include contacting any of the beneficiary's known addresses.

(*2*) *Effect of subsequent denied or revoked petitions.* An H–2A petition filed by the same petitioner subsequent to a denial under paragraph (h)(5)(xi)(A) of this section shall be subject to the condition of approval described in paragraph (h)(5)(xi)(C)(*1*) of this section, regardless of prior satisfaction of such condition of approval with respect to a previously denied or revoked petition.

(xii) *Treatment of alien beneficiaries upon revocation of labor certification.* The approval of an employer's H–2A petition is immediately and automatically revoked if the Department of Labor revokes the labor certification upon which the petition is based. Upon revocation of an H–2A petition based upon revocation of labor certification, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment.

* * * * *

(11) * * *

(i) * * *

(A) * * * However, H–2A petitioners must send notification to DHS pursuant to paragraph (h)(5)(vi) of this section.

* * * * *

(ii) *Immediate and automatic revocation.* The approval of any petition is immediately and automatically revoked if the petitioner goes out of business, files a written withdrawal of the petition, or the Department of Labor revokes the labor certification upon which the petition is based.

* * * * *

PART 215—CONTROLS OF ALIENS DEPARTING FROM THE UNITED STATES

■ 3. The authority citation for part 215 continues to read as follows:

Authority: 8 U.S.C. 1104; 1184; 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1365a note, 1379, 1731–32.

■ 4. Section 215.9 is added to read as follows:

§ 215.9 Temporary Worker Visa Exit Program.

An alien admitted on an H–2A visa at a port of entry participating in the Temporary Worker Visa Exit Program must also depart at the end of his or her authorized period of stay through a port of entry participating in the program and present designated biographic and/or biometric information upon departure. U.S. Customs and Border Protection will establish a pilot program by publishing a Notice in the **Federal Register** designating which H–2A workers must participate in the Temporary Worker Visa Exit Program, which ports of entry are participating in the program, which biographical and/or biometric information would be required, and the format for submission of that information by the departing designated temporary workers.

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 5. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

■ 6. Section 274a.12 is amended by:

■ a. Removing the word ''or'' at the end of paragraph (b)(19);

■ b. Removing the period at the end of paragraph (b)(20), and adding ''; or'' in its place; and by

■ c. Adding a new paragraph (b)(21).

The addition reads as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(21) A nonimmigrant alien within the class of aliens described in 8 CFR 214.2(h)(1)(ii)(C) who filed an application for an extension of stay pursuant to 8 CFR 214.2 during his or her period of admission. Such alien is authorized to be employed by a new employer that has filed an H–2A petition naming the alien as a beneficiary and requesting an extension of stay for the alien for a period not to exceed 120 days beginning from the ''Received Date'' on Form I–797 (Notice of Action) acknowledging receipt of the petition requesting an extension of stay, provided that the employer has enrolled in and is a participant in good standing in the E-Verify program, as determined by USCIS in its discretion. Such authorization will be subject to any conditions and limitations noted on the initial authorization, except as to the employer and place of employment. However, if the District Director or Service Center director adjudicates the application prior to the expiration of this 120-day period and denies the application for extension of stay, the employment authorization under this paragraph (b)(21) shall automatically terminate upon 15 days after the date of the denial decision. The employment authorization shall also terminate automatically if the employer fails to remain a participant in good standing in the E-Verify program, as determined by USCIS in its discretion.

* * * * *

Paul A. Schneider,

Deputy Secretary.

[FR Doc. E8–29888 Filed 12–12–08; 8:45 am]

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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1001, 1003, 1292

[Docket No. EOIR 160F; A.G. Order No. 3028–2008]

RIN 1125–AA59

Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Final rule.

SUMMARY: This final rule adopts, in part, the proposed changes to the rules and procedures concerning the standards of representation and professional conduct for practitioners who appear before the Executive Office for Immigration Review (EOIR), which includes the immigration judges and the Board of Immigration Appeals (Board). It also clarifies who is authorized to represent and appear on behalf of individuals in proceedings before the Board and the immigration judges. Current regulations set forth who may represent individuals in proceedings before EOIR and also set forth the rules and procedures for imposing disciplinary sanctions against practitioners who engage in criminal, unethical, or unprofessional conduct, or in frivolous behavior before EOIR. The final rule increases the number of grounds for discipline, improves the clarity and uniformity of the existing rules, and incorporates miscellaneous technical and procedural changes. The changes herein are based upon the Attorney General's initiative for improving the adjudicatory processes for the immigration judges and the Board, as well as EOIR's operational experience in administering the disciplinary program since the current process was established in 2000.

DATES: *Effective date:* This rule is effective January 20, 2009.

FOR FURTHER INFORMATION CONTACT: John N. Blum, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600,

Falls Church, Virginia 22041, telephone (703) 305–0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

On July 30, 2008, the Attorney General published a proposed rule in the **Federal Register** (73 FR 44178). The comment period ended September 29, 2008. Comments were received from four commenters, including a local bar association, a national immigration lawyer association, and two attorneys. Because some comments overlap, and three of the commenters covered multiple topics, the comments are addressed by topic, rather than by reference to each specific comment and commenter. The provisions of the proposed rule on which the public did not comment are adopted without change in this final rule. Additional technical changes and changes made in *response* to public comments are discussed below.

II. Regulatory Background

This rule amends 8 CFR parts 1001, 1003, and 1292 by changing the present definitions and procedures concerning professional conduct for practitioners, which term includes attorneys and representatives, who practice before the Executive Office for Immigration Review (EOIR). This rule implements measures in *response* to the Attorney General's assessment of EOIR with respect to EOIR's authority to discipline and deter professional misconduct. The rule also aims to improve EOIR's ability to effectively regulate practitioner conduct by implementing technical changes with respect to the definition of attorney and clarifying who is authorized to represent and appear on behalf of individuals in proceedings before the Board of Immigration Appeals (Board) and the immigration judges. The regulations concerning representation and appearances were last promulgated on May 1, 1997 (62 FR 23634) (final rule). The regulations for the rules and procedures concerning professional conduct were last promulgated as a final rule on June 27, 2000 (65 FR 39513).

When it was part of the Department of Justice, the former Immigration and Naturalization Service (INS) incorporated by reference in its regulations EOIR's grounds for discipline and procedures for disciplinary proceedings. Since then, the functions of the former INS were transferred from the Department of Justice (Department) to the Department of Homeland Security (DHS). DHS's immigration regulations are contained in chapter I in 8 CFR, while 8 CFR chapter V now contains the regulations governing EOIR. The rules and procedures concerning professional conduct for representation and appearances before the immigration judges and the Board are now codified in 8 CFR part 1003, subpart G. The rules for representation and appearances before the immigration judges and the Board are codified in 8 CFR part 1292. The rules for representation and appearances and for professional conduct before DHS and its components remain codified in 8 CFR parts 103 and 292.

Both sets of rules provide a unified process for disciplinary hearings as provided in 8 CFR 1003.106, regardless whether the hearing is instituted by EOIR or by DHS. *See generally Matter of Shah,* 24 I&N Dec. 282 (BIA 2007) (imposing discipline on attorney who knowingly and willfully misled USCIS by presenting an improperly obtained certified Labor Condition Application in support of a nonimmigrant worker petition). Finally, both sets of rules provide for cross-discipline, which allows EOIR to request that discipline imposed against a practitioner for misconduct before DHS also be imposed with respect to that practitioner's ability to represent clients before the immigration judges and the Board, and vice versa. *See* 8 CFR 292.3(e)(2) (DHS) and 1003.105(b) (EOIR). Additional background information regarding professional conduct rules for immigration proceedings can be found in the proposed rule, 73 FR at 44178–180.

This rule amends only the EOIR regulations governing representation and appearances, and professional conduct under chapter V in 8 CFR. This rule does not make any changes to the DHS regulations governing representation and appearances or professional conduct.

Currently, the disciplinary regulations allow EOIR to sanction practitioners, including attorneys and certain non-attorneys who are permitted to represent individuals in immigration proceedings (''representatives''), when discipline is in the public interest; namely, when a practitioner has engaged in criminal, unethical, or unprofessional conduct or frivolous behavior. Sanctions may include expulsion or suspension from practice before EOIR and DHS, and public or private censure. EOIR frequently suspends or expels practitioners who are subject to a final or interim order of disbarment or suspension by their state bar regulatory authorities—this is known as ''reciprocal'' discipline.

The Attorney General completed a comprehensive review of EOIR's responsibilities and programs, and determined that, among other things, the immigration judges should have the tools necessary to control their courtrooms and protect the adjudicatory system from fraud and abuse. Accordingly, the Attorney General determined that the existing regulations, including those at 8 CFR 1003.101–109, should be amended to provide for additional sanction authority for false statements, frivolous behavior, and other gross misconduct. Additionally, the Attorney General found that the Board should have the ability to effectively sanction litigants and practitioners for defined categories of gross misconduct.

As a result, this rule seeks to preserve the fairness and integrity of immigration proceedings, and increase the level of protection afforded to aliens in those proceedings by defining additional categories of behavior that constitute misconduct.

In part, the rule responds to the Attorney General's findings and conclusions by adding substantive grounds of misconduct modeled on the American Bar Association Model Rules of Professional Conduct (2006) (ABA Model Rules) that will subject practitioners to sanctions if they violate such standards and fail to provide adequate professional representation for their clients. Specifically, the grounds for sanctionable misconduct have been revised to include language that is similar, and sometimes identical, to the language found in the ABA Model Rules, as such disciplinary standards are widely known and accepted within the legal profession. Although EOIR does not seek to supplant the disciplinary functions of the various state bars, this rule aims to strengthen the existing rules in light of the apparent gaps in the current regulation. *See Matter of Rivera-Claros*, 21 I&N Dec. 599, 604 (BIA 1996). In addition, these revisions will make the EOIR professional conduct requirements more consistent with the ethical standards applicable in most states.

This rule will also enhance the existing regulation by amending the current procedures and definitions through technical modifications that are more consistent with EOIR's authority to regulate practitioner misconduct. *See Koden* v. *U.S. Dep't of Justice*, 564 F.2d 228, 233 (7th Cir. 1977); 8 U.S.C. 1103, 1362. For example, the rule amends the definition of ''attorney'' at 8 CFR 1001.1(f) by adding language stating that an attorney is one who is eligible to practice law in a U.S. state or territory.

Additionally, this rule amends the language at 8 CFR 1292.1(a)(2) to clarify that law students and law graduates must be students and graduates of accredited law schools in the United States. Accordingly, the rule will allow EOIR to investigate and prosecute instances of misconduct more effectively and efficiently while ensuring the due process rights of both the client and the practitioner.

III. Responses to Comments

A. General Comments Concerning the Practitioner Discipline Regulations

Comment. One commenter raised concern about the ability of immigration judges to use these rules ''to commence retaliatory disciplinary proceedings against attorneys who complain of their * * * practices.''

Response. The comment misunderstands EOIR's disciplinary procedural structure. In 2000, the Department addressed the issue as to whether immigration judges had the authority to initiate disciplinary proceedings or impose disciplinary sanctions. *See* Professional Conduct for Practitioners—Rules and Procedures, 65 FR 39513, 39520–39521 (June 27, 2000). Under the current regulations, which have been in place since then, immigration judges have no authority to initiate disciplinary proceedings against a particular attorney. Immigration judges can file complaints about attorneys with EOIR's disciplinary counsel, just as aliens, attorneys, or others involved in an immigration proceeding may file such complaints. These complaints are independently reviewed by EOIR's disciplinary counsel, who then determines, after an independent investigation, whether to close the complaint, informally resolve it, or initiate formal disciplinary proceedings. If an attorney believes that an immigration judge improperly filed a complaint as a retaliatory action, the attorney may file a complaint against the immigration judge with the Office of the Chief Immigration Judge. *See www.usdoj.gov/eoir/sibpages/IJConduct.htm.*

Comment. One organization commented that EOIR should adjust the practitioner disciplinary procedures because EOIR is greatly expanding the scope of its grounds for discipline. The commenter stated that up until the proposed rule, EOIR mainly imposed discipline due to criminal convictions or reciprocally based on discipline imposed by other jurisdictions. The commenter was concerned that the current disciplinary structure is not adequate for the new independent disciplinary scheme that the proposed rule contemplated establishing.

Response. EOIR regularly cooperates with attorney disciplinary agencies at the state and federal levels to impose reciprocal discipline with regard to practitioners who have been suspended or disbarred in other jurisdictions. EOIR also takes prompt action to prohibit practitioners who have been convicted of serious crimes from practicing before EOIR. However, EOIR's practitioner disciplinary procedures were never intended to adjudicate matters involving only reciprocal discipline or criminal convictions. At its inception 50 years ago, the practitioner disciplinary regulations provided ten grounds for discipline that were original in nature. *See* 23 FR 2670, 2672–2673 (April 23, 1958). These regulations contemplated the possibility that practitioners would be charged with misconduct arising from practice before the Department, and that Department officials would need to adjudicate these charges without reference to another tribunal's findings as to misconduct, whether ethical or criminal in nature. As reflected in several published cases, these practitioner disciplinary procedures have been used to adjudicate original charges of professional misconduct. *See Matter of Sparrow,* 20 I&N Dec. 920 (BIA 1994) (case involving both reciprocal and original charges); *Matter of De Anda,* 17 I&N Dec. 54 (BIA, A.G. 1979); *Matter of Solomon,* 16 I&N Dec. 388 (BIA, A.G. 1977); *Matter of Koden,* 15 I&N Dec. 739 (BIA 1974, A.G. 1976). None of these cases reveals a deficiency in the procedures, and these procedures were upheld by a federal court of appeals. *See Koden U.S. Dep't of Justice*, 564 F.2d 228, 233–235 (7th Cir. 1977).

In 2000, the Department completely reviewed, revised, and expanded the practitioner disciplinary procedures. 65 FR at 39523. These regulations expressly created summary disciplinary procedures for cases based on reciprocal discipline and criminal convictions, which are not used in proceedings involving original charges of misconduct. *See* 8 CFR 1003.103–106. When the Department published these new procedures, it also consolidated and added additional grounds for discipline. The Department's major renovations in 2000 to the hearings and appeals procedures for original charges of misconduct were intended to be sufficient to adjudicate the eleven original grounds for discipline in the current regulations. The addition of several more grounds for discipline established in this final rule does not change the sufficiency or adequacy of these existing procedures.

Comment. One commenter stated that EOIR should define ''accredited representative'' and should issue identification cards to accredited representatives so that immigration judges will be able to verify that an individual appearing in court is accredited to practice before EOIR.

Response. The regulations at 8 CFR 1292.1 presently state that a person entitled to representation before EOIR may be represented by, among others, an accredited representative. This section cross-references 8 CFR 1292.2, which provides detailed information concerning accredited representatives. Because accredited representatives must go through a special process to receive accreditation, the regulations already provide more information about accredited representatives than they do about attorneys or any other type of representative. Further, 8 CFR 1003.102(a)(2) specifies the compensation that accredited representatives may receive for their services. Therefore, it is unnecessary to further define the term ''accredited representative.'' The Department also declines, at this time, to issue identification cards to accredited representatives. The regulations at 8 CFR 1292.2(d) require EOIR to maintain a roster of accredited representatives. This roster is available online at *http://www.usdoj.gov/eoir/statspub/accreditedreproster.pdf.* Immigration judges may easily refer to the roster to determine if an individual is an accredited representative. Thus, contrary to the commenter's concern, immigration judges are not ''forced to accept assertions of accredited representatives that they are, in fact, accredited.''

Comment. All of the commenters proposed that the Department apply the professional conduct regulations to government attorneys involved in immigration proceedings. Three commenters asserted that the practitioner disciplinary regulations should apply to both private practitioners and DHS attorneys who practice before EOIR. Further, two commenters indicated that immigration judge misconduct is a problem and one of those commenters argued that rules governing the conduct of immigration judges should be published contemporaneously with these final rules.

Response. As an initial matter, the Department would note for clarity that the ''rule'' of professional conduct for immigration judges referenced by the

commenter was not a proposed rule, but a notice published in the **Federal Register** seeking comment on draft ''Codes of Conduct for the Immigration Judges and Board Members.'' 72 FR 35510 (June 28, 2007). This notice did not include a process by which to discipline immigration judges or Board Members. Rather, this notice recognized certain ''canons'' of professional conduct. *Id.* at 35510–12. Attorneys concerned with an immigration judge's conduct may follow the procedures for filing a complaint regarding the conduct of an immigration judge. *See http://www.usdoj.gov/eoir/sibpages/IJConduct.htm.*

In 2000, the Department addressed the reasons why government attorneys, including immigration judges, are not subject to the same process used for disciplining practitioners. *See* 65 FR at 39522. The reasons stated in 2000 with respect to the current practitioner disciplinary process remain valid, notwithstanding the fact that the government is now represented in removal proceedings by attorneys working for DHS rather than the former INS.

Like the former INS attorneys who were subject to investigation by the Department's Inspector General and Office of Professional Responsibility, DHS's Office of the Inspector General and the Office of Professional Responsibility for Immigration and Customs Enforcement investigate DHS attorneys. Further, DHS attorneys are also required to comply with the Standards of Ethical Conduct for Employees of the Executive Branch, found at 5 CFR part 2635, and other standards applicable to government employees. In fact, DHS has adopted a formal disciplinary process for its employees that provides similar hearing and appeal rights as EOIR's practitioner disciplinary process, including removal or suspension from employment. *See* 5 CFR 9701.601–710. Moreover, applying this rule to DHS attorneys was not included in the proposed rule, and cannot be adopted in this final rule in the absence of prior notice and comment. Accordingly, the Department declines to adopt the comments requesting contemporaneous publication of the Code of Conduct for Immigration Judges and Board Members and a rule addressing professional conduct of government attorneys.

Comment. Two commenters indicated that there is a perception that an inherent conflict of interest exists when immigration judges adjudicate practitioner disciplinary cases. One of the commenters expressed the view that immigration judges do not have training in attorney discipline matters, private practice experience, or sufficient time to spare from their immigration case workload. The commenter argued that EOIR should constitute disciplinary hearing panels composed of private practice attorneys and members of the public to hear and decide practitioner discipline cases.

Response. The use of immigration judges as adjudicators in practitioner disciplinary cases was codified over twenty years ago, in 1987. *See* Executive Office for Immigration Review; Representation and Appearances, 52 FR 24980 (July 2, 1987). In 2000, the Department amended the practitioner disciplinary regulations to provide that both immigration judges and administrative law judges could be assigned to adjudicate practitioner disciplinary cases. When that final rule was published, the Department gave a detailed explanation concerning the use of immigration judges as adjudicating officials in practitioner disciplinary cases. *See* 65 FR at 39515–16. That explanation remains valid.

However, in recognition that these final rules significantly increase the regulation of practitioner conduct, EOIR has chosen to create a corps of adjudicating officials made up of immigration judges and administrative law judges who will receive specialized training in professional responsibility law, and who will hear and decide practitioner disciplinary cases as part of their normal caseload. Further, EOIR acknowledges the concern raised by the commenters and notes that the current regulations require that an immigration judge appointed to hear disciplinary cases is not the complainant and not one whom the practitioner regularly appears before. 8 CFR 1003.106(a)(1)(i).

B. Section 1003.102—Grounds of Misconduct

1. Section 1003.102(e)—Reciprocal Discipline

This rule sought to amend the existing rules that only allow the imposition of discipline where a practitioner resigns ''with an admission of misconduct'' to allow ''the imposition of discipline on an attorney who resigns while a disciplinary investigation or proceeding is pending.'' 73 FR at 44180. No comments were received regarding this part of the proposed rule. Accordingly, this rule will be adopted without change.

2. Section 1003.102(k)—Previous Finding of Ineffective Assistance of Counsel

Comment. Two organizations commented on the proposed amendment to 8 CFR 1003.102(k), which would expand the existing rule to sanction practitioners based on a finding of ineffective assistance of counsel by a federal court. One commenter questioned whether it was appropriate for a finding of ineffective assistance of counsel to serve as a ground for discipline. The commenter asserted that ineffective assistance of counsel is normally raised by aliens when seeking reopening of unfavorable decisions in their cases, and that because of this, allegations of ineffective assistance of counsel are ''rampant.'' The commenter thought that the circumstances under which ineffective assistance of counsel is raised can put well-intentioned and competent attorneys at risk of discipline. The other commenter appreciated that the proposed rule would expand consideration of ineffective assistance of counsel findings ''outside the parameters of the immigration courtroom.'' This commenter also suggested that the rule be revised to make clear that the ground of discipline must be based on a ''final order'' finding ineffective assistance of counsel, either by an immigration judge, the Board, or a federal court.

Response. The purpose of amending this rule is to permit EOIR to impose disciplinary sanctions on practitioners who have been found to have provided ineffective assistance of counsel in immigration proceedings before EOIR, regardless of whether that finding of ineffective assistance of counsel was made by an immigration judge, the Board, or a federal court. Although one of the commenters thought that practitioners would be placed at risk for discipline based on allegations of ineffective assistance of counsel that are made by aliens only seeking reopening of their immigration cases, EOIR has been administering this ground for discipline since 2000 without inappropriately disciplining a practitioner. As stated in the supplemental information for the rule that proposed ineffective assistance of counsel as a ground for discipline, an adjudicating official may determine not to impose disciplinary sanctions notwithstanding a finding of ineffective assistance of counsel in an immigration proceeding. *See* Executive Office for Immigration Review; Professional Conduct for Practitioners—Rules and Procedures, 63 FR 2901, 2902 (January

20, 1998) (proposed rule). Moreover, the EOIR disciplinary counsel does not automatically initiate disciplinary proceedings based on a finding of ineffective assistance of counsel. Rather, proceedings are initiated based on EOIR disciplinary counsel's independent review of the matter. Finally, if proceedings are initiated, practitioners receive a full and fair opportunity to dispute the underlying finding of ineffective assistance of counsel before being disciplined.

Another commenter agreed with the proposed amendment to this ground for discipline; however, the commenter misunderstood the scope of this amendment. The EOIR disciplinary process remains focused on disciplining practitioners based on a finding of ineffective assistance of counsel that occurred before EOIR in immigration proceedings (or before DHS in the case of charges brought by the DHS disciplinary counsel).

One commenter also suggested that EOIR limit discipline to matters in which the finding of ineffective assistance of counsel was made in a final order. We will not adopt this recommendation because the finding of ineffective assistance of counsel is usually not located in a final order by an immigration judge or the Board. This is because aliens most commonly assert ineffective assistance of counsel as a basis for getting their cases reopened. If an alien prevails in the ineffective assistance of counsel claim, the adjudicator who issues this determination will do so in an order that reopens the proceeding, and such an order granting reopening is itself not a final order because further proceedings will be held after the case is reopened. Therefore, for all of the reasons stated above, the Department adopts the proposed amendment to this ground for discipline as originally proposed.

3. Section 1003.102(l)—Failure To Appear in a Timely Manner

One commenter provided a comment agreeing with this change. No other comments were received. Accordingly, this rule is adopted without change.

4. Section 1003.102(m)—Assist in the Unauthorized Practice of Law

Comment. Two comments were received regarding section 1003.102(m). One comment stated that this is ''one of the most valuable rules proposed.'' The other commenter did not take a position on the rule, but suggested revising the rule to include a ''knowingly'' *mens rea* requirement to this ground of discipline that prohibits practitioners from assisting in the unauthorized practice of law.

Response. The Department did not propose a modification to this ground for discipline. This ground was only reprinted in the proposed rule to delete the period at the end of this provision and add a semi-colon. Accordingly, the Department declines to make any substantive amendments to this rule, such as including the word ''knowingly.'' Such a change is not necessary because practitioners should make certain that any other practitioner they work with is authorized to practice before EOIR. However, the Department believes that additional clarification of what constitutes the practice of law would be helpful to practitioners. Therefore, a clarifying statement will be added to this ground for discipline that will state that the practice of law before EOIR means engaging in *practice* or *preparation* as those terms are defined in 8 CFR 1001.1(i) and (k).

5. Section 1003.102(n)—Conduct Prejudicial to the Administration of Justice

Comment. Two commenters were concerned with the language used in this proposed provision. One commenter believed it was too vague. The other commenter, while acknowledging that this proposed provision is based on ABA Model Rule 8.4(d), stated that this rule was extremely broad and suggested that the Department narrow this ground by adding text from the supplemental information in the proposed rule or from the ABA's comments to Rule 8.4(d).

Response. This ground for discipline is based on ABA Model Rule 8.4(d). As such, it is a well-known ethical rule with which most attorneys must comply whenever representing parties before a tribunal. Therefore, we do not believe that additional language needs to be added to the proposed rule. The Attorney General expects that EOIR's disciplinary counsel, adjudicating officials, and the Board will consider the ABA's comments to ABA Model Rule 8.4(d), and how this rule has been applied in interpreting and applying this regulatory provision, so that this new ground for discipline would not be applied in a manner that is inconsistent with the prevailing interpretations with which attorneys are already familiar. Therefore, we are adopting the proposed rule without change.

6. Section 1003.102(o)—Competence

Comment. One commenter commended the addition of this provision, which is based on ABA Model Rule 1.1. The commenter suggested that the Department add additional text to the provision from the ABA's comments 1, 3, and 5 to Rule 1.1.

Response. As indicated in the proposed rule, this ground for discipline uses text that is nearly identical to ABA Model Rule 1.1. The proposed rule also included one sentence from the ABA's comment 5 to Rule 1.1. The Department has considered adding additional text to this ground for discipline from the ABA's comments 1, 3, and 5 to Rule 1.1. However, the Department believes that the proposed rule, as originally proposed, provides sufficient information for practitioners to be on notice of their duty to represent their clients competently. The Department's decision not to add additional text does not mean that the ABA's comments 1, 3, and 5 are not relevant to interpreting this provision. Because this ground for discipline is based on ABA Model Rule 1.1, relevant ABA comments concerning Rule 1.1, and relevant judicial interpretations, can be considered as an important aid in interpreting this ground for discipline.

7. Section 1003.102(p)—Scope of Representation

Comment. One commenter was concerned by this provision because the commenter believed that the provision would interfere with retainer agreements between attorneys and their clients, which are traditionally governed by state law. The commenter agreed that immigration judges should have a role in determining whether a practitioner can withdraw from a case; however, the commenter thought that this provision would require practitioners to continue to represent a client even when there is a conflict of interest. The commenter urged the Department to adopt standards governing whether immigration judges should permit the withdrawal of practitioners from cases. Finally, the commenter suggested that the Department permit limited appearances and allow practitioners to withdraw from cases in which clients have failed to pay fees. Another commenter views this change as ''an excellent proposal'' but suggests that the rule require clear contracts between attorneys and clients.

Response. Upon review, the Department has decided to remove the text from the proposed provision that is not based on ABA Model Rule 1.2(a) and add additional text from ABA Model Rule 1.2(a) concerning a practitioner's ability to ''take such action on behalf of the client as is impliedly authorized to carry out the representation.'' The Department is

making this change because this provision, which involves the scope of representation, should not include text discussing the withdrawal or the termination of employment of practitioners. The commenter's suggestion that the Department adopt standards governing whether immigration judges should permit the withdrawal of practitioners is outside the scope of this rule. This rule only involves practitioner disciplinary matters and does not include proposed amendments to procedures in immigration proceedings, such as 8 CFR 1003.17. Likewise, the suggestion that the Department permit limited appearances is an issue involving immigration proceedings that is not appropriately addressed in this final rule.

8. Section 1003.102(q)—Diligence

Comment. One commenter noted appreciation for this proposal but suggested that the Department add a good cause exception to the requirement that practitioners act with diligence and promptness. The commenter stated that there may always be unforeseen emergencies that occur. The commenter also suggested that the Department permit *nunc pro tunc* filings in immigration cases for good cause shown.

Response. The inclusion in this provision of a good cause exception is unnecessary. This provision requires ''reasonable'' diligence and promptness. Therefore, practitioners will not be expected to anticipate every possible contingency, such as a truly unforeseen emergency, in order to avoid discipline under this rule. However, practitioners should make an effort to prepare for foreseeable exigencies. As stated in *response* to a previous comment, this rule only involves practitioner disciplinary matters and does not include proposed amendments to procedures in immigration proceedings. Therefore, the Department will not adopt, as part of this final rule, a provision that permits late filings if there is good cause.

9. Section 1003.102(r)—Communication

Comment. Two commenters stated that this provision's requirement that practitioners communicate with aliens in their native language would be unduly burdensome. One commenter believes that the rule would transfer the expense of translation services from aliens to practitioners. Another commenter believes that the requirements in this provision would make it difficult for aliens who speak unusual foreign languages to obtain representation. The commenter asserted that aliens often rely on friends and family to translate for them, and practitioners should not be required to ensure that those translations are accurate. One commenter suggested that this provision should only require practitioners to make a diligent and reasonable effort to communicate in the alien's language. Finally, one commenter was concerned that the provision would require practitioners to locate their clients to communicate with them; the commenter suggested that the rule only require communication using the contact information provided to the practitioner from the client.

Response. The Department accepts the suggestions from the commenters and the final version of this provision has been modified to ensure that practitioners are not required to provide all translation services for their clients. However, practitioners must make reasonable efforts to communicate with clients in a language that the client understands. Further, the Department agrees that practitioners should not have to locate their clients and should be able to rely on the contact information provided by their clients. However, if a practitioner cannot locate his or her client, the practitioner is responsible for informing EOIR that the practitioner is unable to contact his or her client.

10. Section 1003.102(s)—Candor Toward the Tribunal

Comment. One commenter took issue with the explanation for this rule in the supplemental information and requested that the rule make clear that ''the duty of the lawyer is only to make reasonable disclosure of contrary authority known to him,'' not to assist DHS in preparing its brief against the lawyer's client.

Response. This provision is extremely narrow and will not require practitioners to seek out legal authority that is contrary to their client's cases just to disclose this information to EOIR. This provision only applies to controlling legal authority that is directly contrary to the client's position when this controlling legal authority is already known to the practitioner and the other party did not provide it to EOIR. In this regard, the commenter is correct that this rule does not view an alien's attorney as having a duty to also conduct research for the opposing party.

11. Section 1003.102(t)—Notice of Entry of Appearance

Comment. One commenter thought that the proposed provision was too broad because it subjects practitioners who provide pro bono services to discipline if they do not sign pleadings or submit a Form EOIR–27 or EOIR–28. The commenter suggested that disciplinary sanctions only be imposed when filings demonstrate a lack of competence or preparation, or the practitioner has undertaken ''full client services.'' Another commenter approved of this change, but suggested that pro se aliens be provided notice of this requirement in their own language and that immigration judges inform all who appear before the court of the requirement.

Response. The Department believes that all practitioners should submit Forms EOIR–27 and EOIR–28, and sign all filings made with EOIR, in cases where practitioners engage in ''practice'' or ''preparation'' as those words are defined in 8 CFR 1001.1(i) and (k). It is appropriate to require practitioners who engage in ''practice'' or ''preparation,'' whether it is for a fee or on a pro bono basis, to enter a notice of appearance and sign any filings submitted to EOIR. As stated in the supplemental information to the proposed rule, this provision is meant to advance the level of professional conduct in immigration matters and foster increased transparency in the client-practitioner relationship. Any practitioner who accepts responsibility for rendering immigration-related services to a client should be held accountable for his or her own actions, including the loss of the privilege of practice before EOIR, when such conduct fails to meet the minimum standards of professional conduct in 8 CFR 1003.102. It is difficult for EOIR to enforce those standards when practitioners fail to enter a notice of appearance or sign filings made with EOIR. However, in an effort to ensure clarity of this ground for discipline, a sentence will be added to this provision that makes it clear that a notice of appearance must be submitted and filings signed in all cases where practitioners engage in ''practice'' or ''preparation.'' If a practitioner provides pro bono services that do not meet these definitions, then a notice of appearance is not necessary.

As for the suggestions made by the second commenter, the Department declines to codify in the regulations a rule that requires notice to pro se aliens or anyone appearing before an immigration judge of an attorney's obligation to enter a Notice of Appearance. The scope of this rule is to provide notice to attorneys of their responsibilities when engaging in practice and preparation before EOIR and to provide grounds for discipline when an attorney fails to carry through on his or her responsibilities.

12. Section 1003.102(u)—Repeated Filings Indicating a Substantial Failure to Competently and Diligently Represent the Client

Comment. One commenter stated that the proposed rule fails to acknowledge that boilerplate language is sometimes appropriate where used in briefs where cases present common issues of law, analysis, and argument. The commenter was concerned that the proposed rule would punish the repeated use of briefing materials regardless of the material's relevance to the case at hand. The commenter proposed limiting the proposed rule's effect to filings that reflect incorporation of incorrect or irrelevant material. Another commenter agrees with this change, but questions how the ''repeated filings'' will be tracked such that the rule will be enforceable.

Response. The rule, as written, is sufficient to meet the concerns of the first commenter and is therefore adopted as the final rule. The rule makes it clear that conduct that will lead to sanctions only includes filings that use boilerplate language that reflect little or no attention to the specific factual or legal issues in a case and thereby show a lack of competence or diligence by the practitioner. As stated in the supplemental information to the proposed rule, EOIR seeks to deter practitioners from filing briefs that provide no recitation of the specific facts in the case and fail to explain how the cited law in the brief applies to the facts of the case. Therefore, this rule is sufficiently circumscribed to ensure that a practitioner's use of a legal argument in one case, which is copied from the practitioner's brief in another case, will not subject the practitioner to sanctions unless the argument fails to connect the legal issues raised in the brief with the specific facts in the case in a manner that shows a lack of competence and diligence.

As for the enforceability of the rule, the proposed rule explained that the Board has already experienced these situations. 73 FR at 44183. In light of this experience, the Board has already developed the means to identify cases where the same attorney is filing boilerplate briefs. Immigration judges, on the other hand, may be able to identify instances of concern based on their ongoing interaction with the practitioners who appear before them.

C. Section 1003.103—Immediate Suspension and Summary Disciplinary Proceedings

Comment. One commenter stated that a petition to immediately suspend a practitioner should not be filed until a final order is issued suspending, disbarring, or criminally convicting the practitioner in another jurisdiction.

Response. The regulations currently permit the imposition of an immediate suspension of a practitioner who has been suspended or disbarred on an interim basis. The proposed rule sought to clarify this authority; however, the proposed rule did not seek to broaden or change it. It is appropriate to immediately suspend a practitioner based on an interim suspension from a state licensing authority or a Federal court pending the issuance of a final order because any practitioner who is under a suspension from another jurisdiction does not meet the definition of an ''attorney'' under 8 CFR 1001.1(f). Such a practitioner is not qualified to practice before EOIR under 8 CFR 1292.1(a)(1). Further, it is beyond argument that it is appropriate to immediately suspend practitioners who have been convicted of serious crimes. The regulations protect practitioners because they require that all criminal appeals be completed before EOIR will issue a final order imposing a suspension or expulsion on a criminally convicted practitioner. *See* 8 CFR 1003.103(b).

Comment. One commenter was concerned that EOIR did not have a provision that would permit it to vacate an immediate suspension order imposed on a practitioner who later has an underlying state bar suspension vacated.

Response. The regulations expressly provide that upon a showing of good cause, the Board may set aside an immediate suspension if it is in the interests of justice to do so. 8 CFR 1003.103(a)(2). If an immediate suspension was solely predicated upon a state bar suspension that was vacated, it would be in the interests of justice for the Board to set aside its immediate suspension order.

Comment. One organization disagreed with the proposed change in the standard of proof in practitioner disciplinary proceedings from ''clear, unequivocal, and convincing evidence'' to ''clear and convincing evidence.'' The commenter stated that removing ''unequivocal'' makes lawyers more vulnerable to discipline without providing a corresponding benefit to the justice system and indicated that the standard of proof in practitioner disciplinary cases should not mirror those in removal proceedings.

Response. The proposed rule indicated the Department's intention to change the standard of proof in practitioner disciplinary cases to clear and convincing evidence because this is now the standard of proof used in removal proceedings adjudicated by the Board and immigration judges. This is appropriate given the reason why ''unequivocal'' was first adopted as part of the standard of proof in practitioner disciplinary proceedings. *See Matter of Koden*, 15 I&N Dec. 739, 748 (BIA 1974, A.G. 1976). In *Koden*, the Board decided that the standard of proof should be clear, convincing, and unequivocal evidence, rather than clear and convincing evidence as argued by the respondent, because many other jurisdictions used ''unequivocal'' as part of their disciplinary standard, and also because the Board and other immigration adjudicators were already familiar with applying the clear, convincing, and unequivocal evidence standard as that was the standard applicable in deportation proceedings. *See id.* It is appropriate for the standard of proof in practitioner disciplinary cases to be adjusted to the clear and convincing standard because that is now the standard that the ABA recommends for all jurisdictions to adopt in disciplinary cases, *see* Model Rules for Lawyer Disciplinary Enforcement R. 18 (2002), and also because that is the standard the Board and immigration judges now apply in removal proceedings. The latter reason is supported by both *Koden* and the regulations at 8 CFR 1003.106(a)(1)(v), which state: ''[d]isciplinary proceedings shall be conducted in the same manner as Immigration Court proceedings as is appropriate . * * *'' Further, while the concerns raised by the commenter were presumably directed at a reduction of the burden the government will bear in proving charges of misconduct, it is important to note that practitioners also receive a benefit to the change in the standard of proof. Practitioners have a reduced burden of proving affirmative defenses and proving that they are morally and professionally fit to be reinstated after being disciplined. *See* 8 CFR 1003.103(b)(2); 1003.105(a)(2); 1003.107(a)(1).

Comment. One commenter suggested that the regulations concerning reciprocal discipline be revised so that reciprocal discipline imposed by the Board will run concurrently with the discipline imposed by the practitioner's state bar. The commenter believed that the proposed revisions to 8 CFR 1003.103 would cause practitioners to be suspended or disbarred for periods of time that are different than that imposed by the state bar without any basis or finding as to why that result is appropriate.

Response. EOIR attempts to ensure in reciprocal disciplinary cases that a

suspension or expulsion before EOIR will be as contemporaneous as possible with discipline imposed by state bars. The regulations at 8 CFR 1003.103(a) permit the Board to impose an immediate suspension on a practitioner who has been suspended or disbarred, and the time served during the immediate suspension can be credited toward the term of suspension or expulsion in the final order. *Id.* However, the Board cannot issue an immediate suspension order against a practitioner contemporaneously with a state bar order of suspension or disbarment unless the practitioner complies with 8 CFR 1003.103(c) and informs EOIR of the suspension or disbarment in a timely fashion. In cases where practitioners fail to inform EOIR of state bar discipline, EOIR will have no alternative but to impose discipline at a later date after learning of the discipline. Even though Board precedent establishes that identical or comparable discipline is generally to be imposed in reciprocal disciplinary matters, *see Matter of Truong,* 24 I&N Dec. 52, 55 (BIA 2006); *Matter of Ramos,* 23 I&N Dec. 843, 848 (BIA 2005); *Matter of Gadda*, 23 I&N Dec. 645, 649 (BIA 2003), EOIR will not reward a practitioner's failure to comply with his or her duty to timely inform EOIR of state bar discipline by shortening the length of the reciprocal discipline imposed.

Further, while the Board generally subscribes to the concept of identical or comparable reciprocal discipline, there have been circumstances where the Board has imposed non-identical reciprocal discipline or denied reinstatement to a practitioner who has since been reinstated to practice before his state bar. *See Matter of Krivonos*, 24 I&N Dec. 292, 293 (BIA 2007) (denying reinstatement to practitioner who had been convicted of immigration-related fraud even though practitioner was reinstated by the state bar); *Matter of Jean-Joseph*, 24 I&N Dec. 295 (BIA 2007) (suspending practitioner for double the length of state bar suspension because practitioner violated the Board's immediate suspension order). Therefore, while identical or comparable reciprocal discipline is generally employed by the Board, the Board must have the flexibility to respond to the facts and circumstances presented in each case.

Comment. One commenter suggested that the rule allowing for public postings of immediate suspensions require that such postings be placed in the waiting rooms of the immigration courts.

Response. The regulatory language specifically states that ''the Board may require that notice of such suspension be posted at the Board, the Immigration Courts, or the DHS.'' In all immediate suspension orders issued by the Board to date, the Board has included a requirement that the immediate suspension be posted in a public area. In addition, such information is accessible to the public online at *http://www.usdoj.gov/eoir/profcond/chart.htm.*

D. Section 1003.105—Notice of Intent To Discipline and Section 1003.106—Hearing and Disposition

Comment. One commenter suggested that a Notice of Intent to Discipline should only be issued when there is a preliminary finding that the charges of misconduct could be sustained on clear and convincing evidence.

Response. This comment involves an existing regulation that was not subject to amendment in the proposed rule and, therefore, is outside the scope of the proposed rule. In 2000, the practitioner disciplinary regulations were amended to provide that a Notice of Intent to Discipline would only be issued when there is sufficient prima facie evidence to warrant charging a practitioner with misconduct. 8 CFR 1003.105(a). However, those charges would have to be proven by clear and convincing evidence. 8 CFR 1003.106(a)(1)(iv). Therefore, implicit in the filing of all charges is the belief by the EOIR disciplinary counsel that the charges can be proven by clear and convincing evidence.

Comment. One commenter took issue with the proposal to limit the circumstances under which a preliminary inquiry report will be served with a Notice of Intent to Discipline. The commenter understood the proposal to mean that the practitioner will no longer be informed of the basis for the charge of disciplinary action.

Response. The supplemental information and language of the proposed rule clearly state that this limitation applies only in summary proceedings because those proceedings will always be brought as a result of a disciplinary decision issued by a state licensing authority or a federal court, or a criminal conviction which will be set forth in the Notice of Intent to Discipline itself. Thus, a preliminary inquiry report would do nothing but repeat the basis of the charges already contained in the Notice. Accordingly, this final rule adopts this proposed rule without change.

Comment. One commenter disagreed with the proposed language for limiting a practitioner's eligibility for a hearing where the practitioner is subject to summary disciplinary proceedings.

Response. In light of the comment and upon further consideration of the proposed change to 8 CFR 1003.105 concerning the availability of in-person hearings in summary disciplinary proceedings, the Department has decided not to adopt the proposed language. Rather, the Department will codify in the regulations the prevailing standard in Board precedent concerning evidentiary hearings in summary discipline cases. In *Matter of Ramos,* 23 I&N Dec. 843, 848 (BIA 2005), the Board held that in summary disciplinary proceedings, a practitioner must show that there is a material issue of fact in dispute that necessitates an evidentiary hearing. *Id.* Therefore, the final regulations reflect this standard. The Department has also decided that this provision should appear in 8 CFR § 1003.106 because it relates to a practitioner's right to a hearing. 8 CFR § 1003.105 involves filing Notices of Intent to Discipline and answers to those notices. Therefore, it is more appropriate for this provision to be located in the section related to disciplinary hearings.

IV. Technical Amendments to Regulations

This final rule also includes technical changes to 8 CFR 1003.101–108 that were not included in the proposed rule. In 8 CFR 1003.101, 1003.103, 1003.104–105, and 1003.107, the words ''Immigration and Naturalization Service,'' ''the Service'' and ''the Office of the General Counsel of the Service'' are being replaced with the term ''DHS,'' which is defined at 8 CFR 1001.1(w). As discussed above, since the promulgation of the final rule concerning the practitioner disciplinary process in June of 2000, the functions of the former Immigration and Naturalization Service (INS) were transferred from the Department to DHS. These changes reflect the creation of DHS and the transfer of the former INS's functions.

The definition of the term ''practice'' in 8 CFR 1001.101(i) is being updated to reflect the fact that immigration judges, and not ''officers of the Service,'' are the adjudicators at the hearing level in immigration proceedings before EOIR. The definition has been unchanged since its adoption nearly forty years ago. *See* 34 FR 12213 (July 24, 1969). At that time, INS officers held hearings in immigration cases and the Board decided appeals from INS's decisions. However, those INS officers eventually became immigration judges employed by EOIR. Therefore, the Department is updating the definition to remove

reference to the ''Service'' and ''officer of the Service,'' and is replacing them with the terms ''DHS'' and ''immigration judge.''

In 8 CFR 1003.103–108, the term ''Office of the General Counsel of EOIR'' is being replaced with the term ''EOIR disciplinary counsel'' as it is used in 8 CFR 1003.0(e)(2)(iii). This change is made to more accurately reflect EOIR's practice of assigning an attorney within the Office of the General Counsel to serve as the chief prosecutor for practitioner disciplinary matters. The EOIR disciplinary counsel is responsible for the day-to-day management of the disciplinary program for attorneys and accredited representatives, and investigates allegations of misconduct against practitioners, including referrals from EOIR's anti-fraud officer concerning ''instances of fraud, misrepresentation, or abuse pertaining to an attorney or accredited representative.'' 8 CFR 1003.0(e)(1), (2)(iii). The EOIR disciplinary counsel determines when to dismiss complaints against practitioners, informally resolve those complaints, or initiate disciplinary proceedings.

The Department has also made technical changes to 8 CFR 1003.105–106 to replace the terms ''Office of the General Counsel for EOIR'' and ''Office of the General Counsel of the Service'' with ''counsel for the government.'' These changes are made to the provisions that relate directly to the litigation of practitioner disciplinary cases. Finally, 8 CFR 1003.106(a)(1)(iii) is being amended to clarify that both parties to a practitioner disciplinary case, and not just the practitioner, have the right to examine and object to evidence presented by the other party, to present evidence, and to cross-examine witnesses presented by the other party. Further, an additional sentence is being added to this provision to indicate that if a practitioner files an answer to the Notice of Intent to Discipline but does not request a hearing, the parties have the right to submit briefs and evidence to support or refute any of the charges or affirmative defenses.

Regulatory Requirements

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects only those practitioners who practice immigration law before EOIR. This rule will not affect small entities, as that term is defined in 5 U.S.C. 601(6), because the rule is similar in substance to the existing regulatory process.

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 251 of the Small Business Regulatory Enforcement Act of 1996 (5 U.S.C. 804). 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—Regulatory Planning and Review

The Attorney General has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and, accordingly, this rule has been submitted to the Office of Management and Budget for review.

Executive Order 13132—Federalism

This rule 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 section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988—Civil Justice Reform

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

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this proposed rule because there are no new or revised recordkeeping or reporting requirements.

List of Subjects

8 CFR Part 1001

Administrative practice and procedures, Immigration, Legal services.

8 CFR Part 1003

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

8 CFR Part 1292

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

■ For the reasons set forth in the preamble, parts 1001, 1003, and 1292 of title 8 of the Code of Federal Regulations are amended as follows:

PART 1001—DEFINITIONS

■ 1. The authority citation for part 1001 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103.

■ 2. Amend § 1001.1 to revise paragraphs (f) and (i) to read as follows:

§ 1001.1 Definitions.

* * * * *

(f) The term *attorney* means any person who is eligible to practice law in and is a member in good standing of the bar of the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, and is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law.

* * * * *

(i) The term *practice* means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge, or the Board.

* * * * *

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 3. The authority citation for part 1003 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.

■ 4. Amend § 1003.1 by removing from paragraph (d)(5) the citation ''§ 1.1(j) of this chapter'' and adding in its place the citation ''§ 1001.1(j) of this chapter''.

Subpart G—Professional Conduct for Practitioners—Rules and Procedures

§ 1003.101 [Amended]

■ 5. Amend § 1003.101 by:
■ a. Removing from paragraph (a)(1) the words ''Immigration and Naturalization Service (the Service)'' and adding in its place ''DHS'';
■ b. Removing from paragraph (a)(2) the words ''the Service'' and adding in its place ''DHS'';
■ c. Removing from paragraph (b) the words ''the Service'' and adding in its place ''DHS''.

■ 6. Amend § 1003.102 by:
■ a. Removing from paragraph (j)(2) the citation ''§ 1003.1(d)(1–a)'' and adding in its place the citation ''§ 1003.1(d)'';
■ b. Revising paragraphs (e), (k), (l), and (m); and by
■ c. Adding paragraphs (n) through (t), to read as follows:

§ 1003.102 Grounds.

* * * * *

(e) Is subject to a final order of disbarment or suspension, or has resigned while a disciplinary investigation or proceeding is pending;

* * * * *

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

(l) Repeatedly fails to appear for pre-hearing conferences, scheduled hearings, or case-related meetings in a timely manner without good cause;

(m) Assists any person, other than a practitioner as defined in § 1003.101(b), in the performance of activity that constitutes the unauthorized practice of law. The practice of law before EOIR means engaging in *practice* or *preparation* as those terms are defined in §§ 1001.1(i) and (k);

(n) Engages in conduct that is prejudicial to the administration of justice or undermines the integrity of the adjudicative process. Conduct that will generally be subject to sanctions under this ground includes any action or inaction that seriously impairs or interferes with the adjudicative process when the practitioner should have reasonably known to avoid such conduct;

(o) Fails to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners;

(p) Fails to abide by a client's decisions concerning the objectives of representation and fails to consult with the client as to the means by which they are to be pursued, in accordance with paragraph (r) of this section. A practitioner may take such action on behalf of the client as is impliedly authorized to carry out the representation;

(q) Fails to act with reasonable diligence and promptness in representing a client.

(1) A practitioner's workload must be controlled and managed so that each matter can be handled competently.

(2) A practitioner has the duty to act with reasonable promptness. This duty includes, but shall not be limited to, complying with all time and filing limitations. This duty, however, does not preclude the practitioner from agreeing to a reasonable request for a postponement that will not prejudice the practitioner's client.

(3) A practitioner should carry through to conclusion all matters undertaken for a client, consistent with the scope of representation as previously determined by the client and practitioner, unless the client terminates the relationship or the practitioner obtains permission to withdraw in compliance with applicable rules and regulations. If a practitioner has handled a proceeding that produced a result adverse to the client and the practitioner and the client have not agreed that the practitioner will handle the matter on appeal, the practitioner must consult with the client about the client's appeal rights and the terms and conditions of possible representation on appeal;

(r) Fails to maintain communication with the client throughout the duration of the client-practitioner relationship. It is the obligation of the practitioner to take reasonable steps to communicate with the client in a language that the client understands. A practitioner is only under the obligation to attempt to communicate with his or her client using addresses or phone numbers known to the practitioner. In order to properly maintain communication, the practitioner should:

(1) Promptly inform and consult with the client concerning any decision or circumstance with respect to which the client's informed consent is reasonably required;

(2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished. Reasonable consultation with the client includes the duty to meet with the client sufficiently in advance of a hearing or other matter to ensure adequate preparation of the client's case and compliance with applicable deadlines;

(3) Keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation; and

(4) Promptly comply with reasonable requests for information, except that when a prompt *response* is not feasible, the practitioner, or a member of the practitioner's staff, should acknowledge receipt of the request and advise the client when a *response* may be expected;

(s) Fails to disclose to the adjudicator legal authority in the controlling jurisdiction known to the practitioner to be directly adverse to the position of the client and not disclosed by opposing counsel;

(t) Fails to submit a signed and completed Notice of Entry of Appearance as Attorney or Representative in compliance with applicable rules and regulations when the practitioner:

(1) Has engaged in *practice* or *preparation* as those terms are defined in §§ 1001.1(i) and (k), and

(2) Has been deemed to have engaged in a pattern or practice of failing to submit such forms, in compliance with applicable rules and regulations. Notwithstanding the foregoing, in each case where the respondent is represented, every pleading, application, motion, or other filing shall be signed by the practitioner of record in his or her individual name; or

(u) Repeatedly files notices, motions, briefs, or claims that reflect little or no attention to the specific factual or legal issues applicable to a client's case, but rather rely on boilerplate language indicative of a substantial failure to competently and diligently represent the client.

* * * * *

■ 7. Amend § 1003.103 by:
■ a. Revising the first sentence in paragraph (a)(1);
■ b. Revising the first and second sentences in paragraph (a)(2);
■ c. Adding a new sentence after the second sentence in paragraph (a)(2);
■ d. Revising the first and second sentences in paragraph (b) introductory text;

■ e. Revising paragraph (b)(2) introductory text; and by

■ f. Revising the first sentence of paragraph (c).

The revisions and addition read as follows:

§ 1003.103 Immediate suspension and summary disciplinary proceedings; duty of practitioner to notify EOIR of conviction or discipline.

(a) *Immediate Suspension*—

(1) *Petition*. The EOIR disciplinary counsel 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 § 1003.102(h), or any practitioner who has been suspended or disbarred by, or while a disciplinary investigation or proceeding is pending has resigned from, the highest court of any State, possession, territory, or Commonwealth of the United States, or the District of Columbia, or any Federal court, or who has been placed on an interim suspension pending a final resolution of the underlying disciplinary matter. A copy of the petition shall be forwarded to DHS, 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 DHS. Proof of service on the practitioner of DHS'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 EOIR disciplinary counsel, together with a certified copy of a court record finding that a practitioner has been found guilty of, or pleaded guilty or nolo contendere to, a serious crime, or has been disciplined or has resigned, as described in paragraph (a)(1) of this section, the Board shall forthwith enter an order immediately suspending the practitioner from practice before the Board, the Immigration Courts, and/or DHS, notwithstanding the pendency of an appeal, if any, of the underlying disciplinary proceeding, 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. If an immediate suspension is imposed upon a practitioner, the Board may require that notice of such suspension be posted at the Board, the Immigration Courts, or DHS. * * *

* * * * *

(b) *Summary disciplinary proceedings*. The EOIR disciplinary counsel shall promptly initiate summary disciplinary proceedings against any practitioner described in paragraph (a) of this section by the issuance of a Notice of Intent to Discipline, upon receipt of a certified copy of the order, judgment, and/or record evidencing the underlying criminal conviction, discipline, or resignation, and accompanied by a certified copy of such document. However, delays in initiation of summary disciplinary proceedings under this section will not impact an immediate suspension imposed pursuant to paragraph (a) of this section. * * *

* * * * *

(2) In the case of a summary proceeding based upon a final order of disbarment or suspension, or a resignation while a disciplinary investigation or proceeding is pending (*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 clear and convincing evidence that:

* * * * *

(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 § 1003.102(h), or who has been disbarred or suspended by, or while a disciplinary investigation or proceeding is pending has resigned from, the highest court of any State, possession, territory, or Commonwealth of the United States, or the District of Columbia, or any Federal court, must notify the EOIR disciplinary counsel 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.* * *

* * * * *

■ 8. Amend § 1003.104 by:

■ a. Revising paragraph (a);

■ c. Revising the first, third, and fourth sentences in paragraph (b);

■ d. Revising paragraph (c); and by

■ e. Revising paragraph (d), to read as follows:

§ 1003.104 Referral of Complaints

(a) *Filing 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 EOIR disciplinary counsel. 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 EOIR disciplinary counsel using the Form EOIR–44. The EOIR disciplinary counsel shall notify DHS of any disciplinary complaint that pertains, in whole or part, to a matter before DHS.

(2) *Practitioners authorized to practice before DHS*. Complaints of criminal, unethical, or unprofessional conduct, or frivolous behavior by a practitioner who is authorized to practice before DHS shall be filed with DHS 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 EOIR disciplinary counsel will initiate a preliminary inquiry. * * * If the EOIR disciplinary counsel determines that a complaint is without merit, no further action will be taken. The EOIR disciplinary counsel may, in its discretion, close a preliminary inquiry if the complainant fails to comply with reasonable requests for assistance, information, or documentation. * * *

(c) *Resolution reached prior to the issuance of a Notice of Intent to Discipline*. The EOIR disciplinary counsel, 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 EOIR disciplinary counsel receives credible information or allegations that a practitioner has engaged in criminal conduct, the EOIR disciplinary counsel shall refer the matter to DHS or the appropriate United States Attorney and, if appropriate, to the Inspector General, the Federal Bureau of Investigation, or other law enforcement agency. In such cases, in making the decision to pursue

disciplinary sanctions, the EOIR disciplinary counsel 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.

* * * * *

■ 9. Amend § 1003.105 by:
■ a. Revising paragraph (a);
■ b. Revising the first and second sentences of paragraph (b);
■ c. Revising the third sentence of paragraph (c)(1); and by
■ d. Revising paragraph (d)(2) introductory text, to read as follows:

§ 1003.105 Notice of Intent to Discipline.

(a) *Issuance of Notice to practitioner.* (1) If, upon completion of the preliminary inquiry, the EOIR disciplinary counsel determines that sufficient prima facie evidence exists to warrant charging a practitioner with professional misconduct as set forth in § 1003.102, he or she will file with the Board and issue to the practitioner who was the subject of the preliminary inquiry a Notice of Intent to Discipline. Service of this notice will be made upon the practitioner by either certified mail to his or her last known address, as defined in paragraph (a)(2) of this section, or by personal delivery. 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. In summary disciplinary proceedings brought pursuant to § 1003.103(b), a preliminary inquiry report is not required to be filed with the Notice of Intent to Discipline.

(2) For the purposes of this section, the last known address of a practitioner is the practitioner's address as it appears in EOIR's case management system if the practitioner is actively representing a party before EOIR on the date that the EOIR disciplinary counsel issues the Notice of Intent to Discipline. If the practitioner does not have a matter pending before EOIR on the date of the issuance of a Notice of Intent to Discipline, then the last known address for a practitioner will be as follows:

(i) Attorneys in the United States: the attorney's address that is on record with a state jurisdiction that licensed the attorney to practice law.

(ii) Accredited representatives: the address of a recognized organization with which the accredited representative is affiliated.

(iii) Accredited officials: the address of the embassy of the foreign government that employs the accredited official.

(iv) All other practitioners: the address for the practitioner that appears in EOIR's case management system for the most recent matter on which the practitioner represented a party.

(b) *Copy of Notice to DHS; reciprocity of disciplinary sanctions.* A copy of the Notice of intent to Discipline shall be forwarded to DHS. DHS 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 DHS. * * *

(c) * * *

(1) * * * A copy of the answer and any such motion shall be served by the practitioner on the counsel for the government.

* * * * *

(d) * * *

* * * * *

(2) Upon such a default by the practitioner, the counsel for the government shall submit to the Board proof of 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 proposed 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 interests of justice. With the exception of cases in which the Board has already imposed an immediate suspension pursuant to § 1003.103, 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 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 EOIR disciplinary counsel, provided:

* * * * *

■ 10. Amend § 1003.106 by:
■ a. Revising the section heading to read as set forth below;
■ b. Revising the heading of paragraph (a);
■ c. Redesignating paragraphs (a)(1) and (a)(2) as paragraphs (a)(2) and (a)(3);
■ d. Adding a new paragraph (a)(1);
■ e. Revising the first and second sentences of newly redesignated paragraph (a)(2)(ii),
■ f. Revising paragraphs (a)(2)(iii) and (a)(2)(iv);
■ g. Revising the first sentence of paragraph (a)(2)(v) introductory text;
■ h. Revising paragraph (a)(3) introductory text;
■ i. Revising paragraph (a)(3)(ii);
■ j. Revising paragraphs (b) and (c); and by
■ k. Revising the first and third sentences of paragraph (d).

The revisions read as follows:

§ 1003.106 Right to be heard and disposition.

(a) *Right to be heard*—(1) *Summary disciplinary proceedings.* If a practitioner who is subject to summary disciplinary proceedings pursuant to § 1003.103(b) requests a hearing, he or she must make a prima facie showing to the Board in his or her answer that there is a material issue of fact in dispute with regard to the basis for summary disciplinary proceedings, or with one or more of the exceptions set forth in § 1003.103(b)(2)(i)–(iii). If the Board determines that there is a material issue of fact in dispute with regard to the basis for summary disciplinary proceedings, or with one or more of the exceptions set forth in § 1003.103(b)(2)(i)–(iii), then the Board shall refer the case to the Chief Immigration Judge for the appointment of an adjudicating official. Failure to make such a prima facie showing shall result in the denial of a request for a hearing. The Board shall retain jurisdiction over the case and issue a final order.

(2) * * *

(ii) Except as provided in § 1003.105(c)(3), upon the practitioner's request for a hearing, the adjudicating official may 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. When designating the time and place of a hearing, the adjudicating official shall provide for the service of a notice of hearing, as the term ''service'' is defined in 8 CFR 1003.13, on the practitioner and the counsel for the government. * * *

(iii) The practitioner may be represented 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. Each party shall have a reasonable opportunity to examine and object to evidence presented by the other party, to present evidence on his or her own behalf, and to cross-examine witnesses presented by the other party. If a practitioner files an answer but does not request a hearing, then the adjudicating official shall provide the parties with the opportunity to submit briefs and evidence to support or refute any of the charges or affirmative defenses.

(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, any supporting documents, and any other evidence, including pleadings, briefs, and other materials. 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 and convincing evidence.

(v) The record of proceedings, regardless of whether an immigration judge or an administrative law judge is the adjudicating official, shall conform to the requirements of 8 CFR part 1003, subpart C and 8 CFR 1240.9. * * *

* * * * *

(3) *Failure to appear in proceedings.* If the practitioner requests a hearing as provided in section 1003.105(c)(3) but fails to appear, 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 the counsel for the government at the hearing. In such a proceeding, the counsel for the government shall submit to the adjudicating official proof of 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. 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 counsel for the government, provided:

* * * * *

(ii) His or her failure to appear 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 and, as soon as practicable, 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 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 and convincing evidence shall be dismissed. The adjudicating official shall provide for the service of a written decision or a memorandum summarizing an oral decision, as the term ''service'' is defined in 8 CFR 1003.13, on the practitioner and the counsel for the government. 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 § 1003.6.

(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 review pursuant to § 1003.1(d)(3). Parties must comply with all pertinent provisions for appeals to the Board, including provisions relating to forms and fees, as set forth in Part 1003, and must use the Form EOIR–45. The decision of the Board is a final administrative order as provided in § 1003.1(d)(7), and shall be served upon the practitioner as provided in 8 CFR 1003.1(f). With the exception of cases in which the Board has already imposed an immediate suspension pursuant to § 1003.103, 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 counsel for the government. 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 DHS 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 EOIR disciplinary counsel may notify an appropriate Federal or state disciplinary or regulatory authority of any complaint filed against a practitioner. * * * In addition, the EOIR disciplinary counsel shall transmit notice of all public discipline imposed under this rule to the National Lawyer Regulatory Data Bank maintained by the American Bar Association.

* * * * *

■ 11. Amend § 1003.107 by:
■ a. Revising the second and third sentences of paragraph (b) introductory text;
■ b. Revising paragraph (b)(1); and by
■ c. Adding a new paragraph (c), to read as follows:

§ 1003.107 Reinstatement after expulsion or suspension.

* * * * *

(b) Petition for reinstatement. * * * A copy of such a petition shall be served on the EOIR disciplinary counsel. In matters in which the practitioner was ordered expelled or suspended from practice before DHS, a copy of such petition shall be served on DHS.

(1) The practitioner shall have the burden of demonstrating by clear and convincing evidence that he or she possess the moral and professional qualifications required to appear before the Board and the Immigration Courts or DHS, or before all three authorities, and that his or her reinstatement will not be detrimental to the administration of justice. The EOIR disciplinary counsel and, in matters in which the practitioner was ordered expelled or suspended from practice before DHS, DHS 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.

* * * * *

(c) *Appearance after reinstatement.* A practitioner who has been reinstated to practice by the Board must file a new Notice of Entry of Appearance of Attorney or Representative in each case on the form required by applicable rules and regulations, even if the reinstated practitioner previously filed such a form in a proceeding before the practitioner was disciplined.

* * * * *

■ 12. Amend § 1003.108 by:

■ a. Revising the second sentence of paragraph (a) introductory text;

■ b. Revising paragraph (a)(1) introductory text;

■ c. Revising the second sentence of paragraph (a)(1)(i);

■ d. Revising paragraph (a)(1)(iv); and by

■ e. Revising paragraph (a)(2), to read as follows:

§ 1003.108 Confidentiality.

(a) *Complaints and preliminary inquiries.* * * * A practitioner whose conduct is the subject of a complaint or preliminary inquiry, however, may waive confidentiality, except that the EOIR disciplinary counsel 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 EOIR disciplinary counsel 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) * * * If disclosure of information is made pursuant to this paragraph, the EOIR disciplinary counsel may define the scope of information disseminated and may limit the disclosure of information to specified individuals and entities;

* * * * *

(iv) A practitioner is the subject of multiple disciplinary complaints and the EOIR disciplinary counsel has determined not to pursue all of the complaints. The EOIR disciplinary counsel 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 EOIR disciplinary counsel, in the exercise of discretion, may disclose documents and information concerning complaints and preliminary inquiries to the following individuals and entities: * * *

* * * * *

PART 1292—REPRESENTATION AND APPEARANCES

■ 13. The authority citation for Part 1292 continues to read as follows:

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

■ 14. In § 1292.1, remove paragraph (a)(6) and revise paragraph (a)(2) introductory text, to read as follows:

§ 1292.1 Representation of others.

(a) * * *

* * * * *

(2) *Law students and law graduates not yet admitted to the bar.* A law student who is enrolled in an accredited U.S. law school, or a graduate of an accredited U.S. law school who is not yet admitted to the bar, provided that:

* * * * *

Dated: December 12, 2008.

Michael B. Mukasey,

Attorney General.

[FR Doc. E8–30027 Filed 12–17–08; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1240 and 1241

[EOIR Docket No. 163; AG Order No. 3027–2008]

RIN 1125–AA60

Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice is publishing this final rule to amend the regulations regarding voluntary departure. This rule adopts, without substantial change, the proposed rule under which a grant of voluntary departure is automatically withdrawn upon the filing of a motion to reopen or reconsider with the immigration judge or the Board of Immigration Appeals (Board) or a petition for review in a federal court of appeals. This final rule adopts, with some modification, the proposed rule under which an immigration judge will set a presumptive civil monetary penalty of $3,000 if the alien fails to depart within the time allowed. However, this rule adopts only in part the proposals to amend the provisions relating to the voluntary departure bond. Finally, this rule adopts the notice advisals in the proposed rule and incorporates additional notice requirements in light of public comments.

DATES: This rule is effective January 20, 2009.

FOR FURTHER INFORMATION CONTACT: John Blum, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041; telephone (703) 305–0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

The Attorney General published a proposed rule in the **Federal Register** on November 30, 2007 (72 FR 67674). The comment period ended on January 29, 2008. Comments were received from nine commenters, including public interest law and advocacy groups, a law firm, three non-attorneys, and one immigration bond agency. Since some comments overlap, and other commenters covered multiple topics, the comments are addressed by topic in sections III–VIII of this preamble, rather than by reference to each specific comment and commenter.

II. Introduction

A. Background

The Immigration and Nationality Act (INA or Act) provides that, as an alternative to formal removal proceedings and entry of a formal removal order, ''[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense.'' INA 240B(a)(1), (b)(1) (8 U.S.C. 1229c(a)(1), (b)(1)). Voluntary departure ''is a privilege granted to an alien in lieu of deportation.'' *Iouri* v. *Aschroft,* 487 F.3d 76, 85 (2d Cir. 2007), cert. denied, 128 S.Ct. 2986 (2008) (citing *Ballenilla-Gonzalez* v. *INS,* 546 F.2d 515, 521 (2d Cir. 1976)). It is ''an agreed upon exchange of benefits between the alien and the government.'' *Banda-Ortiz* v. *Gonzales,* 445 F.3d 387, 389 (5th Cir. 2006), cert. denied, 127 S.Ct. 1874 (2007). This *quid pro quo* offers an alien ''a specific benefit—exemption from the ordinary bars to relief—in return for a quick departure at no cost to the government.'' *Id.* at 390 (quoting *Ngarurih* v. *Ashcroft,* 371 F.3d 182, 194 (4th Cir. 2004)). When choosing to seek voluntary departure, the alien agrees to take the benefits and burdens of the statute together. *Ngarurih,* 371 F.3d at 194. In order to obtain voluntary departure at the conclusion of removal proceedings, an alien must establish to the immigration judge by clear and convincing evidence that he or she is both willing and able