18-8745 ORIGINAL

N0. 19-_____

In The

Supreme Court Of The United States

In Re LOUIS A. PICCONE,

Petitioner – Appellant,
v.

SUPREME COURT OF PENNSYLVANIA

Respondents - Appellees.

On Appeal From The Supreme Court of Pennsylvania
In Case No. 2499 Disciplinary Docket No. 3

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

The United States Patent and Trademark Office ("USPTO") has enacted regulations, including 37 C.F.R. § 11.52, abolishing discovery under the Federal Rules of Civil Procedure guaranteed by 35 U.S.C. § 24, in contested disciplinary cases. The discovery rights of this statute have been held to insure ". . . that the fundamental elements of **procedural and substantive due process** will be accorded to parties to [contested cases]", *In re Natta*, 388 F.2d 215 (3d Cir. 1968).

After proceedings, conducted in flagrant violation of other federal law, in which Mr. Piccone was denied necessary documents and testimony from USPTO employees and former clients with which to defend against charges of misconduct, the USPTO suspended Mr. Piccone's registration to practice for three (3) years. The Pennsylvania Supreme Court then initiated reciprocal discipline and suspended Mr. Piccone's state license based upon the flawed USPTO action.

When underlying USPTO disciplinary proceedings are conducted according to regulations which abolish both 35 U.S.C. § 24's mandated discovery under the Federal Rules of Civil Procedure, and, the statute's attendant due process protections, does Mr. Piccone's Pennsylvania reciprocal suspension, based upon the USPTO action, violate the principles of *Selling v. Radford*, 243 U.S. 46 (1917), and, it's Pennsylvania equivalent, Pa.R.D.E. 216(c)(1) – (c)(3)?

LIST OF PARTIES

Petitioner Louis A. Piccone, and, the Supreme Court of Pennsylvania are the only parties to this action.

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Appendix A: December 14, 2018, Decision of Pennsylvania Supreme Court Suspending Mr. Piccone's State License To Practice Law.

Appendix B: November 13, 2018, Decision of United States District Court for the Eastern District of Virginia ("USDC EDVA") Reviewing United States Patent and Trademark Office ("USPTO") Decision Suspending Mr. Piccone's Registration To Practice Before the USPTO.

Appendix C: December 22, 2008, Decision of the Commonwealth of Massachusetts, District Court Department of the Trial Court, Pittsfield District Court, Docket No. 0827CR215, dated December 22, 2008, in Commonwealth v. Piccone, dismissing all pending charges without trial.

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authority

JURISDICTION

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the December 14, 2018, judgment of the Supreme Court of Pennsylvania, suspending his State license to practice law.

OPINIONS BELOW

On December 14, 2018, The Supreme Court of Pennsylvania reciprocally suspended Mr. Piccone's license to practice law for a period of three (3) years without any written opinion, based upon a February 18, 2018, suspension issued by the United States Patent and Trademark Office. A copy of the suspension order is attached as Appendix A. Also, attached as Appendix B is a copy of the USDC EDVA decision reviewing the USPTO's final decision.

JURISDICTION

The Supreme Court of Pennsylvania entered an order suspending Mr. Piccone's license to practice law in that Commonwealth on December 14, 2018. The Court has jurisdiction under 28 U.S.C. §1254(2)(a).

STATUTES AND POLICIES AT ISSUE

35 U.S.C. § 24 SUBPOENAS, WITNESSES.

The clerk of any United States court for the district wherein testimony is to be taken for use in any contested case in the Patent and Trademark Office, shall, upon the application of any party thereto, issue a subpoena for any witness residing or being within such district, commanding him to appear and testify before an officer in such district authorized to take depositions and affidavits, at the time and place stated in the subpoena. The 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.

37 C.F.R. § 11.52 Discovery.

Discovery shall not be authorized except as follows:

(a) After an answer is filed under § 11.36 and when a party establishes that discovery is reasonable and relevant, the hearing officer, under such conditions as he or she deems appropriate, may order an opposing party to:

(1) Answer a reasonable number of written requests for admission or interrogatories;

(2) Produce for inspection and copying a reasonable number of documents; and

(3) Produce for inspection a reasonable number of things other than documents.

(b) Discovery shall not be authorized under paragraph (a) of this section of any matter which:

(1) Will be used by another party solely for impeachment;

(2) Is not available to the party under 35 U.S.C. 122;

(3) Relates to any other disciplinary proceeding;

(4) Relates to experts except as the hearing officer may require under paragraph (e) of this section;

(5) Is privileged; or

(6) Relates to mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party.

(c) The hearing officer may deny discovery requested under paragraph (a) of this section if the discovery sought:

(1) Will unduly delay the disciplinary proceeding;

(2) Will place an undue burden on the party required to produce the discovery sought; or

(3) Consists of information that is available:

(i) Generally to the public;

(ii) Equally to the parties; or

(iii) To the party seeking the discovery through another source.

(d) Prior to authorizing discovery under paragraph (a) of this section, the hearing officer shall require the party seeking discovery to file a motion (§ 11.43) and explain in detail, for each request made, how the discovery sought is reasonable and relevant to an issue actually raised in the complaint or the answer.

(e) The hearing officer may require parties to file and serve, prior to any hearing, a pre-hearing statement that contains:

(1) A list (together with a copy) of all proposed exhibits to be used in connection with a party's case-in-chief;

(2) A list of proposed witnesses;

(3) As to each proposed expert witness:

(i) An identification of the field in which the individual will be qualified as an expert;

(ii) A statement as to the subject matter on which the expert is expected to testify; and

(iii) A statement of the substance of the facts and opinions to which the expert is expected to testify;

(4) Copies of memoranda reflecting respondent's own statements to administrative representatives.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

Shortly after Attorney Louis Piccone's prevailed against false charges brought by Massachusetts Child Protective Services ("CPS")[1] his case was featured in a front page article in a prominent legal publication, and indigent parents, without the training, experience, or, resources to represent themselves, began to contact him to request legal help. Out of a profound sense of anger at the intentional mistreatment of he, and his family and pursuant to his ethical obligations to "seek improvement of the law", help provide "equal access to our legal system", and, to "reform the law"[2], Mr. Piccone sought correction of the CPS system through, for example, federal civil rights actions under 42 U.S.C. § 1983 et seq. These lawsuits sought, among other things, to raise the low "some credible evidence" or "reasonable cause to believe" evidentiary standards currently used by 48 of the 50 states[3] to remove custody of children from their parents', to the "probable cause" required by the 4th amendment to the U.S. Constitution[4]. In

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1 All charges against Mr. Piccone, and his wife, were dismissed as baseless and as retaliation for Mr. Piccone refusing to allow interviews of his children unless the interviews were video-recorded. See, Appendix C.

2 See, Preamble to Pennsylvania Rules of Professional Responsibility.

3 See for example, 119 M.G.L. § 24.

4 "[T]he Fourth Amendment applies in the context of the seizure of a child by a government-agency official during a civil child-abuse or maltreatment investigation." *Kia P. v. McIntyre*, 235 F.3d 749, 762 (2d Cir.2000). For example, under federal law there is, no social worker exception to the strictures of the Fourth Amendment. See e.g., *Roska v. Peterson*, 304 F.3d 982, 989 (10th Cir.2002) (warrantless no-knock entry violated Fourth Amendment absent

addition, Mr. Piccone engaged in protected speech[5] by appearing on radio shows and participating in the leadership of not-for-profit political organizations petitioning government, and organizing grass roots protest, to what appears to be a grossly unconstitutional system for the removal and destruction of American children in the foster care system[6].

After expending his, and his families' savings in 2008, contesting the CPS charges against him, Mr. Piccone changed the mix of cases in his practice to include cases securing the return of children to their parents and, bring, or, aid in bringing, civil rights lawsuits against CPS agencies in approximately, 11 different states, without having any salary or regular income. Mr. Piccone proceeded on the good will of others, and, those sums he made from doing contract legal work. Despite drafting "sophisticated"[7] complaints, being clearly authorized by statute to

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exigency of imminent danger to child's welfare); *Calabretta v. Floyd*, 189 F.3d 808, 816 (9th Cir.1999).

5 Freedom of expression is protected by the 1st Amendment in the United States and by Section 2 of the Canadian Charter of Rights and Freedoms.

6 Of all children in foster care, 66% will be homeless, go to jail, or, die within one year of aging out of the foster care system when they turn 18. "Statistics Suggest Bleak Futures For Children Who Grow Up In Foster Care", Amarillo Globe-News, By BRITTANY NUNN, Sunday, Posted Jun 24, 2012 at 9:29 PM. Moreover, most of the children taken into foster care are removed in error due to the low evidentiary standard used [6], with there being an error rate of between 75% (*Valmonte v. Bane*, 18 F.3d 992 (2nd Cir. 1994)) and 92% (See, "Child Abuse: Guilty Until Proven Innocent or Legalized Governmental Child Abuse" by Karen Radko, available at http://www.ipt-forensics.com/journal/volume5/j5_2_6.htm) in adjudications using those low evidentiary standards. This means something like 1/2 of the children in foster care will have a very poor life outcome, **and**, will have been removed from their parents by mistake.

7 This is the term the USDC DMA has used to describe Mr. Piccone's 42 U.S.C. § 1983 Complaints.

aid pro se litigants[8], and having clear Supreme Court, or, Court of Appeals authority, supporting the legal causes pursued, Mr. Piccone was repeatedly unjustifiably accused of violating disciplinary rules for helping pro se litigants in what are **highly** unpopular causes. Even if there is absolutely no evidence of abuse or neglect, the mere fact of allegations, no matter how baseless, are sufficient to isolate the accused.

With little or no funds to proceed, Mr. Piccone was administratively suspended from practice by Pennsylvania bar authorities from September 1 to October 19, 2011, for failure to comply with CLE requirements because he could not afford the costs of taking the necessary classwork. Mr. Piccone was again administratively suspended from October 19, 2012 to December 21, 2012, for similar reasons again related to his financial circumstances. Then again, Mr. Piccone was administratively suspended a third time from September 30, 2013, to August 13, 2014, for not having sufficient funds to pay required fees to maintain his license. Attorneys at various bar authorities were legally and ethically obligated

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[8] The bulk of the charges against Mr. Piccone are for the unauthorized practice of law. Mr. Piccone believes all of his actions aiding pro se litigants were authorized by, for example, Massachusetts Rules of Professional Conduct, Rule 5.5(c), which provides safe harbor because a Pennsylvania "lawyer. . . may provide legal services. . . in this jurisdiction [Massachusetts] that are in . . . a . . . potential proceeding . . . if . . . **a person the lawyer is assisting**, is authorized by law . . . to appear in such proceeding". As pro se litigants are authorized to appear in federal district Courts to represent themselves by 28 U.S.C. § 1654, Mr. Piccone's actions in preparing complaints for filing in a District Court, were authorized by law. The USPTO, Supreme Court of Pennsylvania, and, USDC EDVA have all concluded that the plain meaning of the phrase "a person the lawyer is assisting" is limited to just attorneys, and, excludes pro se litigants.

to notify[9] the USPTO of both the 2011 and 2012 administrative suspensions in the same manner that the USPTO was notified of Mr. Piccone's 2013 suspension. Such notice would have triggered the USPTO's 1 year statute of limitations in 35 U.S.C. § 32, for alleged misconduct, in 2011, and in 2012, in the same manner that this statute of limitations was triggered in 2013. The legal presumption that government employees act in accordance with governing law, (See, *United States v. Chemical Found, Inc.*, 272 U.S. 1, 14-15 (1926)), created the rebuttable presumption that Mr. Piccone had a statute of limitations defense, in addition to his other defenses, to most if not all misconduct. By operation of law, these previous suspensions, and notifications or communications regarding, should have placed the USPTO on notice of Mr. Piccone's 2011, and, 2012, suspensions so as to act as grievances triggering the 1 year statute of limitations to bar most, if not all, of the misconduct charges against Mr. Piccone.

After receiving a communication advising of Mr. Piccone's 2013 administrative suspension, the USPTO began an investigation into Mr. Piccone's actions regarding aiding pro se litigants involved in CPS proceedings and his political activities petitioning government and organizing popular protest seeking change to State CPS laws. In 2014, the USPTO filed a disciplinary complaint

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[9] See for example, Pennsylvania Rules of Professional Responsibility, Rule 8.3, titled "Reporting Professional Misconduct".

which was unauthorized under USPTO regulations[10] which was first heard by an Administrative Law Judge ("ALJ") from the Environmental Protection Agency ("EPA") not having subject matter jurisdiction to hear such causes[11]. During his disciplinary proceedings before an EPA ALJ, Mr. Piccone submitted two separate motions for permission to serve requests for production of documents under the Federal Rules of Civil Procedure pursuant to 35 U.S.C. § 24 which made relatively ordinary "form" requests for documents that would likely contain material information regarding Mr. Piccone's defense's, including communications that would have triggered a statute of limitations bar in 2011 and/or 2012. Mr. Piccone also made several different requests for authorization from both the ALJ, and the USPTO, seeking subpoena's for witnesses to testify to Mr. Piccone's defenses. Both of these discovery requests were denied, although in the weeks before Mr. Piccone's trial, he was allowed to conduct a single deposition of a third party who didn't work for the USPTO, and propound a single interrogatory effectively written by the ALJ. Pursuant to 35 U.S.C. § 24, Mr. Piccone also applied for, and

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[10] The Complaint was not signed by the only USPTO employee authorized to execute such documents under 37 C.F.R. § 11.34, and in violation of the prohibition against delegating such signatory responsibility in 37 C.F.R. § 11.18, and 35 U.S.C. § 26.

[11] 35 U.S.C. § 32 and 37 C.F.R. § 11.39(a) both require an ALJ appointed by the Director of the USPTO hear USPTO disciplinary cases. Yet, Chief Environmental Protection Agency Administrative Law Judge ("EPA-ALJ") Susan Biro, who heard Mr. Piccone's case, was appointed as an ALJ in 1996, before the passage of 35 U.S.C. § 32 in 2011 or the enactment of 37 C.F.R. § 11.39(a) in 2008. Quite simply the EPA, in general, and, ALJ Biro specifically, did not, have subject matter jurisdiction to hear Mr. Piccone's disciplinary proceedings.

received, subpoena's from the USDC EDVA and the USDC DDC which he served on the USPTO employees involved. The USPTO declined to comply with any of the subpoenas. All of Mr. Piccone's attempts to obtain reasonable and relevant discovery, about, for example, how the OED Director applies the confusing one (1) year statute of limitations contained in 35 U.S.C. § 32, as interpreted by the OED Director differently in Mr. Piccone's proceedings[12] and other circumstances.

B. The USPTO Proceedings

The U.S. Patent and Trademark Office ("USPTO") Office of Enrollment and Discipline ("OED") Director filed a disciplinary complaint on December 10, 2014, initiating what became a contested case before the USPTO once Mr. Piccone filed his answer on February 9, 2015. A two (2) day hearing was held on October 13, and October 14, 2015, after which the presiding Environmental Protection Agency ("EPA") Administrative Law Judge, ("ALJ") issued a June 16, 2016, preliminary decision. Mr. Piccone appealed that decision to the USPTO Director, who issued a final agency action on May 25, 2017, for which reconsideration was requested on June 14, 2017, and denied on February 9, 2018. A petition for review by the U.S.

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[12] Compare the OED Director's original interpretation of the 1 year period discussed in 77 FR 45249 (1 year from the date on which the OED Director "receives from the practitioner a complete written response to a request for information and evidence") with that enacted in 37 C.F.R. § 11.34 (". . . one year after the date on which the OED Director receives a grievance forming the basis of the complaint").

District Court for the Eastern District of Virginia ("USDC EDVA") was filed on March 18, 2018, and denied in it's entirety on November 13, 2018. Those proceedings are currently on appeal to the Court of Appeals for the Federal Circuit.

C. The Pennsylvania Reciprocal Discipline Proceedings

The Pennsylvania Supreme Court initiated reciprocal disciplinary proceedings by serving a June 29, 2018, Order to Show Cause why reciprocal discipline should not be issued in response to the USPTO suspension. After full briefing the Pennsylvania Supreme Court suspended Mr. Piccone's State license to practice law for a period of three (3) years. During the Pennsylvania proceedings, Mr. Piccone's request for a subpoena to put the USPTO statute of limitations issue to rest was denied.

REASONS FOR GRANTING THE PETITION

Review Is Warranted Because An Executive Branch Agency Has Used It's Regulatory Power To Abolish Important Due Process Rights Established In A Federal Statute Enacted By Congress.

The Plain Meaning of 35 U.S.C. § 24 Requires That Mr. Piccone Be Afforded Document Discovery Under The Federal Rules of Civil Procedure

The ALJ's denial, in toto, of both Mr. Piccone's first request for production of documents, dated, March 12, 2015, and, his subsequent renewed request for

production of documents dated April 24, 2015, violated the literal meaning, and purpose, of 35 U.S.C. § 24.

The meaning of 35 U.S.C. § 24 is plain on it's face, and is expressed by, including *In re Natta*, 388 F.2d 215 (3d Cir. 1968), as:

> [t]his statute **manifests a clear congressional intent** to make available to parties to [contested cases] the broad discovery provisions of the Federal Rules of Civil Procedure . . . **This approach insures that the fundamental elements of procedural and substantive due process will be accorded to parties to [contested cases].** (emphasis added, bracketed material added][13]

Later caselaw has not disputed that the purpose of the statute is to give those parties in contested cases "broad discovery", instead defining the issue as being whether the statutory language compels a conclusion that Congress meant to allow discovery in district courts independent of control by the USPTO tribunal hearing the contested case. See, *Brown v. Braddick*, 595 F.2d 961 (5th Cir. 1979). But the current PTO regulations now create a presumption against discovery, with § 11.52 stating "[d]iscovery **shall not** be authorized except as follows . . .)[14], and then setting forth a significant list of undiscoverable material beyond the discretion of

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[13] This intent is also manifested by the APA, 5 U.S.C. § 556(d), stating: "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts".

[14] The mandatory language in this regulation seemingly means, discovery as authorized under 35 U.S.C. § 24 is not authorized, making the USPTO regulation contrary to law.

the presiding ALJ[15] to change. The material excluded from discovery is either discoverable, or may be discoverable, under the Federal Rules of Civil Procedure, within the discretion of a presiding District Court Judge. The Federal Circuit Court's decision in *Abbott labs v. Cordis Corp.*, 710 F.3d 1318 (Fed. Cir. 2013) lead the District Court in this case to hold that § 24 "only empowers a district Court to issue subpoenas for use in a proceeding before the PTO if the PTO's **regulations** authorize parties to take depositions for use in that proceeding" and "[d]oes not incorporate the Federal Rules wholesale or entitle Piccone to 'discovery beyond that permitted by [PTO] discovery **rules** and **rules** of admissibility'". The District Court made the same error as the USPTO regulations - - by doing away with a statute passed by Congress. The plain meaning of 35 U.S.C. § 24 gives practitioner's in contested cases the procedural and/or substantive benefits of the Federal Rules of Civil Procedure, under older cases, without USPTO supervision, or under the newer cases, with USPTO supervision. But quite simply, the USPTO has regulated away any use of the Federal Rules of Civil Procedure, an important due process safeguard in disciplinary and other contested cases[16], in a manner contrary to law. Instead the American public and a targeted practitioner gets the narrowly drawn discovery in rule § 11.52, drafted by

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[15] The EPA ALJ's hearing USPTO disciplinary cases are not authorized to act contrary to regulation or decide the legality thereof.

[16] See, Footnote 21.

the OED Director[17], substituted for the well thought out, and, substantially litigated, Federal Rules of Civil Procedure, prepared by the reputable and diverse, Judicial Conference of the United States. Moreover, 35 U.S.C. § 24 is no longer a measure of the due process rights which Congress bestowed upon the American public to protect property rights in patent matters, or, liberty interests in a practitioner's chosen profession. The USPTO's actions no longer allow for facile examination of what process is due for procedural due process in disciplinary proceedings[18] under a *Matthews v. Eldridge*, 424 U.S. 319 (1976) analysis which compliance with 35 U.S.C. § 24 allows.

USPTO rulemaking has also lead to confusion as to what the plain meaning of the statute is in the context of the different types of contested cases held at the USPTO[19]. The same plain language of 35 U.S.C. § 24 has been used to create substantially different discovery rights for patent interference matters and

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[17] The OED Director and a small group of USPTO employees is largely responsible for the current iteration of the USPTO disciplinary rules. This is not to say they were not enacted after public comment, however small that comment may have been. There has been, and likely will not ever be, the type of review or litigation of the FRCP that fine tunes and optimizes discovery rules to serve all vested party's interests in the optimal balance of truth seeking tools.

[18] The crux of Mr. Piccone's request for this appellate review of this issue is that all prior cases evaluating 35 U.S.C. § 24 appear to involve mere property interest's stemming from patents in the course of patent interference matters, and not the liberty interests involved in disciplinary "contested cases".

[19] Section 24 subpoenas are explicitly permitted in two other types of PTO proceedings, as well: trademark proceedings and disciplinary proceedings. *See* 37 C.F.R. §§ 2.120(3)(b), (j)(2), 11.38. Both types of proceedings allow the use of depositions. *See* 37 C.F.R. §§ 11.50 –.51, 2.123 –.124. Another type of proceeding, public use proceedings, follows the rules governing the use of testimony in interferences, including the use of depositions. *See*37 C.F.R. § 1.292; MPEP § 720.04 (8th ed. Rev. 9, Aug. 2012).

disciplinary matters, contrary to the statute requiring that the Federal Rules of Civil Procedure "shall" apply to both[20]. The ALJ denied Mr. Piccone any document discovery whatsoever under 35 U.S.C. § 24, a situation that Mr. Piccone submits constitutes a denial of his due process rights under the facts of his disciplinary proceedings, in which he has was unable to conduct reasonable discovery. The ALJ denied Mr. Piccone the ability, available under the Federal Rules of Civil Procedure, to call witnesses whose factual circumstances were employed against him, and, to support defenses which by operation of law should have barred the majority of charges against him. Mr. Piccone was also denied exculpatory information with the USPTO denying any obligation, including under it's own regulations, to provide, for example, basic statute of limitations information for the sake of a fair hearing in front of a U.S. agency.

The ALJ's Denial Of Subpoena Power Under 35 U.S.C. § 24 Amounted To A Denial Of Due Process

The ALJ's complete denial of Mr. Piccone's March 12, and April 24, 2015, discovery motions, including the ability to subpoena witness, denied Mr. Piccone due process of law.

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[20] Compare 37 C.F.R. § 11.52 for discovery in Disciplinary cases, with, 37 C.F.R. § 41.150 for discovery in interference contested cases[20].

The USPTO has a four tier system of actions required for obtaining subpoena's that prevents and/or impedes a practitioner's ability to obtain discovery under 35 U.S.C. § 24 in a manner which denies a practitioner due process of law. First. A practitioner in a disciplinary proceeding, must obtain permission from the ALJ by filing a motion under 37 C.F.R. § 11.52 justifying that the subpoenaed material as material and relevant, against a presumption that no discovery is allowed. If the ALJ grants consent to issue a subpoena, then permission must be solicited from OGC under so-called *Touhy*[21] requirements contained in 37 C.F.R. 104.21 et seq. If the OGC responds (in Mr. Piccone's case, the OGC apparently lost Mr. Piccone's March 2015, Touhy request, never acted on same, and, Mr. Piccone had to file a second *Touhy* request shortly before his trial, which was denied). The practitioner must then obtain a subpoena issued by a U.S. District Court. For disciplinary trials held at an EPA Courthouse in Washington, DC, subpoena's issued by the USDC for the EDVA, are ineffective to bring USPTO Virginia employees outside the EDVA District into Washington DC. Similarly, Subpoena's issued by the USDC for Washington, DC are ineffective to bring Virginia USPTO employees outside the issuing EDVA district into Washington

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[21] Named after *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). Reading Touhy now raises the issue whether the subject of that federal prosecution was another falsely convicted innocent man, which injustice went uncorrected by virtue of the time in which the case was heard.

DC[22]. Moreover, if a Practitioner obtains a valid subpoena from a District Court by exercising his rights under 35 U.S.C. § 24, without going through the other process steps not required by statute, any evidence obtained is inadmissible under 37 C.F.R. § 11.51(b)[23]. A practitioner is therefore left without any subpoena power over USPTO employees or documents under the Federal Rules of Civil Procedure. The time it takes to engage the discovery procedures the USPTO has set up is prohibitive to obtaining meaningful discovery within the time period usually allowed for administrative proceedings of this type[24], if the ALJ will let any discovery occur.

As both Congress and the Courts have already opined that the discovery rights granted by 35 U.S.C. §24 are an important procedural due process mechanism, the USPTO's now complete abandonment of the FRCP in contested cases represents a clear case of an agency's regulations being contrary to law. As the USPTO's procedures are offensive to due process the reciprocal Pennsylvania Proceedings are also defective and violate the principles of *Selling v. Radford*, 243 U.S. 46 (1917), and, it's Pennsylvania equivalent, Pa.R.D.E. 216(c)(1) – (c)(3).

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22 On information and belief, until approximately the time when the USPTO moved it's headquarters to it's current location, the USDC DDC had jurisdiction over USPTO operations.

23 The deposition shall not be filed with the hearing officer and may not be admitted in evidence before the hearing officer unless he or she orders the deposition admitted in evidence. The admissibility of the deposition shall lie within the discretion of the hearing officer who may reject the deposition on any reasonable basis including the fact that demeanor is involved and that the witness should have been called to appear personally before the hearing officer.

24 Mr. Piccone's request for an extension of time was denied.

Review is Warranted to Resolve a Longstanding Split in the Circuit Courts' of Appeal as to the Plain Meaning of 35 U.S.C. § 24.

Although there are tens of cases[25] discussing the scope and meaning of 35 U.S.C. § 24, there remains a split in the circuits as to whether: 1) the USPTO supervises litigants use of 35 U.S.C. § 24, during "contested" cases, or District Court discovery matters under 35 U.S.C. § 24 may proceed independently of USPTO supervision; and, 2) what the scope of the Federal Rules of Civil Procedure employed by the statute is. For example, *El Encanto, Inc. v. Hatch Chile Company, Inc.*, 825 F.3d 1161 (10th Cir. 2016) holds that ". . . the second sentence makes the full panoply of procedures relevant to document production available to parties in contested PTO proceedings" directly conflicting with the Court of Appeals for the Federal Circuits holding in *Abbott labs v. Cordis Corp.*, 710 F.3d 1318, 1328 (Fed. Cir. 2013) stating: "[w]e hold that 35 U.S.C. § 24 **only** empowers a district court to issue subpoenas for use in a proceeding before the PTO **if** the PTO's regulations authorize parties to take depositions for use in that proceeding")[26].(bold and underlining added). While all circuits seemingly agree that some form or aspect of the Federal Rules of Civil Procedure must be used in

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[25] The number of cases representing substantial litigation efforts by almost fifty different parties, over a period of decades, is an independent reason justifying this Court's review.

[26] See also, "Like the First and Third Circuits, we conclude that section 24 is designed to allow the courts to render assistance to the PTO" *Id* at 1326.

contested cases before the USPTO, the USPTO, has done away with the Federal Rules of Civil Procedure altogether in contested disciplinary cases. This Court's guidance is necessary to resolve the significant disparity in interpretations between the Circuit Courts and the at least 23 different cases discussing this statute.

Review Is Warranted Because Mr. Piccone Is Actually Innocent Of Most, If Not All, Of The Charged Misconduct And The Interpretation Used To Find Him Guilty Is Of National Importance In Determining Whether The Considerable Population Of Pro Se Litigants Has Reasonable Access To Pro Bono Assistance Of Counsel.

The USPTO's harsh treatment of Mr. Piccone as described in footnote 7,is of national importance because it concerns the regulation of the practice of the 1.34 million attorneys[27] in the United States, and, because the interpretation of Rule 5.5 of the Rules of Professional Responsibility is of significant importance to the millions of Americans who represent themselves pro se, each year[28].

The USPTO's self-serving and narrow interpretation of Rule 5.5, denies the millions of pro se litigants the aid of pro bono attorneys, in a manner contrary to the explicit purpose of that rule to "provide legal services on a temporary basis in

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27 See, https://www.statista.com/statistics/740222/number-of-lawyers-us/.

28 There were 800,000 pro se litigants in Georgia alone in 2016. See, https://theconversation.com/every-year-millions-try-to-navigate-us-courts-without-a-lawyer-84159.

this jurisdiction under circumstances that do not create an unreasonable risk to the interests of the lawyer's clients, the public or the courts"[29].

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
Electronically signed,
/S/ Louis A. Piccone

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[29] See Comment 5 to the Massachusetts version of this Rule. See, https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-55-unauthorized-practice-of-law.

CERTIFICATE OF SERVICE

I hereby certify that in accordance with Supreme Court Rule 29, on March 12, 2019, I mailed a true and correct copy of this Petition to the following individual as indicated:

Michael D. Gottsch
Disciplinary Counsel
Office of Disciplinary Counsel
Pa Supreme Court
Michael.Gottsch@pacourts.us

Electronically signed,

/S/ Louis A. Piccone

Louis A. Piccone

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari in the above-referenced case contains 4,773 words, excluding the parts of the petition exempted by Supreme Court Rule 33.1(d).

Electronically signed,

/S/ Louis A. Piccone

Louis A. Piccone