

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 3 and 292

[EOIR No. 112P; A.G. ORDER No. 2138-98]

RIN 1125-AA13

Executive Office for Immigration Review; Professional Conduct for Practitioners—Rules and Procedures

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

ACTION: Proposed rule.

SUMMARY: This rule proposes to change the rules and procedures concerning professional conduct for practitioners, which includes attorneys and representatives, who practice before the Executive Office for Immigration Review (EOIR), which includes the Board of Immigration Appeals (the Board) and the Immigration Courts, as well as the rules and procedures concerning professional conduct for practitioners who practice before the Immigration and Naturalization Service (the Service). This rule also includes a provision pursuant to section 545 of the Immigration Act of 1990, concerning sanctions against attorneys or representatives who engage in frivolous behavior in immigration proceedings. This rule outlines the authority EOIR has to investigate and impose disciplinary sanctions against practitioners who practice before its tribunals, and clarifies the authority of the Service to investigate complaints regarding practitioners who practice before the Service. The procedures by which disciplinary proceedings may be initiated before EOIR against practitioners who appear before the Service are also outlined. This proposed rule will allow EOIR and the Service to investigate, present, and complete disciplinary proceedings more effectively and efficiently while ensuring the due process rights of the

practitioner. This proposed rule will allow frivolous claims to be resolved and meritorious cases to be completed quickly and without unnecessary delay, since the need for expeditious resolution of these cases is critical to and in the best interests of all parties involved.

DATES: Written comments must be received on or before March 23, 1998.

ADDRESSES: Please submit written comments to both Margaret M. Philbin, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, Virginia, 22041 and Janice B. Podolny, Associate General Counsel, Immigration and Naturalization Service, 425 I Street, NW., Room 6100, Washington, DC 20536.

FOR FURTHER INFORMATION CONTACT: Margaret M. Philbin, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, Virginia 22041, telephone (703) 305-0470, or Janice B. Podolny, Associate General Counsel, Immigration and Naturalization Service, 425 I Street, NW, Room 6100, Washington, DC 20536, telephone (202) 514-2895.

SUPPLEMENTARY INFORMATION: This rule proposes to amend 8 CFR parts 3 and 292 by changing the present rules and procedures concerning professional conduct for practitioners, which includes attorneys and representatives, who practice before the Executive Office for Immigration Review (EOIR), which includes the Board of Immigration Appeals (the Board) and the Immigration Courts. Currently, the regulations at 8 CFR 292.3 require the Immigration and Naturalization Service (the Service) to investigate complaints filed regarding the conduct of attorneys and representatives practicing before both the Service and EOIR. If the investigation establishes, to the satisfaction of the Service, that disciplinary proceedings should be instituted, the General Counsel of the Service serves a copy of the written charges upon the attorney or representative and upon the Office of the Chief Immigration Judge. The present procedure provides for the government to be represented by a Service attorney in disciplinary proceedings before an Immigration Judge. The decision of the Immigration Judge may be appealed to the Board by either party.

This proposed rule includes several major changes to the current regulation. First, it separates and distinguishes the investigation of complaints and the disciplinary proceedings involving attorneys and representatives practicing before EOIR from the investigation of complaints and the disciplinary proceedings involving attorneys and representatives practicing before the Service. Under the proposed rule, the Office of the General Counsel of EOIR will accept complaints made against attorneys or representatives (referred to as "practitioners") who appear before the Board, the Immigration Courts, or both. The Office of the General Counsel of the Service will accept complaints made against practitioners who appear before the Service. The Office of the General Counsel that receives the complaint will conduct a preliminary inquiry. If the Office of the General Counsel of EOIR or the Service determines that a complaint is without merit, no further action will be taken. If the Office of the General Counsel of EOIR or the Service determines, by a preponderance of the evidence, that a practitioner has engaged in professional misconduct as set forth in the rule, it will issue a Notice of Intent to Discipline to the practitioner named in the complaint. When making a decision as to whether a Notice of Intent to Discipline should be issued, the Office of the General Counsel of EOIR or the Service will consider the contents of the complaint (including the nature and recency of the conduct or behavior of the practitioner and the harm or damages sustained by the complainant), the results of the preliminary inquiry, and other relevant information. The practitioner will have an opportunity to file an answer and request a hearing.

Second, the proposed rule establishes a new disciplinary process for the adjudication of all complaints. Upon the filing of an answer by the practitioner, the Director of EOIR will appoint an adjudicating official and, if a hearing is requested, will designate the time and place of the hearing. Failure to file an answer in a timely manner will be deemed an admission to the factual allegations set forth in the Notice of Intent to Discipline. The recommended disciplinary sanctions in the Notice of Intent to Discipline then will become final, unless a motion to set aside the final order is granted. The Office of the

General Counsel of EOIR will represent the government in the hearing, unless the proceeding is initiated by the Service, in which case the Office of the General Counsel of the Service will represent the government. The practitioner may be represented by counsel of his or her own choice at no expense to the government. The adjudicating official will hold a hearing, take testimony, examine witnesses, and will report his or her findings and recommendations to the Disciplinary Committee. The Disciplinary Committee will be a three-member panel appointed by the Deputy Attorney General, with at least one Committee member from EOIR. The Deputy Attorney General will designate one Committee member to serve as Chairperson. The Disciplinary Committee may adopt, modify, or otherwise amend the recommended disciplinary sanctions and issue a final order which may apply to practice before the Board and the Immigration Courts or the Service, or before all three authorities. There is no administrative appeal from the order of the Disciplinary Committee. A practitioner who wishes to obtain a judicial review of a decision of the Disciplinary Committee can do so in federal district court pursuant to 28 U.S.C. 1331.

Third, the proposed rule includes a reinstatement procedure, which will permit a practitioner to petition for his or her reinstatement if he or she has been expelled or, in the case of a suspension, if the period of suspension has not yet expired.

Fourth, the proposed rule revises and restates the grounds for disciplinary sanctions, which will be reduced from fifteen to twelve by combining several previous grounds, eliminating several others, and adding two new grounds. Ten of the grounds for disciplinary sanctions will apply to all practitioners appearing before the Board, the Immigration Courts, and the Service, while the two additional grounds will only apply to practitioners appearing before the Board and the Immigration Courts. Wherever possible, the grounds have been revised to include language that is similar, if not identical, to language found in the American Bar Association Model Rules of Professional Conduct (1995). EOIR has made these revisions in order to provide practitioners with a set of disciplinary standards that are widely known and accepted within the legal profession.

For example, one of the grounds for disciplinary sanctions prohibits the charging of grossly excessive fees. This ground has been expanded in the proposed rule to include a number of factors to be considered in determining

whether a fee is grossly excessive, such as the time and labor required, the fee customarily charged in the locality for similar legal services, and the experience and ability of the attorney. The disciplinary ground banning the solicitation of professional employment has been revised to permit a practitioner to solicit professional employment from a prospective client known to be in need of legal services in a particular matter with certain restrictions. If the practitioner has no family or prior professional relationship with the prospective client, the practitioner must include the words "Advertising Material" on the outside of the envelope of any written communication and at the beginning and ending of any recorded communication. This change is made in light of the United States Supreme Court decision in *Shapiro v. Kentucky*, 486 U.S. 466 (1988), in which the Court held that legal advertising, in the form of targeted, direct-mail solicitation, is a form of commercial speech protected by the First Amendment but subject to regulation, such as the requirement that a solicitation letter bear a label identifying it as an advertisement. *Shapiro*, 486 U.S. at 477. The disciplinary ground regarding false or misleading communications about a practitioner's qualifications now includes a prohibition against a practitioner's use of the term "certified specialist" in immigration and/or nationality law, unless the practitioner has been granted such certification by the appropriate state regulatory authority or by an organization that has been approved by the appropriate state regulatory authority to grant such certifications. This amendment is included in order to ensure the public that a practitioner who holds himself or herself out as a certified specialist does so only after demonstrating proficiency in immigration and/or nationality law, and to prevent false, deceptive, or misleading advertising.

One of the two new grounds for disciplinary sanctions concerns conduct by a practitioner that constitutes ineffective assistance of counsel as previously determined in a finding by the Board or an Immigration Judge in an immigration proceeding. A practitioner who is the subject of an ineffective assistance of counsel claim heretofore has been able to plead *mea culpa* when an alien raises the issue on a motion to reopen with the Board or an Immigration Judge without any disciplinary consequences from his or her admissions. In addition, a practitioner who is consistently accused

of providing ineffective assistance of counsel has not experienced any ramifications from such repeated claims before the Board or an Immigration Judge. By adding this ground to the disciplinary standard, practitioners now may face the consequences of claims of ineffective assistance of counsel from former clients.

A factual finding of ineffective assistance of counsel in an immigration proceeding will be necessary in order to support the issuance of a Notice of Intent to Discipline for this ground. A mere grant of a motion to reopen based on a claim of ineffective assistance of counsel, absent a specific factual finding of ineffective assistance of counsel, will not support the issuance of a Notice of Intent to Discipline.

Federal caselaw has repeatedly addressed the standards to be used in determining whether an alien has been the victim of ineffective assistance of counsel. Thus, in order for an alien to prevail on a claim of ineffective assistance of counsel, he or she must show that his or her counsel's performance was so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause. *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994). See also *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985) (ineffective assistance of counsel is denial of due process only if proceeding was so fundamentally unfair that alien was prevented from reasonably presenting his case); *Paul v. INS*, 521 F.2d 194, 199 (5th Cir. 1975) (alien must present sufficient facts to allow court to infer that competent counsel would have acted otherwise).

Situations may arise where the Board or the Immigration Judge makes a factual finding of ineffective assistance of counsel in an immigration proceeding but the adjudicating official in the disciplinary proceeding recommends that no disciplinary action be imposed upon the practitioner. Since the practitioner in question is not a party to an alien's motion to reopen on the basis of ineffective assistance of counsel and may not have presented any evidence in his or her defense with regard to this issue, the adjudicating official in the disciplinary proceeding, upon further development of the facts, may determine, notwithstanding the finding of the Immigration Judge or the Board, that the attorney's conduct does not rise to a level for which disciplinary sanctions should be imposed. Such a ruling is subject to review by the Disciplinary Committee, which will then issue a final decision in the matter.

Fifth, the proposed rule contains a provision that allows for the immediate suspension of any practitioner who has been convicted of a serious crime, or any practitioner who has been disbarred or is currently under suspension or resignation with an admission of misconduct by the bar of any state, possession, territory, commonwealth, or the District of Columbia, or by any Federal court. Such immediate suspension may be imposed upon the practitioner while any appeal from the underlying conviction or discipline is pending and will continue until such time as a final administrative decision is made by the Disciplinary Committee. If a final administrative decision includes the imposition of a period of suspension, any time spent by the practitioner under immediate suspension will be credited toward the period suspension imposed by the final administrative decision. This provision will enable EOIR and the Service to take immediate action against such practitioners and will provide a certain degree of protection to those individuals most likely to be affected by the practitioner's misconduct.

For those practitioners who are immediately suspended, the proposed rule allows for the initiation of a summary disciplinary proceeding. Such a proceeding will be conducted in a manner similar to the standard disciplinary proceeding set forth in this rule, except that a certified copy of a judgment of conviction or judgment or order of discipline shall serve as a rebuttable presumption of the commission of the crime or the professional misconduct, and the burden of proof shall be upon the practitioner to show cause why the proposed disciplinary sanctions should not be imposed. This summary proceeding will enable EOIR and the Service to expeditiously bring disciplinary proceedings against practitioners who have engaged in criminal or unethical conduct while providing an opportunity for the practitioner to challenge the disciplinary charges and proposed sanctions.

Finally, the proposed rule contains a provision that addresses the issue of confidentiality with regard to complaints, preliminary inquiries, settlement agreements, and disciplinary proceedings. The provision provides that information concerning complaints or preliminary inquiries will be confidential unless a waiver is made, but in certain circumstances a waiver is not required before information can be disclosed. Resolutions, such as warning letters, admonitions, and agreements in

lieu of discipline reached prior to the issuance of a Notice of Intent to Discipline will remain confidential. Notices of Intent to Discipline and action taken subsequent thereto, including settlement agreements, may be disclosed to the public. Disciplinary hearings will also be open to the public. This provision will adequately protect practitioners who may be the subject of a complaint or preliminary inquiry and also will maintain the integrity and credibility of the disciplinary process by keeping the system open to the public.

This proposed rule will allow EOIR and the Service to investigate, present, and complete disciplinary proceedings more effectively and efficiently while ensuring the due process rights of the practitioner. This proposed rule will allow frivolous claims to be resolved quickly and without unnecessary delay because the need for expeditious resolution of these cases is critical to and in the best interests of all parties involved. EOIR and the Service recognize that the primary purposes of disciplinary proceedings, and any sanctions that are imposed as a result of such proceedings, include the protection of the public, the preservation of the integrity of the immigration courts and the legal profession, and the maintenance of high professional standards by practitioners.

The proposed rule regarding the authority of EOIR to investigate complaints and to conduct disciplinary proceedings has been placed in 8 CFR part 3 for several reasons: (1) To highlight the independence of EOIR from the Service; (2) to provide EOIR with the ability to police its own tribunals and the persons who come before them; and (3) to provide a more efficient and effective disciplinary system. The proposed rule and the amendments to 8 CFR part 292 clarify the authority of the Service to investigate complaints regarding attorneys and representatives who practice before the Service and outline the procedures by which disciplinary proceedings may be initiated before EOIR against practitioners who appear before the Service. Once the Service decides to issue a Notice of Intent to Discipline, the complaint will be heard and decided under the same procedures used for disciplinary actions initiated by the Office of the General Counsel of EOIR. Moreover, the rule also provides for notice of the initiation of disciplinary actions and coordination of disciplinary sanctions regarding the Service as well as the Board and the Immigration Courts.

Regulatory Flexibility Act

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

Unfunded Mandates Reform Act of 1995

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

Small Business Regulatory Enforcement Fairness Act of 1996

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

Executive Order 12866

The Attorney General has determined that this rule is not a significant regulatory action under Executive Order No. 12866, and accordingly this rule has not been reviewed by the Office of Management and Budget.

Executive Order 12612

This rule has no federalism implications warranting the preparation of a Federalism Assessment in accordance with Executive Order No. 12612.

Executive Order 12988

The rule meets the applicable standards provided in sections 3 (a) and 3 (b) (2) of Executive Order No. 12988.

List of Subjects*8 CFR Part 3*

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

8 CFR Part 292

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

For the reasons set forth in the preamble, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

Authority: 5 U.S.C. 301; 8 U.S.C. 1103; 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002.

2–3. Section 3.1 is amended by revising the reference to “§ 292.3(a)(15) of this chapter” in the first sentence of paragraph (d)(1–a)(ii) to read “§ 3.52(j)”, and by revising paragraph (d)(3) to read as follows:

§ 3.1 General authorities.

* * * * *

(d) * * *

(3) *Rules of practice.* The board shall have authority, with the approval of the Director, EOIR, to prescribe rules governing proceedings before it. It shall also determine whether any organization desiring representation is of a kind described in § 1.1(j) of this chapter.

* * * * *

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

5. Subpart D is added to part 3 after Subpart C, to read as follows:

Subpart D—Professional Conduct for Practitioners—Rules and Procedures

Sec.

3.51 General provisions.

3.52 Grounds.

3.53 Filing of an preliminary inquiry into complaints; resolutions; referral of complaints.

3.54 Notice of Intent to Discipline.

3.55 Hearing and disposition.

3.56 Reinstatement after expulsion or suspension.

3.57 Confidentiality.

3.58 Discipline of government attorneys.

Subpart D—Professional Conduct for Practitioners—Rules and Procedures

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

§ 3.51 General provisions.

(a) *Disciplinary Committee.* The Disciplinary Committee is a three-member panel appointed by the Deputy Attorney General, with at least one Committee member from the Executive Office for Immigration Review. The Deputy Attorney General will designate one Committee member to serve as Chairperson. A designee appointed by the Deputy Attorney General may serve as an alternate Disciplinary Committee member when, in the absence or unavailability of a Disciplinary Committee member or for other good cause, his or her participation is deemed necessary. Once designated, his or her participation in a case shall continue to its normal conclusion.

(b) *Authority to sanction.* The Disciplinary Committee may impose disciplinary sanctions against any practitioner if it finds it to be in the public interest to do so. It will be in the public interest to impose disciplinary sanctions against a practitioner who is authorized to practice before the Board of Immigration Appeals (the Board) and the Immigration Courts when such person has engaged in criminal, unethical, or unprofessional conduct, or in frivolous behavior, as set forth in § 3.52. In accordance with the disciplinary proceedings set forth in this subpart and outlined below, the Disciplinary Committee may impose any of the following disciplinary sanctions:

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

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

(3) Public or private censure; or

(4) Such other disciplinary sanctions as the Disciplinary Committee deems appropriate.

(c) *Persons subject to sanctions.*

Persons subject to sanctions include any practitioner. A practitioner is any attorney as defined in § 1.1(f) of this chapter who does not represent the federal government, or any representative as defined in § 1.1(j) of this chapter. Attorneys employed by the

Department of Justice shall be subject to discipline pursuant to § 3.58.

(d) *Immediate suspension and summary disciplinary proceedings—(1) Immediate suspension.* The Office of the General Counsel of EOIR may ask the Disciplinary Committee to immediately suspend from practice before the Board and the Immigration Courts any practitioner who has been convicted of a serious crime, as defined in § 3.52(h), or who has been disbarred or is currently under suspension or resignation with an admission of misconduct by the bar of any state, possession, territory, commonwealth, or the District of Columbia, or by any Federal court. Such immediate suspension may be imposed upon the practitioner while any appeal from the underlying conviction or discipline is pending and shall continue until such time as a final administrative decision is made by the Disciplinary committee. If a final administrative decision includes the imposition of a period of suspension, any time spent by the practitioner under immediate suspension pursuant to this paragraph will be credited toward the period of suspension imposed by the final administrative decision.

(2) *Summary disciplinary proceedings.* The Office of the General Counsel of EOIR may initiate summary disciplinary proceedings against any practitioner described in paragraph (d)(1) of this section. Summary proceedings may be initiated by the issuance of a Notice of Intent to Discipline if accompanied by a certified copy of a judgment of conviction or a judgment or order of discipline. Summary proceedings shall be conducted in accordance with the provisions set forth in §§ 3.54 and 3.55, except that a certified copy of a judgment of conviction or judgment or order of discipline shall serve as a rebuttable presumption of the commission of the crime or the professional misconduct. The imposition of disciplinary sanctions shall follow, unless the practitioner can rebut the presumption by demonstrating that:

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

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

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

(3) *Ineligibility to rebut the presumption of professional misconduct.* An attorney shall not be eligible to rebut the presumption of the commission of professional misconduct unless he or she is a member in good standing of the bar of the highest court of any state, possession, territory, commonwealth, or the District of Columbia.

(e) *Duty of practitioner to notify EOIR of conviction or discipline.* Any practitioner who has been convicted of a serious crime, as defined in § 3.52(h), or who has been disciplined for professional misconduct by the bar of any state, possession, territory, commonwealth, or the District of Columbia, or by a Federal court must notify the Office of the General Counsel or EOIR of any such conviction or disciplinary action within 30 days of the issuance of the initial order, even if an appeal of the conviction or discipline is pending. Failure to do so may result in immediate suspension as set forth in paragraph (d)(1) of this section. This duty to notify applies only to convictions for serious crimes or rulings of professional misconduct entered after the effective date of this regulation.

§ 3.52 Grounds.

It is deemed to be in the public interest for the Disciplinary Committee to impose disciplinary sanctions against any practitioner who falls within one or more of the categories enumerated in this section, but these categories do not constitute the exclusive grounds for which disciplinary sanctions may be imposed in the public interest. A practitioner who falls within one of the following categories may be subject to disciplinary sanctions in the public interest if he or she:

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

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

time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; and the experience, reputation, and ability of the attorney or attorneys performing the services,

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

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

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

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

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

(e) Is currently subject to a final order of disbarment, suspension, or resignation with an admission of misconduct

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

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

(f) Makes a false or misleading communication about his or her qualifications or services. A communication is false or misleading if it:

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

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

(g) Engages in contumelious or otherwise obnoxious conduct with regard to a case in which he or she acts in a representative capacity, which, in the opinion of the Disciplinary Committee, would constitute cause for suspension or disbarment if the case were pending before a court, or which, in such a judicial proceeding, would constitute a contempt of court;

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

(i) Falsely certifies a copy of a document as being a true and complete copy of an original;

(j) Engages in frivolous behavior in a proceeding before the Immigration Court, the Board, or any other administrative appellate body under title II of the Immigration and Nationality Act.

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

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

(k) Engages in conduct that constitutes ineffective assistance of counsel, as previously determined in a finding by the Board or the Immigration Court in an immigration proceeding, within five years preceding the filing of the complaint; or

(l) Repeatedly fails to appear for scheduled hearings in a timely manner.

§ 3.53 Filing of and preliminary inquiry into complaints; resolutions; referral of complaints.

(a) *Filing of complaints*—(1) *Practitioners authorized to practice before the Board and the Immigration Courts.* Complaints of criminal, unethical, or unprofessional conduct, or frivolous behavior by a practitioner who is authorized to practice before the Board and the Immigration Courts shall be filed with the Office of the General Counsel of EOIR. Complaints must be

submitted in writing and must state in detail the information that supports the basis for the complaint, including, but not limited to, the names and addresses of the complainant and the practitioner, the date(s) of the conduct or behavior, the nature of the conduct or behavior, the individuals involved, the harm or damages sustained by the complainant, and any other relevant information. Any individual may file a complaint with the Office of the General Counsel of EOIR. The Office of the General Counsel of EOIR shall notify the Office of the General Counsel of the Service of any complaint filed that pertains, in whole or in part, to a matter involving the Service.

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

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

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

(d) *Referral of complaints of criminal conduct.* If the Office of the General Counsel of EOIR receives credible information or allegations that a practitioner has engaged in criminal conduct in connection with an immigration matter, the Office of the General Counsel of EOIR shall refer the matter to the Inspector General and, if

appropriate, to the Federal Bureau of Investigation. In such cases, in making the decision to pursue disciplinary sanctions, the Office of the General Counsel of EOIR shall coordinate in advance with the appropriate investigative and prosecutive authorities of the Department to ensure that neither the disciplinary process nor criminal prosecutions are jeopardized.

§ 3.54 Notice of Intent to Discipline.

(a) *Issuance of Notice to practitioner.* If, upon completion of the preliminary inquiry, the Office of the General Counsel of EOIR determines, by a preponderance of the evidence, that a practitioner has engaged in professional misconduct as set forth in § 3.52, it will issue a Notice of Intent to Discipline to the practitioner named in the complaint. This notice will be served upon the practitioner by personal service as defined in § 103.5a of this chapter. Such notice shall contain a statement of the charge(s), a copy of the preliminary inquiry report, the proposed disciplinary sanctions to be imposed, the procedure for filing an answer or requesting a hearing, and the mailing address and telephone number for the Disciplinary Committee.

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

(c) *Answer.* The practitioner shall file an answer to the Notice of Intent to Discipline with the Office of the General Counsel of EOIR within 30 days of the date of service of the Notice of Intent to Discipline, unless an extension of time is granted for good cause by the Disciplinary Committee. A request for an extension of time to answer must be received by the Disciplinary Committee at least three (3) working days before the time to answer has expired. A copy of such request shall be served on the Office of the General Counsel of EOIR. The answer shall be in writing, must respond to each charge in a substantive and detailed manner, and may include any supporting documents, including affidavits or statements. The answer

shall state whether the practitioner requests a hearing on the matter.

(d) *Failure to file an answer.* Failure to file an answer in a timely manner shall be deemed an admission to the factual allegations set forth in the Notice of Intent to Discipline and no further proof shall be required to establish the truth of such facts. The Office of the General Counsel of EOIR shall submit proof of personal service of the Notice of Intent to Discipline. The practitioner shall be precluded thereafter from requesting a hearing on the matter. The recommended disciplinary sanctions in the Notice of Intent to Discipline shall then become final and the Disciplinary Committee shall issue a final order adopting the recommended disciplinary sanctions against the practitioner. A practitioner may file a motion to set aside a final order of disciplinary sanctions, issued pursuant to this paragraph, with the Disciplinary Committee if:

- (1) Such a motion is filed within 15 days of service of the final order; and
- (2) His or her failure to file an answer was due to exceptional circumstances (such as serious illness of the practitioner or death of an immediate relative of the practitioner, but not including less compelling circumstances) beyond the control of the practitioner.

§ 3.55 Hearing and disposition.

(a) *Hearing*—(1) *Procedure.* (i) The Director of EOIR shall, upon the filing of an answer, appoint an adjudicating official. An adjudicating official may be an Immigration Judge, an Assistant Chief Immigration Judge, a Board Member, or an Administrative Law Judge. Upon the practitioner's request for a hearing, the Director of EOIR shall designate the time and place of the initial 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 and the Disciplinary Committee.

(ii) The practitioner may be represented at the hearing by counsel at no expense to the government. At the hearing, the practitioner shall have a reasonable opportunity to examine and object to evidence presented by the government, to present evidence on his or her own behalf, and to cross-examine witnesses presented by the government. The adjudicating official shall consider:

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

(iii) The record of the hearing, regardless of whether the hearing is held before an Immigration Judge, an Assistant Chief Immigration Judge, a Board Member, or an Administrative Law Judge, shall conform to the requirements of 8 CFR 240.9. Disciplinary hearings shall be conducted in the same manner as immigration court proceedings as is appropriate, and shall be open to the public, except that:

(A) Depending upon physical facilities, the adjudicating official may place reasonable limitations upon the number in attendance at any one time,

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

(2) *Failure to appear at hearing.* Failure to appear at the hearing shall be deemed an admission to the factual allegations set forth in the Notice of Intent to Discipline, even when the practitioner filed an answer, and no further proof shall be required to establish the truth of such facts. The Office of the General Counsel of EOIR or the Office of the General Counsel of the Service shall submit proof of personal service of the Notice of Intent to Discipline. The practitioner shall be precluded thereafter from participating further in the proceedings. The recommended disciplinary sanctions in the Notice of Intent to Discipline shall then become final and the Disciplinary Committee shall issue a final order adopting the recommended disciplinary sanctions against the practitioner. A practitioner may file a motion to set aside a final order of disciplinary sanctions issued pursuant to this paragraph if:

- (i) Such a motion is filed within 15 days of service of the final order; and
- (ii) His or her failure to appear at the hearing was due to exceptional circumstances (such as serious illness of the practitioner or death of an immediate relative of the practitioner, but not including less compelling circumstances) beyond the control of the practitioner.

(b) *Recommendation.* The adjudicating official shall consider the entire record, including any testimony and evidence presented at the hearing, and shall report his or her findings and recommendations to the Disciplinary Committee. If the adjudicating official finds that the grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline have been established by clear, unequivocal, and convincing evidence, he or she shall recommend that the disciplinary sanctions set forth in the Notice of Intent to Discipline be adopted, modified, or otherwise amended. If the adjudicating official recommends that the practitioner be suspended, the time period for such suspension shall be specified. Court costs also may be assessed against the practitioner, including the costs of a transcript, an interpreter, or any other costs necessary to conduct the hearing. If the adjudicating official finds that the grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline have not been established by clear, unequivocal, and convincing evidence, he or she shall recommend to the Disciplinary Committee that the case be dismissed.

(c) *Decision.* Upon a de novo review of the findings and recommendations of the adjudicating official, the Disciplinary Committee may adopt, modify, or otherwise amend the recommended disciplinary sanctions. The decision of the Disciplinary Committee is a final administrative order and shall be served upon the practitioner by personal service as defined in § 103.5a of this chapter. A copy of the final administrative decision of the Disciplinary Committee shall be served upon the Office of the General Counsel of EOIR and the Office of the General Counsel of the Service. If disciplinary sanctions are imposed against a practitioner (other than a private censure), the Disciplinary Committee may require that a notice of such sanctions be posted at the Immigration Courts, the Board, or the Service for the period of time during which the sanctions are in effect, or for any other period of time as determined by the Disciplinary Committee.

(d) *Referral.* In addition to or in lieu of initiating disciplinary proceedings against a practitioner, the Office of the General Counsel of EOIR may notify the appropriate state and/or local professional licensing or regulatory authority of a complaint filed against a practitioner. Any final administrative decision imposing sanctions against a practitioner (other than a private censure) shall be reported to the

appropriate state and/or local professional licensing or regulatory authority.

§ 3.56 Reinstatement after expulsion or suspension.

(a) *Expiration of suspension.* A practitioner who has been suspended will be reinstated automatically to practice before the Board and the Immigration Courts or the Service, or before all three authorities, once the period of suspension has expired, provided that he or she meets the definition of attorney or representative as set forth in § 1.1 (f) and (j), respectively, of this chapter. If a practitioner cannot meet the definition of attorney or representative, the Disciplinary Committee will 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 Disciplinary Committee after one-half of the suspension period has expired or one year has passed, whichever is greater, provided that he or she meets the definition of attorney or representative as set forth in § 1.1 (f) and (j), respectively, of the chapter. A copy of such petition shall be served on the Office of the General Counsel of EOIR. In matters in which the practitioner was also ordered expelled or suspended from practice before the Service, a copy of such petition shall be served on the Office of the General Counsel of the Service. The practitioner shall have the burden of demonstrating by clear, unequivocal, and convincing evidence that he or she possesses the moral and professional qualifications required to appear before the Board and the Immigration Courts or the Service, or before all three authorities, and that his or her reinstatement will not be detrimental to the administration of justice. The Office of the General Counsel of EOIR, and in matters in which the practitioner was ordered expelled or suspended from practice before the Service, the Office of the General Counsel of the Service, may respond to the petition in the form of a written response, which may include documentation of any complaints filed against the expelled or suspended practitioner subsequent to his or her expulsion or suspension. If a practitioner cannot meet the definition of attorney or representative as set forth in § 1.1 (f) and (j), respectively, of this chapter, the Disciplinary Committee will deny the petition for reinstatement. If reinstatement is found to be inappropriate or unwarranted, the

petition shall be denied and any subsequent petitions for reinstatement may not be filed before the end of one year from the date of the previous denial. If reinstatement is found to be appropriate and the practitioner is found to be qualified to practice before the Board and the Immigration Courts or the Service, or before all three authorities, the practitioner will be reinstated.

§ 3.57 Confidentiality.

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

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

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

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

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

(iv) A practitioner is the subject of multiple complaints and the Office of the General Counsel of EOIR has determined not to pursue all of the complaints. The Office of the General Counsel of EOIR may inform complainants whose allegations have not been pursued of the status of the

other preliminary inquiries or the manner in which the other complaint(s) against the practitioner have been resolved.

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

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

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

(iii) To agencies and other jurisdictions responsible for professional licensing;

(iv) To the complainant or a lawful designee;

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

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

(c) *Notices of Intent to Discipline and action subsequent thereto.* Notices of Intent to Discipline and any action that takes place subsequent to their issuance, except for the imposition of private censures, may be disclosed to the public, except that private censures may become part of the public record if introduced as evidence of a prior record of discipline in any subsequent proceeding. Settlement agreements reached after the issuance of a Notice of Intent to Discipline may be disclosed to the public upon final approval by the adjudicating official and the Disciplinary Committee. Disciplinary hearings are open to the public, except as noted in § 3.55.

§ 3.58 Discipline of government attorneys.

Complaints regarding the conduct and behavior of government attorneys shall be directed to the Office of Professional Responsibility of the Department of Justice.

PART 292—REPRESENTATION AND APPEARANCES

6. The authority citation for part 292 continues to read as follows:

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

7. Section 292.3 is revised to read as follows:

§ 292.3 Professional Conduct for Practitioners—Rules and Procedures.

(a) *General provisions—(1) Disciplinary Committee.* The Disciplinary Committee established under § 3.51 of this chapter may impose disciplinary sanctions against any practitioner if it finds it to be in the public interest to do so.

(2) *Authority to sanction.* It will be in the public interest to impose disciplinary sanctions against a practitioner who is authorized to practice before the Service when such person has engaged in criminal, unethical, or unprofessional conduct, or in frivolous behavior, as set forth in § 3.52 of this chapter. In accordance with the disciplinary proceedings set forth in part 3 of this chapter, the Disciplinary Committee may impose any of the following disciplinary sanctions:

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

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

(iii) Public or private censure; or

(iv) Such other disciplinary sanction as the Disciplinary Committee deems appropriate.

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

(4) *Immediate suspension and summary disciplinary proceedings—(i) Immediate suspension.* The Office of the General Counsel of the Service may ask the Disciplinary Committee to immediately suspend from practice before the Service any practitioner who has been convicted of a serious crime, as defined in § 3.52(h) of this chapter, or who has been disbarred or is currently under suspension or resignation with an admission of misconduct by the bar of any state, possession, territory, commonwealth, or the District of Columbia, or by any Federal Court. Such immediate suspension may be imposed upon the practitioner while any appeal from the underlying

conviction or discipline is pending and shall continue until such time as a final administrative decision is made by the Disciplinary Committee. If a final administrative decision includes the imposition of a period of suspension, any time spent by the practitioner under immediate suspension pursuant to this paragraph will be credited toward the period of suspension imposed by the final administrative decision.

(ii) *Summary disciplinary proceedings.* The Office of the General Counsel of the Service may initiate summary disciplinary proceedings against any practitioner described in paragraph (a)(4)(i) of this section. Summary proceedings may be initiated by the issuance of a Notice of Intent to Discipline if accompanied by a certified copy of a judgment of conviction or a judgment or order of discipline.

Summary proceedings shall be conducted in accordance with the provisions set forth in §§ 3.54 and 3.55 of this chapter, except that a certified copy of a judgment of conviction or judgment or order of discipline shall serve as a rebuttable presumption of the commission of the crime or the professional misconduct. The imposition of disciplinary sanction shall follow, unless the practitioner can rebut the presumption by demonstrating that:

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

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

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

(iii) *Ineligibility to rebut the presumption of professional misconduct.* An attorney shall not be eligible to rebut the presumption of the commission of professional misconduct unless he or she is a member in good standing of the bar of the highest court of any state, possession, territory, commonwealth, or the District of Columbia.

(5) *Duty of practitioner to notify the Service of conviction or discipline.* Any practitioner who has been convicted of a serious crime, as defined in § 3.52(h) of this chapter, or who has been disciplined for professional misconduct by the bar of any state, possession, territory, commonwealth, or the District of Columbia, or by a Federal court must

notify the Office of the General Counsel of the Service of any such conviction or disciplinary action within 30 days of the issuance of the initial order, even if an appeal of the conviction or discipline is pending. Failure to do so may result in immediate suspension as set forth in paragraph (a)(3)(i) of this section. This duty to notify applies only to convictions for serious crimes or rulings of professional misconduct entered after the effective date of this regulation.

(b) *Grounds of discipline as set forth in § 3.52 of this chapter.* It is deemed to be in the public interest for the Disciplinary Committee to impose disciplinary sanctions as described in paragraph (a) of this section against any practitioner who falls within one or more of the categories enumerated in § 3.52 of this chapter, with the exception of paragraphs (k) and (l) of that section, but these categories do not constitute the exclusive grounds for which disciplinary sanctions may be imposed in the public interest.

(c) *Filing of and preliminary inquiry into complaints, resolutions; referral of complaints—(1) Practitioners authorized to practice before Service.* Complaints of criminal, unethical, or unprofessional conduct, or of frivolous behavior by a practitioner who is authorized to practice before the Service shall be filed with the Office of the General Counsel of the Service. 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 individual involved, the harm or damages sustained by the complainant, and any other relevant information. Any individual may file a complaint with the Office of the General Counsel of the Service. The Office of the General Counsel of the Service shall notify the Office of the General Counsel of the Executive Office for Immigration Review (EOIR) of any complaint filed that pertains, in whole or in part, to a matter before the Board or the Immigration Courts.

(2) *Practitioners authorized to practice before the Board and the Immigration Courts.* Complaints of criminal, unethical, or unprofessional conduct, or of frivolous behavior by a practitioner who is authorized to practice before the Board and the Immigration Courts shall be filed with the Office of the General Counsel of EOIR pursuant to the procedures set forth in § 3.53(a) of this chapter.

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

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

(5) *Referral of complaints of criminal conduct.* If the Office of the General Counsel of the Service receives credible information or allegations that a practitioner has engaged in criminal conduct in connection with an immigration matter, the Office of the General Counsel of the Service shall refer the matter to the Inspector General and, if appropriate, to the Federal Bureau of Investigation. In such cases, in making the decision to pursue disciplinary sanctions, the Office of the General Counsel of the Service shall coordinate in advance with the appropriate investigative and prosecutive authorities of the Department to ensure that neither the disciplinary process nor criminal prosecutions are jeopardized.

(d) *Notice of Intent to Discipline—(1) Issuance of Notice to practitioner.* If, upon completion of the preliminary inquiry, the Office of the General Counsel of the Service determines, by a preponderance of the evidence, that a practitioner has engaged in professional misconduct as set forth in § 3.52 of this chapter, it will issue a Notice of Intent to Discipline to the practitioner named in the complaint. This notice will be served upon the practitioner by personal service as defined in § 103.5a of this chapter. Such notice shall contain a statement of the charge(s), a copy of the preliminary inquiry report, the

proposed disciplinary sanctions to be imposed, the procedure for filing an answer or requesting a hearing, and the mailing address and telephone number for the Disciplinary Committee. The Office of the General Counsel of the Service shall forward a copy of the Notice of Intent to Discipline to the Disciplinary Committee.

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

(3) *Answer.* The practitioner shall file an answer to the Notice of Intent to Discipline with the Office of the General Counsel of the Service within 30 days of the date of service, unless an extension of time is granted for good cause by the Disciplinary Committee. A request for an extension of time to answer must be received by the Disciplinary Committee at EOIR Headquarters at least three (3) working days before the time to answer has expired. A copy of such request shall be served on the Office of the General Counsel of the Service. The answer shall be in writing, must respond to each charge in a substantive and detailed manner, and may include any supporting documents, including affidavits or statements. The answer shall state whether the practitioner requests a hearing on the matter. The Office of the General Counsel of the Service shall forward a copy of the practitioner's answer to the Disciplinary Committee or, if no answer was filed, notification of such shall be filed with the Disciplinary Committee.

(4) *Failure to file an answer.* Failure to file an answer in a timely manner shall be deemed an admission to the factual allegations set forth in the Notice of Intent to Discipline and no further proof shall be required to establish the truth of such facts. The Office of the General Counsel of the Service shall submit proof of personal service of the Notice of Intent to Discipline. The practitioner shall be precluded thereafter from requesting a hearing on the matter. The recommended disciplinary sanctions in the Notice of Intent to Discipline shall then become

final and the Disciplinary Committee shall issue a final order adopting the recommended disciplinary sanctions against the practitioner. A practitioner may file a motion to set aside a final order of disciplinary sanctions, issued pursuant to this paragraph, with the Disciplinary Committee if:

(i) Such a motion is filed within 15 days 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.

(e) *Hearing and disposition.* Upon the filing of an answer, the matter shall be heard and decided according to the procedures set forth in §§ 3.55 and 3.56 of this chapter. The Office of the General Counsel of the Service shall represent the government.

(f) *Referral.* In addition to or in lieu of initiating disciplinary proceedings against a practitioner, the Office of the General Counsel of the Service may notify the appropriate state and/or local professional licensing or regulatory authority of a complaint filed against a practitioner. Any final administrative decision imposing sanctions against a practitioner (other than a private censure) shall be reported to the appropriate state and/or local professional licensing or regulatory authority.

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

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

(A) A practitioner has caused, or is likely to cause, harm to client(s), the

public, or the administration of justice, such that the public or specific individuals should be advised of the nature of the allegations. If disclosure of information is made pursuant to this paragraph, the Office of the General Counsel of the Service may define the scope of information disseminated and may limit the disclosure of information to specified individuals or entities;

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

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

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

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

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

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

(C) To agencies and other jurisdictions responsible for professional licensing;

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

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

(2) *Resolutions reached prior to the issuance of a Notice of Intent to Discipline.* Resolutions, such as warning letters, admonitions, and agreements in lieu of discipline, reached prior to the issuance of a Notice of Intent to Discipline will remain confidential.

(3) *Notices of Intent to Discipline and action subsequent thereto.* Notices of Intent to Discipline and any action that takes place subsequent to their issuance, except for the imposition of private censures, may be disclosed to the public, except that private censures may become part of the public record if

introduced as evidence or a prior record of discipline in any subsequent proceeding. Settlement agreements reached after the issuance of a Notice of Intent to Discipline may be disclosed to the public upon final approval by the adjudicating official and the Disciplinary Committee. Disciplinary hearings are open to the public, except as noted in § 3.55(a)(iii) of this chapter.

(h) *Discipline of government attorneys.* Complaints regarding the conduct and behavior of government attorneys shall be directed to the Office of Professional Responsibility of the Department of Justice.

Dated: January 12, 1998.

Janet Reno,

Attorney General.

[FR Doc. 98-1192 Filed 1-16-98; 8:45 am]

BILLING CODE 4410-30-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97-CE-130-AD]

RIN 2120-AA64

Airworthiness Directives; Pilatus Aircraft Ltd. Model PC-7 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to adopt a new airworthiness directive (AD) that would apply to certain Pilatus Aircraft Ltd. Model PC-7 airplanes. The proposed AD would require inspecting the elevator and rudder attachment brackets for cracks and/or corrosion, and repairing or replacing any cracked or corrosion-damaged parts, as applicable. The proposed AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Switzerland. The actions specified by the proposed AD are intended to prevent failure of the elevator and rudder attachment brackets because of cracks or corrosion damage, which could result in the elevator and/or rudder separating from the airplane with consequent loss of airplane control.

DATES: Comments must be received on or before February 23, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel,

Attention: Rules Docket No. 97-CE-130-AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

Service information that applies to the proposed AD may be obtained from Pilatus Aircraft Ltd., Customer Liaison Manager, CH-6371 Stans, Switzerland; telephone: +41 41 619 6509; facsimile: +41 41 610 3351. This information also may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Mr. Roman T. Gabrys, Aerospace Engineer, Small Airplane Directorate, Airplane Certification Service, FAA, 1201 Walnut, suite 900, Kansas City, Missouri 64106; telephone (816) 426-6932; facsimile (816) 426-2169.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 97-CE-130-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 97-CE-130-AD, Room 1558,