

## § 1003.106

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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:

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

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

[65 FR 39526, June 27, 2000, as amended at 73 FR 76925, Dec. 18, 2008]

### **§ 1003.106 Right to be heard and disposition. 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) *Procedure*. (i) The Chief Immigration Judge shall, upon the filing of an answer, appoint an Immigration Judge as an adjudicating official. At the request of the Chief Immigration Judge or in the interest of efficiency, the Director of EOIR may appoint an Admin-

istrative Law Judge as an adjudicating official. An Immigration Judge or Administrative Law Judge shall not serve as the adjudicating official in any case in which he or she is also the complainant. An Immigration Judge shall not serve as the adjudicating official in any case involving a practitioner who regularly appears before him or her.

(ii) 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. The practitioner shall be afforded adequate time to prepare his or her case in advance of the hearing. Pre-hearing conferences may be scheduled at the discretion of the adjudicating official in order to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise to simplify and organize the proceeding. Settlement agreements reached after the issuance of a Notice of Intent to Discipline are subject to final approval by the adjudicating official or if the practitioner has not filed an answer, subject to final approval by the Board.

(iii) The practitioner may be represented 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. Disciplinary hearings shall be conducted in the same manner as Immigration Court proceedings as is appropriate, and shall be open to the public, except that:

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

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

(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:

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

(ii) His or her failure to appear 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

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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. Any final administrative decision imposing sanctions against a practitioner (other than a private censure) shall be reported to any such disciplinary or regulatory authority in every jurisdiction where the disciplined practitioner is admitted or otherwise authorized to practice. In addition, the 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.

[65 FR 39526, June 27, 2000, as amended at 73 FR 76925, Dec. 18, 2008]

**§1003.107 Reinstatement after expulsion or suspension.**

(a) *Expiration of suspension.* Upon notice to the Board, a practitioner who has been suspended will be reinstated to practice before the Board and the Immigration Courts or the Service, or before all three authorities, once the period of suspension has expired, provided that he or she meets the defini-

tion of attorney or representative as set forth in §1001.1(f) and (j), respectively, of this chapter. If a practitioner cannot meet the definition of attorney or representative, the Board shall decline to reinstate the practitioner.

(b) *Petition for reinstatement.* A practitioner who has been expelled or who has been suspended for one year or more may file a petition for reinstatement directly with the Board after one-half of the suspension period has expired or one year has passed, whichever is greater, provided that he or she meets the definition of attorney or representative as set forth in §1001.1(f) and (j), respectively, of this chapter. 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 possesses 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.

(2) If a practitioner cannot meet the definition of attorney or representative as set forth in §1001.1(f) and (j), respectively, of this chapter, the Board shall deny the petition for reinstatement without further consideration. If the petition for reinstatement is found to be otherwise inappropriate or unwarranted, the petition shall be denied. Any subsequent petitions for reinstatement may not be filed before the end of one year from the date of the Board's previous denial of reinstatement. If the petition for reinstatement is determined to be timely, the practitioner