

returnable, plastic containers to be shipped with the highly portable cards is also unacceptable since the portability of the cards could enable a handler to evade inspection on a lot or lots of nectarines or peaches by moving the cards to uninspected containers, and could jeopardize the industries' "trace back" program. All of these alternatives were, therefore, rejected.

At the Management Services Committee meeting, the members reviewed all subcommittee recommendations available to them. The members of the Management Services Committee include the chairpersons and vice-chairpersons of the committees, who generally have many years experience working in the industries. They, too, discussed recommendations of subcommittees and were free to make alternative recommendations or revise recommendations to the committees, as they reviewed such recommendations.

Like committee meetings, subcommittee meetings are open to the public and comments are widely solicited.

This rule does not impose any additional reporting and recordkeeping requirements on either small or large handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, as noted in the initial regulatory flexibility analysis, the Department has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

However, as previously stated, nectarines and peaches under the orders have to meet certain requirements set forth in the standards issued under the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 through 1627). Standards issued under the Agricultural Marketing Act of 1946 are otherwise voluntary.

In addition, the committees' meetings were widely publicized throughout the nectarine and peach industries and all interested parties were invited to attend the meetings and participate in committee deliberations on all issues. These meetings are held annually during the last week of November or first week of December. Like all committee meetings, the November 30, 1999, meetings were public meetings and all entities, both large and small, were able to express views on these issues. The committees themselves are composed of producers.

An interim final rule concerning this action was published in **Federal Register** on March 22, 2000 (65 FR 15205). Copies of the rule were mailed

to all committee members and handlers by the committee staff on March 22, 2000. Finally, the rule was made available through the Internet by the Office of the Federal Register. A 60-day comment period ending May 22, 2000, was provided to allow interested persons to respond to the proposal. One comment was received during the comment period in response to the proposal.

The commenter submitted several clarifications to the interim final rule. One clarification dealt with the inadvertent omission of the "Grand Sun" nectarine variety from the variety specific size designations in paragraph (a)(3) of § 916.356. The clarification also noted that the interim final rule listed the variety as "Gran Sun." As noted earlier, these corrections relative to the Grand Sun nectarine variety have been made.

The commenter also requested name corrections for two peach varieties. According to the commenter, the name "Prima Gattie" should be corrected to read "Prima Gattie 8," and the name "Yukon King" should be corrected to read "Autumn Snow."

Accordingly, appropriate changes are made based upon the comment received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following website: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, the information and recommendations submitted by the committees, and other information, it is found that finalizing the interim final rule, with appropriate changes, as published in the **Federal Register** (65 FR 15205, March 22, 2000) will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because: (1) Handlers are already shipping nectarines and peaches from the 2000 crop; (2) handlers are already aware of this rule, which was unanimously recommended at a public meeting; and (3) a 60-day comment period was provided for in the interim final rule.

## List of Subjects

### 7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

### 7 CFR Part 917

Marketing agreements, Peaches, Pears, Reporting and recordkeeping requirements.

Accordingly, the interim final rule amending 7 CFR parts 916 and 917, which was published at 65 FR 15205 on March 22, 2000, is adopted as a final rule with the following changes:

1. The authority citation for 7 CFR parts 916 and 917 continues to read as follows:

**Authority:** 7 U.S.C. 601-674.

## PART 916—NECTARINES GROWN IN CALIFORNIA

### § 916.356 [Amended]

2. Section 916.356, paragraph (a)(3) is amended by adding the words "Grand Sun" between the words "Early Diamond" and "Johnny's Delight."

## PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

### § 917.459 [Amended]

3. Section 917.459, paragraph (a)(6) is amended by revising the words "Prima Gattie" to read "Prima Gattie 8," removing the words "Yukon King," and adding the words "Autumn Snow" between the words "Autumn Rose" and "Cal Red."

Dated: June 21, 2000.

**Robert C. Keeney,**

*Deputy Administrator, Fruit and Vegetable Programs.*

[FR Doc. 00-16151 Filed 6-26-00; 8:45 am]

**BILLING CODE 3410-02-P**

## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

#### 8 CFR Parts 3 and 292

[EOIR No. 112F; A.G. Order No. 2309-2000]

RIN 1125-AA13

#### Professional Conduct for Practitioners—Rules and Procedures

**AGENCY:** Executive Office for Immigration Review and Immigration and Naturalization Service, Justice.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the rules and procedures concerning professional conduct for attorneys and

representatives (practitioners) who appear before the Executive Office for Immigration Review (EOIR) and/or the Immigration and Naturalization Service (the Service). This final rule also includes a provision that was promulgated as an interim rule on April 6, 1992, pursuant to section 545 of the Immigration Act of 1990, concerning sanctions against attorneys or representatives who engage in frivolous behavior in immigration proceedings. This final rule outlines the authority EOIR has to investigate complaints and impose disciplinary sanctions against practitioners who appear before its tribunals, and clarifies the authority of the Service to investigate complaints regarding practitioners who conduct business with the Service. This final rule permits EOIR and the Service to investigate allegations of ethical misconduct and initiate disciplinary proceedings more effectively and efficiently while ensuring the due process rights of the practitioner. The final rule also reinstates the Board of Immigration Appeals as the reviewing body for disciplinary decisions, instead of the Disciplinary Committee, as was set forth in the proposed rule. Both the public comments and the Department of Justice's (Department) reassessment of the appellate review process resolved that, as is presently established, Board review of disciplinary decisions is more efficient and practical and should therefore remain unchanged. Additionally, this final rule enables efficient resolution of frivolous complaints and meritorious cases, a consideration critical to, and in the best interests of, all parties involved.

**EFFECTIVE DATE:** July 27, 2000.

**FOR FURTHER INFORMATION CONTACT:**

Charles Adkins-Blanch, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, Virginia, 22041, telephone (703) 305-0470, or Julia A. Doig, Chief Appellate Counsel, Immigration and Naturalization Service, 5113 Leesburg Pike, Suite 200, Falls Church, Virginia 22041, telephone (703) 756-6257.

**SUPPLEMENTARY INFORMATION:** Currently, the regulations at 8 CFR 292.3 require the Service to investigate complaints filed regarding the conduct of attorneys and representatives (referred to in the final rule as practitioners) practicing before both the Service and EOIR. If the investigation establishes, to the satisfaction of the Service, that disciplinary proceedings should be instituted, the General Counsel of the Service serves a copy of the written charges upon the attorney or

representative and upon the Office of the Chief Immigration Judge. The present procedure provides for the government to be represented by a Service attorney in disciplinary proceedings before an Immigration Judge. The decision of the Immigration Judge may be appealed to the Board of Immigration Appeals (Board) by either party.

On January 20, 1998, the Service and EOIR published a proposed rule in the **Federal Register** (63 FR 2901) amending parts 3 and 292 of the rules and procedures governing professional conduct for practitioners who appear before EOIR, which includes the Board and the Immigration Courts, as well as the rules and procedures governing professional conduct for practitioners who conduct business before the Service. The proposed rule included various grounds of discipline and procedures for hearings and appeals, which, although somewhat more sophisticated, were in many ways similar to the approach of the current regulations. The proposed rule was neither written on a clean slate nor did it propose to institute a new form of professional discipline; in fact, it was merely intended to clarify and improve the existing procedures and, in particular, to remove the Service from the enforcement role with respect to professional misconduct occurring before the Board and the Immigration Courts. The proposed rule did contain a new procedure for adjudicating disciplinary complaints. The proposed process included a hearing by an adjudicating official appointed by the Director of EOIR and a report by that adjudicating official to a three-member Disciplinary Committee appointed by the Deputy Attorney General.

This final rule retains the Service's investigative and prosecutorial responsibilities only in disciplinary proceedings for those practitioners who conduct business before the Service as an adjudicative body, *e.g.*, in asylum proceedings, adjustment interviews, and visa petition cases, but transfers these same investigative and prosecutorial responsibilities to EOIR for practitioners appearing before the Board and the Immigration Courts. This change allows each agency to maintain separate jurisdictions over practitioners based upon which agency they appear before, while permitting both agencies to utilize the same hearing and appeal process. This change will result in a fair and consistent application of the rules.

In response to the proposed rulemaking, EOIR and the Service received 491 comments. Identical form letters from South Florida practitioners

totaled 130, with 17 additional individual letters from the same region. These letters account for approximately 30% of the total comments received. Another 277 names were signed to one petition-style letter prepared by the national office of the American Immigration Lawyers Association (AILA), accounting for approximately 57% of the total comments received. Some of the public comments were supportive; one in particular recounted the detrimental effect that one practitioner's negligence had on two unsuspecting immigrants. Many others, however, were opposed to any rule that would regulate practitioners' professional conduct. EOIR and the Service gave full consideration to each and every public comment submitted during the comment period. We first submit some general authorities and then address the concerns expressed in the comments in the following passages.

In exercising its plenary powers over immigration, Congress has granted express authority to the Attorney General to "establish such regulations \* \* \* as (s)he deems necessary for carrying out (her) authority" under the laws relating to the immigration and naturalization of aliens. 8 U.S.C. 1103(a)(3). Congress also provided that aliens in immigration proceedings "shall have the privilege of being represented (at no expense to the government) by such counsel, *authorized to practice in such proceedings, as he shall choose.*" 8 U.S.C. 1362 (emphasis added). In so doing, Congress vested implied authority with the Attorney General to prescribe standards of conduct and rules of procedure that are applicable to practitioners who appear before the Board, the Immigration Courts, and the Service.

In the proposed rule, EOIR and the Service noted that the primary purpose of prescribing rules and setting standards for determining who may practice before the Board, the Immigration Courts, and the Service, and for adopting procedures for disciplining those practitioners who fail to conform to such standards, includes the protection of the public, the preservation of the integrity of the Immigration Courts, and the maintenance of high professional standards. EOIR and the Service are committed to these important public interest objectives through the fair and efficient administration of this final rule.

While most practitioners adequately represent their clients in immigration matters, a small minority of practitioners do not meet the minimum

standards set forth in this rule and an even smaller minority may take unfair advantage of the very clients they have promised to help. Others have engaged in conduct that has rendered them unfit to practice law, as determined by the state courts which originally licensed them to practice. The practitioners who should not, and in fact cannot, be permitted to continue to practice before EOIR and the Service are the practitioners who will primarily be affected by this rule.

#### General Comments

A chief concern of many commenters was that this rule would have a chilling effect on an immigration practitioner's ability to advocate zealously for his or her client, suggesting that both the First Amendment right to freedom of speech and the Sixth Amendment right to counsel were implicated by such a rule. A similar majority argued that it is not the function of EOIR or the Service to control the conduct of attorneys who have been admitted to the practice of law by state courts. Many commenters expressed concern that sanctions imposed pursuant to this rule could cut off a practitioner's livelihood or jeopardize his or her professional reputation, although some acknowledged a need to protect clients from unscrupulous immigration practitioners, citing incompetent and/or unethical conduct by practitioners. One commenter was particularly concerned with protecting non-profit agencies from the burdens of potentially higher professional liability policies, more staff training, and better case-screening procedures.

Several commenters suggested that EOIR and the Service pattern the proposed disciplinary rule after the disciplinary process applicable to representatives who appear before Administrative Law Judges in the Social Security Administration (SSA) and the Internal Revenue Service (IRS). Under such advisement, EOIR and the Service consulted SSA and IRS regulations in drafting this disciplinary rule and adopted many of the provisions promulgated by those agencies.

The following paragraphs provide a section-by-section summary of the comments received, followed by the Department's response. Many of the comments were lengthy and we have attempted to summarize the commenters' views as accurately as possible. We have responded to all of the relevant issues raised in the comments and have highlighted where revisions have been made to the proposed rule. Please note that section

numbering in the final rule has been revised.

#### *Sections 3.101(a) and 3.106(a)—Adjudicating Officials and Composition of the Disciplinary Committee*

*Comments.* Some commenters suggested that an inherent conflict exists given that adjudicating officials and the Disciplinary Committee have a connection to EOIR that taints the entire disciplinary process. Comments regarding the composition of the Disciplinary Committee included the following: The composition of the Committee is vague; the pool of possible members should be specified with term limits; no qualifications for the Committee have been specified; the Committee should be independent of the Department; the Committee should include a non-lawyer; the Committee should include a member of the private bar; and the EOIR representative should not serve on the Committee if he or she is also the complainant in a particular case. Several commenters also suggested that an Immigration Judge should not serve as the adjudicating official in a case where he or she is also the complainant, an Immigration Judge should not serve as the adjudicating official in any case involving a practitioner who regularly appears before him or her, and the disciplinary hearing should be conducted by an Administrative Law Judge (ALJ) pursuant to the Administrative Procedure Act (APA).

Other commenters assumed that Immigration Judges would be prejudiced against aliens while favoring the government and, therefore, would not be fair adjudicating officials. Some commenters noted that the rule provides no guidelines for appointing adjudicating officials and no opportunity to submit briefs or arguments to the Disciplinary Committee.

*Response.* Although some commenters concluded that the connection between adjudicating officials and EOIR taints the disciplinary process, there was no specific suggestion of how such a connection causes conflict or unfairness. Moreover, there is little merit to the argument of inherent conflict, since the Board and Immigration Judges are all part of the Department and yet act independently in fairly adjudicating the nation's immigration laws. A connection between EOIR and the proposed disciplinary process is not inherently unfair nor does it create an inherent conflict. Precedent for such a process exists within the disciplinary system

used by the Social Security Administration, which uses its own ALJs as hearing officers and its own Appeals Council as a reviewing panel.

However, EOIR and the Service have revised several of the provisions in this section in response to the comments that we received. The rule has been revised to provide that an Immigration Judge shall not serve as the adjudicating official in cases where he or she is also the complainant in a case (§ 3.106(a)(1)(i)). Also, an Immigration Judge shall not serve as the adjudicating official in any case involving a practitioner who regularly appears before him or her (§ 3.106(a)(1)(i)). In the final rule, the Chief Immigration Judge will appoint the adjudicating official in most cases (§ 3.106(a)(1)(i)).

More significantly, in light of the comments received, EOIR and the Service have, in the final rule, replaced the proposed Disciplinary Committee with the Board in all respects. Since the Board already has the authority to implement the existing disciplinary system under § 3.1(d)(3), and to hear appeals of disciplinary sanctions under § 292.3(b)(1)(vi), revising the final rule to have appeals go to the Board results in no change in the Board's current (and long-standing) role.

We have identified a number of reasons for retaining the Board as the appellate body for disciplinary decisions made by adjudicating officials. First, the Board provides practitioners subject to these proceedings with an established appeal process. All of the procedural practices concerning briefing schedules, transcripts, motions, and oral arguments will be consistent for both immigration proceedings and disciplinary proceedings. Most practitioners know the Board's appeal procedures and will be familiar with them when appealing any disciplinary decision. Second, the Board has the immigration expertise which may prove critical where a practitioner's conduct is intricately intertwined with the legal issues in an underlying immigration case. Third, the Board, unlike the Disciplinary Committee, has the ability to publish precedent decisions, thereby providing practitioners and the public with authoritative interpretations of the regulations. Fourth, it is logical for the Board to exercise ultimate control over practitioners who appear before EOIR, and also consistent with state court practice of having the highest appellate level oversee the ultimate discipline of practitioners. Finally, the Board is structured to hear cases on a regular, consistent basis and has the support resources (attorney staff, paralegals,

clerks) to fully staff a disciplinary system.

By retaining the Board's review authority, we anticipate the issuance of timely decisions by members possessing the requisite legal and procedural expertise, as well as adjudicatory experience. This assumption is based on the fact that the Board has reviewed disciplinary cases on appeal throughout the existence of the current disciplinary program. Some of the comments to the proposed rule raised opposition to the "in-house" nature of the Disciplinary Committee. However, given that the Board is an established independent adjudicator within the Department, the revised appeal structure should dispel any concerns about an "in-house" review.

One commenter suggested disciplinary hearings should be conducted pursuant to the Administrative Procedure Act (APA) (codified at 5 U.S.C. 551 *et seq.*), which primarily regulates the processes of rulemaking and adjudication by agencies with substantial independent authority in the exercise of specific functions. Determining whether the APA applies to disciplinary proceedings conducted under this rule requires careful consideration of several factors.

As stated above, Congress has granted authority to the Attorney General to set standards for determining who may practice before the Board, the Immigration Courts, and the Service, and to prescribe rules of procedure for disciplining those who fail to conform to such standards. An agency with the power to admit practitioners has the authority to disbar or discipline them for professional misconduct.

Also, since deportation proceedings are not subject to the APA, see *Marcello v. Bonds*, 349 U.S. 302, 309 (1955) (Administrative Procedure Act is not applicable to deportation proceedings under the Immigration and Nationality Act); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1025 (9th Cir. 1992) (Immigration and Nationality Act, rather than Administrative Procedure Act, controls exclusively in deportation proceeding), disciplinary proceedings pursuant to 8 U.S.C. 1362 historically have not been conducted under the APA, see *Herman v. Dulles*, 205 F.2d 715, 717 (D.C. Cir. 1953) (existing powers of administrative agencies to control practice by counsel who appear before them are not changed by the Administrative Procedure Act, citing Attorney General's Manual on the Administrative Procedure Act, 1947, p.66). Furthermore, no statutory provision exists which requires the adjudication of such disciplinary proceedings under the APA. See *United*

*States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474, 477 (S.D.N.Y. 1979) (provisions of APA apply only if another statute requires that they be utilized); see also *Amalgamated Meat Cutters and Butcher Workmen v. Connally*, 337 F. Supp. 737, 761-62 (D. D.C.1971).

Moreover, this rule provides ample protections for practitioners subject to discipline, analogous to procedures provided in the APA and consistent with the delineated public interest objectives of the Department. Such protections include timely notice of hearings and the opportunity to be heard with respect to the charges lodged.

In addition, subjecting disciplinary proceedings to the strictures of the APA is unnecessary, and it would also be impractical and burdensome given that Immigration Judges (who comprise the largest pool of potential adjudicating officials) do not adjudicate cases pursuant to the APA. Finally, as stated in the supplementary information to the proposed rule, practitioners subject to discipline may avail themselves of judicial review pursuant to 28 U.S.C. 1331 upon issuance of a final administrative order.

Therefore, in light of the above considerations and in order to maintain consistency with, among other things, the current disciplinary rule, Board disciplinary decisions that have been upheld by the Federal courts, and established Immigration Court practices, the Department has determined that disciplinary hearings will be conducted in the same manner as immigration proceedings.

The proposed rule contained no provision for briefs to be submitted or oral arguments to be heard before the Disciplinary Committee. However, now that the rule retains the Board as the appellate body in disciplinary proceedings, the regulations that govern oral argument (see 8 CFR 3.1(e)) and the submission of briefs on appeal (see 8 CFR 3.3(c)) are incorporated by reference in the final rule.

#### *Sections 3.103 and 292.3(c)—Immediate Suspension and Summary Proceeding*

*Comments.* Several commenters suggested that an immediate suspension provision could create an unfair and prejudicial result based on "a skeletal complaint filed by a disgruntled client." The commenters expressed concern that a practitioner could be suspended based on mere allegations of misconduct. This presumption is incorrect, as explained below. Others felt that a criminal conviction or state bar disciplinary action should be "final" before an

administrative decision is rendered; otherwise "a practitioner will have been deprived of his or her livelihood during that period" should the conviction or disciplinary action be overturned or vacated.

*Response:* The disciplinary rule provides that a practitioner may be subject to immediate suspension and a summary proceeding based *only* upon either (i) disbarment, suspension, or resignation with an admission of misconduct as found by a state or Federal court or (ii) a conviction for a serious crime. The language in this provision is similar to that found in the Rules for Disciplinary Enforcement for the United States Court of Appeals for the District of Columbia Circuit, the District of Columbia Court of Appeals' Rules Governing the Bar, and the California Rules of Professional Conduct.

The immediate suspension provision, therefore, is designed to protect the public from practitioners who have a criminal conviction, are no longer in "good standing" as set forth in 8 CFR 1.1(f), or who have otherwise forfeited or encumbered their law license. Such misconduct does not arise from "a skeletal complaint filed by a disgruntled client." Rather, based upon facts proven by the requisite high standard of proof ("clear and convincing evidence" in most disciplinary matters and "beyond a reasonable doubt" in criminal matters) and applicable law, a state or Federal court has already made a determination that the practitioner has engaged in serious misconduct. As amplified in the final rule, such a determination, as evidenced by a certified copy of a court record or order, brings "title deeds of high respect" and must be accorded great deference.

Furthermore, a rule that would permit a practitioner who has been criminally convicted of a serious crime to continue to practice before the Board, the Immigration Courts, or the Service pending all appeals of the underlying matter would expose the court's proceedings to the intervention of disqualified, unfit practitioners and subject clients to unnecessary risk. However, recognizing that a practitioner may seek to appeal such a conviction during the period of his immediate suspension, the rule has been amended so that no final administrative disciplinary order may be entered until all direct appeals of the underlying conviction have been exhausted. Additionally, the final rule provides that the Board may set aside an immediate suspension order "when it appears in the interest of justice to do so."

The final rule provides an attorney with an opportunity to rebut the presumed validity of the underlying disciplinary order in a summary proceeding by demonstrating that: (1) The underlying disciplinary proceeding was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; (2) there was such an infirmity of proof establishing the attorney's professional misconduct as to give rise to the clear conviction that the adjudicating official could not, consistent with his or her duty, accept as final the conclusion on that subject; or (3) the imposition of discipline by the adjudicating official would result in grave injustice. The proposed rule denied an attorney admitted in only one jurisdiction the opportunity to rebut the presumption of professional misconduct. This provision has been eliminated in the final rule. This procedure comports in part with, among other jurisdictions, the United States Supreme Court's practice in imposing reciprocal discipline.

Additionally, the proposed rule made the rebuttable presumption safeguards available to practitioners in summary proceedings premised on either reciprocal discipline for professional misconduct or conviction of a serious crime. However, consistent with the practice of state bars, we have limited the rebuttable presumption safeguards so that they apply in reciprocal discipline matters only, rather than extend them to criminal conviction matters, and amended the rule accordingly. Thus, upon filing a certified copy of a court record evidencing a criminal conviction in a summary proceeding based thereon, the only issue to be determined shall be the nature of the discipline to be imposed. Under the final rule, absent extraordinary circumstances, practitioners will be prevented from launching collateral attacks on criminal convictions in a summary proceeding.

#### Section 3.102—Grounds

*General Comments.* Several commenters suggested that the rules for sanctions are too vague and do not contain the level of detail, specificity, and explanation provided by the American Bar Association Model Rules of Professional Conduct (ABA Model Rules). However, others agreed that since the rule closely tracks the ABA Model Rules and that those rules are undergoing revision, this Federal rule should undergo the same revision. Still other commenters suggested that EOIR and the Service use the IRS disciplinary rules as a guide.

Commenters suggested that the rule be expanded to allow for disciplining lawyers who assist in the unauthorized practice of law, *e.g.*, attorneys who sign their names to forms prepared by non-lawyers without any attorney input or oversight. Some commenters went on to suggest that the rule should reach beyond disciplining lawyers only and expand to discipline visa consultants and *notarios* who engage in the unauthorized practice of immigration law, such that any fee collected by a *notario* would be considered "excessively gross" and any application, petition, or brief prepared by a *notario* would be considered negligence *per se*.

*Response.* As stated in the supplementary information to the proposed rule, the revised grounds for disciplinary sanctions include language, wherever possible, that is similar, if not identical to, the ABA Model Rules. EOIR and the Service gave serious consideration to the suggestion that a ground for disciplinary sanctions that addresses the problem of the unauthorized practice of law be included in the final rule. The difficulty in addressing this problem involves a jurisdictional issue. The jurisdiction of this rule is limited to practitioners, *i.e.*, attorneys, accredited representatives, and other persons described in 8 CFR 292.1(a). It cannot reach to persons who are not within one of these categories, such as visa consultants or *notarios*, because the statutory language at 8 U.S.C. 1362, which establishes the framework for the attorney discipline process, refers only to counsel "authorized to practice in (removal and appeal) proceedings." However, in response to the comments, EOIR and the Service have added an additional ground for discipline in the final rule which renders a practitioner subject to discipline if he or she assists a non-practitioner in the performance of any activity that constitutes the unauthorized practice of law.

#### Section 3.102(a)—Grossly Excessive Fees

*Comments.* Many commenters expressed concerns that EOIR and the Service would be "second-guessing the amount of work attorneys dedicate to their cases or the fees they charge." They stated that fees depend on many subjective factors and further concluded that only private practitioners have the experience to know how to appropriately set fees. Other commenters pointed out that since fees are negotiated with a client up front, the client has the option to go to a different attorney if he or she finds that the fees are too high. Some commenters noted

that making a determination of what is "grossly excessive" will require probing into confidential client information, while others inquired as to how much weight will be given to the different factors used in determining what is "grossly excessive." While some commenters concluded that state bar associations generally do not involve themselves in financial arrangements between lawyers and clients, others suggested that federal regulation is unnecessary because state bar associations can review fee disputes. Still others suggested this was a means by which EOIR and the Service would punish a practitioner who has been successful in defending an immigration client.

*Response.* It is important to note that the primary purpose of this provision is to protect clients, not to interfere with attorney-client fee arrangements. The "grossly excessive fees" standard, which exists in the current rule and was retained in the proposed rule, is higher than the "reasonable fees" measure set out under the ABA Model Rules. The "grossly excessive" standard is similar to the "unconscionable" standard used by the IRS in its regulations. See 31 CFR 10.28.

Unlike the general provision in the existing regulation, the provision in the final rule enumerates factors to be considered in determining if a fee is grossly excessive that are virtually identical to those found in the ABA Model Rules. These factors include: The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the practitioner; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; and the experience, reputation, and ability of the practitioner or practitioners performing the services. As other jurisdictions have done, a balancing test may be crafted based upon the various factors in deciding whether a practitioner has violated the rule. These factors will improve the fair assessment of fees by providing practitioners with notice of the variables to be used in determining if a fee is grossly excessive. Investigating allegations of grossly excessive fees may require probing into confidential client information where absolutely necessary,

and then only with the client's permission.

It is important to note that this rule is not designed to set fee schedules or arbitrate fee disputes between practitioners and their clients. Neither EOIR nor the Service intends to engage in "second-guessing" negotiated fee arrangements. Expert jurists in immigration law who command higher fees for their services than other immigration practitioners would not be in violation of the regulations based solely on their fee. However, we are aware of instances in which practitioners have preyed on unsuspecting clients by charging them exorbitant fees for handling relatively routine immigration matters, or worse yet, have charged clients for services that were never rendered at all. Protecting clients from practitioners who charge such grossly excessive fees is the purpose of this provision.

#### *Section 3.102(b)—Bribes*

*Comment.* One commenter suggested that expanding the rule to include "attempt to bribe" as well as bribery was unnecessary and that proving "attempt to bribe" would be difficult and should not be included in the rule.

*Response.* This basic language is in the current rule. Moreover, it would be inadvisable to limit this rule to only those persons who successfully bribe an individual, but not include those who engage in conduct that constitutes an attempt to bribe. The act of attempted bribery is as serious as the act of bribery itself and certainly compromises the integrity of the practitioner who engages in such behavior. Therefore, we did not adopt this suggestion. It should be noted that the SSA regulations also have a similar provision which prohibits any "attempt to influence, directly or indirectly, the outcome of a decision, determination or other administrative action by offering or granting a loan, gift, entertainment or anything of value to a presiding official, Agency employee or witness who is or may reasonably be expected to be involved in the administrative decisionmaking process." 20 CFR 404.1740(c)(6).

#### *Section 3.102(c)—False Statements and Willful Misrepresentation*

*Comments.* Several commenters stated that this provision is too vague and that the Department should provide more guidance. Another commenter suggested that a ground for discipline should be included to deal with preparation of documents, pleadings, papers, etc., that are false and misleading and are prepared by

attorneys who fail to disclose their names and addresses as preparers.

*Response.* The language in this provision closely resembles the language in the current regulation, combined with language from ABA Model Rule 3.3. The language in the rule would not preclude pursuing a practitioner who prepares false or misleading unsigned documents, although the ability to prove who prepared such documents might be difficult. Immigration Judges across the country have indicated that the filing of false or fraudulent documents is a growing problem. This problem includes the submission of once valid documents that have been altered (*e.g.*, foreign birth certificates), falsely created documents (*e.g.*, visas or letters from religious or political groups), and valid documents that contain false information (*e.g.*, asylum applications). This provision as written is broad enough to deal with these types of fraud. It should be noted that the SSA regulations have a similar provision which states that an individual may not "(k)nowingly make or present, or participate in the making or presentation of, false or misleading oral or written statements, assertions, or representations about a material fact or law." 20 CFR 404.1740(c)(3).

#### *Section 3.102(d)—Soliciting Professional Employment*

*Comment.* One commenter suggested that the language in the rule concerning solicitation may conflict with state bar solicitation regulations already in place, creating difficulties for practitioners who may wish to advertise in more than one area.

*Response.* The language in this provision closely resembles the language in ABA Model Rule 7.3 and in the IRS regulations at 31 CFR 10.30. This provision is designed to deal with a growing number of instances that have been brought to our attention concerning the use of "runners" in and around the Immigration Courts. These persons are not authorized to practice immigration law themselves but approach potential clients on behalf of individuals who are licensed professionals. As noted in the Comment to ABA Model Rule 7.3:

There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already be overwhelmed by the circumstances giving

rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching. Model Rules of Professional Conduct Rule 7.3 cmt. (1993).

#### *Section 3.102(g)—Contumelious or Obnoxious Conduct*

*Comments.* Many commenters registered their objections to this provision. They argued that subjecting practitioners to discipline based upon the concept of "obnoxious behavior" would result in practitioners being unable to represent or defend their clients zealously and would require them to be subdued or "nice" in order not to offend EOIR or the Service. As one commenter put it: "(O)ne person's obnoxious behavior is another person's zealous representation." Another commenter feared that "(a) practitioner could be disciplined if, in the opinion of the Disciplinary Committee, he talks too fast or too slow, uses his hands too much when speaking, or has some nervous habit."

Still another commenter concluded that the threat of discipline based on this ground would impair the attorney/client relationship because practitioners would be afraid to advocate zealously on behalf of their clients for fear that such representation would be perceived as obnoxious. Some commenters suggested that it would be impossible for EOIR and the Service to apply this rule in a consistent and fair manner, while others noted that state bars already deal with "contumelious" or "obnoxious" conduct of practitioners. Several commenters concluded that such a disciplinary ground would lead to frivolous complaints and unnecessary litigation.

*Response:* Nothing in this provision is intended to impinge upon a practitioner's zealous representation of his or her client. However, even zealous representation does not entitle a practitioner to engage in contumelious or obnoxious conduct. Any suggestion that this provision will be used, as one commenter suggests, if a practitioner "talks too fast or too slow, uses his hands too much when speaking, or has some nervous habit" is without basis. Behavior disciplined under this provision will be necessarily extreme and without any acceptable premise.

This provision is in the current rule and is retained in the final rule. This provision is included primarily to address the type of conduct that would rise to the level of contempt in a court

of general jurisdiction. IRS regulations contain a similar provision for contemptuous conduct. See 31 CFR 10.51(i). Until recently, Immigration Judges have not had the authority to issue contempt citations for the type of behavior described in this provision. The only alternative for a judge was to file a disciplinary complaint with the Service. Immigration Judges were recently given contempt authority in section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208 (IIRIRA), 8 U.S.C. 1229a(b)(1); however, this authority will be exercised only after the Department issues regulations. It is expected that the contempt regulations, once published, will provide that a practitioner can be disciplined under the Professional Conduct Rules when the practitioner has been sanctioned for contemptuous conduct by an Immigration Judge pursuant to 8 U.S.C. 1229a(b)(1). A finding of contempt will become a prerequisite to the imposition of disciplinary action pursuant to this subsection. Therefore, the current language will be retained in the final rule, pending amendment by the contempt regulations, which will be published in the near future.

#### Section 3.102(h)—Convictions/Crimes

*Comments.* Some commenters found the definition of “serious crime” to be overly broad. While some commenters argued that a practitioner might lose his or her livelihood for committing a minor offense, others concluded that the conviction that forms the basis for disciplinary action might have no bearing on the practitioner’s ability to practice immigration law. Several commenters found the retroactivity aspect of this provision to be unfair, as well as the notion that a practitioner who has filed a timely appeal from a criminal conviction or state disciplinary finding would still be subject to discipline under the rule. Several commenters pointed out that practitioners in each state will be held to different standards of conduct because the definitions of crimes vary from state to state.

*Response:* The definition of “serious crime” is taken from the Rules of Disciplinary Enforcement for the United States Court of Appeals for the District of Columbia. A “serious crime” as defined in the rule includes “any felony.” Any practitioner who has been convicted of a felony has seriously undermined his professional integrity and reputation and, as a result, has jeopardized his ability to continue to represent aliens before the Board, the Immigration Courts, and the Service.

Lesser offenses included within the definition of a “serious crime” are offenses that involve moral turpitude, such as fraud, bribery, extortion, deceit, theft, misappropriation, and false swearing. A conviction for any of these crimes calls into question a practitioner’s ability to perform his or her duties in a manner which upholds the integrity of the profession.

Moreover, the magnitude of interests to be affected by the decisions of EOIR and/or the Service requires that those who represent individuals before either agency be persons whose qualities as practitioners will secure proper service to their clients and assist in the discharge of important agency duties. Additionally, there is no requirement in the authorities or by practice that an incident for which the disciplinary authority seeks to bring charges must relate to a proceeding or pending proceedings.

One commenter noted that the regulation requiring a practitioner to notify EOIR of any conviction for a serious crime is prospective while the actual ground for disciplinary action based on a conviction for a serious crime may be retroactive. Convictions for serious crimes—whether they occur before or after the effective date of the final rule—call into question a practitioner’s fitness to represent aliens. A rule that would limit the criminal conviction ground to only those practitioners convicted after the effective date of the rule would substantially hamper the Department’s goals of protecting the public and preserving the integrity of immigration proceedings. Therefore, § 3.102(h), which is consistent with the prior rule, has not been amended because applying this section only to convictions that occur after the effective date of the rule would undermine the Department’s goals.

Several commenters raised a question with regard to the practitioner who has appealed his or her conviction, stating that such a person should not be subject to discipline during pendency of an appeal. We agree. Therefore, we have added language in §§ 3.103(b) and 292.3(c)(2) that prevents imposition of final discipline arising out of a criminal conviction until direct appeals of the underlying conviction have been exhausted. Notwithstanding, we note that given the grave nature of criminal proceedings and any resulting conviction or plea, a practitioner may be subject to an interim order of suspension under the regulations pending the outcome of any such appeal.

Once again, the primary objective of this rule is to protect the public and preserve the integrity of adjudicative immigration processes. Any practitioner who has been convicted of a serious crime should be held accountable for his or her actions, including loss of the privilege to practice before the Board, the Immigration Courts, and the Service.

#### Section 3.102(i)—False Certification of a Copy of a Document

*Comment.* One commenter suggested that the element of intent be added to the rule.

*Response:* In response to this comment, we have revised this ground by adding the element of intent.

#### Section 3.102(j)—Frivolous Behavior

*Comments.* Some commenters expressed concern that, under this provision, practitioners might be inhibited from putting forth an unpopular or unorthodox interpretation of the law; an attorney could make a losing argument for ten years before the Board and then may prevail in the eleventh year. It was suggested that an attorney’s job is to advocate the “good points” of the law as well as to challenge the “wrong” side of rules and decisions. Others feared retribution for taking actions disagreeable to EOIR or the Service. Several commenters believed that the rule should include a requirement that a practitioner zealously represent his or her client.

*Response:* Sanctions for frivolous behavior are required in section 545 of the Immigration Act of 1990 (8 U.S.C. 1230(b)(6)). This provision implements the statutory language and has previously been included at 8 CFR 292.3(a)(15). The language in this provision is closely patterned after the language in Rule 11 of the Federal Rules of Civil Procedure (FRCP). Precautions are provided to allow for both advocacy grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. Whereas the IRS regulations define frivolous as “patently improper,” the language in the final rule reflects a more specific set of standards and does not interfere with the zealous advocacy of a practitioner.

#### Section 3.102(k)—Ineffective Assistance of Counsel

*Comments.* One commenter suggested that “[t]here should be a limit of one year on the period of time following the alleged fact for a complaint to be brought.” One commenter concluded that this provision would inhibit the zealous representation of immigrants;

another commenter went so far as to conclude that the fear of disciplinary action "will keep practitioners from telling their clients of the mistakes they have made and instead of fixing the mistakes, they would let them be." Another commenter suggested that such a provision may prevent one practitioner from filing a motion to reopen based on ineffective assistance of counsel because the other practitioner could lose his or her livelihood. Others concluded that since the ABA Model Rules do not make malpractice a disciplinary offense, neither should the final rule, given that clients already have the remedy of suing a practitioner for legal malpractice. Several commenters believed that the final rule goes against the traditional rules of professional conduct, while others felt that the state bar disciplinary process is adequate.

*Response:* The comment concerning the time period within which a complaint can be filed based on an ineffective assistance of counsel claim suggests that the time period be limited to one year from the alleged misconduct, rather than five years as provided in the rule. However, because a finding of ineffective assistance of counsel must be made by the Board or the Immigration Court before such a complaint would be considered, and since many cases take longer than one year to adjudicate fully, a longer period of time is required in order to protect the complaining alien. Also, a shorter period of time might unfairly discourage or prevent an alien from bringing a complaint against his or her former attorney or accredited representative. However, in order to strike a balance on this point, the Department has amended the rule to require that a complaint based on this ground be filed within one year of the finding of ineffective assistance of counsel made by the Board or the Immigration Court.

It is worrisome to believe that a practitioner would risk a client's case, and possibly his client's ability to remain in this country, and not resolve a potential problem by choosing instead to remain idle in order to protect himself from an ineffective assistance of counsel claim that would survive only if due process had been denied as a result of the practitioner's conduct, *i.e.*, where the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case. See *Matter of Lozada*, 19 I&N Dec. 637, 638 (1988); see also *Ramirez-Durazo v. INS*, 794 F.2d 491, 499-500 (9th Cir. 1986). Also, one must show that he was prejudiced by his representative's performance. See

*Mohsseni Behbahani v. INS*, 796 F.2d 249, 251 (9th Cir. 1986).

Therefore, it is unlikely that a practitioner who has "made a mistake" in a client's case would allow such a mistake to languish when he could still resolve the problem without prejudice to the client and, in all probability, no longer be subject to an ineffective assistance of counsel claim. As is mentioned throughout the supplementary information in the proposed rule, these regulations are intended to preserve the fairness and integrity of the adjudicative process, secure proper service to aliens subject to proceedings before the Immigration Courts and the Service, and ensure minimal qualification standards for practitioners.

Regarding the commenter who suggested that malpractice claims should suffice as a remedy, it is certainly true that a client may sue a practitioner for malpractice in such instances. However, speculation about the availability of such a legal remedy should not preclude EOIR or the Service from pursuing disciplinary action. While malpractice lawsuits may result in monetary compensation for a particular client, they do little to protect other clients from the same fate.

*Section 3.102(l)—Repeated Failure To Appear for Scheduled Hearings in a Timely Manner*

*Comment.* One commenter felt the phrase "repeatedly fails to appear" was too vague.

*Response:* This provision does not define the number of occasions that will amount to "repeated" failures to appear. Such a definition is not included in the rule because choosing an arbitrary number would hamper the ability to utilize prosecutorial discretion when considering a practitioner's explanation for his or her absences. In 1998, the Social Security Administration published a final rule entitled "Standards of Conduct for Claimant Representatives," see 63 FR 41404 (1998), which includes a provision similar to the provision in the proposed rule regarding repeated absences from scheduled hearings. It notes that "such conduct adversely affects claimants, diminishes the ability of the Agency to operate efficiently and harms other applicants by disrupting schedules and work flow." *Id.* at 41406. For the same reasons, EOIR and the Service have added a similar provision in the rule, with the addition of a "good cause" element.

*Section 3.102(m)—Assisting in the Unauthorized Practice of Law*

*Comment.* Several commenters suggested that this rule address the unauthorized practice of law issue. See *General Comments* above.

*Response.* In response to the comments, EOIR and the Service have added an additional ground for discipline in the final rule which renders a practitioner subject to discipline if he or she assists a non-practitioner in the performance of any activity that constitutes the unauthorized practice of law. This ground is a necessary addition to the rule in order to protect the public from the mistakes of untrained and unqualified individuals, as well as the schemes of unscrupulous immigration practitioners, and reflects the concerns of a number of commenters.

*Sections 3.104(b) and 292.3(d)(3)—Preliminary Inquiries*

and

*Sections 3.105(a) and 292.3(e)(1)—Notice of Intent To Discipline*

*Comments.* A large number of commenters were concerned that the disciplinary process may be used to intimidate, retaliate, or otherwise harass practitioners who are successful in advocating against the government in immigration proceedings. One commenter suggested that this rule might be used to "intimidate and control any lawyer who might be so bold as to file a motion to recuse a judge (or) seek to enter an objection upon the record." The fact that the Department components (EOIR and the Service) investigate disciplinary cases and issue Notices of Intent to Discipline prompted some commenters to raise due process and conflict of interest issues. One commenter suggested that in order to "move cases along," Immigration Judges will resort to the disciplinary process and effectively chill aggressive representation. Another commenter concluded that this rule is a way for EOIR to ensure that "as many non-citizens as possible be deported by taking the lawyers out of the equation."

One commenter suggested that the Notice of Intent to Discipline be served by personal service and that the practitioner should be notified of any complaint and be given an opportunity to respond before any charging document is issued. Several commenters wanted to see the government hire an independent entity to investigate complaints lodged against private practitioners by government employees; others felt that the



government should hire separate counsel to conduct independent investigations.

*Response:* Most, if not all, of the commenters failed to recognize that the current disciplinary system is structured so that the Service (the prosecuting party in an adversarial immigration proceeding) is the party bringing the disciplinary action before EOIR (the adjudicating body). This structure has led to revisions in this rule which, in many cases, transfers responsibility for issuing charging documents from the Service to EOIR. The only cases in which the Service still retains responsibility for issuing charging documents concern situations where the Service serves as the adjudicating body (*i.e.*, adjustment of status cases, asylum cases, and some visa petition cases, among others, but not in matters before an Immigration Judge or the Board). This transition of the disciplinary system from the Service to EOIR is being made specifically to eliminate the appearance of any bias or conflict of interest. The Office of the General Counsel of EOIR or the Office of the General Counsel of the Service, not Immigration Judges or Service trial attorneys, is responsible for conducting preliminary inquiries and issuing charging documents. While the comments reflect some practitioners' reluctance to be regulated, there is simply no basis for the conclusion that this disciplinary process is biased against practitioners.

The primary purpose of this rule is to protect vulnerable aliens from unscrupulous immigration practitioners and from those who have engaged in conduct that raises questions about their fitness to practice law. Rather than demonstrating an overabundance of zeal, some practitioners fail to represent their clients at all. Numerous complaints have been reported about practitioners who fail to appear or to file essential documents or evidence on behalf of their clients. The Board adjudicates numerous motions to reopen filed before it based on such claims of ineffective assistance of counsel. The rule will provide an effective means to address the mounting instances of practitioners' failure to represent their clients. Many immigration practitioners have had the experience of trying to salvage the case of a client who was harmed by a previous representative's inaction. Often a state bar does not have the expertise to evaluate or prosecute such cases of misconduct. The disciplinary rules will provide an effective means to address such problems.

Concerning the request that the practitioner be notified of any complaints lodged against him or her, the preliminary inquiry will, in most cases, afford the practitioner an opportunity to discuss the complaint with an investigator. However, if a complaint is clearly frivolous or without merit, it is possible that the practitioner may not be contacted if it is determined that no action will be taken against him or her. Additionally, during the preliminary inquiry phase of a disciplinary proceeding, EOIR and the practitioner may reach a resolution or settlement prior to the issuance of a Notice of Intent to Discipline. Once the preliminary inquiry is completed, and if no such resolution has been reached, a Notice of Intent to Discipline will then be issued. It should be noted that the Notice of Intent to Discipline will be served by personal service, as defined in 8 CFR 103.5a.

#### *Sections 3.105(d) and 3.106(a)(2)—Default Provisions*

*Comments.* One commenter stated that 15 days is an insufficient time period in which to file a motion to set aside an order of default for failure to file an answer or for failure to appear at a disciplinary hearing. Some commenters thought that a practitioner should be allowed to file motions at any time after an order is issued, or at least within 180 days of issuance. One commenter thought that the provision that requires a practitioner to prove a negative (*i.e.*, failure to appear due to exceptional circumstances) is unfair when the burden of proof is placed on the practitioner.

*Response:* It should be noted that section 6103 of the California Rules of Professional Conduct provides that if the accused does not appear at the time appointed to answer the accusation without sufficient cause, "the court may proceed and determine the accusation in his absence." Moreover, IRS disciplinary regulations provide that an attorney's "(f)ailure to file an answer within the time prescribed. \* \* \* shall constitute an admission of the allegations of the complaint and a waiver of hearing, and the Examiner may make his decision by default without a hearing or further procedure." 31 CFR 10.58(c). Furthermore, it is common practice in state bar disciplinary proceedings to allow both for default and expedited time frames when an attorney fails to file an answer or fails to appear before a disciplinary hearing panel. In response to the suggestions that the time period be expanded for the filing of motions to set aside, EOIR and the Service balanced

the practitioner's due process rights against the primary goals of this regulation, including the protection of the public, and concluded that the time period set forth in the final rule is fair.

#### *Section 3.106(c)—Review Process*

*Comments.* Most commenters complained that the rule provides no opportunity for the practitioner to present a written or oral argument to the Disciplinary Committee. The remaining commenters complained that there is no appeal from the decision of the Disciplinary Committee.

*Response:* As stated above, the proposed Disciplinary Committee has been replaced by the Board in all respects regarding this rule. All of the established appeal procedures in immigration cases, including the submission of written briefs and requests for oral arguments, now apply also to disciplinary cases on appeal to the Board. A practitioner who wishes to obtain judicial review of the Board's decision can do so in Federal district court pursuant to 28 U.S.C. 1331.

#### *Sections 3.106(d) and 292.3(g)—Referral to State Bars*

*Comment.* One commenter suggested that the rule be amended to require all orders of public discipline to be reported to the ABA National Lawyer Regulatory Data Bank and to all jurisdictions in which the disciplined attorney is admitted.

*Response:* We have incorporated into the final rule a provision for referrals of public discipline to the ABA National Lawyer Regulatory Data Bank and to every jurisdiction in which the disciplined attorney is admitted.

#### *Section 3.107—Reinstatement*

*Comments.* One commenter believed that the requirement that a "practitioner has the burden of proving that he or she possesses the moral and professional qualifications to be reinstated by clear, convincing, and unequivocal evidence" is too ambiguous and does not protect the public. Another commenter concluded that it is too difficult to quantify moral qualifications, while another suggested that the rule should provide for a hearing during which the practitioner must show that he or she is rehabilitated and no longer poses a risk to the public, the Board, the Immigration Courts, and the Service.

*Response:* The language in this provision is taken directly from the Rules of Disciplinary Enforcement for the United States Court of Appeals for the District of Columbia Circuit. However, we have adopted the suggestion on providing a reinstatement

hearing by amending the rule to give the Board discretion to hold a hearing if the practitioner meets all of the reinstatement requirements.

#### Section 3.108—Confidentiality

*Comments.* There were some generalized concerns that these provisions do not sufficiently protect a practitioner's privacy, especially with regard to disclosures made to law enforcement authorities, complainants, and witnesses.

*Response:* These provisions are patterned after the Rules of Procedure of the State Bar of California. The presumption in the provisions is one of confidentiality, not disclosure. Exceptions to confidentiality are based on "protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality," and include, but are not limited to, limited disclosures necessary to conduct preliminary inquiries.

#### Sections 3.109 and 292.3—Discipline of Government Attorneys/Immigration Judges

*Comments.* Many commenters expressed their concern that the proposed rule applies only to private immigration practitioners and not to Immigration Judges and/or Service trial attorneys. Since Immigration Judges and Service trial attorneys are subject to the disciplinary system which is overseen by the Department's Office of Professional Responsibility (OPR), a system which regulates all Department attorneys, many commenters stated that having two different systems is unfair and suggested this was a denial of Equal Protection. Still other commenters concluded that the rule will hamper legal advocacy and that the "major purpose of the rule is to intimidate private attorneys out of practice" and "to deny aliens their statutory right to representation."

*Response:* Congress has broadly empowered the Attorney General pursuant to 8 U.S.C. 1103, to "establish such regulations \* \* \* and perform such other acts as she deems necessary for carrying out her authority" under the provisions of the Immigration and Nationality Act. Congress delegated its plenary power over immigration matters in order to advance, among other purposes, the public interest in deciding whether to admit or exclude aliens.

Consistent with Congress's sweeping grant of authority to the Attorney General in immigration matters, "in any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General

from such removal proceedings, the person concerned shall have the privilege of being represented \* \* \* by such counsel, *authorized to practice in such proceedings*, as he shall choose" (emphasis added). 8 U.S.C. 1362. Such statutory authority, which serves as a primary basis for this disciplinary regulation, refers exclusively to counsel for individuals subject to such proceedings, not to Immigration Judges or attorneys for the government.

The Supreme Court has held that "where the empowering provision of a statute states simply that the agency may 'make \* \* \* such rules and regulations as may be necessary to carry out the provisions of (an) act,' \* \* \* the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 280–81 (1969). The general authority upon which we rely herein to impose disciplinary sanctions properly gives heed to Congress' enabling language and public interest purposes. Moreover, we view the need to safeguard adjudicative processes, fairly decide cases, and protect the public through implementation of this disciplinary regulation as consonant with Congress's public interest intent. Contrary to the assertion that such regulations will hamper counsel in rendering legal assistance to aliens, we believe that these rules will strengthen the effectiveness of representation and provide fairer adjudications.

As one court stated in reference to the foregoing express grants of authority from Congress, "an agency empowered to prescribe its own rules has the implied power to determine who can practice before it." *Koden v. United States Dep't of Justice*, 564 F.2d 228, 234 (7th Cir. 1977). In that case, the Seventh Circuit held that the authority bestowed on the Attorney General is more than adequate to empower, expressly or impliedly, an agency to set disciplinary standards applicable to representatives. The *Koden* court upheld a disciplinary regulation substantially similar to this one that had existed for over 25 years (at the time of the court's decision) and applied only to private immigration practitioners.

Additionally, since 1975, OPR has had responsibility for investigating allegations of misconduct against any of the Department's lawyers, which today number over 9,000 individuals, including Immigration Judges and Service trial attorneys, where such allegations relate to the exercise of their authority to investigate, litigate,

adjudicate, or provide legal services. *See* 28 CFR 0.39. Such employees are also subject to the jurisdiction of the Department's Office of Inspector General. Among other rules, regulations, and orders, Department attorneys must abide by the standards of conduct applicable to executive branch employees and the Department's supplemental standards of conduct. *See* 5 CFR part 2635 *et seq.*; 5 CFR part 3801 *et seq.*

Such comprehensive standards and procedures, under the auspices of OPR and the Office of Inspector General, are equally, if not more, rigorous than those provided in this rule. They provide separate means for seeking discipline of Immigration Judges and Department attorneys.

It should also be noted that on October 21, 1998, Congress amended Chapter 31 of Title 28 of the United States Code by adding section 530B in Public Law 105–277. This amendment, which went into effect on April 19, 1999, subjects Department attorneys to state laws and rules, and local federal court rules, governing attorneys in each state where such attorneys engage in their duties, to the same extent and in the same manner as other attorneys in that state. *See* 64 FR 19273 (1999) (Interim Rule on Ethical Standards for Attorneys for the Government).

#### Definitions

*Comment.* One commenter pointed out that the rule uses the term "practitioner" whereas the current rule uses the terms "attorney" and "representative."

*Response:* Use of the new term "practitioner" in the proposed rule is simply for convenience when referring to both attorneys, as defined in 8 CFR 1.1(f), and representatives, as defined in 8 CFR 1.1(j).

#### Disciplinary System Involving Both EOIR and INS

*Comments.* Many commenters expressed concerns over the two parallel proceedings outlined in the proposed rule. They felt that the jurisdiction between EOIR and the Service is unclear, that the two systems are not necessary, that practitioners will have to be familiar with the professional conduct requirements of two agencies, and that two separate complaints could result in two punishments. Another commenter thought that the Board and Immigration Judges already have "plenary power to sanction attorneys."

*Response:* Some commenters have characterized this rule as two parallel disciplinary systems with the potential for two disciplinary actions for the same

misconduct. This notion is incorrect; only one disciplinary system exists and the delineations of authority are clear under the regulation. If a complaint concerns a practitioner's conduct before the Service in its adjudicative capacity (*i.e.*, adjustment of status cases, asylum cases, visa petition cases), then the complaint should be filed with the Service, which will conduct a preliminary inquiry. If, however, the basis of the complaint concerns a practitioner's conduct before EOIR (*i.e.*, the Board or the Immigration Courts), then the complaint should be filed with EOIR, which will conduct a preliminary inquiry. EOIR's jurisdiction to investigate and prosecute disciplinary cases will not extend to cases over which the Service has adjudicatory authority and, likewise, the Service's jurisdiction to investigate and prosecute disciplinary cases will not extend to cases over which EOIR has adjudicatory authority.

Between EOIR and the Service, there remains an expectation of cooperation and communication in instances where it is unclear which agency should take responsibility for investigating a complaint, *i.e.*, if a complaint alleges misconduct that occurred before both agencies. Each agency is required to serve a copy of a Notice of Intent to Discipline on the other agency. Moreover, each agency may submit a written request to the adjudicating official asking that any discipline imposed upon a practitioner that restricts his or her authority to practice before one agency also apply to his or her authority to practice before the other agency. This will avoid the situation in which a practitioner could be forced to go through two separate disciplinary hearings for the same misconduct. It also gives the adjudicating official the discretion to prohibit a practitioner from continuing to practice before one agency pending suspension or exclusion from the other. Without this provision, for example, a practitioner who appears before EOIR and who has been suspended for assisting others in the unauthorized practice of law could continue to practice before the Service unless and until the Service conducted its own separate proceeding.

Contrary to one commenter's suggestion, the Board and Immigration Judges do not have "plenary power to sanction attorneys." Until the contempt rule is final (see discussion above), the revised set of grounds as set forth in this disciplinary regulation is the only means by which the Board and Immigration Judges may seek to remedy related professional misconduct.

#### *Procedures*

*Comments.* Some commenters felt that there should be a right to discovery while others felt that the Federal Rules of Evidence (FRE) and/or the Federal Rules of Civil Procedure (FRCP) should be used in disciplinary proceedings. One commenter asked under what circumstances costs would be assessed to the practitioner. Another commenter requested that hearings be held in the practitioner's city of practice and that a hearing should be set automatically, regardless of whether a hearing has been requested or the practitioner has failed to file an answer to the Notice of Intent to Discipline. One commenter suggested that the hearing should be closed to the public. Others suggested that the 30-day time period to file an answer be extended to 60 days. Some commenters would like to see the Disciplinary Committee establish rules of procedure. Other commenters opined that the complaining party must have standing to bring a complaint, *e.g.*, the complainant must be an "aggrieved party" who can show harm or damage. One commenter questioned how ongoing cases would be handled under the new rule.

*Response:* Disciplinary proceedings are designed to be conducted under the same procedures which govern deportation and removal hearings in Immigration Courts, practices which are familiar to both adjudicating officials and practitioners. The proposed rule required the Director of EOIR not only to appoint the adjudicating official, but also to designate the time and place of the hearing. After further review, however, this provision has been amended in several respects.

First, the final rule now gives the Chief Immigration Judge the authority to appoint an Immigration Judge as the adjudicating official. At the request of the Chief Immigration Judge or in the interest of efficiency, however, the Director of EOIR may appoint an Administrative Law Judge as an adjudicating official. Second, the adjudicating official will designate the time and place of the hearing. This amendment was added to give the adjudicating official more control over the scheduling of the hearing. Third, the rule has been amended to require the adjudicating official to designate the place of the hearing "with due regard to the location of the practitioner's practice or residence, the convenience of witnesses, and any other relevant factors." Although it is most likely that the adjudicating official will select a site for the hearing which is convenient for the practitioner, this amendment does

not require that such a selection be made since there may be other important factors which might dictate that another site is preferable. For example, it is reasonable to predict that disciplinary proceedings will most likely be held in one of EOIR's Immigration Courts, where such hearings are presently held, so that proper administrative support, such as clerks and interpreters, are available. Selection of such a hearing site might require the practitioner to travel to that location.

Finally, the final rule has eliminated the terms "Assistant Chief Immigration Judge" and "Board Member" as persons who may be appointed as adjudicating officials. The term "Assistant Chief Immigration Judge" was deleted because it was determined to be unnecessary, since the term "Immigration Judge" is deemed to include "Assistant Chief Immigration Judge." The term "Board Member" was deleted since, under the final rule, the Board is now the appellate reviewing body for disciplinary appeals, thereby eliminating the possibility that Board Members could be appointed as adjudicating officials.

The rule requires the practitioner to request a hearing if he or she so desires, but does not make such a hearing mandatory. There may be reasons why a practitioner may not want a hearing, *e.g.*, the practitioner intends to settle the case, does not want publicity, or does not wish to expend the time and money necessary to prepare for a hearing. To give the practitioner the option of having a hearing gives him or her more control over the progression of the case. Further, the rule does not allow for a hearing for a practitioner who fails to file an answer to a Notice of Intent to Discipline.

One commenter suggested that all hearings be closed. However, the prevailing procedure among state bars mandates that disciplinary hearings be open to the public once a charging document has been filed. The public has a right to know what transpires in such cases, and the notion of conducting disciplinary hearings behind closed doors may foster ignorance and raise doubts as to the nature of the proceedings. It should be noted that there are two exceptions in the rule to a public hearing. These include limitations of the physical facilities and/or the need to protect witnesses, parties, or the public interest.

Another commenter suggested the time period to file an answer should be extended from 30 to 60 days. In order for disciplinary actions to be most effective, it is imperative that cases be

resolved in a timely manner. To provide a practitioner with 30 days to file an answer is reasonable.

Another commenter stated that a complaining party must have standing and must be an "aggrieved party" who can show harm or damage. However, there is no reason to limit the ability of anyone to file a complaint. The degree to which a complainant has been harmed will go to the merits of the case itself, but should not preclude an individual from filing a complaint. Moreover, it is anticipated that complaints may come from adjudicators, Service personnel, aliens, or practitioners themselves, all of whom may have first-hand knowledge of practitioner misconduct.

One commenter questioned when costs might be assessed against the practitioner. Assessment of costs is not available in Immigration Court or at the Board, and benefits such as the use of interpreters have not previously been charged against a party. In an effort to keep disciplinary proceedings procedurally similar to Immigration Court practice, the agency has decided not to assess costs in disciplinary proceedings. Therefore, the provision concerning costs has been deleted in the final rule.

With regard to ongoing cases in which a charging document has been issued and filed with the Office of the Chief Immigration Judge prior to the effective date of these regulations, such matters will proceed to a final disposition under the previous regulations.

#### *State Bars Are Appropriate Entities To Handle Complaints*

*Comments.* Many commenters said that it is inappropriate for federal agencies to unilaterally impose a national disciplinary scheme where states should have sole jurisdiction and, further, that federal regulations concerning discipline will cause confusion and uncertainty with regard to state rules. Others objected that the rule subjects practitioners to being disciplined twice for the same conduct—once by the federal government and once by the state bar. Others believed that this rule is an unnecessary and impermissible intrusion into the state law licensure process and "to bar a lawyer from practice before an agency is unheard of."

*Response:* In response to the comments that claim that this regulation is an "impermissible intrusion into the state law licensure process" and that it is "inappropriate for federal agencies to unilaterally impose a national disciplinary scheme where states should

have sole jurisdiction," we refer commenters to the U.S. Supreme Court decision in *Sperry v. Florida*, 373 U.S. 379 (1963). In that case, the state of Florida sought to enjoin a non-attorney registered to practice before the United States Patent Office from preparing and prosecuting patent applications in Florida because he was not a member of the Florida Bar. The Supreme Court held that the federal government has preemptive powers over states' legislative and judicial authorities when acting under valid federal regulations. As noted above in the supplementary information, EOIR and the Service maintain that under the broad rulemaking authority of the Attorney General and the federal government's preemptive powers, EOIR and the Service have the authority (and indeed, have had the authority since these regulations were first adopted more than 45 years ago) to promulgate disciplinary regulations on a nationwide basis governing the privilege of appearing as an attorney or representative before the Board, the Immigration Courts, and the Service.

The commenters also claim that this regulation is unnecessary in light of the 51 state bar disciplinary agencies (including the District of Columbia) which regulate attorney conduct. The American Bar Association (ABA) suggested that EOIR and the Service establish a system by which complaints about attorneys alleged to have engaged in misconduct be referred to state disciplinary authorities, and by which such disciplinary authorities then would notify the agencies about sanctioned lawyers. Since the ABA submitted almost identical comments regarding the EOIR/Service rule and the Social Security Administration's (SSA's) recently published rule on its disciplinary system (*see* 63 FR 41404 (1998)), it appears that the organization is expressing its general objection to federal oversight of the professional conduct of those who appear before federal agencies.

In response to such comments, it should be noted that immigration hearings are held in approximately 50 Immigration Courts located in 23 different states and territories. Moreover, attorneys often represent aliens in jurisdictions other than those in which they are licensed to practice law. It is imperative that EOIR and the Service administer a uniform disciplinary system among the respective Immigration Courts. For the reasons explained in SSA's supplementary information to their disciplinary rule, EOIR and the Service should not be expected or required to

apply numerous local rules, or local interpretations of the rules, to problems that require national uniformity. Applying local rules or local interpretations in lieu of a national standard would leave immigration attorneys in one state subject to discipline, while possibly exempting immigration attorneys in another state. EOIR and the Service do not believe that it would benefit the Board, the Immigration Courts, the Service, the public, or attorneys to promote inconsistency in regulating the conduct of practitioners, who all practice before the same forum.

Similar to the SSA program, practice before EOIR and the Service is not limited to attorneys, but includes non-attorneys who may not be subject to state bar rules. EOIR and the Service believe that all practitioners, attorneys and non-attorneys alike, must be held to uniform standards of professional conduct in immigration proceedings. Without this regulation, non-attorneys may not be accountable to any disciplinary authority.

EOIR and the Service anticipate working closely with the various state bars when investigating disciplinary complaints. Referrals to state bars may be appropriate when a complaint does not allege a violation of the federal regulations but may allege a violation of state bar rules or regulations. Cooperation between the federal government and the 51 state bar disciplinary authorities will optimize resources and minimize duplication of investigations. In general, state bars have not been resistant to the Federal government's efforts to assist in protecting the public by scrutinizing the professional conduct of attorneys. Moreover, immigration law is a very complex area and this program may assist state bars with investigating allegations of misconduct against immigration attorneys.

After publication of the proposed rule, the vast majority of comments were from attorneys who opposed the idea of any Federal government regulations of professional conduct. However, as we have tried to emphasize in this final rule, the Department's imperatives, including preserving the integrity of the Board, the Immigration Courts, and the Service, ensuring the important and proper discharge of statutory duties under the immigration laws of the United States, and safeguarding a vulnerable client population, support continuing and improving the reasonable and fair regulation of such conduct.

One comment in particular exemplified the peril of susceptible

clients, and was submitted by immigrant twin brothers who are law students. After fleeing the former Yugoslavia, they arrived in the United States with the hope of starting a new life. They feared for their lives in their country and applied for political asylum so they would not have to return to their country to face persecution and possibly death. They retained an immigration attorney to help them file the necessary applications. After appearing before an Immigration Judge, the brothers were given a deadline to file their asylum applications with the court, and a hearing date was set. The attorney assured the brothers that the applications had been filed before the deadline and that they did not need to show up for any further hearings before the Immigration Judge.

During the ensuing months, the attorney continued to pressure the brothers for additional legal fees, telling them he needed to file more paperwork. He told them to expect to receive their permanent resident cards in the mail. After numerous attempts to contact the attorney over the next several years, the brothers finally went to the Immigration Court to find out the status of their case. Much to their surprise, they learned that their case had been dismissed after the Immigration Judge and the Board considered their requests for asylum to be abandoned when no applications had been submitted by the deadline. The brothers then contacted their attorney who told them that he had never received anything from the Immigration Court or the Service.

Eventually, they hired a new attorney who helped them correct the mistakes of the former attorney by filing a motion to reopen based on ineffective assistance of counsel. The brothers wrote: "The immigration problem which faces this great nation of ours is caused by many of the immigration attorneys who misrepresent their clients who often do not speak (the) English language and do not understand immigration law. \* \* \* The proposed rule is a rule which needs to be used in practice. It needs to be enacted in order to deter the misconduct of attorneys who practice immigration law. These attorneys like our former attorney are taking advantage of the most vulnerable group of people in our society. Your office would serve a great deal in this process by properly investigating, and determining which complaints have merit. \* \* \* This rule makes good on a pledge by the Attorney General to deter the bad conduct of immigration attorneys. Hopefully, this letter will inform you that (the) rule is needed and wanted by not only

immigrants like us but also future legal professionals."

#### *Regulatory Flexibility Act*

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule affects only those practitioners who practice immigration law before EOIR and the Service. Approximately 5000 immigration and 400 accredited representatives will be subject to this rule. This rule will not have a significant adverse economic impact on a substantial number of small entities because the rule is similar in substance to the existing regulatory process and will affect only those practitioners who have committed serious crimes or who have lost their license to practice law or otherwise engaged in professional misconduct. Therefore, this rule does not have a significant economic impact on a substantial number of small entities.

#### *Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### *Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### *Executive Order 12866*

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review", section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is not a "significant regulatory action" under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by the Office of Management and Budget.

#### *Executive Order 12612*

This regulation will not have substantial direct effects on the States,

on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### *Executive Order 12988—Civil Justice Reform*

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### *Plain Language Instructions*

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write Charles Adkins-Blanch, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, Virginia, 22041, telephone (703) 305-0470.

#### **List of Subpart**

##### *8 CFR Part 3*

Administrative practice and procedure, Immigration, Legal services, Organization and functions (Government agencies), Reporting and recordkeeping requirements.

##### *8 CFR Part 292*

Administrative practice and procedures, Immigration, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, parts 3 and 292 of title 8 of the Code of Federal Regulations are amended as follows:

### **PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

1. The authority citation for Part 3 continues to read as follows:

**Authority:** 5 U.S.C. 301; 8 U.S.C. 1103; 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949-1953 Comp., p. 1002; section 203 of Pub L. 105-100.

2. In section 3.1, add paragraph (b)(13) and revise paragraph (d)(3) to read as follows:

#### **§ 3.1 [Amended]**

\* \* \* \* \*

(b) \* \* \*

(13) Decisions of adjudicating officials in practitioner disciplinary proceedings as provided in subpart G of this part.

\* \* \* \* \*

(d) \* \* \*

(3) *Rules of practice.* The Board shall have authority, with the approval of the

Director, EOIR, to prescribe rules governing proceedings before it. It shall also determine whether any organization and/or individual desiring to represent aliens in immigration proceedings meets the requirements as set forth in § 292.2 of this chapter.

3-4. Section 3.1(d)(1-a)(ii) is amended by revising the reference to “§ 292.3(a)(15) of this chapter” in the first sentence to read “§ 3.102(j).”

### § 3.12 [Amended]

5. Section 3.12 is amended by revising the reference to “§ 292.3 of this chapter” in the second sentence to read “this part 3.”

### Subpart F—[Reserved]

6. Subpart F is added and reserved.

7. Subpart G is added to Part 3 to read as follows:

### Subpart G—Professional Conduct for Practitioners—Rules and Procedures

Sec.

3.101 General provisions.

3.102 Grounds.

3.103 Immediate suspension and summary disciplinary proceedings; duty of practitioner to notify EOIR of correction or discipline.

3.104 Filing of complaints; preliminary inquiries; resolutions; referral of complaints.

3.105 Notice of Intent to Discipline.

3.106 Hearing and disposition.

3.107 Reinstatement after expulsion or suspension.

3.108 Confidentiality.

3.109 Discipline of government attorneys.

### Subpart G—Professional Conduct for Practitioners—Rules and Procedures

#### § 3.101 General provisions.

(a) *Authority to sanction.* An adjudicating official or the Board of Immigration Appeals (the Board) may impose disciplinary sanctions against any practitioner if it finds it to be in the public interest to do so. It will be in the public interest to impose disciplinary sanctions against a practitioner who is authorized to practice before the Board and the Immigration Courts when such person has engaged in criminal, unethical, or unprofessional conduct, or in frivolous behavior, as set forth in § 3.102. In accordance with the disciplinary proceedings set forth in this subpart and outlined below, an adjudicating official or the Board may impose any of the following disciplinary sanctions:

(1) Expulsion, which is permanent, from practice before the Board and the Immigration Courts or the Immigration and Naturalization Service (the Service), or before all three authorities;

(2) Suspension, including immediate suspension, from practice before the Board and the Immigration Courts or the Service, or before all three authorities;

(3) Public or private censure; or

(4) Such other disciplinary sanctions as the adjudicating official or the Board deems appropriate.

(b) *Persons subject to sanctions.* Persons subject to sanctions include any practitioner. A practitioner is any attorney as defined in § 1.1(f) of this chapter who does not represent the federal government, or any representative as defined in § 1.1(j) of this chapter. Attorneys employed by the Department of Justice shall be subject to discipline pursuant to § 3.109. Nothing in this regulation shall be construed as authorizing persons who do not meet the definition of practitioner to represent individuals before the Board and the Immigration Courts or the Service.

#### § 3.102 Grounds.

It is deemed to be in the public interest for an adjudicating official or the Board to impose disciplinary sanctions against any practitioner who falls within one or more of the categories enumerated in this section, but these categories do not constitute the exclusive grounds for which disciplinary sanctions may be imposed in the public interest. Nothing in this regulation should be read to denigrate the practitioner's duty to represent zealously his or her client within the bounds of the law. A practitioner who falls within one of the following categories shall be subject to disciplinary sanctions in the public interest if he or she:

(a) Charges or receives, either directly or indirectly:

(1) In the case of an attorney, any fee or compensation for specific services rendered for any person that shall be deemed to be grossly excessive. The factors to be considered in determining whether a fee or compensation is grossly excessive include the following: The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; and the experience,

reputation, and ability of the attorney or attorneys performing the services,

(2) In the case of an accredited representative as defined in § 292.1(a)(4) of this chapter, any fee or compensation for specific services rendered for any person, except that an accredited representative may be regularly compensated by the organization of which he or she is an accredited representative, or

(3) In the case of a law student or law graduate as defined in § 292.1(a)(2) of this chapter, any fee or compensation for specific services rendered for any person, except that a law student or law graduate may be regularly compensated by the organization or firm with which he or she is associated as long as he or she is appearing without direct or indirect remuneration from the client he or she represents;

(b) Bribes, attempts to bribe, coerces, or attempts to coerce, by any means whatsoever, any person (including a party to a case or an officer or employee of the Department of Justice) to commit any act or to refrain from performing any act in connection with any case;

(c) Knowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence. If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures;

(d) Solicits professional employment, through in-person or live telephone contact or through the use of runners, from a prospective client with whom the practitioner has no family or prior professional relationship, when a significant motive for the practitioner's doing so is the practitioner's pecuniary gain. If the practitioner has no family or prior professional relationship with the prospective client known to be in need of legal services in a particular matter, the practitioner must include the words “Advertising Material” on the outside of the envelope of any written communication and at the beginning and ending of any recorded communication. Such advertising material or similar solicitation documents may not be distributed by any person in or around the premises of any building in which an Immigration Court is located;

(e) Is subject to a final order of disbarment or suspension, or has

resigned with an admission of misconduct.

(1) In the jurisdiction of any state, possession, territory, commonwealth, or the District of Columbia, or in any Federal court in which the practitioner is admitted to practice, or

(2) Before any executive department, board, commission, or other governmental unit;

(f) Knowingly or with reckless disregard makes a false or misleading communication about his or her qualifications or services. A communication is false or misleading if it:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading, or,

(2) Contains an assertion about the practitioner or his or her qualifications or services that cannot be substantiated. A practitioner shall not state or imply that he or she has been recognized or certified as a specialist in immigration and/or nationality law unless such certification is granted by the appropriate state regulatory authority or by an organization that has been approved by the appropriate state regulatory authority to grant such certification;

(g) Engages in contumelious or otherwise obnoxious conduct, with regard to a case in which he or she acts in a representative capacity, which would constitute contempt of court in a judicial proceeding;

(h) Has been found guilty of, or pleaded guilty or *nolo contendere* to, a serious crime, in any court of the United States, or of any state, possession, territory, commonwealth, or the District of Columbia. A serious crime includes any felony and also includes any lesser crime, a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, dishonesty, bribery, extortion, misappropriation, theft, or an attempt, or a conspiracy or solicitation of another, to commit a serious crime. A plea or verdict of guilty or a conviction after a plea of *nolo contendere* is deemed to be a conviction within the meaning of this section;

(i) Knowingly or with reckless disregard falsely certifies a copy of a document as being a true and complete copy of an original;

(j) Engages in frivolous behavior in a proceeding before an Immigration Court,

the Board, or any other administrative appellate body under title II of the Immigration and Nationality Act, provided:

(1) A practitioner engages in frivolous behavior when he or she knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to harass or to cause unnecessary delay. Actions that, if taken improperly, may be subject to disciplinary sanctions include, but are not limited to, the making of an argument on any factual or legal question, the submission of an application for discretionary relief, the filing of a motion, or the filing of an appeal. The signature of a practitioner on any filing, application, motion, appeal, brief, or other document constitutes certification by the signer that the signer has read the filing, application, motion, appeal, brief, or other document and that, to the best of the signer's knowledge, information, and belief, formed after inquiry reasonable under the circumstances, the document is well-grounded in fact and is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, and is not interposed for any improper purpose.

(2) The imposition of disciplinary sanctions for frivolous behavior under this section in no way limits the authority of the Board to dismiss an appeal summarily pursuant to § 3.1(d)(1-a);

(k) Engages in conduct that constitutes ineffective assistance of counsel, as previously determined in a finding by the Board or an Immigration Judge in an immigration proceeding, and a disciplinary complaint is filed within one year of the finding;

(l) Repeatedly fails to appear for scheduled hearings in a timely manner without good cause; or

(m) Assists any person, other than a practitioner as defined in § 3.101(b), in the performance of activity that constitutes the unauthorized practice of law.

**§ 3.103 Immediate suspension and summary disciplinary proceedings; duty of practitioner to notify EOIR of conviction or discipline.**

(a) *Immediate suspension.* (1) *Petition.* The Office of the General Counsel of EOIR shall file a petition with the Board to suspend immediately from practice before the Board and the Immigration Courts any practitioner who has been found guilty of, or pleaded guilty or *nolo contendere* to, a

serious crime, as defined in § 3.102(h), or any practitioner who has been disbarred or suspended on an interim or final basis by, or has resigned with an admission of misconduct from, the highest court of any state, possession, territory, commonwealth, or the District of Columbia, or any Federal court. A copy of the petition shall be forwarded to the Office of the General Counsel of the Service, which may submit a written request to the Board that entry of any order immediately suspending a practitioner before the Board or the Immigration Courts also apply to the practitioner's authority to practice before the Service. Proof of service on the practitioner of the Service's request to broaden the scope of any immediate suspension must be filed with the Board.

(2) *Immediate suspension.* Upon the filing of a petition for immediate suspension by the Office of the General Counsel of EOIR, together with a certified copy of a court record finding that a practitioner has been so found guilty of a serious crime, or has been so disciplined or has so resigned, the Board shall forthwith enter an order immediately suspending the practitioner from practice before the Board, the Immigration Courts, and/or the Service, notwithstanding the pendency of an appeal, if any, of the underlying conviction or discipline, pending final disposition of a summary disciplinary proceeding as provided in paragraph (b) of this section. Such immediate suspension will continue until imposition of a final administrative decision. Upon good cause shown, the Board may set aside such order of immediate suspension when it appears in the interest of justice to do so. If a final administrative decision includes the imposition of a period of suspension, time spent by the practitioner under immediate suspension pursuant to this paragraph may be credited toward the period of suspension imposed under the final administrative decision.

(b) *Summary disciplinary proceedings.* The Office of the General Counsel of EOIR shall promptly initiate summary disciplinary proceedings against any practitioner described in paragraph (a) of this section. Summary proceedings shall be initiated by the issuance of a Notice of Intent to Discipline, accompanied by a certified copy of the order, judgment, and/or record evidencing the underlying criminal conviction, discipline, or resignation. Summary proceedings shall be conducted in accordance with the provisions set forth in §§ 3.105 and 3.106. Any such summary proceeding

shall not be concluded until all direct appeals from an underlying criminal conviction shall have been completed.

(1) In matters concerning criminal convictions, a certified copy of the court record, docket entry, or plea shall be conclusive evidence of the commission of the crime in any summary disciplinary proceeding based thereon.

(2) In the case of a summary proceeding based upon a final order of disbarment or suspension, or a resignation with an admission of misconduct, (*i.e.*, reciprocal discipline), a certified copy of a judgment or order of discipline shall establish a rebuttable presumption of the professional misconduct. Disciplinary sanctions shall follow in such a proceeding unless the attorney can rebut the presumption by demonstrating by clear, unequivocal, and convincing evidence that:

(i) The underlying disciplinary proceeding was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(ii) There was such an infirmity of proof establishing the attorney's professional misconduct as to give rise to the clear conviction that the adjudicating official could not, consistent with his or her duty, accept as final the conclusion on that subject; or

(iii) The imposition of discipline by the adjudicating official would result in grave injustice.

(c) *Duty of practitioner to notify EOIR of conviction or discipline.* Any practitioner who has been found guilty of, or pleaded guilty or *nolo contendere* to, a serious crime, as defined in § 3.102(h), or who has been disbarred or suspended by, or who has resigned with an admission of misconduct from, the highest court of any state, possession, territory, commonwealth, or the District of Columbia, or by any Federal court, must notify the Office of the General Counsel of EOIR of any such conviction or disciplinary action within 30 days of the issuance of the initial order, even if an appeal of the conviction or discipline is pending. Failure to do so may result in immediate suspension as set forth in paragraph (a) of this section and other final discipline. This duty to notify applies only to convictions for serious crimes and to orders imposing discipline for professional misconduct entered on or after August 28, 2000.

**§ 3.104 Filing of complaints; preliminary inquiries; resolutions; referral of complaints.**

(a) *Filing of complaints.*—(1) *Practitioners authorized to practice before the Board and the Immigration Courts.* Complaints of criminal,

unethical, or unprofessional conduct, or of frivolous behavior by a practitioner who is authorized to practice before the Board and the Immigration Courts, shall be filed with the Office of the General Counsel of EOIR. Disciplinary complaints must be submitted in writing and must state in detail the information that supports the basis for the complaint, including, but not limited to, the names and addresses of the complainant and the practitioner, the date(s) of the conduct or behavior, the nature of the conduct or behavior, the individuals involved, the harm or damages sustained by the complainant, and any other relevant information. Any individual may file a complaint with the Office of the General Counsel of EOIR using the Form EOIR-44. The Office of the General Counsel of EOIR shall notify the Office of the General Counsel of the Service of any disciplinary complaint that pertains, in whole or in part, to a matter involving the Service.

(2) *Practitioners authorized to practice before the Service.* Complaints of criminal, unethical, or unprofessional conduct, or of frivolous behavior by a practitioner who is authorized to practice before the Service, shall be filed with the Office of the General Counsel of the Service pursuant to the procedures set forth in § 292.3(d) of this chapter.

(b) *Preliminary inquiry.* Upon receipt of a disciplinary complaint or on its own initiative, the Office of the General Counsel of EOIR will initiate a preliminary inquiry. If a complaint is filed by a client or former client, the complainant thereby waives the attorney-client privilege and any other applicable privilege, to the extent necessary to conduct a preliminary inquiry and any subsequent proceedings based thereon. If the Office of the General Counsel of EOIR determines that a complaint is without merit, no further action will be taken. The Office of the General Counsel of EOIR may, in its discretion, close a preliminary inquiry if the complainant fails to comply with reasonable requests for assistance, information, or documentation. The complainant and the practitioner shall be notified of any such determination in writing.

(c) *Resolutions reached prior to the issuance of a Notice of Intent to Discipline.* The Office of the General Counsel of EOIR, in its discretion, may issue warning letters and admonitions, and may enter into agreements in lieu of discipline, prior to the issuance of a Notice of Intent to Discipline.

(d) *Referral of complaints of criminal conduct.* If the Office of the General Counsel of EOIR receives credible

information or allegations that a practitioner has engaged in criminal conduct, the Office of the General Counsel of EOIR shall refer the matter to the Inspector General and, if appropriate, to the Federal Bureau of Investigation. In such cases, in making the decision to pursue disciplinary sanctions, the Office of the General Counsel of EOIR shall coordinate in advance with the appropriate investigative and prosecutorial authorities within the Department to ensure that neither the disciplinary process nor criminal prosecutions are jeopardized.

**§ 3.105 Notice of Intent to Discipline.**

(a) *Issuance of Notice to practitioner.* If, upon completion of the preliminary inquiry, the Office of the General Counsel of EOIR determines that sufficient prima facie evidence exists to warrant charging a practitioner with professional misconduct as set forth in § 3.102, it will issue a Notice of Intent to Discipline to the practitioner named in the complaint. This notice will be served upon the practitioner by personal service as defined in § 103.5a of this chapter. Such notice shall contain a statement of the charge(s), a copy of the preliminary inquiry report, the proposed disciplinary sanctions to be imposed, the procedure for filing an answer or requesting a hearing, and the mailing address and telephone number of the Board.

(b) *Copy of Notice to the Service; reciprocity of disciplinary sanctions.* A copy of the Notice of Intent to Discipline shall be forwarded to the Office of the General Counsel of the Service. The Office of the General Counsel of the Service may submit a written request to the Board or the adjudicating official requesting that any discipline imposed upon a practitioner which restricts his or her authority to practice before the Board or the Immigration Courts also apply to the practitioner's authority to practice before the Service. Proof of service on the practitioner of any request to broaden the scope of the proposed discipline must be filed with the adjudicating official.

(c) *Answer.*—(1) *Filing.* The practitioner shall file a written answer to the Notice of Intent to Discipline with the Board within 30 days of the date of service of the Notice of Intent to Discipline unless, on motion to the Board, an extension of time to answer is granted for good cause. A motion for an extension of time to answer must be received by the Board no later than three (3) working days before the time to answer has expired. A copy of the



answer and any such motion shall be served by the practitioner on the Office of the General Counsel of EOIR (or the Office of the General Counsel of the Service with respect to a Notice of Intent to Discipline issued by the Service).

(2) *Contents.* The answer shall contain a statement of facts which constitute the grounds of defense and shall specifically admit or deny each allegation set forth in the Notice of Intent to Discipline. Every allegation in the Notice of Intent to Discipline which is not denied in the answer shall be deemed to be admitted and may be considered as proved, and no further evidence in respect of such allegation need be adduced. The practitioner may also state affirmatively special matters of defense and may submit supporting documents, including affidavits or statements, along with the answer.

(3) *Request for hearing.* The practitioner shall also state in the answer whether he or she requests a hearing on the matter. If no such request is made, the opportunity for a hearing will be deemed waived.

(d) *Failure to file an answer.* (1) Failure to file an answer within the time period prescribed in the Notice of Intent to Discipline, except where the time to answer is extended by the Board, shall constitute an admission of the allegations in the Notice of Intent to Discipline and no further evidence with respect to such allegations need be adduced.

(2) Upon such a default by the practitioner, the Office of the General Counsel shall submit to the Board proof of personal service of the Notice of Intent to Discipline. The practitioner shall be precluded thereafter from requesting a hearing on the matter. The Board shall issue a final order adopting the recommended disciplinary sanctions in the Notice of Intent to Discipline unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct, or would otherwise be unwarranted or not in the interest of justice. Any final order imposing discipline shall not become effective sooner than 15 days from the date of the order to provide the practitioner opportunity to comply with the terms of such order, including, but not limited to, withdrawing from pending immigration matters and notifying immigration clients of the imposition of any sanction. A practitioner may file a motion to set aside a final order of discipline issued pursuant to this paragraph, with service of such motion on the Office of the General Counsel of EOIR, provided:

(i) Such a motion is filed within 15 days of the date of service of the final order; and

(ii) His or her failure to file an answer was due to exceptional circumstances (such as serious illness of the practitioner or death of an immediate relative of the practitioner, but not including less compelling circumstances) beyond the control of the practitioner.

### § 3.106 Hearing and disposition.

(a) *Hearing.—(1) Procedure.* (i) The Chief Immigration Judge shall, upon the filing of an answer, appoint an Immigration Judge as an adjudicating official. At the request of the Chief Immigration Judge or in the interest of efficiency, the Director of EOIR may appoint an Administrative Law Judge as an adjudicating official. An Immigration Judge or Administrative Law Judge shall not serve as the adjudicating official in any case in which he or she is also the complainant. An Immigration Judge shall not serve as the adjudicating official in any case involving a practitioner who regularly appears before him or her.

(ii) Upon the practitioner's request for a hearing, the adjudicating official shall designate the time and place of the hearing with due regard to the location of the practitioner's practice or residence, the convenience of witnesses, and any other relevant factors. Such notice shall be served upon the practitioner by personal service as defined in § 103.5a of this chapter. The practitioner shall be afforded adequate time to prepare his or her case in advance of the hearing. Pre-hearing conferences may be scheduled at the discretion of the adjudicating official in order to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise to simplify and organize the proceeding. Settlement agreements reached after the issuance of a Notice of Intent to Discipline are subject to final approval by the adjudicating official or if the practitioner has not filed an answer, subject to final approval by the Board.

(iii) The practitioner may be represented at the hearing by counsel at no expense to the government. Counsel for the practitioner shall file a Notice of Entry of Appearance on Form EOIR-28 in accordance with the procedures set forth in this Part 3. At the hearing, the practitioner shall have a reasonable opportunity to examine and object to evidence presented by the government, to present evidence on his or her own behalf, and to cross-examine witnesses presented by the government.

(iv) In rendering a decision, the adjudicating official shall consider the following: the complaint, the preliminary inquiry report, the Notice of Intent to Discipline, the answer and any supporting documents, and any other evidence presented at the hearing (or, if the practitioner files an answer but does not request a hearing, any pleading, brief, or other materials submitted by counsel for the government). Counsel for the government shall bear the burden of proving the grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline by clear, unequivocal, and convincing evidence.

(v) The record of the hearing, regardless of whether the hearing is held before an Immigration Judge or an Administrative Law Judge, shall conform to the requirements of 8 CFR part 3, subpart C and 8 CFR 240.9. Disciplinary hearings shall be conducted in the same manner as Immigration Court proceedings as is appropriate, and shall be open to the public, except that:

(A) Depending upon physical facilities, the adjudicating official may place reasonable limitations upon the number of individuals in attendance at any one time, with priority being given to the press over the general public, and

(B) For the purposes of protecting witnesses, parties, or the public interest, the adjudicating official may limit attendance or hold a closed hearing.

(2) *Failure to appear at the hearing.* If the practitioner fails to appear at the hearing, the adjudicating official shall then proceed and decide the case in the absence of the practitioner, in accordance with paragraph (b) of this section, based upon the available record, including any additional evidence or arguments presented by EOIR or the Service at the hearing. In such a proceeding, the Office of the General Counsel of EOIR or the Office of the General Counsel of the Service shall submit to the adjudicating official proof of personal service of the Notice of Intent to Discipline as well as the Notice of the Hearing. The practitioner shall be precluded thereafter from participating further in the proceedings. Any final order imposing discipline entered in absentia shall be a final order, but shall not become effective sooner than 15 days from the date of the order to provide the practitioner opportunity to comply with the terms of such order, including, but not limited to, withdrawing from pending immigration matters and notifying immigration clients of the imposition of any sanction. A final order of discipline issued pursuant to this paragraph shall

not be subject to further review, except that the practitioner may file a motion to set aside the order, with service of such motion on the Office of the General Counsel of EOIR (or the Office of the General Counsel of the Service), provided:

(i) Such a motion is filed within 15 days of the date of issuance of the final order; and

(ii) His or her failure to appear at the hearing was due to exceptional circumstances (such as serious illness of the practitioner or death of an immediate relative of the practitioner, but not including less compelling circumstances) beyond the control of the practitioner.

(b) *Decision.* The adjudicating official shall consider the entire record, including any testimony and evidence presented at the hearing, and, as soon as practicable after the hearing, render a decision. If the adjudicating official finds that one or more of the grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline have been established by clear, unequivocal, and convincing evidence, he or she shall rule that the disciplinary sanctions set forth in the Notice of Intent to Discipline be adopted, modified, or otherwise amended. If the adjudicating official determines that the practitioner should be suspended, the time period for such suspension shall be specified. Any grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline that have not been established by clear, unequivocal, and convincing evidence shall be dismissed. Except as provided in paragraph (a)(2) of this section, the adjudicating official's decision becomes final only upon waiver of appeal or expiration of the time for appeal to the Board, whichever comes first, nor does it take effect during the pendency of an appeal to the Board as provided in § 3.6.

(c) *Appeal.* Upon the issuance of a decision by the adjudicating official, either party or both parties may appeal to the Board to conduct a *de novo* review of the record. Parties must comply with all pertinent provisions for appeals to the Board, including provisions relating to forms and fees, as set forth in this Part 3, and must use the Form EOIR-45. The decision of the Board is a final administrative order as provided in § 3.1(d)(2), and shall be served upon the practitioner by personal service as defined in § 103.5a of this chapter. Any final order imposing discipline shall not become effective sooner than 15 days from the date of the order to provide the practitioner opportunity to comply with the terms of such order, including, but not limited

to, withdrawing from any pending immigration matters and notifying immigration clients of the imposition of any sanction. A copy of the final administrative order of the Board shall be served upon the Office of the General Counsel of EOIR and the Office of the General Counsel of the Service. If disciplinary sanctions are imposed against a practitioner (other than a private censure), the Board may require that notice of such sanctions be posted at the Board, the Immigration Courts, or the Service for the period of time during which the sanctions are in effect, or for any other period of time as determined by the Board.

(d) *Referral.* In addition to, or in lieu of, initiating disciplinary proceedings against a practitioner, the Office of the General Counsel of EOIR may notify any appropriate Federal and/or state disciplinary or regulatory authority of any complaint filed against a practitioner. Any final administrative decision imposing sanctions against a practitioner (other than a private censure) shall be reported to any such disciplinary or regulatory authority in every jurisdiction where the disciplined practitioner is admitted or otherwise authorized to practice. In addition, the Office of the General Counsel of EOIR shall transmit notice of all public discipline imposed under this rule to the National Lawyer Regulatory Data Bank maintained by the American Bar Association.

### § 3.107 Reinstatement after expulsion or suspension.

(a) *Expiration of suspension.* Upon notice to the Board, a practitioner who has been suspended will be reinstated to practice before the Board and the Immigration Courts or the Service, or before all three authorities, once the period of suspension has expired, provided that he or she meets the definition of attorney or representative as set forth in § 1.1(f) and (j), respectively, of this chapter. If a practitioner cannot meet the definition of attorney or representative, the Board shall decline to reinstate the practitioner.

(b) *Petition for reinstatement.* A practitioner who has been expelled or who has been suspended for one year or more may file a petition for reinstatement directly with the Board after one-half of the suspension period has expired or one year has passed, whichever is greater, provided that he or she meets the definition of attorney or representative as set forth in § 1.1(f) and (j), respectively, of this chapter. A copy of such petition shall be served on the Office of the General Counsel of EOIR.

In matters in which the practitioner was ordered expelled or suspended from practice before the Service, a copy of such petition shall be served on the Office of the General Counsel of the Service.

(1) The practitioner shall have the burden of demonstrating by clear, unequivocal, and convincing evidence that he or she possesses the moral and professional qualifications required to appear before the Board and the Immigration Courts or the Service, or before all three authorities, and that his or her reinstatement will not be detrimental to the administration of justice. The Office of the General Counsel of EOIR, and in matters in which the practitioner was ordered expelled or suspended from practice before the Service, the Office of the General Counsel of the Service, may reply within 30 days of service of the petition in the form of a written response to the Board, which may include documentation of any complaints filed against the expelled or suspended practitioner subsequent to his or her expulsion or suspension.

(2) If a practitioner cannot meet the definition of attorney or representative as set forth in § 1.1(f) and (j), respectively, of this chapter, the Board shall deny the petition for reinstatement without further consideration. If the petition for reinstatement is found to be otherwise inappropriate or unwarranted, the petition shall be denied. Any subsequent petitions for reinstatement may not be filed before the end of one year from the date of the Board's previous denial of reinstatement. If the petition for reinstatement is determined to be timely, the practitioner meets the definition of attorney or representative, and the petitioner has otherwise set forth by the requisite standard of proof that he or she possesses the qualifications set forth herein, and that reinstatement will not be detrimental to the administration of justice, the Board shall grant the petition and reinstate the practitioner. The Board, in its discretion, may hold a hearing to determine if the practitioner meets all of the requirements for reinstatement.

### § 3.108 Confidentiality.

(a) *Complaints and preliminary inquiries.* Except as otherwise provided by law or regulation, information concerning complaints or preliminary inquiries is confidential. A practitioner whose conduct is the subject of a complaint or preliminary inquiry, however, may waive confidentiality, except that the Office of the General Counsel of EOIR may decline to permit

a waiver of confidentiality if it is determined that an ongoing preliminary inquiry may be substantially prejudiced by public disclosure before the filing of a Notice of Intent to Discipline.

(1) *Disclosure of information for the purpose of protecting the public.* The Office of the General Counsel of EOIR may disclose information concerning a complaint or preliminary inquiry for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality in circumstances including, but not limited to, the following:

(i) A practitioner has caused, or is likely to cause, harm to client(s), the public, or the administration of justice, such that the public or specific individuals should be advised of the nature of the allegations. If disclosure of information is made pursuant to this paragraph, the Office of the General Counsel of EOIR may define the scope of information disseminated and may limit the disclosure of information to specified individuals or entities;

(ii) A practitioner has committed criminal acts or is under investigation by law enforcement authorities;

(iii) A practitioner is under investigation by a disciplinary or regulatory authority, or has committed acts or made omissions that may reasonably result in investigation by such authorities;

(iv) A practitioner is the subject of multiple disciplinary complaints and the Office of the General Counsel of EOIR has determined not to pursue all of the complaints. The Office of the General Counsel of EOIR may inform complainants whose allegations have not been pursued of the status of any other preliminary inquiries or the manner in which any other complaint(s) against the practitioner have been resolved.

(2) *Disclosure of information for the purpose of conducting a preliminary inquiry.* The Office of the General Counsel of EOIR, in the exercise of discretion, may disclose documents and information concerning complaints and preliminary inquiries to the following individuals or entities:

(i) To witnesses or potential witnesses in conjunction with a complaint or preliminary inquiry;

(ii) To other governmental agencies responsible for the enforcement of civil or criminal laws;

(iii) To agencies and other jurisdictions responsible for disciplinary or regulatory investigations and proceedings;

(iv) To the complainant or a lawful designee;

(v) To the practitioner who is the subject of the complaint or preliminary inquiry or the practitioner's counsel of record.

(b) *Resolutions reached prior to the issuance of a Notice of Intent to Discipline.* Resolutions, such as warning letters, admonitions, and agreements in lieu of discipline, reached prior to the issuance of a Notice of Intent to Discipline, will remain confidential. However, such resolutions may become part of the public record if the practitioner becomes subject to a subsequent Notice of Intent to Discipline.

(c) *Notices of Intent to Discipline and action subsequent thereto.* Notices of Intent to Discipline and any action that takes place subsequent to their issuance, except for the imposition of private censures, may be disclosed to the public, except that private censures may become part of the public record if introduced as evidence of a prior record of discipline in any subsequent disciplinary proceeding. Settlement agreements reached after the issuance of a Notice of Intent to Discipline may be disclosed to the public upon final approval by the adjudicating official or the Board. Disciplinary hearings are open to the public, except as noted in § 3.106(a)(1)(v).

### § 3.109 Discipline of government attorneys.

Complaints regarding the conduct or behavior of Department attorneys, Immigration Judges, or Board Members shall be directed to the Office of Professional Responsibility, United States Department of Justice. If disciplinary action is warranted, it shall be administered pursuant to the Department's attorney discipline procedures.

## PART 292—REPRESENTATION AND APPEARANCES

8. The authority citation for Part 292 continues to read as follows:

**Authority:** 8 U.S.C. 1103, 1252b, 1362.

9. Section 292.3 is revised to read as follows:

### § 292.3 Professional Conduct for Practitioners—Rules and Procedures.

(a) *General provisions.*— (1) *Authority to sanction.* An adjudicating official or the Board of Immigration Appeals (the Board) may impose disciplinary sanctions against any practitioner if it finds it to be in the public interest to do so. It will be in the public interest to impose disciplinary sanctions against a practitioner who is authorized to practice before the Service when such

person has engaged in criminal, unethical, or unprofessional conduct, or in frivolous behavior, as set forth in § 3.102 of this chapter. In accordance with the disciplinary proceedings set forth in part 3 of this chapter, an adjudicating official or the Board may impose any of the following disciplinary sanctions:

(i) Expulsion, which is permanent, from practice before the Board and the Immigration Courts or the Service, or before all three authorities;

(ii) Suspension, including immediate suspension, from practice before the Board and the Immigration Courts or the Service, or before all three authorities;

(iii) Public or private censure; or

(iv) Such other disciplinary sanctions as the adjudicating official or the Board deems appropriate.

(2) *Persons subject to sanctions.* Persons subject to sanctions include any practitioner. A practitioner is any attorney as defined in § 1.1(f) of this chapter who does not represent the federal government, or any representative as defined in § 1.1(j) of this chapter. Attorneys employed by the Department of Justice shall be subject to discipline pursuant to paragraph (i) of this section.

(b) *Grounds of discipline as set forth in § 3.102 of this chapter.* It is deemed to be in the public interest for the adjudicating official or the Board to impose disciplinary sanctions as described in paragraph (a)(1) of this section against any practitioner who falls within one or more of the categories enumerated in § 3.102 of this chapter, with the exception of paragraphs (k) and (l) of that section, but these categories do not constitute the exclusive grounds for which disciplinary sanctions may be imposed in the public interest. Nothing in this regulation should be read to denigrate the practitioner's duty to represent zealously his or her client within the bounds of the law.

(c) *Immediate suspension and summary disciplinary proceedings; duty of practitioner to notify the Service of conviction or discipline.* (1) *Petition.* The Office of the General Counsel of the Service shall petition the Board to suspend immediately from practice before the Service any practitioner who has been found guilty of, or pleaded guilty or *nolo contendere* to, a serious crime, as defined in § 3.102(h) of this chapter, or who has been disbarred or suspended on an interim or final basis by, or has resigned with an admission of misconduct from, the highest court of any state, possession, territory, commonwealth, or the District of Columbia, or any Federal court. A copy

of the petition shall be forwarded to the Office of the General Counsel of EOIR, which may submit a written request to the Board that entry of any order immediately suspending a practitioner before the Service also apply to the practitioner's authority to practice before the Board or the Immigration Courts. Proof of service on the practitioner of EOIR's request to broaden the scope of any immediate suspension must be filed with the Board.

(2) *Immediate suspension.* Upon the filing of a petition for immediate suspension by the Office of the General Counsel of the Service, together with a certified copy of a court record finding that a practitioner has been so found guilty of a serious crime, or has been so disciplined or has so resigned, the Board shall forthwith enter an order immediately suspending the practitioner from practice before the Service and/or the Board and Immigration Courts, notwithstanding the pendency of an appeal, if any, of the underlying conviction or discipline, pending final disposition of a summary proceeding, as provided in paragraph (c)(3) of this section. Such immediate suspension will continue until imposition of a final administrative decision. Upon good cause shown, the Board may set aside such order of immediate suspension when it appears in the interest of justice to do so. If a final administrative decision includes the imposition of a period of suspension, time spent by the practitioner under immediate suspension pursuant to this paragraph may be credited toward the period of suspension imposed under the final administrative decision.

(3) *Summary disciplinary proceedings.* The Office of the General Counsel of the Service shall promptly initiate summary disciplinary proceedings against any practitioner described in paragraph (c)(1) of this section. Summary proceedings shall be initiated by the issuance of a Notice of Intent to Discipline, accompanied by a certified copy of the order, judgment and/or record evidencing the underlying criminal conviction or discipline. Summary proceedings shall be conducted in accordance with the provisions set forth in §§ 3.105 and 3.106 of this chapter. Any such proceeding shall not be concluded until all direct appeals from an underlying criminal conviction have been completed.

(i) In matters concerning criminal convictions, a certified copy of the court record, docket entry, or plea shall be conclusive evidence of the commission

of that crime in any summary disciplinary hearing based thereon.

(ii) In the case of a summary proceeding based upon a final order of disbarment or suspension, or a resignation with an admission of misconduct, (i.e., reciprocal discipline), a certified copy of a judgment or order of discipline shall establish a rebuttable presumption of the professional misconduct. Disciplinary sanctions shall follow in such a proceeding unless the attorney can rebut the presumption by demonstrating by clear, unequivocal, and convincing evidence that:

(A) The underlying disciplinary proceeding was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(B) There was such an infirmity of proof establishing the practitioner's professional misconduct as to give rise to the clear conviction that the adjudicating official could not, consistent with his or her duty, accept as final the conclusion on that subject; or

(C) The imposition of discipline by the adjudicating official would result in grave injustice.

(4) *Duty of practitioner to notify the Service of conviction or discipline.* Any practitioner who has been found guilty of, or pleaded guilty or *nolo contendere* to, a serious crime, as defined in § 3.102(h) of this chapter, or who has been disbarred or suspended by, or who has resigned with an admission of misconduct from, the highest court of any state, possession, territory, commonwealth, or the District of Columbia, or by any Federal court, must notify the Office of the General Counsel of the Service of any such conviction or disciplinary action within 30 days of the issuance of the initial order, even if an appeal of the conviction or discipline is pending. Failure to do so may result in immediate suspension as set forth in paragraph (c)(1) of this section. This duty to notify applies only to convictions for serious crimes or to orders imposing discipline for professional misconduct entered on or after July 27, 2000.

(d) *Filing of complaints; preliminary inquiries; resolutions; referral of complaints.*—(1) *Filing of complaints.*—

(i) *Misconduct occurring before Service.* Complaints of criminal, unethical, or unprofessional conduct, or of frivolous behavior before the Service by a practitioner shall be filed with the Office of the General Counsel of the Service. Disciplinary complaints must be submitted in writing and must state in detail the information that supports the basis for the complaint, including, but not limited to, the names and

addresses of the complainant and the practitioner, the date(s) of the conduct or behavior, the nature of the conduct or behavior, the individuals involved, the harm or damages sustained by the complainant, and any other relevant information. Any individual may file a complaint with the Office of the General Counsel of the Service. The Office of the General Counsel of the Service shall notify the Office of the General Counsel of EOIR of any disciplinary complaint that pertains, in whole or in part, to a matter before the Board or the Immigration Courts.

(ii) *Misconduct occurring before the Board and the Immigration Courts.* Complaints of criminal, unethical, or unprofessional conduct, or of frivolous behavior before the Board and the Immigration Courts by a practitioner shall be filed with the Office of the General Counsel of EOIR pursuant to the procedures set forth in § 3.104(a) of this chapter.

(2) *Preliminary inquiry.* Upon receipt of a disciplinary complaint or on its own initiative, the Office of the General Counsel of the Service will initiate a preliminary inquiry. If a complaint is filed by a client or former client, the complainant thereby waives the attorney-client privilege and any other applicable privilege, to the extent necessary to conduct a preliminary inquiry and any subsequent proceeding based thereon. If the Office of the General Counsel of the Service determines that a complaint is without merit, no further action will be taken. The Office of the General Counsel of the Service may, in its discretion, close a preliminary inquiry if the complainant fails to comply with reasonable requests for assistance, information, or documentation. The complainant and the practitioner shall be notified of any such determination in writing.

(3) *Resolutions reached prior to the issuance of a Notice of Intent to Discipline.* The Office of the General Counsel of the Service, in its discretion, may issue warning letters and admonitions, and may enter into agreements in lieu of discipline, prior to the issuance of a Notice of Intent to Discipline.

(4) *Referral of complaints of criminal conduct.* If the Office of the General Counsel of the Service receives credible information or allegations that a practitioner has engaged in criminal conduct, the Office of the General Counsel of the Service shall refer the matter to the Inspector General and, if appropriate, to the Federal Bureau of Investigation. In such cases, in making the decision to pursue disciplinary sanctions, the Office of the General

Counsel of the Service shall coordinate in advance with the appropriate investigative and prosecutorial authorities within the Department to ensure that neither the disciplinary process nor criminal prosecutions are jeopardized.

(e) *Notice of Intent to Discipline.*—(1) *Issuance of Notice to practitioner.* If, upon completion of the preliminary inquiry, the Office of the General Counsel of the Service determines that sufficient prima facie evidence exists to warrant charging a practitioner with professional misconduct as set forth in § 3.102 of this chapter, it will issue a Notice of Intent to Discipline to the practitioner named in the complaint. This notice will be served upon the practitioner by personal service as defined in § 103.5a of this chapter. Such notice shall contain a statement of the charge(s), a copy of the preliminary inquiry report, the proposed disciplinary sanctions to be imposed, the procedure for filing an answer or requesting a hearing, and the mailing address and telephone number of the Board.

(2) *Copy of Notice to EOIR; reciprocity of disciplinary sanctions.* A copy of the Notice of Intent to Discipline shall be forwarded to the Office of the General Counsel of EOIR. The Office of the General Counsel of EOIR may submit a written request to the Board or the adjudicating official requesting that any discipline imposed upon a practitioner which restricts his or her authority to practice before the Service also apply to the practitioner's authority to practice before the Board and the Immigration Courts. Proof of service on the practitioner of any request to broaden the scope of the proposed discipline must be filed with the adjudicating official.

(3) *Answer.*—(i) *Filing.* The practitioner shall file a written answer to the Notice of Intent to Discipline with the Board as provided in § 3.105(c) of this chapter.

(ii) *Failure to file an answer.* Failure to file an answer within the time period prescribed in the Notice of Intent to Discipline, except where the time to answer is extended by the Board, shall constitute an admission of the allegations in the Notice of Intent to Discipline and no further evidence with respect to such allegations need be adduced. Upon such a default by the practitioner, the Office of the General Counsel of the Service shall submit to the Board proof of personal service of the Notice of Intent to Discipline. The practitioner shall be precluded thereafter from requesting a hearing on the matter. The Board shall adopt the

recommended disciplinary sanctions in the Notice of Intent to Discipline and issue a final order as provided in § 3.105(d) of this chapter. A practitioner may file a motion to set aside a final order of discipline issued pursuant to this paragraph, with service of such motion on the Office of the General Counsel of the Service, provided:

(A) Such a motion is filed within 15 days of service of the final order; and

(B) His or her failure to file an answer was due to exceptional circumstances (such as serious illness of the practitioner or death of an immediate relative of the practitioner, but not including less compelling circumstances) beyond the control of the practitioner.

(f) *Hearing and disposition; appeal; reinstatement proceedings.* Upon the filing of an answer, the matter shall be heard and decided according to the procedures set forth in § 3.106(a), (b), and (c) of this chapter. The Office of the General Counsel of the Service shall represent the government. Reinstatement proceedings shall be conducted according to the procedures set forth in § 3.107 of this chapter.

(g) *Referral.* In addition to, or in lieu of, initiating disciplinary proceedings against a practitioner, the Office of the General Counsel of the Service may notify any appropriate Federal and/or state disciplinary or regulatory authority of any complaint filed against a practitioner. Any final administrative decision imposing sanctions against a practitioner (other than a private censure) shall be reported to any such disciplinary or regulatory authority in every jurisdiction where the disciplined practitioner is admitted or otherwise authorized to practice. In addition, the Office of the General Counsel of the Service shall transmit notice of all public discipline imposed under this rule to the National Lawyer Regulatory Data Bank maintained by the American Bar Association.

(h) *Confidentiality.*—(1) *Complaints and preliminary inquiries.* Except as otherwise provided by law or regulation, information concerning complaints or preliminary inquiries is confidential. A practitioner whose conduct is the subject of a complaint or preliminary inquiry, however, may waive confidentiality, except that the Office of the General Counsel of the Service may decline to permit a waiver of confidentiality if it is determined that an ongoing preliminary inquiry may be substantially prejudiced by a public disclosure before the filing of a Notice of Intent to Discipline.

(i) *Disclosure of information for the purpose of protecting the public.* The

Office of the General Counsel of the Service may disclose information concerning a complaint or preliminary inquiry for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality in circumstances including, but not limited to, the following:

(A) A practitioner has caused, or is likely to cause, harm to client(s), the public, or the administration of justice, such that the public or specific individuals should be advised of the nature of the allegations. If disclosure of information is made pursuant to this paragraph, the Office of the General Counsel of the Service may define the scope of information disseminated and may limit the disclosure of information to specified individuals or entities;

(B) A practitioner has committed criminal acts or is under investigation by law enforcement authorities;

(C) A practitioner is under investigation by a disciplinary or regulatory authority, or has committed acts or made omissions that may reasonably result in investigation by such an authority;

(D) A practitioner is the subject of multiple disciplinary complaints and the Office of the General Counsel of the Service has determined not to pursue all of the complaints. The Office of the General Counsel of the Service may inform complainants whose allegations have not been pursued of the status of any other preliminary inquiries or the manner in which any other complaint(s) against the practitioner have been resolved.

(ii) *Disclosure of information for the purpose of conducting a preliminary inquiry.* The Office of the General Counsel of the Service, in the exercise of discretion, may disclose documents and information concerning complaints and preliminary inquiries to the following individuals or entities:

(A) To witnesses or potential witnesses in conjunction with a complaint or preliminary inquiry;

(B) To other governmental agencies responsible for the enforcement of civil or criminal laws;

(C) To agencies and other jurisdictions responsible for conducting disciplinary investigations or proceedings;

(D) To the complainant or a lawful designee; and

(E) To the practitioner who is the subject of the complaint or preliminary inquiry or the practitioner's counsel of record.

(2) *Resolutions reached prior to the issuance of a Notice of Intent to Discipline.* Resolutions, such as warning

letters, admonitions, and agreements in lieu of discipline, reached prior to the issuance of a Notice of Intent to Discipline, will remain confidential. However, such resolutions may become part of the public record if the practitioner becomes subject to a subsequent Notice of Intent to Discipline.

(3) *Notices of Intent to Discipline and action subsequent thereto.* Notices of Intent to Discipline and any action that takes place subsequent to their issuance, except for the imposition of private censures, may be disclosed to the public, except that private censures may become part of the public record if introduced as evidence of a prior record of discipline in any subsequent disciplinary proceeding. Settlement agreements reached after the issuance of a Notice of Intent to Discipline may be disclosed to the public upon final approval by the adjudicating official or the Board. Disciplinary hearings are open to the public, except as noted in § 3.106(a)(v) of this chapter.

(i) *Discipline of government attorneys.* Complaints regarding the conduct or behavior of Department attorneys, Immigration Judges, or Board Members shall be directed to the Office of Professional Responsibility, United States Department of Justice. If disciplinary action is warranted, it shall be administered pursuant to the Department's attorney discipline procedures.

Dated: June 17, 2000.

**Janet Reno,**

*Attorney General.*

[FR Doc. 00-16052 Filed 6-26-00; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 9 CFR Parts 54 and 79

[Docket No. 99-067-2]

#### Scrapie Pilot Projects

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are amending the regulations concerning the voluntary scrapie flock certification program and the interstate movement of sheep and goats to exempt flocks from certain regulatory requirements when the flocks are participating in scrapie control pilot projects authorized by the Animal and Plant Health Inspection Service. We

believe this action is necessary so that pilot projects can achieve their goal of furthering progress toward the eradication of scrapie. This action will affect a small number of flock owners participating in scrapie control pilot projects.

**EFFECTIVE DATE:** June 27, 2000.

**FOR FURTHER INFORMATION CONTACT:** Dr. Diane Sutton, Senior Staff Veterinarian, National Animal Health Programs Staff, VS, APHIS, 4700 River Road Unit 43, Riverdale, MD 20737-1235; (301) 734-6954.

#### SUPPLEMENTARY INFORMATION:

##### Background

Scrapie is a degenerative and eventually fatal disease affecting the central nervous systems of sheep and goats. To control the spread of scrapie within the United States, the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture (USDA), administers regulations at 9 CFR part 79, which restrict the interstate movement of certain sheep and goats. APHIS also administers the Voluntary Scrapie Flock Certification Program (the VSFCP), described in the regulations at 9 CFR part 54.

On December 17, 1999, we published in the **Federal Register** (64 FR 70608-70610, Docket No. 99-067-1) a proposal to amend 9 CFR parts 54 and 79 to add a definition of the term *scrapie control pilot project* and to allow the Administrator to waive specified requirements of parts 54 and 79 for flocks participating in scrapie control pilot projects. The purpose of the proposal was to enhance the ability of APHIS to work with flock owners to develop pilot projects for scrapie control that may involve using techniques and procedures different from those contained in the current regulations.

We solicited comments concerning our proposal for 30 days ending January 18, 2000. We received seven comments by that date. They were from a State government, an association representing veterinarians, two associations representing the U.S. sheep industry, and three individual sheep producers. Six commenters generally supported the proposed rule, but several suggested changes to improve it. One commenter opposed the proposed rule. Several of the commenters also raised issues outside the scope of the proposed rule. All issues raised by the comments pertinent to the proposed rule are discussed below by topic.

#### Pilot Projects will Preserve Infected Sheep and Delay Eradication of Scrapie

The comment opposed to the proposed rule stated that pilot projects, by lessening restrictions, could result in the movement of sheep that were potentially infected with scrapie, spreading the disease and delaying its eradication. This commenter stated that sheep allowed movement by the pilot projects would be quarantined or destroyed under the previous regulations. Another commenter urged APHIS to be conservative in its approval of pilot projects to guard against projects that may actually contribute to the spread of scrapie.

We are not making any change in response to these comments. Historically, scrapie control has not been successful in part because producers of sheep with valuable genetic lines were often left with few alternatives other than flock depopulation. This was discouraging and often influenced producers not to report scrapie. The pilot projects will allow us to evaluate methods that may provide alternatives to flock depopulation while minimizing the spread of disease. It is essential to use pilot projects to evaluate different tests and control methods. It is our belief that these projects will assist us in adjusting our control and eradication programs to be more effective and acceptable to producers and will, therefore, accelerate, not delay, progress toward the eradication of scrapie. Each pilot project will have restrictions on the movement of sheep in the project that are commensurate with the risk that the sheep might spread scrapie, and these movement restrictions and other precautions in pilot project design should prevent the spread of scrapie as a result of the pilot projects.

#### Definition of Scrapie Control Pilot Project

The definition proposed for the term *scrapie control pilot project* was "A pilot project authorized by the Administrator in writing, designed to perform research or test or improve program procedures for scrapie control. In addition to APHIS, participants may include State animal health agencies, flock owners, and other parties as necessary." Two commenters suggested that pilot projects could contribute to the eradication as well as the control of scrapie, and noted that eventual eradication of the disease is an important goal of scrapie programs and should be stressed. We agree.

One commenter questioned including "designed to perform research" in the