




OOD  
PM 19-06

Effective: January 1, 2019

To: All of EOIR  
From: James R. McHenry III, Director   
Date: December 18, 2018

## INTERNAL REPORTING OF SUSPECTED INEFFECTIVE ASSISTANCE OF COUNSEL AND PROFESSIONAL MISCONDUCT

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PURPOSE:	Establishes EOIR policy and procedures for reporting suspected ineffective assistance of counsel and other professional misconduct
OWNER:	Office of the Director
AUTHORITY:	8 C.F.R. §§ 1003.0(b), (e)(1) and part 1003, subpart G; 28 C.F.R. §§ 0.39a, 68.28, 68.35, 68.36
CANCELLATION:	None

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This policy guidance establishes EOIR policies and procedures for reporting suspected incidents of ineffective assistance of counsel or other violations of the EOIR Rules of Professional Conduct for Practitioners to the EOIR Office of General Counsel (OGC) Attorney Discipline Program.

All private attorneys and other representatives authorized to appear before the immigration courts, the Board of Immigration Appeals (BIA), or the Office of the Chief Administrative Hearing Officer (OCAHO), collectively referred to as immigration practitioners, must observe high standards of ethical conduct and professional behavior. Practitioners' professional behavior protects the rights of parties appearing before EOIR, supports EOIR's adjudicatory efficiency, and helps EOIR meet its mission to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws.

### I. Misconduct in Proceedings Before an Immigration Court or the BIA

EOIR, through the Attorney Discipline Program administered by OGC and run by the EOIR disciplinary counsel, investigates complaints against practitioners who may have engaged in criminal, unethical, or unprofessional conduct. The EOIR disciplinary counsel may resolve complaints of substantiated misconduct through warning letters and admonitions, or the EOIR disciplinary counsel may initiate disciplinary proceedings and seek sanctions in the form of disbarment, suspension, or a censure. The EOIR disciplinary counsel may also refer the complaint to the appropriate state licensing authorities.

A wide range of conduct violations may provide grounds for the EOIR disciplinary counsel to conduct an investigation into, and possibly discipline, an immigration practitioner. For example, EOIR may sanction an immigration practitioner who engages in one or more of the following types of unprofessional conduct that impact EOIR's ability to achieve its mission:<sup>1</sup>

- Engaging in conduct that constitutes ineffective assistance of counsel, as determined by an immigration judge, the BIA, or a federal court judge or panel;
- Failing to act with reasonable diligence and promptness while representing a client, as a practitioner's workload must be controlled and managed so that each matter can be handled competently;
- Engaging in frivolous behavior in a proceeding before an immigration court or the BIA, including taking action to cause unnecessary delay;
- Attempting to coerce, by any means whatsoever, any person, including an immigration judge, to commit any act or to refrain from performing any act in connection with any case;
- Engaging in contemptuous or otherwise obnoxious conduct which would constitute contempt of court in a judicial proceeding;
- Repeatedly failing to appear for pre-hearing conferences, scheduled hearings, or other case-related meetings in a timely manner without good cause;
- Failing to disclose to the immigration judge or BIA legal authority in the controlling jurisdiction known to be adverse to the client and not disclosed by opposing counsel; and
- Repeatedly filing 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.

The EOIR disciplinary counsel accepts complaints against immigration practitioners from the public, the Department of Homeland Security, and EOIR staff. Members of the public are instructed to submit a complaint on the EOIR Form-44, [Immigration Practitioner/Organization Complaint Form](#), which is available on the EOIR website. To date, EOIR staff has had multiple and varied processes to notify the EOIR disciplinary counsel about complaints of misconduct. This policy guidance creates a uniform process for the internal reporting of complaints.

Effective January 1, 2019, for all EOIR employees, all suspected violations of the EOIR Rules of Professional Conduct for practitioners, including any finding of ineffective assistance of counsel, must be submitted to the EOIR disciplinary counsel for investigation no later than 60 days after the suspected violation occurred or was discovered or after a finding of ineffective assistance of counsel was made.<sup>2</sup> Complaints need not be limited to the types of conduct specified above.

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<sup>1</sup> The complete list of the categories of behavior that may result in disciplinary sanctions by EOIR is contained at 8 C.F.R. § 1003.102 and follows this guidance (Appendix A).

<sup>2</sup> Only the EOIR disciplinary counsel or the Department of Justice Office of Professional Responsibility (OPR) may make referrals to state licensing authorities regarding professional misconduct by private attorneys. *See* 28 C.F.R. 0.39a(a)(9). The EOIR disciplinary counsel will make a referral to a state licensing authority, if necessary, based on a review of the information provided in the internal complaint.

All complaints should be submitted to the EOIR disciplinary counsel via email to [EOIR.Attorney.Discipline@usdoj.gov](mailto:EOIR.Attorney.Discipline@usdoj.gov). The complaint should include the following information:

1. the EOIR staff member's name, title, and component or office,
2. the name of the practitioner and, if known, the practitioner's EOIR ID number,
3. the date(s) of the incident(s),
4. the associated A-number(s) or case number(s) for the case(s),
5. a summary of the conduct at issue, and
6. copies of the relevant documents, if any.

If the complaint also involves suspected fraud, the EOIR Fraud and Abuse Program should be cc'd on the email described above at the following email address:

[EOIR.Fraud.Program@usdoj.gov](mailto:EOIR.Fraud.Program@usdoj.gov).

After review of each complaint, the EOIR disciplinary counsel or another staff member in the Attorney Discipline Program and the EOIR Fraud Program may request additional information. EOIR employees are directed to cooperate with such requests. The EOIR disciplinary counsel will take the appropriate action on each complaint, and when warranted, the EOIR disciplinary counsel may seek sanctions. The EOIR disciplinary counsel may also refer the complaint to the appropriate state licensing authorities.

Further specifics regarding the complaint process for EOIR components follow.

#### A. Office of the Chief Immigration Judge

Immigration judges should directly submit suspected violations of the Rules of Professional Conduct to the EOIR disciplinary counsel by sending the email outlined above and copying the supervisory assistant chief immigration judge (ACIJ). Immigration judges must alert the disciplinary counsel in every case where the immigration judge finds that a practitioner engaged in ineffective assistance of counsel, such as in the context of a motion to reopen, regardless of whether the motion is ultimately granted. *See* 8 C.F.R. § 1003.102(k). A member of the Attorney Discipline Program will inform the immigration judge regarding the outcome of the investigation.

Court administrators, judicial law clerks (JLCs), and attorney advisors (AAs) should first inform the supervising ACIJ about the suspected violation via email. If the ACIJ concurs, he or she will submit the complaint directly to the EOIR disciplinary counsel by sending the email outlined above.

All other immigration court staff should submit complaints to the court administrator. The court administrator will then follow the process outlined above.

#### B. Board of Immigration Appeals

During the adjudication of a proceeding, board members and BIA staff will consider whether each case presents any indicia of ineffective assistance of counsel or other violations of the EOIR

Rules of Professional Conduct. If a board member, JLC, AA, or paralegal identifies conduct in the record of proceedings (ROP) that evinces or implicates misconduct, that board member, attorney, or paralegal will select the “AC” code on the BIA circulation sheet to identify the case and send the email outlined above to the EOIR disciplinary counsel. Board members must alert the disciplinary counsel in every case in which the BIA finds that a practitioner engaged in ineffective assistance of counsel, such as in the context of a motion to reopen, regardless of whether the motion is ultimately granted. *See* 8 C.F.R. § 1003.102(k). All other BIA staff should first inform their supervisor via email of the suspected violation. The supervisor will then submit the complaint to the EOIR disciplinary counsel by sending the email outlined above and ensure that the “AC” code on the BIA circulation sheet is selected. At the conclusion of the adjudicatory process, the BIA will transfer the ROP for any case marked with the “AC” code to the disciplinary counsel.

### C. Other EOIR Components

All other EOIR components or offices, particularly those that interact with immigration practitioners, such as OGC and the Office of Legal Access Programs, must take care to ensure that all suspected violations of the EOIR Rules of Professional Conduct are reported to the EOIR disciplinary counsel. EOIR attorneys or supervisors should submit complaints directly to the disciplinary counsel by sending the email outlined above. Other staff members should first submit a complaint to their supervisor, who will then send the email outlined above to the disciplinary counsel.

## II. Misconduct in Proceedings Before OCAHO

“OCAHO’s rules of practice and procedure vest authority in Administrative Law Judges to determine whether individuals appearing before OCAHO have acted ethically and with integrity, to exclude individuals from proceedings, to issue decisions and orders, and to ‘take other appropriate measures necessary to enable [the judge] to discharge the duties of the office’ consistent with actions authorized by the Administrative Procedure Act.” *United States v. La. Crane Co., LLC*, 11 OCAHO no. 1246, 13 (2015); *see also* 28 C.F.R. §§ 68.28(a)(5)-(8), 68.35, 68.36. All parties in proceedings before OCAHO are expected to act with integrity and in an ethical manner. 28 C.F.R. § 68.35(a). For attorneys, OCAHO looks to relevant state bar rules to determine whether ethical violations have occurred. *La. Crane Co.*, 11 OCAHO no. 1246 at 3. Parties, witnesses, and representatives before OCAHO are expected to meet professional obligations, including, but not limited to, complying with all directions of the administrative law judge (ALJ), chief ALJ, or chief administrative hearing officer (CAHO); not engaging in the use of dilatory tactics; adhering to reasonable standards of orderly and ethical conduct; acting in good faith; and, not engaging in *ex parte* communications. Whenever a party, witness, or representative fails to meet his or her professional obligations, the ALJ, Chief ALJ, or CAHO may issue appropriate sanctions.

Whenever the CAHO, the Chief ALJ, or an ALJ suspects that a practitioner has failed to meet his or her professional obligations, he or she should complete the above email with all information relevant to practice before OCAHO and forward it to EOIR disciplinary counsel who may, in turn, forward the information to OPR.

Judicial law clerks (JLCs), attorney advisors (AAs), paralegals or other OCAHO staff members should first inform their ALJ, the Chief ALJ, or the CAHO about the suspected violation via email. If the ALJ, Chief ALJ, or CAHO concurs, he or she will submit the complaint directly to the EOIR disciplinary counsel by sending the email outlined above.

### III. Conclusion

More information on the Attorney Discipline Program and the complaint process is available in the [EOIR Attorney Discipline Program Fact Sheet](#). The attorneys and staff members in OGC with the Attorney Discipline Program are also available as a resource for EOIR staff members. Any further questions regarding the attorney discipline complaint or investigations process should be directed to the EOIR Attorney Discipline Program by email at [EOIR.Attorney.Discipline@usdoj.gov](mailto:EOIR.Attorney.Discipline@usdoj.gov) or by phone at 703-305-0470.

This PM is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Please contact your supervisor or the EOIR Attorney Discipline Program if you have any questions.

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## **Appendix A**

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

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

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

(2) In the case of an accredited representative as defined in § 1292.1(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 § 1292.1(a)(2) of this chapter, any fee or compensation for specific services rendered for any person, except that a law student or law graduate may be regularly compensated by the organization or firm with which he or she is associated as long as he or she is appearing without direct or indirect remuneration from the client he or she represents;

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

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

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

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

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

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

(2) Contains an assertion about the practitioner or the practitioner's qualifications or services that cannot be substantiated. A practitioner shall not state or imply that the practitioner has been recognized or certified as a specialist in immigration 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. An accredited representative shall not state or imply that the accredited representative:

(i) Is approved to practice before the immigration courts or the Board, if the representative is only approved as an accredited representative before DHS;

(ii) Is an accredited representative for an organization other than a recognized organization through which the representative acquired accreditation; or

(iii) Is an attorney.

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

(h) Has been found guilty of, or pleaded guilty or nolo contendere to, a serious crime, in any court of the United States, or of any state, possession, territory, commonwealth, or the District of Columbia. A serious crime includes any felony and also includes any lesser crime, a necessary element of which, as determined by the statutory or common



law definition of such crime in the jurisdiction where the judgment was entered, involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, dishonesty, bribery, extortion, misappropriation, theft, or an attempt, or a conspiracy or solicitation of another, to commit a serious crime. A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of this section;

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

(j) Engages in frivolous behavior in a proceeding before an immigration court, the Board, or any other administrative appellate body under title II of the Immigration and Nationality Act, provided:

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

(2) The imposition of disciplinary sanctions for frivolous behavior under this section in no way limits the authority of the Board to dismiss an appeal summarily pursuant to § 1003.1(d);

(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;
- (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; or
- (v) Acts outside the scope of the representative's approved authority as an accredited representative.

8 C.F.R. § 1003.102.