents of a legal nature abroad is illegal under USPTO regulation, then the correspondence, affidavits, filings and other documents routinely prepared by foreign lawyers communicating directions for patent and trademark prosecution matters in before the U.S. on a daily basis, are also illegal. Such a finding would shut down the International community's prosecution of patent and trademark matters in the United States.

IV. Mr. Piccone Was Authorized To Practice Trademark Law By 37 C.F.R. § 11.14(e)

The Panels affirmance of the USPTO misinterpretation of 37 C.F.R. § 11.14(e) constitutes legal and factual error that renders the regulation unconstitutionally vague and ineffective to notice the public of what constitutes illegal behavior before the USPTO. The **undisputed** facts are that at the time Mr. Piccone prepared the subject response to office action regarding the Lawless America Association (the "Association") Trademark matter, Mr. Piccone was an

officer of that not for profit political organization, authorized to act on it's behalf in trademark matters under 37 C.F.R. § 11.14(e).

This regulation contains no application procedure or pre-qualifying screening done before granting the authority to "appear". A personal, corporate or Associational pro se trademark applicant (collectively called "pro se trademark applicant" hereafter) is automatically granted all authority necessary to "appear" to file and prosecute a trademark application including all pre-filing legal work to obtain trademark protection. If this were not so, then every pro se trademark applicant would be guilty of the unauthorized practice of law, a crime in most states, for their pre-filing activities. Similarly, if the regulation did not authorize the preparation of a response to office action under the definition of "appear" then every pro se trademark application could also be prosecuted for their post filing preparation of documents. Any interpretation of this regulation not automatically granting authority to prepare documents **in anticipation of** submission to the USPTO would render the regulation useless for it's intended purpose.

Pursuant to any interpretation of 37 C.F.R. § 11.14, the same action of preparing a response to an Office Action, by an Officer of an Association ("Officer") who is indisputedly authorized to sign and file it with the USPTO, falls into any reasonable definition of **both** "practice" and "appear" . As such the regulation must provide a pro se trademark application authorization to both

"practice" and "appear" **on behalf of the themselves**. Moreover, the regulation must authorize an Officer to prepare trademark prosecution documents **in anticipation of** filing them with the USPTO, because otherwise a pro se trademark applicant could not do the document preparation necessary to accomplish the purpose of the regulation – an absurd result contrary to the rules of statutory construction. See, *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 260-61 (D.C. Cir. 2005). Indeed, as an officer, Mr. Piccone was authorized to both prepare and/or to sign and file the subject Trademark Application with the USPTO, and had he signed and filed the response, instead of Mr. Windsor, he was completely authorized to do so.

The USPTO's tortured misinterpretation would also render the regulation unconstitutionally vague, as failing to explicitly and definitely state what conduct is punishable. See, *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). For example, the regulation as interpreted by the USPTO and the Panel, only allows a pro se trademark applicant to "appear" at USPTO office to speak with USPTO personal, and not engage in the "practice" of trademark law preparing the documents necessary to file and prosecute the trademark application.

The Panel's finding that there was no evidence that Mr. Piccone was appearing as a member of Lawless rather than practicing as an attorney on behalf

of the organization is immaterial because § 11.14 has no requirement that the signing Officer state he is not acting as an attorney.

As his second defense, Mr. Piccone noted that all of his charged actions regarding this trademark application took place in Canada, where the Supreme Court has already found that the body of U.S. patent laws, including 37 C.F.R. Part 11, do not apply, and are not enforceable[5]. Mr. Piccone's good faith should be apparent from his previous request for an advisory opinion that his actions, while abroad, would not be misconduct while on suspension from the Pennsylvania bar (A4528-29).

V. USPTO Regulation 37 C.F.R. § 11.52 Regarding Discovery In Contested Disciplinary Cases Unconstitutionally Narrows the Scope of 35 U.S.C. § 24

Mr. Piccone challenges the Panel Decision's application *Abbott Labs v. Cordis Corp.*, 710 F.3d 1318[6], to both testimony and document discovery as misconstruing the plain meaning of 35 U.S.C. § 24, because the statute quarantees practitioner's engaged in contested disciplinary hearings, in which their liberty interest in pursuing their chosen profession is at risk, the due process protections afforded by the discovery provisions of the Federal Rules of Civil Procedure. The USPTO exceeded it's authority by narrowing the scope of federal statute by

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5 See next section of this brief.

6 The analysis in all known cases on this issue is limited to the due process protections afforded before the government interferes with property interests in a patent as opposed to the more important liberty interests a practitioner has in a chosen profession.

enacting 37 C.F.R. § 11.52 creating a presumption against any discovery, and, in those cases where approved, discovery is always restricted to exclude material otherwise allowed by the Fed.R.Civ.P. When conducting the required analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976) of what procedures are required to satisfy the dictates of due process in contested cases before the USPTO, Congress provides the answer through 35 U.S.C. § 24, that document discovery be conducted under the Fed.R.Civ.P.

The combination of a presumption against discovery together with the USPTO affirmatively arguing that it's attorneys have no obligation under USPTO regulations or Virginia law (as collectively detailed in previous briefing), requiring the disclosure of material exculpatory evidence[7], creates a real due process problem requiring resolution by a hearing before this Court en banc.

VI. The EPA ALJ Hearing This Case Did Not Have Subject Matter Jurisdiction

The Panel Decision dismissed Mr. Piccone's well argued subject matter jurisdiction defense without analysis or comment, even though the same issue arises in every disciplinary case because the USPTO has ignored federal statutory law and it's own regulations. This court must address jurisdictional

[7] To be clear Mr. Piccone is respectfully and specifically requesting this Court's en banc review to include an analysis of whether USPTO regulations require USPTO attorneys to disclose material exculpatory evidence as previously fully briefed, as well as all other appellate issues originally raised.

issues, even sua sponte, whenever those issues come to the court's attention, whether raised by a party or not, and even if the parties affirmatively urge the court to exercise jurisdiction over the case. *Sebelius v. Auburn Regional Med. Ctr.*, 568 U.S. 145, 153 (2013). This issue should be heard en banc, because Chief EPA ALJ Susan Biro was appointed as an ALJ in 1996[8], and was not appointed by the USPTO Director, as required by the 2011 changes to 35 U.S.C. § 32, and, the 2008 enactment of 37 C.F.R. § 11.39(a).

Moreover, when read in light of the 10th Amendment to the Constitution, the USPTO's authority under 35 U.S.C. § 32, does not extend to the investigation and prosecution of state misconduct in the first instance, in order to find misconduct under USPTO Disciplinary Rules. See, *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1873). In this case, the USPTO erroneously investigated, charged and convicted Mr. Piccone of violations of state law prohibiting the unauthorized practice of state law, as a predicate for prosecuting Mr. Piccone for violating 37 C.F.R. § 11.505. For example, the Constitution does not expressly delegate the function of regulating attorneys to the federal government, and the 10th amendment requires that such responsibility remain with the various states. As the USPTO did not have subject matter jurisdiction, all charges against Mr. Piccone should be dropped.

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[8] See, https://www.epa.gov/aboutepa/epas-administrative-law-judges.

VII. Mr. Piccone's Bivens Claims And Declaratory Judgement Actions Should be Heard

The Panel Decision errs by dismissing Mr. Piccone's Bivens' and Declaratory Judgment claims without comment or analysis. Nothing in 35 U.S.C. § 32, or, the USDC EDVA's Local Rules, limits the kind of review a finally disciplined practitioner may seek, so long as that review is sought in that Court. The USPTO interpretation of 35 U.S.C. § 32, as providing "the exclusive remedy", and, that no remedies to disciplinary defendants under the APA[9], the Declaratory Judgement Act[10], *Bivens* claims[11], or any other manner of appropriate federal claim, exist, is contradicted by the statutory and caselaw authority cited in the record (for example, footnotes 84 and 85 in Appellants, March 20, 2019, brief) circumscribing any USPTO desire to operate unhindered by federal law and without the supervision of the Courts and/or Congress.

IX. 37 C.F.R. § 11.505 Requires Activity "In" Any Given Jurisdiction In Order To Find Misconduct

The plain meaning of 37 C.F.R. § 11.505 prohibition against a practitioner practicing law ". . . **in** a jurisdiction in violation of the regulation of the legal profession **in that jurisdiction**" (emphasis added) requires an attorney to take

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9 See, *Dickinson v. Zurko*, 527 U.S. 150 (1999).

10 See, 28 U.S.C. 2201;*Abbott Labs v. Gardner*, 387 U.S. 136, 154 (1967) *MedImmune v. Genentech*, 549 U.S. 118 (2007); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 325 (1936).

11 See, *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) and *Goldstein v. Moatz et al.*, 364 F.3d 205 (2004).

action in the subject jurisdiction such that Mr. Piccone cannot have committed any misconduct in the Hankins (Illinois) or Nunley (Iowa) matters. For example, Mr. Piccone never traveled to Illinois and had all communications with the subject pro se litigant at her home in Missouri. Without having taken any actions **"in"** Illinois Mr. Piccone cannot have engaged in unauthorized practice **"in"** that jurisdiction.

IX. CONCLUSION

For all these reasons, this Court should reverse the panel's decision in all regards and return this matter to the agency for the immediate lifting of Mr. Piccone's suspension.

ORAL ARGUMENT IS REQUESTED

Respectfully submitted,

Electronically signed,
/S/ Louis A. Piccone

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief for Louis A. Piccone complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e). The brief contains 2,982 words, excluding the parts of the brief exempted by Federal Circuit Rule 32(b) and Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), as measured by the word processing software used to prepare this brief.

I further certify that the foregoing Brief For Louis A. Piccone complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font.

Respectfully Submitted,

Electronically signed,
/S/ Louis A. Piccone

_____
Louis A. Piccone

CERTIFICATE OF SERVICE

This document was sent via email (Kimere.Kimball@usdoj.gov) to and regular mail postage pre-paid to Kimere Kimball, the AUSA representing the USPTO on this 11th day of January 2020.

Electronically signed,
/s/ Louis A. Piccone

_____
Louis A. Piccone

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

LOUIS A. PICCONE,
Petitioner-Appellant

v.

UNITED STATES PATENT AND TRADEMARK OFFICE,
Respondent-Appellee

TEN UNKNOWN U.S. PATENT AND TRADEMARK OFFICE EMPLOYEES,
Respondent

2019-1471

Appeal from the United States District Court for the Eastern District of Virginia in No. 1:18-cv-00307-LMB-IDD, Judge Leonie M. Brinkema.

Decided: November 20, 2019

LOUIS A. PICCONE, Hawkesbury, Ontario, Canada, pro se.

KIMERE JANE KIMBALL, Office of the United States Attorney for the Eastern District of Virginia, Alexandria, VA,

for respondent-appellee. Also represented by G. ZACHARY TERWILLIGER.

Before LOURIE, MOORE, and CHEN, *Circuit Judges.*

PER CURIAM.

Louis Piccone appeals a decision of the United States District Court for the Eastern District of Virginia dismissing his petition for review of the final decision of the Director of the United States Patent and Trademark Office (PTO) suspending Mr. Piccone from practice before the PTO for three years. *See Piccone v. United States Patent & Trademark Office*, No. 18-CV-00307, 2018 WL 5929631 (E.D. Va. Nov. 13, 2018). Because the PTO's decision to suspend Mr. Piccone was not arbitrary, capricious or an abuse of discretion, or otherwise not in accordance with law, we *affirm*.

BACKGROUND

Mr. Piccone is an attorney admitted to the Pennsylvania bar. In 1997, he registered as an attorney authorized to practice before the PTO.

Between 2007 and 2014, Mr. Piccone's Pennsylvania bar license was thrice suspended: September 1, 2011 to October 11, 2011, for failure to comply with continuing legal education requirements (CLE); October 19, 2012 to December 21, 2012, for failing to pay bar membership fees; and September 20, 2013 to August 13, 2014, again for failure to comply with CLE requirements. During that time, Mr. Piccone also received repeated censures for his formal and informal participation in non-Pennsylvania cases. *See, e.g.*, *Doe v. Briggs*, 945 F. Supp. 2d 210 (D. Mass. 2013); *Katz v. McVeigh*, No. 10-CV-410, 2012 WL 1379647 (D.N.H. Apr. 20, 2012); *Pease v. Burns*, 679 F. Supp. 2d 161 (D. Mass. 2010); *Nolan v. Primagency, Inc.*, No. 07-CV-134, 2008 WL 1758644 (S.D.N.Y. Apr. 16, 2008); *Nolan v. Primagency,*

Inc., No. 07-CV-134, 2008 WL 650387 (S.D.N.Y. Mar. 3, 2008). The actions leading to those censures fall into three broad categories of conduct: (1) unauthorized practice of law, (2) failure to adhere to *pro hac vice* admission standards, and (3) neglecting client matters.

On December 11, 2013, the PTO became aware of Mr. Piccone's misconduct when the executive director of the Massachusetts Board of Bar Examiners called and emailed the PTO Office of Enrollment and Discipline (OED) regarding the impact of Mr. Piccone's suspension from practice in Pennsylvania on his license to practice before the PTO. After some independent searching, OED identified the many decisions discussing Mr. Piccone's conduct, leading to an OED investigation.

On December 10, 2014, OED issued a nine-count complaint alleging misconduct by Mr. Piccone. J.A. 317–41. In addition to Mr. Piccone's behavior in U.S. district courts, the complaint identified that Mr. Piccone acted as an attorney in a matter before the PTO while his Pennsylvania bar license was suspended. After a two-day hearing, an Administrative Law Judge found against Mr. Piccone on eight of the nine counts and recommended a three-year suspension from practicing before the PTO. *See* J.A. 248–316. Mr. Piccone sought review from the Director, who affirmed. *See* J.A. 626–61. The Director declined Mr. Piccone's request for reconsideration. Mr. Piccone then filed a petition for review in the Eastern District of Virginia, which was dismissed. *Piccone*, 2018 WL 5929631, at *7.

Mr. Piccone now appeals to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1). *See also Sheinbein v. Dudas*, 465 F.3d 493, 494–95 (Fed. Cir. 2006).

DISCUSSION

The PTO has authority to establish regulations that "govern the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties

before the Office." 35 U.S.C. § 2(b)(2)(D). As relevant here, it has exercised this authority by enacting the Code of Professional Responsibility, 37 C.F.R. §§ 10.20 *et seq.* (2004), which governed attorney conduct up to May 3, 2013, and the Rules of Professional Conduct, 37 C.F.R. §§ 11.101 *et seq.*, which govern attorney conduct thereafter. When a registered practitioner does not comply with his professional obligations, the PTO can suspend or exclude him from practicing before the Office after notice and opportunity for a hearing. 35 U.S.C. § 32; 37 C.F.R. § 11.20.

The Administrative Procedure Act (APA) governs district court review of disciplinary action taken by the PTO. *Bender v. Dudas*, 490 F.3d 1361, 1365–66 (Fed. Cir. 2007). Pursuant to the APA, a decision is upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. We review a district court's decision on a petition for review of a PTO disciplinary decision de novo, applying the same standard applied by the district court. *See Sheinbein*, 465 F.3d at 495. Mr. Piccone raises numerous procedural and substantive challenges to the PTO disciplinary proceeding. As detailed below, Mr. Piccone's arguments fail.

1. The Institution of Disciplinary Proceedings

Mr. Piccone argues that the disciplinary action against him was not properly authorized because Deputy OED Director William Griffin signed the Complaint initiating the action rather than OED Director William Covey. Appellant's Br. 18–22. The controlling regulation provides that the signature of the OED Director is a required component of a disciplinary complaint. 37 C.F.R. § 11.34(a)(5) ("A complaint instituting a disciplinary proceeding shall . . . [b]e signed by the OED Director."). It is, however, well established that delegation of duties is presumptively permissible. *See Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1031–32 (Fed. Cir. 2016); *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004). Both Director

Covey and Deputy Director Griffin signed sworn statements, declaring that Director Covey delegated the authority to commence proceedings against Mr. Piccone to Deputy Director Griffin. J.A. 342–45. Mr. Piccone provides no evidence to the contrary and makes no argument as to why the presumption of permissible delegation should not apply in this instance. Accordingly, Deputy Director Griffin was within his power to institute disciplinary proceedings against Mr. Piccone.

2. Statute of Limitations

Mr. Piccone argues that the PTO failed to commence the disciplinary proceedings within the applicable statute of limitations. Appellant's Br. 40–41. A disciplinary proceeding:

> shall be commenced not later than the earlier of either the date that is 10 years after the date on which the misconduct forming the basis for the proceeding occurred, or 1 year after the date on which the misconduct forming the basis for the proceeding is made known to an officer or employee of the Office as prescribed in the regulations established under section 2(b)(2)(D).

35 U.S.C. § 32. The relevant regulation provides, "[a] complaint shall be filed within one year after the date on which the OED Director receives a grievance forming the basis of the complaint." 37 C.F.R. § 11.34(d). A "grievance" is defined as "a written submission from any source received by the OED Director that presents possible grounds for discipline of a specified practitioner." *Id.* § 11.1.

The statute of limitations is an affirmative defense that Mr. Piccone bore the burden of establishing by clear and convincing evidence before the PTO. 37 C.F.R. § 11.49. The PTO determined that he failed to meet that burden, and determined that the complaint was brought within the limitations period. Now, on appeal, Mr. Piccone must show

that the PTO's determination was arbitrary or capricious. He does not meet this burden. OED learned of Mr. Piccone's misconduct on December 11, 2013, when the Massachusetts Board of Bar Examiners called and emailed OED to check whether his licensure was impacted by a suspension in Pennsylvania. J.A. 601–02. Within one year, on December 10, 2014, OED filed a complaint commencing a disciplinary proceeding. Mr. Piccone has identified no evidence to the contrary.

Mr. Piccone further argues that the PTO had constructive notice of his misconduct when his Pennsylvania bar license was suspended because the Pennsylvania Supreme Court published notices of his suspensions in 2011 and 2012. Appellant's Br. 40. The one-year limitations period runs from the date misconduct "is made known to an officer or employee of the Office as prescribed in the regulations," which state that the relevant date is "the date on which the OED Director receives a grievance." 35 U.S.C. § 32; 37 C.F.R. § 11.34(d). Under this framework, contrary to Mr. Piccone's position, constructive notice is not enough. Thus, the PTO's determination that the disciplinary complaint was brought within the statute of limitations was not arbitrary, capricious, or otherwise not in accordance with law.

3. The ALJ's Discovery Decisions

Mr. Piccone argues that the ALJ's discovery decisions denied him due process. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Mr. Piccone argues that this requirement was not met because (1) OED attorneys were required to produce exculpatory evidence but failed to do so, (2) he was entitled to full discovery as part of the administrative proceeding but did not receive it, and (3) his reasonable requests to the ALJ for discovery were denied.

Appellant's Br. 22–31. Mr. Piccone has not demonstrated a violation of due process.

First, Mr. Piccone's argument that OED denied him due process by failing to produce exculpatory evidence is baseless. Mr. Piccone does not identify any evidence withheld by the PTO in the disciplinary proceeding—he merely speculates about types of documents that, should they exist, might help his case. Appellant's Reply Br. 17–18. Where, as here, there is no reason to believe OED failed to disclose exculpatory evidence, there is no basis for questioning the propriety of its procedure.

Second, there is no right to the full scope of discovery permitted under the Federal Rules of Civil Procedure in a PTO disciplinary action. Mr. Piccone's reliance on 35 U.S.C. § 24 as establishing such a right is misplaced. Section 24, relating to witnesses and subpoenas, states, "[t]he provisions of the Federal Rules of Civil Procedure relating to the attendance of witnesses and to the production of documents and things shall apply to contested cases in the Patent and Trademark Office." 35 U.S.C. § 24. But it is well established that Section 24 relates only to the handling of witnesses and does not afford a party any right to discovery beyond what is allowed by PTO discovery rules. *Abbott Labs. v. Cordis Corp.*, 710 F.3d 1318, 1325–26 (Fed. Cir. 2013).

Third, the record reflects that Mr. Piccone was given much of the discovery he requested once he complied with the ALJ's scheduling order and PTO regulations. The ALJ authorized written discovery requests to OED and allowed Mr. Piccone to depose the executive director of the Massachusetts Board of Bar Examiners. Mr. Piccone's argument that he was denied all "reasonable attempts" at discovery is, thus, unsupported. We find no due process violation in the disciplinary proceeding.

4. Unauthorized Practice of Law Before the PTO

Mr. Piccone argues that the PTO's conclusion that he engaged in unauthorized practice of law in a trademark matter ignored his status as a director of the organization involved therein. The PTO's decision finding that Mr. Piccone was an attorney representing the organization, as opposed to a member of the organization, was not arbitrary or capricious.

The PTO found that Mr. Piccone violated the prohibition against unauthorized practice of law, as set out in 37 C.F.R. § 11.505, when he prepared a Response to Office Action on Behalf of Lawless America Association (Lawless) during the prosecution of a trademark application. J.A. 650–52. On February 12, 2014, while Mr. Piccone's Pennsylvania bar license was suspended, he sent a draft of the Response to the President of Lawless, who submitted it to the PTO. At that time, Mr. Piccone remained the attorney of record.

Mr. Piccone argues that his activity in the Lawless trademark matter was permissible because he was a director of the organization. Appellant's Br. 42–46. The governing regulations provide that only attorneys may *practice* before the PTO in trademark matters but allow officers of an organization a right to appear in trademark matters. 37 C.F.R. § 11.14. The PTO found that there was no evidence that Mr. Piccone was appearing as a member of Lawless rather than practicing as an attorney on behalf of the organization. Mr. Piccone signed documents filed with the PTO as the attorney of record and the President of Lawless acted as the corporate officer by signing the February 12 Response. Thus, we find that the PTO's conclusion that Mr. Piccone was practicing law, in contravention of 37 C.F.R. § 11.505, was not arbitrary or capricious.

5. Unauthorized Practice of Law in Massachusetts

The PTO found against Mr. Piccone on three counts of misconduct due to his repeated failure to seek admission *pro hac vice* in Massachusetts. Mr. Piccone argues that the PTO's decision was factually and legally flawed. Appellant's Br. 31–34. He argues that he was protected by a safe harbor provision in Massachusetts Rule of Professional Conduct 5.5(c)(2) that allows attorneys to practice pending admission *pro hac vice*. The safe harbor applies if the attorney "reasonably expects to be . . . authorized" to practice *pro hac vice* in the future. Mass. Rules Prof'l Conduct r. 5.5(c)(2). But Mr. Piccone never sought *pro hac vice* admission in the Massachusetts actions, indicating he lacked the reasonable belief of future admission necessary to qualify for the safe harbor.

Mr. Piccone also argues that under Massachusetts Rule of Professional Conduct 5.5(c)(2) he is allowed to assist any "person . . . authorized by law" to appear in a proceeding, including a *pro se* individual. While a *pro se* individual is authorized to appear before a court, a person is no longer *pro se* once he is represented by an attorney. A represented person is *not* individually authorized to appear before a court. Thus, Mr. Piccone's argument that he was merely assisting a person authorized to appear before the court, where the PTO found Mr. Piccone was acting as an attorney for the plaintiffs in the Massachusetts cases, fails. The PTO's decision related to Mr. Piccone's unauthorized practice of law in Massachusetts was not arbitrary, capricious, or otherwise not in accordance with law.

CONCLUSION

We have considered Mr. Piccone's remaining arguments but find them unpersuasive. For the foregoing reasons, we *affirm* the district court's dismissal of Mr. Piccone's challenge to his suspension.

AFFIRMED

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January 11, 2020

Peter R. Marksteiner
Clerk of Court
Court of Appeals For The Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: Appeal No.: 19-1471
Piccone v. USPTO, et. al.

Dear Mr. Marksteiner,

Enclosed please find Appellant's Petition For Panel Rehearing And Rehearing En Banc. I note that Local Rule 35.1 indicates additional copies of this brief are only necessary if the brief is over 50 pages. Additional copies can be provided on request.

If you have any questions on this matter, do not hesitate to contact me.

Sincerely,
Electronically signed
/s/ Louis A. Piccone
Louis A. Piccone

FedEx Express *International Air Waybill*

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18 ☐ Direct Signature — Someone at recipient's address may sign for delivery.
34 ☐ Indirect Signature — If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential deliveries only.

7 Payment Complete payment options for both transportation charges and duties and taxes.
Bill transportation charges to:
☑ Sender Acct. No. in Section 1 will be billed. 2 ☐ Recipient 3 ☐ Third Party 4 ☐ Credit Card 5 ☑ Cash/Cheque
Enter FedEx Acct. No. or Credit Card No. below.
PAYÉ LE JAN. ...
FedEx Acct. No. [redacted]
Credit Card Exp. Date Credit Card Auth.
Bill Customs charges to:
1 ☐ Sender Acct. No. in Section 1 will be billed. Enter FedEx Acct. No. below. 2 ☐ Recipient 3 ☐ Third Party 5 ☐ Cash/Cheque
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8 Required Signature
Use of this Air Waybill constitutes your agreement to the Conditions of Contract on the back of this Air Waybill, and you represent that this shipment does not contain dangerous goods. Certain international treaties, including the Warsaw or Montreal Convention, may apply to this shipment and limit our liability for damage, loss, or delay, as described in the Conditions of Contract.

Sender's Signature [signature]

Received above shipment in good order and condition. We agree to pay all charges, including Customs duties and taxes as applicable, and we agree to the Conditions of Contract as stated on the reverse side of the Recipient's Copy.

660

Recipient's Signature

Origin Station ID	Country Code/Destination Station ID	URSA Routing	Handling Mode
YMXA	BZSA	XC	Total Volume (cm³)

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Forms Attached: ☐ CI ☐ CO
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