appointment as the OED Director; and, 3) there is no evidence of record that the USPTO Director, knew of, let alone approved, the OED Director's "policy" of violating federal law, and, allowing staff to execute disciplinary complaints in violation of regulations.

This Court should strike the Complaint as not authorized and ultra vires, reverse the USPTO's suspension of Mr. Piccone's registration to practice, and dismiss all charges against Mr. Piccone, for failure to file a complaint authorized by law.

WHEREFORE, Mr. Piccone requests that his Petition for a Writ of certiorari be granted, and for such other relief as the Court finds just.

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

Louis A. Piccone, Pro Se
593 McGill St.
Hawkesbury, CANADA
K6A-1R1
(613) 632-4798
louis@piccone.us

CERTIFICATE OF SERVICE

I hereby certify that in accordance with Supreme Court Rule 29, on May 20, 2020, I mailed a true and correct hard and electronic copy of this Petition to the following individual as indicated:

Kimere Jane Kimball
Assistant U.S. Attorney
2100 Jamieson Avenue
Alexandria, VA 22314

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 6,975 words, excluding the parts of the petition exempted by Supreme Court Rule 33.1(d).

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NOTE: This disposition is nonprecedential.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

NOTE: This order 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.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

ORDER

Louis A. Piccone filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on February 21, 2020.

FOR THE COURT

February 14, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

LOUIS A. PICCONE, Petitioner, v. UNITED STATES PATENT AND TRADEMARK OFFICE, et al., Respondents.	)	1:18-cv-00307 (LMB/IDD)

MEMORANDUM OPINION

Louis A. Piccone ("Piccone"), acting pro se, filed this Petition[1] to review a decision of the United States Patent and Trademark Office ("PTO") suspending Piccone's license to practice before the PTO for a period of three years. Piccone asks the Court to vacate the PTO's decision as arbitrary or capricious, an abuse of discretion, or not in accordance with law. He also seeks declaratory relief as well as damages against unnamed PTO employees[2] under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). The Petition has been fully briefed and is now ripe for decision, and the Court finds that oral argument would not aid the decisional process. For the reasons that follow, the Petition will be dismissed.

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[1] Piccone has actually filed two petitions. The first, filed on March 12, 2018 [Dkt. No. 1], was only three pages long and was accompanied by a letter of transmission [Dkt. No. 1-1] stating that the filing was a "preliminary version" to be followed by a more complete petition. The second, filed two days later [Dkt. No. 2], was styled as a "Combined Petition . . . and Complaint," and altogether—including the petition itself and its nine attachments, which contain additional briefing and which Piccone asserts are "incorporated into [the] Petition as though set out in full"—spanned over 200 pages. Consistent with the parties' briefing, the second petition will be treated as the operative one in this action.

[2] Piccone's initial petition named as respondents Andrei Iancu, in his capacity as Under Secretary of Commerce for Intellectual Property and Director of the PTO; William Covey; and ten unnamed individuals. His second petition identified only the PTO and ten unnamed individuals now identified as PTO employees.

I.BACKGROUND

Piccone is an attorney who in 1989 was admitted to practice in Pennsylvania. A4821.[3] As relevant here, on three occasions Piccone has been administratively suspended from the practice of law by the Supreme Court of Pennsylvania: from September 1 to October 11, 2011, for failure to comply with continuing legal education ("CLE") requirements; from October 19 to December 21, 2012, for failure to pay the annual bar membership fee; and from September 30, 2013 to August 13, 2014, again for noncompliance with CLE requirements. A3174-75.

Piccone registered to practice before the PTO in August 1997. A3171-72. On December 10, 2014, the Director of the PTO's Office of Enrollment and Discipline ("OED") issued a disciplinary complaint charging Piccone with nine counts of professional misconduct.[4] A84-108. Count I involved Piccone's alleged unauthorized practice of law before the PTO in connection with a trademark application. A87-89. Counts II through V alleged that Piccone had engaged in the unauthorized practice of law in several federal district courts across the country. A89-96.[5] Finally, Counts VI through IX alleged that Piccone had engaged in "disreputable or gross conduct," acted in a fraudulent or dishonest manner, and had neglected his clients' interests. A97-108. The OED Director's complaint requested that Piccone be suspended or excluded from practicing before the PTO. A85, A108.

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[3] References in the form "A____" are to the administrative record [Dkt. Nos. 13-19]. Both in his Petition and in a separately filed motion [Dkt. No. 29], Piccone argued that the record was incomplete or deficient. On October 18, 2018, the Court concluded that the record did not require supplementation or alteration and denied Piccone's motion [Dkt. No. 33]; the remaining arguments about the administrative record raised in the Petition are now moot.

[4] Although the complaint was issued on behalf of the OED Director, it was signed by William Griffin, OED's Deputy Director. See A108.

[5] Count V also alleged that Piccone had knowingly made a false statement of fact to a federal district court and thereby engaged in fraudulent behavior. A94-96.

The Chief Administrative Law Judge of the United States Environmental Protection Agency (the "ALJ") was assigned to adjudicate the disciplinary proceeding. A1-2. In just under nine months, Piccone filed 35 motions, "including numerous motions to dismiss, motions for summary judgment, and motions to reconsider." A2. The ALJ held a two-day hearing in mid-October 2015 and heard live testimony from Piccone and a PTO staff attorney as well as deposition testimony from Piccone's business associate, two of his former clients, and an officer of the Massachusetts Board of Bar Examiners. See A3. The parties also submitted post-hearing briefs for the ALJ's consideration. A3-4.

The ALJ's 69-page Initial Decision found the following to have been established by clear and convincing evidence: First, Piccone engaged in the unauthorized practice of law before the PTO by acting as attorney of record and drafting a series of documents on behalf of Lawless America Association ("Lawless"), to be filed by Lawless's president, while Piccone was suspended from the Pennsylvania bar. A15-21. Second, in a series of lawsuits filed in federal district courts in Illinois, Iowa, Massachusetts, and New Hampshire, Piccone provided legal assistance to parties without securing authorization to proceed pro hac vice, and on several occasions while his Pennsylvania license to practice law was suspended. A21-48, A57-60. Third, Piccone engaged in gross misconduct and neglected his client in an action filed in the Southern District of New York. A48-53. The ALJ rejected several other charges included in the OED Director's complaint as unsupported by sufficient evidence. A48, A53, A56-57. Having found that Piccone had violated several of the PTO's disciplinary rules,[6] the ALJ ordered that Piccone be suspended from practicing before the PTO for three years. A68 (citation omitted).

[6] The ALJ found that Piccone had violated 37 C.F.R. § 11.505, which prohibits lawyers from practicing law in any jurisdiction "in violation of the regulation of the legal professional in that jurisdiction"; 37 C.F.R. § 10.23(a), (b)(4), and (b)(5), which respectively prohibit attorneys from

Piccone appealed that decision to the PTO Director, arguing that the ALJ had committed 53 errors of fact, procedure, and law. A5991-6029. The Director affirmed the ALJ's decision in a 34-page Final Order. A6114-6147.[7] Piccone's subsequent motion for reconsideration, A6150-72, A6198-211, was denied by the PTO on February 9, 2018. A6213-28. Piccone timely filed the present Petition to review the PTO Director's final decision [Dkt. Nos. 1-2].

II.ANALYSIS

Congress delegated to the PTO the authority to promulgate rules "govern[ing] the recognition and conduct of agents, attorneys, and other persons representing applicants or other parties before [it]." 35 U.S.C. § 2(b)(2)(D). This delegation gives the PTO "broad authority" to set procedural and ethical rules for those who practice before it, and Congress's grant of gap-filling authority necessitates that courts defer to the PTO's choices where reasonable and not contrary to law. Lacavera v. Dudas, 441 F.3d 1380, 1383 (Fed. Cir. 2006) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)). Congress also authorized the Director of the PTO, "after notice and opportunity for a hearing," to "suspend or exclude . . . from further practice before the [PTO] . . . any person, agent, or attorney shown to be

engaging in "disreputable or gross conduct," "conduct involving dishonesty, fraud, deceit, or misrepresentation," and "conduct that is prejudicial to the administration of justice"; 37 C.F.R. § 10.77(b) and (c), which forbid attorneys to "[h]andle a legal matter without [adequate] preparation" or to "[n]eglect a legal matter entrusted to" them; and 37 C.F.R. § 10.84(a), which requires practitioners to "seek the lawful objectives of a client through reasonably available means permitted by law and the Disciplinary Rules." Sections 10.23, 10.77, and 10.84 were removed and reserved as part of the PTO's 2013 switch from the Code of Professional Responsibility to the Rules of Professional Conduct. Changes to Representation of Others Before the United States Patent and Trademark Office, 78 Fed. Reg. 20,180, 20,197 (Apr. 3, 2013).

[7] The Final Order was prepared and signed by the General Counsel of the PTO, who had been delegated the authority to act on the PTO Director's behalf. A6115, A6146. For ease of reference, the Court will refer to this decision as that of the PTO Director.

incompetent or disreputable, or guilty of gross misconduct, or who does not comply with the regulations established under section 2(b)(2)(D)." 35 U.S.C. § 32.

This court has exclusive jurisdiction to review decisions by the Director to suspend or exclude an attorney from practice before the PTO. 35 U.S.C. § 32; see Franchi v. Manbeck, 972 F.2d 1283, 1287-88 (Fed. Cir. 1992). Review under § 32 is governed by the judicial review provisions of the Administrative Procedure Act ("APA"). Chaganti v. Lee, 187 F. Supp. 3d 682, 690 (E.D. Va. 2016) (citing Bender v. Dudas, 490 F.3d 1361, 1365 (Fed. Cir. 2007)). Accordingly, the court's review is "highly deferential, with a presumption in favor of finding the agency action valid." Id. (quoting Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 192 (4th Cir. 2009)). The PTO's decision will be disturbed only if the petitioner demonstrates that "it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Bender, 490 F.3d at 1365-66 (quoting 5 U.S.C. § 706).

A. The PTO's Findings of Professional Misconduct

First among the Petition's core arguments is that the ALJ and the PTO Director erred, under the facts and the law, in concluding that Piccone engaged in professional misconduct. None of the reasons Piccone provides is persuasive. For example, Piccone argues that it was improper for the PTO to find that he had engaged in the unauthorized practice of law with respect to work he did in support of Lawless's trademark application in late 2013 to mid-2014, while his bar license was suspended. See Combined Pet. and Compl. [Dkt. No. 2] ("Pet.") 3; id. Ex. C [Dkt. No. 2-6] 26. In support, Piccone cites a PTO regulation stating that "[a]ny individual may appear in a trademark matter for . . . [a] corporation or association of which he or she is an officer and which he or she is authorized to represent." 37 C.F.R. § 11.14(e). Piccone argues that because he was the sole "director" of Lawless at the time, see A3278, he was an officer of the

corporation and thus entitled to "appear" on its behalf. Pet. Ex. C [Dkt. No. 2-6] 26-35. Piccone misconstrues the regulation.[8] Section 11.14 provides in pertinent part:

> (a) Attorneys. Any individual who is an attorney as defined in § 11.1[9] may represent others before the Office in trademark and other non-patent matters. . . .
>
> (b) Non-lawyers. Individuals who are not attorneys are not recognized to practice before the Office in trademark and other non-patent matters, except that individuals not attorneys who were recognized to practice before the Office in trademark matters under this chapter prior to January 1, 1957, will be recognized as agents to continue practice before the Office in trademark matters
>
> (c) Foreigners. Any foreign attorney or agent not a resident of the United States . . . may be recognized for the limited purpose of representing parties located in such country before the Office in the presentation and prosecution of trademark matters . . . .
>
> . . . .
>
> (e) No individual other than those specified in paragraphs (a), (b), and (c) of this section will be permitted to practice before the Office in trademark matters on behalf of a client. Any individual may appear in a trademark or other non-patent matter in his or her own behalf. Any individual may appear in a trademark matter for . . . [a] corporation or association of which he or she is an officer and which he or she is authorized to represent, if such firm, partnership, corporation, or association is a party to a trademark proceeding pending before the Office.

37 C.F.R. § 11.14(a)-(e) (emphasis added). Although section 11.14 permits an individual who is not an active member of a bar in good standing to make limited appearances on behalf of a corporation of which she is an officer, that does not obviate the regulation's central prohibition against nonlawyers practicing on behalf of others before the PTO. As another PTO regulation makes clear, "practice" means "law-related service that comprehends any matter connected with

[8] The Court finds that the regulation clearly and unambiguously supports the PTO's position; however, even were that not the case, the PTO's interpretation is in no sense "plainly erroneous or inconsistent with the regulation" and would thus be entitled to deference. Auer v. Robbins, 519 U.S. 452, 461 (1997) (citation omitted).

[9] "Attorney or lawyer means an individual who is an active member in good standing of the bar of the highest court of any State." 37 U.S.C. § 11.1.

the presentation to the Office or any of its officers or employees relating to a client's rights, privileges, duties, or responsibilities under the laws or regulations administered by the Office." Id. § 11.5(b); see A6138. Here, Piccone listed himself as the attorney of record on Lawless's trademark application, A3182, and never corrected that listing despite being suspended from practice by the Supreme Court of Pennsylvania. Moreover, during the period his license was suspended, Piccone drafted (among other documents) a substantive Response to a USPTO Office Action, which Lawless's president then signed and submitted to the PTO. See A6137-38. There was nothing arbitrary or capricious about the PTO's conclusion that under those circumstances, Piccone had engaged in the unauthorized practice of law.[10]

Piccone also challenges the PTO's findings that he engaged in professional misconduct in representing clients in federal courts in Illinois, Iowa, Massachusetts, and New Hampshire. He first argues that conduct in other judicial forums is beyond the scope of the PTO's disciplinary procedures, highlighting a 1985 regulation stating that "only that conduct which is relevant to the practice of patent, trademark, or other law before the PTO is what the PTO seeks to regulate." Pet. 4 (quoting Practice Before the Patent and Trademark Office, 50 Fed. Reg. 5158, 5161 (Feb. 6, 1985)). As respondents point out, that statement was intended only to clarify that PTO regulations would not preempt state bar rules, and PTO regulations expressly contemplate the possibility that misconduct before other tribunals may result in disciplinary proceedings before

[10] Piccone also argues that because he prepared the Response in Canada, he was beyond the territorial reach of the PTO's disciplinary procedures. Pet. Ex. C [Dkt. No. 2-6] 35-46. Piccone repeats this argument with respect to other charges of misconduct. The extraterritoriality principle on which Piccone relies, see, e.g., Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010), has no application here because the relevant conduct is not the physical drafting of legal documents but rather the submission of those documents as part of ongoing administrative or judicial proceedings taking place in this country. Otherwise, an attorney could always escape disciplinary proceedings in a state where that attorney was practicing simply by claiming that the objectionable filings were drafted in and electronically submitted from outside the state.

the PTO, see 37 C.F.R. § 11.24. Congress expressly allowed the PTO Director to suspend or exclude practitioners based not only on violations of the PTO's own rules but also on any "gross misconduct" or behavior indicating the attorney is "incompetent or disreputable," 35 U.S.C. § 32, which logically includes conduct in federal district court proceedings.

Consequently, Piccone is left to quibble with the ALJ's and PTO Director's findings of fact. He argues, for instance, that the many instances in which he did legal work on behalf of clients in jurisdictions where he was not licensed to practice law were permissible because he "reasonably expect[ed] to be admitted pro hac vice."[11] Pet. Ex. D [Dkt. No. 2-7] 1. This argument flies in the face of the record, which demonstrates that Piccone made no attempt to move for pro hac vice admission in cases in Illinois, Iowa, and Massachusetts. See, e.g., A2589-93, A3340-55, A3417-19, A3483-87, A3811-13. Piccone even failed to file a motion for admission after being explicitly instructed to do so by a federal district court. See A3345, A5690. Piccone's argument also flatly contradicts his testimony at the hearing that at least in Massachusetts, he could not find local counsel to sponsor his motions for admission pro hac vice and accordingly made a conscious decision to label the pleadings he was drafting as "pro se" but "prepared with the aid of Louis A. Piccone, Esquire." A5698. Nor can Piccone effectively undermine the finding that he provided legal assistance to a plaintiff in an action filed in the Central District of Illinois even after his bar license was suspended in September 2013. See A21-24, A5690. Likewise, in response to the PTO's finding that he had neglected his client in a case before the Southern District of New York by entirely failing to comply with court orders and

[11] The Petition requests declaratory relief to the effect that state rules of professional conduct "do[] not require that an out of state attorney . . . engage local counsel prior to signing a retainer agreement with, or aiding in the preparation of a complaint for, a client in which the out of state attorney will need to apply for admission pro hac vice." Pet. 21. The Court lacks power to issue an advisory opinion on sovereign states' rules of ethical or professional conduct.

deadlines in late 2007 and early 2008, A48-53, Piccone argues that he was incarcerated at the time and thus should have been considered exempt from professional duties to his client and immune from any discipline stemming from that time period. Pet. Ex. H [Dkt. No. 2-11]. But nearly all of the missed deadlines and failures to comply took place from October 2007 to early January 2008, which was before the time when Piccone claims he was charged with an offense and well before when he was incarcerated. See A3768-72.

There is no need to detail every one of the PTO's findings. Having reviewed the parties' submissions and the record, the Court concludes that the PTO's findings of fact and conclusions with respect to Piccone's professional misconduct were reasonable and well supported. Nor did the PTO Director commit an abuse of discretion by affirming the ALJ's initial decision to suspend Piccone from practicing before the PTO for three years. A6139-44. For years, in multiple cases and across several states, and despite clear admonishments from many federal courts,[12] Piccone continually pushed ethical and legal boundaries in an effort to evade the rules prohibiting the unlicensed practice of law. The PTO Director carefully reviewed Piccone's conduct under the factors set out in 37 C.F.R. § 11.54(b), and the resulting three-year suspension is more than fitting.

[12] See, e.g., Doe v. Briggs, 945 F. Supp. 2d 210, 212 (D. Mass. 2013) (discussing Piccone's "disturbing attempts in prior litigation to involve himself in a quasi-attorney role" and stating that "[i]t is long past time for Piccone to stop what smacks of an unauthorized practice of law"); Katz v. McVeigh, No. 10-cv-410, 2012 WL 1379647, at *1-4 (D.N.H. Apr. 20, 2012) (denying Piccone's motion for admission pro hac vice based on Piccone's prior conduct, including a "pattern of behavior that has resulted in the wasting of judicial resources," a "persistent failure to explain or justify his demonstrated inability to comply with court orders and deadlines," and the "unauthorized practice of law"); Pease v. Burns, 679 F. Supp. 2d 161, 164-69 (D. Mass. 2010) (denying Piccone's motion for admission pro hac vice based on Piccone's "evasion and unreasonable behavior" and frequent "unauthorized practice of law").

B. Piccone's Remaining Arguments

Perhaps anticipating the conclusion that the PTO's findings and decision are neither arbitrary or capricious nor an abuse of discretion, Piccone unleashes a barrage of legal theories for why the disciplinary proceeding was improper or unlawful. None has merit.[13]

Several of Piccone's arguments fail because they flout clearly established law. For example, his argument that the entire disciplinary proceeding was ultra vires because there was no written delegation of authority from the OED Director to the Deputy Director, see Pet. Ex. A [Dkt. No. 2-3], ignores the longstanding principle that delegation is "presumptively permissible absent affirmative evidence of a contrary congressional intent" or a violation of an agency's own regulation, see U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004)—neither of which is present here. Similarly misguided is his argument that the statutory framework governing PTO disciplinary proceedings requires that "the Federal Rules of Civil Procedure" relating to discovery "shall apply to contested cases," 35 U.S.C. § 24. Section 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"; it does not incorporate the Federal Rules wholesale or entitle Piccone to "discovery beyond that permitted by [PTO] discovery rules and rules of admissibility." Abbott Labs. v. Cordis Corp., 710 F.3d 1318, 1325, 1328 (Fed. Cir. 2013) (alteration in original) (citation omitted). Finally, Piccone's

[13] Piccone's arguments are styled as APA challenges or as freestanding requests for declaratory relief. Given the conclusion that none of Piccone's arguments is meritorious, the Court need not address the issue disputed by the parties of whether 35 U.S.C. § 32 is the exclusive avenue for claims challenging the PTO's disciplinary proceedings or the procedures used therein. Similarly, Piccone candidly admits that his Bivens claim is merely a stopgap to ensure that "the constitutional issues raised [in his Petition are] heard in some context," Pet. 17; this district has refused to imply a right of action to cover PTO disciplinary actions under Bivens, see Haley v. Under Secretary of Commerce for Intellectual Property, 129 F. Supp. 3d 377, 382-83 (E.D. Va. 2015), and the Court will not do so here.

attempt to fault the PTO for failing to disclose exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963)— leaving aside Piccone's inability to identify any such evidence actually withheld, see Pet. Ex. B [Dkt. No. 2-5] 19-27—falls flat in light of clear precedent that Brady applies in civil proceedings only "where the potential consequences equal or exceed those of most criminal convictions," Fox ex rel. Fox v. Elk Run Coal Co., 739 F.3d 131, 138-39 (4th Cir. 2014) (internal quotation marks and citation omitted), which do not include PTO disciplinary proceedings, Polidi v. Lee, No. 1:15-cv-01030, 2015 WL 13674860, at *2 (E.D. Va. Nov. 24, 2015), aff'd sub nom. Polidi v. Matal, 709 F. App'x 1016 (Fed. Cir. 2017).

Several of Piccone's other arguments fail to demonstrate any basis on which the Court could conclude that the PTO acted arbitrarily or capriciously or abused its discretion. Piccone's assertion that he was "denied an independent hearing officer," Pet. 4 (capitalization altered), amounts to little more than disagreement with a number of the ALJ's procedural rulings.[14] The record reveals that although the ALJ enforced the PTO's procedures, she allowed Piccone to take some discovery and oversaw the proceedings in a reasonable and nonarbitrary manner. Similarly, Piccone argues that because the ALJ concluded there was no clear and convincing evidence of misconduct with respect to Count 8, involving a civil action that was dismissed without prejudice by the District Court for the District of New Hampshire, A53-57, she necessarily erred in concluding that there was misconduct as to Count 9, which involved a new action filed in the same court, A57-60. That is simply not the case. As respondents point out, Piccone's conduct in

[14] For instance, Piccone objects that the ALJ erred by requiring him to comply with the PTO's regulations on employee testimony in agency proceedings. See Pet. Ex. B [Dkt. No. 2-5] 33-35. That argument ignores the fact that "[t]he Supreme Court has approved such regulations, holding that agencies may legitimately promulgate regulations governing employee testimony and may, pursuant to those regulations, forbid an employee to testify in a court proceeding." United States v. Soriano-Jarquin, 492 F.3d 495, 504 (4th Cir. 2007) (citing United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951)).

the two litigations was not identical, and indeed, that he was advised of the need to secure pro hac vice admission in the first litigation makes his decision not to do so in the second all the more egregious. Further, although Piccone argues that the PTO "failed to provide [him] with a warning or other opportunity to bring his conduct into complianace [sic] with law," Pet. 6, he fails to identify any statute or regulation requiring such an opportunity to correct.

Next, Piccone's argument that the disciplinary proceeding was contrary to law for failure to comply with the applicable statute of limitations also fails. PTO disciplinary proceedings must be initiated by the earlier of (i) "10 years after the date on which the misconduct forming the basis for the proceeding occurred" or (ii) "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." 53 U.S.C. § 32. Likewise, the OED Director's complaint must "be filed within one year after the date on which the OED Director receives a grievance forming the basis of the complaint." 37 U.S.C. § 11.34(d). The record discloses that the OED learned of Piccone's misconduct on December 11, 2013, when a staff attorney spoke with a Massachusetts Board of Bar Examiners official who informed her that Piccone had been administratively suspended by the Supreme Court of Pennsylvania. See A5113-18. The OED filed its disciplinary complaint against Piccone on December 10, 2014, within the one-year limitations period. Piccone responds that the PTO should be deemed to have been on constructive notice before December 2013 because facts relating to his misconduct had been published in several federal judicial opinions or because officials of the Pennsylvania state bar should have notified the PTO about earlier suspensions. Pet. Ex. E [Dkt. No. 2-8] 5-14; Pet. 17-18. Yet Piccone's theories of constructive notice contradict the plain terms of the governing statute and regulation, which respectively provide that the one-year limitations period runs from the date the misconduct "is made known to an officer

or employee" or "the date on which the OED Director receives a grievance." 35 U.S.C. § 32 (emphasis added); 37 U.S.C. § 11.34(d) (emphasis added).[15] Piccone tries to salvage his statute of limitations argument by objecting to discovery rulings he claims prevented him from potentially learning something that might have contradicted the PTO's evidence that it learned about his misconduct in December 2013. Pet. Ex. E [Dkt. No. 2-8] 9-13. Invoking a statute of limitations is an affirmative defense, Hill v. Braxton, 277 F.3d 701, 705 (4th Cir. 2002), and Piccone bore the burden of proving that defense "by clear and convincing evidence," 37 C.F.R. § 11.49. The Court finds nothing arbitrary or capricious in the PTO's conclusion that Piccone failed to do so.

Finally, many of Piccone's arguments are utterly unsubstantiated. He submits, for example, that the PTO was "prosecuting this case against [him] for political reasons" and "as retaliation for his work petitioning the government for changes in laws in the child welfare area." Pet. 3, 14. He argues, without further explanation, that the PTO's definition of the practice of trademark law is "overbroad, illegal, unconstitutional and unenforceable." Id. at 18. And he alleges that "[a]gency supervisors failed to enforce agency regulations against their subordinates to maximize the opportunity for agency attorneys to prevail during agency proceedings, and to cover up agency misconduct." Id. at 7. These arguments are without any foundation in the record and provide no basis for the Court to conclude that the PTO's decision should be disturbed.[16]

Respondents have thoroughly and capably addressed the dozens of arguments Piccone included in his over-200-page Petition. Having reviewed the briefs and administrative record, the

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[15] Again, the PTO's reasonable interpretations of ambiguous language in the statute it administers and the regulation it promulgated are entitled to deference under Chevron and Auer, respectively.

[16] Piccone also makes passing reference to selective enforcement and Freedom of Information Act issues but has not stated standalone claims on those theories.

Court has little difficulty concluding that the PTO's findings, conclusions, and disposition in Piccone's disciplinary proceeding were not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

III.CONCLUSION

For the reasons stated above, the Petition will be dismissed by an appropriate Order to be issued with this Memorandum Opinion.

Entered this 13th day of November, 2018.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge