

## And The Defense Wins

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On May 24, 2017, DRI member [Michael E. McCabe, Jr.](#), founder of **McCabe Law LLC** in Potomac, Maryland, obtained a rare defense win in the case of *In re Anonymous*, No. D2014-19—a reversal of a USPTO administrative law judge’s decision suspending a patent attorney for 18 months and imposition of no professional discipline.

The facts were undisputed. A patent attorney solicited clients and took files from a former employer with the intention of setting up a competing law firm. The firm sued the attorney. A state court issued a preservation order. Before turning over electronic files, the attorney attempted to overwrite files to conceal potentially incriminating information. When the spoliation was discovered, the court ordered monetary sanctions and an adverse inference.

The attorney’s misconduct was reported to state bar counsel. After an investigation, the attorney and state bar agreed to a one-year suspension. The agreement was entered as an order of the state’s highest court.

The patent attorney then reported the state-level discipline to the Director of the USPTO’s Office of Enrollment and Discipline (OED). The OED Director filed a disciplinary complaint seeking an indefinite suspension or the attorney’s “exclusion” from practice before the USPTO. The federal disciplinary complaint was referred to an ALJ for further proceedings.

The attorney filed a motion to dismiss for violation of the Accardi doctrine and lack of subject matter jurisdiction. According to the attorney’s motion, the USPTO’s rules of disciplinary procedure mandate that when a practitioner is disciplined by another jurisdiction, the USPTO is required to follow its rules on reciprocal discipline and may not file a *de novo* disciplinary complaint. Following the mandatory reciprocal disciplinary rules in this case would have exposed the patent attorney to, at most, a one-year suspension. The OED Director opposed the motion and argued he had “discretion” to file a new complaint and seek greater discipline than was imposed by the state.

The ALJ agreed with the government and denied the motion to dismiss. After an evidentiary hearing, the ALJ found the attorney violated three USPTO ethics rules. The ALJ ordered that the patent attorney be suspended for 18 months from practicing before the PTO.

On appeal, the USPTO Director reversed. The Agency head held that the OED Director was required to follow the PTO’s reciprocal discipline rules. The OED Director then moved for modification of the PTO Director’s Final Decision and requested permission to file an amended complaint for reciprocal discipline. The OED Director argued that amendment should be allowed because the statute of limitations had run, and thus a new complaint was time-barred.

The USPTO Director denied modification. The Agency head found the modification request failed to identify any factual or legal error. Moreover, the USPTO Director concluded that no authority existed to permit the OED Director to file a post-appeal amended complaint.

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