

DRAFT REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**REGULATION OF REPRESENTATIVES IN AGENCY
PROCEEDINGS**

George M. Cohen
University of Virginia School of Law

This report was prepared for the consideration of the Administrative Conference of the United States. It does not necessarily reflect the views of the Conference (including its Council, committees, or members).

Recommended Citation

George M. Cohen, Regulation of Representatives in Agency Proceedings (Oct. 18, 2021) (draft report to the Admin. Conf. of the U.S.) [URL forthcoming]

REGULATION OF REPRESENTATIVES IN AGENCY PROCEEDINGS

George M. Cohen

Draft of October 26, 2021

I. INTRODUCTION AND SCOPE

Many federal agencies conduct adjudicatory proceedings and permit claimants or parties to those proceedings to be represented by attorney or non-attorney practitioners. Almost fifty of these agencies have one or more rules specifically regulating the conduct of these practitioners.¹ The number of agencies with such rules has steadily increased from the first agencies adopting rules in the mid-twentieth century to the most recent agencies adopting, or modifying, their rules in the last decade. In a previously published paper, I engaged in the first broad comparison of these rules across agencies, but that paper offered only a preliminary and general analysis of these rules.² The purpose of this study is to undertake a detailed examination of how these rules work in practice in a sample of agencies and to make recommendations about how existing rules might be improved, and how agencies lacking such rules might think about whether to adopt them and if so what form they might take.

The scope of the study is limited in several important ways. First, the study focuses on what I will call agency “rules of conduct” or “rules of professional conduct,” which is the term the American Bar Association (ABA) and most states use to refer to their ethics rules that regulate the practice of law by lawyers.³ What distinguishes these rules from other agency rules, such as more general rules of agency procedure and practice, is that they are directed at conduct by both attorney and non-attorney representatives, and provide for sanctions directed at those representatives that include disqualifying those representatives from practicing before the agency in a particular case or for a period of time, or otherwise restrict the right of those representatives to practice as representatives before an agency. Second, the study focuses on those rules of conduct that apply in agency adjudicatory proceedings involving at least some oral argument or presentation, as opposed to agency activities such as investigations or formal rulemaking, or practice before an agency that involves only submission of written documents (though reference will sometimes be made to rules governing those other contexts). Third, the study focuses only on rules of conduct that apply to private attorneys or non-attorney representatives practicing before federal agencies. It does not address rules applicable to current government lawyers representing the agencies in agency proceedings.

The adoption of rules of professional conduct by agencies, at least as applied to lawyer representatives, has not been universally applauded. Some have raised questions about agency

¹See George M. Cohen, *The Laws of Agency Lawyering*, 84 Fordham L. Rev. 1963, 1991 (2016) (Appendix A).

²*Id.*

³See generally ABA Model Rules of Professional Conduct. All states and D.C. now base their disciplinary rules for lawyers on the ABA Model Rules.

authority to adopt such rules in the absence of express congressional authorization,⁴ though several federal appellate courts have found that authority to adopt these rules exists even in the absence of such express authorization.⁵ In addition, the ABA in 1982, in response to a proposal for a set of Model Rules for Agency Discipline, adopted a resolution endorsing the enactment of legislation that would preclude federal agencies from adopting “standards of practice to govern the professional conduct of attorneys who represent clients” other than those “affecting such attorney’s participation in a particular proceeding before it, as immediately necessary to maintain order in or assure the integrity of such proceeding.”⁶ Since that time, Congress has not enacted the proposed legislation, agency rules have proliferated, and the ABA Model Rules of Professional Conduct have effectively incorporated the agency professional conduct rules.⁷ In a meeting with ABA representatives at the outset of this project, the representatives reiterated the positions taken in the 1982 resolution. Because this project’s scope is limited to agency professional conduct rules in adjudication, the rules discussed here do not conflict with the resolution, except possibly to the extent that they authorize disqualification of lawyer representatives beyond the proceeding in which the conduct occurred.

The remaining sections of the report deal with several topics. Section II describes the methodology used in the study. Section III considers the question of who may practice before the agencies as a representative, discussing both attorney and non-attorney representatives. Section IV considers a variety of issues concerning the structure of agency rules of conduct: how the rules are labeled; the number and location of the rules; the degree of coordination with the rules of other agencies; and whether the rules incorporate other state or federal ethics rules. Section V compares the content of the professional conduct rules in the sampled agencies. Section VI addresses topics concerning how the rules are implemented and enforced: the accessibility of and guidance accompanying the rules; the public disclosure of final disciplinary orders; the frequency of discipline; the practice of referring conduct issues to, and receiving referrals from state or other disciplinary authorities; the practice of reciprocal discipline; and who within agencies enforces the rules. Section VII offers conclusions and recommendations.

⁴For a general discussion of the issue, see Michael P. Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, 45 Case W. Res. L. Rev. 173 (1984).

⁵See *Checkosky v. SEC*, 23 F.3d 452, 455-56, 468-472, 493-94 (D.C. Cir. 1994) (separate opinions of Judge Silberman, Judge Randolph, and Judge Reynolds in case involving discipline of accountants); *Davy v. SEC*, 792 F.2d 1418, 1421 (9th Cir. 1986); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 577-82 (2d Cir. 1979).

⁶See ABA Annual Meeting 1982, joint resolution of Section of Administrative Law, Section of Natural Resources Law, Section of Public Utility Law, and Federal Communications Bar Association. The resolution also recommended that the proposed legislation permit federal agencies to exercise disciplinary authority over an attorney “in conformity with formal disciplinary action taken against such attorney in a jurisdiction where such attorney is admitted to practice.” This statement refers to “reciprocal discipline,” which the report discusses.

⁷See ABA Model Rules of Professional Conduct, Rule 1.0(m) (defining “tribunal” to include an administrative agency acting in an adjudicative capacity); Rule 3.4(c) (stating that a lawyer “shall not ... knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists).

II. METHODOLOGY

With the assistance of Gavin Young of ACUS, I conducted a series of interviews with a select group of eight agencies that have professional conduct rules.⁸ The interviews took place between September 15, 2021 and October 14, 2021. The interviews involved between one and three representatives from each agency, whose roles included administrative law judge, deputy chief counsel, general counsel, assistant general counsel, disciplinary counsel, managing counsel, and executive secretary to the agency. Although the interviewees were all knowledgeable about the rules and practices of their agencies, they were not authorized to speak on behalf of the agencies and the observations and opinions they provided were their own. To preserve at least some degree of anonymity, the report will simply identify that a comment or observation was made by an interviewee from a state agency. The agencies we selected for interview are not a random sample, and they omit some agencies with significant professional conduct rules, such as the US Patent and Trademark Office (USPTO), the Internal Revenue Service (IRS), the Surface Transportation Board, and the financial regulatory agencies. Nevertheless, the agencies interviewed represent a wide range of agency types and approaches to professional conduct rules.

The agencies interviewed, in the order in which they appear in the Code of Federal Regulations, and with the date its rules were first adopted, are: the US Department of Agriculture (USDA) (1967), the Department of Homeland Security (DHS) (1958), the Securities and Exchange Commission (SEC) (1935),⁹ the Federal Energy Regulatory Commission (FERC) (1978), the Social Security Administration (SSA) (1998), the Department of Labor (DOL) (1983), the National Labor Relations Board (NLRB) (1959), and the Department of Veterans Affairs (VA) (1988). Thus, in all the interviewed agencies, the professional conduct rules have been in effect for at least 20 years and in some cases for more than 60 years.¹⁰ Moreover, most of these agencies have significantly modified their rules in recent years; VA (2003, 2019), SEC (2003), SSA (2017), DHS (2000, 2008), NLRB (1996), and DOL (2015).

We also interviewed the US Department of State, an agency that currently has no professional conduct. The report will focus on eight agencies that have professional conduct rules, as well as to some extent the USPTO, which is the subject of a recent in-depth study of practitioner discipline.¹¹ I will also make references to other agencies at various points for

⁸We also interviewed the US Department of State, which currently lacks professional conduct rules, but which also does not conduct many adjudicatory-type hearings apart from hearings in certain passport matters. *See* 22 U.S.C. Part 51, Subpart F. Although the interview yielded some interesting information, because it is tangential to the subjects addressed in this report, the information is not included here.

⁹The original SEC rule, Rule 2(e), was promulgated in 1935 but was redesignated as Rule 102(e) in 1995. The text of the relevant language did not change. 67 Fed. Reg. 71,670, 71,671 n.11.

¹⁰At least 15 other agencies have adopted professional conduct rules since 1998, when SSA adopted its rules. *See* George M. Cohen, *The Laws of Agency Lawyering*, 84 Fordham L. Rev. 1963, 1999 (2016) (Appendix D).

¹¹Jon J. Lee, *Double Standards: An Empirical Study of Patent and Trademark Discipline*, 61 B.C. L. Rev. 1613 (2020). The USPTO rules were first adopted in 1985 and significantly revised in 2013 to conform to the ABA Model Rules of Professional Conduct.

comparison.

III. WHO MAY PRACTICE BEFORE THE AGENCIES?

An important component of rules governing representative practice in agency adjudications is the regulation of who may serve as a representative. Many agencies permit both attorneys and non-attorneys to serve as representatives of claimants and parties in agency adjudications. For the vast majority of agencies that permit representative practice, the qualification rules vary greatly, and often differ between lawyers and non-attorneys. This section describes the requirements for representation in the sampled agencies.

A. Attorney Representatives

The Administrative Procedure Act (APA) provides that “[a]n individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person on whose behalf he acts.”¹² Thus, the statute “prohibits agencies from erecting their own supplemental admission requirements for duly admitted members of a state bar.”¹³ The statute does not, however, define “good standing.” Nor does it “authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency.”¹⁴

By permitting lawyers to practice before an agency so long as they are licensed in some state, the APA provides an important exception to restrictions on multijurisdictional practice, both under unauthorized practice of law rules and state ethics rules, that would otherwise restrict lawyer practice outside jurisdictions in which they are licensed. Lawyers who seek to practice in courts outside jurisdictions where they are licensed must generally be admitted *pro hac vice* for a particular proceeding, which includes associating with local counsel. The APA provision makes such a process unnecessary for lawyers practicing before federal agencies.¹⁵

¹²5 U.S.C. § 500(b). The USPTO is exempted from this provision in 5 U.S.C. § 500(e). “State” is defined as “a State, a territory or possession of the United States including a Commonwealth, or the District of Columbia.” *Id.* § 500(a)(2).

¹³*Polydoroff v. ICC*, 773 F.2d 372, 374 (D.C. Cir. 1985); *Levine v. Saul*, 2020 WL 5258690 *6 (D.R.I. Sept. 3, 2020).

¹⁴5 U.S.C. § 500(d)(2); *Polydoroff*, 773 F.2d at 374 (“There can be little doubt that the Commission, like any other institution in which lawyers or other professionals participate, has the authority to police the behavior or practitioners appearing before it.”).

¹⁵Rule 5.5(d)(2) of the ABA Model Rules of Professional Conduct states: “A lawyer admitted in another United States jurisdiction ... and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that ... are services that the lawyer is authorized by federal ... law or rule to provide in this jurisdiction.” Comment [18] to ABA Model Rule 5.5 states that an authorization by “executive regulation” is included within this permission. *See Alaska Eth. Op.* 2010-1 (finding that a lawyer who practices only immigration law but is not licensed in Alaska may maintain an office in Alaska under Rule 5.5(d)(2)); *Ohio Op.* 2016-9 (2016) (finding that an

Given the APA rule, one might expect the admission or qualification requirements for a lawyer representative to be straightforward and uniform, and to some extent they are. Nevertheless, there are some differences among the agencies in the language they use for their rules governing lawyer qualification, generally based on the language of the agencies' enabling statutes. At the permissive end of the spectrum, several agencies allow any "attorney" to represent a party in an agency proceeding, without further elaboration. The sampled agencies with this type of rule are the USDA,¹⁶ the NLRB,¹⁷ and FERC.¹⁸

Four of the sampled agencies essentially track the language of the APA provision, though they differ slightly in the way they articulate what counts as a United States jurisdiction or "good standing," and whether the admission requirement is mandatory or may be waived by an Administrative Law Judge (ALJ). DHS tracks the APA definition of permissible jurisdictions, and defines "good standing" as "not under any order suspending, enjoining, restraining, disbaring, or otherwise restricting him or her in the practice of law."¹⁹ Based on its governing statute, the SEC adds as qualified lawyers those "admitted to practice before the Supreme Court of the United States" and specifies that lawyers licensed in Puerto Rico and the Virgin Islands may also practice before the agency."²⁰ Similarly, based on the language in its governing statute, SSA permits to practice before that agency "any attorney in good standing who (1) Has the right to practice law before a court of a State, Territory, District, or island possession of the United States, or before the Supreme Court or a Federal court of the United States; (2) Is not disqualified or suspended from acting as a representative in dealings with us; and (3) Is not prohibited by any law from acting as a representative."²¹ SSA adds, however, that it "*may* refuse to recognize the

out-of-state lawyer admitted before a federal agency in Ohio may maintain a physical office in Ohio but may not practice Ohio law); *but see* N.J. UPL Op. 27 (1993) (out-of-state attorneys may represent clients before DHS and EOIR but may not open offices in New Jersey for purposes of that representation); *cf.* Ct. Eth. Op. 98-1 (lawyer licensed in NY but not Connecticut can advertise the lawyer's federal immigration law practice in Connecticut).

¹⁶7 C.F.R. § 1.26(a) ("In any hearing or other proceeding before the Department of Agriculture, the parties may ... by counsel"); 7 C.F.R. § 1.141(c) ("The parties may appear ... by attorney of record in the proceeding.").

¹⁷29 C.F.R. § 102.177(a).

¹⁸38 C.F.R. § 385.2101(a).

¹⁹8 C.F.R. §§ 1.2, 292.1(a)(1).

²⁰17 C.F.R. § 201.102(b); 15 U.S.C. § 78c(a)(16). Although the SEC's Sarbanes-Oxley applies more broadly to a person "licensed in any jurisdiction, domestic or foreign," 15 C.F.R. § 205.2(c), unless the foreign lawyer is a "non-appearing foreign attorney," 15 C.F.R. § 205.2(j), those rules are not limited to lawyers who "appear and practice" in an SEC administrative proceeding, 15 C.F.R. § 205.2(a). Thus, the Sarbanes-Oxley rules do not appear to grant permission to practice in SEC adjudicative proceedings to foreign lawyers. In addition, the SEC recognizes that some other professionals, such as accountants and engineers, may "appear and practice" before the SEC, and are subject to discipline, but not as representatives of parties. 15 C.F.R. §§ 201.102(e)(1)(iv) & (e)(2).

²¹20 C.F.R. § 404.1705(a) (applicable to Federal Old-Age, Survivors and Disability Insurance cases); 20 C.F.R. 416.1505(a) (applicable to Supplemental Security Income for the Aged, Blind, and Disabled cases). SSA's governing statute, 42 U.S.C. § 406(1) states in part:

An attorney in good standard who is admitted to practice before the highest court of the State, Territory, District or insular possession of his residence or before the Supreme Court of the United States, or the inferior Federal courts, shall be entitled to represent claimants before the Commissioner of Social Security.

person ... if the person does not meet the requirements in this section,”²² suggesting that SSA may waive the requirements if it chooses. DOL also essentially tracks the APA requirement²³ and, like the SSA, includes a waiver provision, stating that if an attorney is “not in good standing in his or her jurisdiction,” that attorney “may not represent a party ... before the Office of Administrative Law Judge, unless he or she obtains the judge’s approval.”

Unique among the surveyed agencies, the VA has an elaborate “accreditation” process required of lawyers as well as non-attorneys.²⁴ The VA’s accreditation rules go beyond the requirements established in the APA but are expressly permitted by the VA’s governing statute.²⁵ Most of the VA’s accreditation requirements apply to both attorneys and non-attorney representatives and are discussed below. The only requirement applicable only to lawyers is that they must submit to the Office of General Counsel a “self-certification of admission information concerning practice before any other court, bar, or State or Federal agency, and a determination of character and fitness.”²⁶ The provision adds: “The General Counsel will presume an attorney’s character and fitness to practice before VA based on State bar membership in good standing unless the General Counsel receives credible information to the contrary.”²⁷

Finally, the one agency interviewed that does not have professional conduct rules, the Department of State, does provide for hearings in cases involving certain passport denials and revocation. The rule setting forth the procedure for that kind of hearing states that if a lawyer appears as a representative at a hearing the lawyer “must be admitted to practice in any state of the United States, the District of Columbia, or any territory or possession of the United States, or

Notwithstanding the preceding sentences, the Commission, after due notice and opportunity for hearing, (A) may refuse to recognize as a representative, and may disqualify a representative already recognized, any attorney who has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice or who has been disqualified from participating in or appearing before any Federal program or agency, and (B) may refuse to recognize, and may disqualify, as a non-attorney representative any attorney who has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice.

²²20 C.F.R. § 404.1705(c); 20 C.F.R. § 416.1505(c) (emphasis added).

²³29 C.F.R. § 18.22(b)(1).

²⁴38 C.F.R. § 14.629(b).

²⁵38 U.S.C. § 5904(a)(2) (“The Secretary shall prescribe in regulations (consistent with the Model Rules of Professional Conduct of the American Bar Association) qualifications and standards of conduct for individuals recognized under this section, including a requirement that, as a condition of being so recognized, and individuals must – (A) show that such individual is of good moral character and in good repute, is qualified to render claimants valuable service, and is otherwise competent to assist claimants in presenting claims; (B) have such level of experience or specialized training as the Secretary shall specify; and (C) certify to the Secretary that the individual has satisfied any qualifications and standards prescribed by the Secretary under this section.”).

²⁶38 C.F.R. § 14.629(b)(1)(ii).

²⁷*Id.* The rule also includes a requirement for lawyers that after accreditation, the lawyer must submit a designated form, 38 C.F.R. § 14.629(c)(1), and states that “an attorney associated or affiliated with the claimant’s attorney of record or employed by the same legal services office as the attorney of record may assist in the representation of the claimant,” 28 C.F.R. § 14.629(c)(2).

be admitted to practice before the courts of the country in which the hearing is to be held.”²⁸ The rule does not provide for non-attorney representation.²⁹

B. Non-Attorney Representatives

The APA does not “grant or deny to an individual who is not qualified as provided by ... this section the right to appear for or represent a person before an agency or in an agency proceeding.”³⁰ Thus, the APA does not prevent agencies from permitting non-attorney representatives and sets no requirements for such representatives. As a result, the sampled agencies’ approaches to non-attorney representation are more varied than their approaches to lawyer representation. The NLRB and USDA are again at the permissive end of the spectrum. The NLRB apparently permits anyone to act as a representative, or at least not does not identify any restrictions.³¹ USDA has two different rules on who is eligible to practice, one of which expressly allows non-attorney representatives, again apparently without restriction.³² Nevertheless, an interviewee from USDA stated that although most cases heard under that rule do have lawyer representatives, occasionally family members will represent claimants. The interviewee also stated that whether to allow a non-attorney representative is considered within the discretion of the ALJ, even though the rule does not articulate that limitation.

Two other agencies, SSA and DOL, articulate relatively broad standards of competence and character, but neither adopts limitations on the type of person who may serve as a representative nor imposes any specific requirements that the non-attorney representative must meet. SSA states that a non-attorney representative must be “capable of giving valuable help to [a claimant] in connection with [a] claim”; “not disqualified or suspended from acting as a representative in dealings with us”; “not prohibited by any law from acting as a representatives”; and “generally known to have a good character and reputation.”³³ DOL’s rule states that for a

²⁸22 C.F.R. § 51.71(c).

²⁹22 C.F.R. § 51.71(b) (“The person requesting the hearing must appear in person or with or through his or her attorney.”).

³⁰5 U.S.C. § 500(d)(1). The individuals qualified by this section are lawyers, who are permitted by 5 U.S.C. § 500(b), and accountants representing a person before the IRS, who are permitted by 5 U.S.C. § 500(c). Section 500 does not define “agency proceeding.” But 5 U.S.C. § 551(12) defines “agency proceeding” as “an agency process as defined by paragraphs (5), (7), and (9) of this section. Section 551(5) defines “rule making” as “agency process for formulating, amending, or repealing a rule”; § 551(7) defines “adjudication” as “agency process for the formulation of an order”; and § 551(9) defines “licensing” as “agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.” By its terms, however, § 551 applies only to “this subchapter” (Subchapter II – Administrative Procedure) and not Subchapter I (General Provisions), which includes 5 U.S.C. § 500.

³¹29 C.F.R. § 102.177(a).

³²7 C.F.R. § 1.26(a) (“In any hearing or other proceeding before the Department of Agriculture, the parties may appear in person or by counsel or other representative.”); 7 C.F.R. § 1.141(c) (“The parties may appear in person or by attorney of record in the proceeding.”).

³³20 C.F.R. §§ 404.1705(b); 416.1505(b). Subsection (4) of those rules defines “lacking good character and reputation” as including, but not limited to “persons who have a final conviction of a felony ... or any crime

non-attorney representative, the ALJ “may require that the representative establish that he or she is subject to the laws of the United States and possesses communication skills, knowledge, character, thoroughness and preparation reasonably necessary to render appropriate assistance.”³⁴

Three other agencies in the sample limit the types of people who may serve as non-attorney representatives. The SEC³⁵ and FERC³⁶ limit representation by non-attorneys to agents who are permitted to represent various types of entities. DHS has a more detailed set of restrictions. It allows representation by five categories of non-attorneys. The first category is a law student or recent law graduate who has not yet been admitted to the bar, subject to certain requirements.³⁷ The second category is a “reputable individual,” who must generally have a pre-existing relationship with the claimant, does not receive any payment, and appears only for a single case.³⁸ The third category is an “accredited representative,” who is an agent of a non-profit religious, charitable, or social service organization in the United States that has been accredited by DHS.³⁹ The last two categories recognize that many parties in DHS proceedings are not American citizens. As a result, DHS permits representation by “accredited officials” of a foreign government to which an alien party owes allegiance as well as attorneys licensed outside the U.S.⁴⁰ An interviewee from DHS noted that the limited permission of non-attorney representatives has caused friction with some states, such as Washington, which permits legal practice by “limited licensed technicians,”⁴¹ and California, which permits practice by some law school graduates who have not earned a passing score on the bar exam but are working under the supervision of a licensed lawyer.⁴²

Finally, as mentioned above, the VA has an accreditation process that applies to both attorney and non-attorney representatives.⁴³ As for the non-attorney representatives, the VA

involving moral turpitude, dishonesty, false statement, misrepresentations, deceit, or theft.”

³⁴29 C.F.R. 18.22(b)(2). The articulated competence standard is similar to that in ABA Model Rule 1.1. The rule adds that the ALJ “may inquire as to the qualification or ability of a non-attorney representative to render assistance at any time.”

³⁵15 C.F.R. § 201.102(b) (stating that “a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association; and an officer or employee of a state commission or of a department or political subdivision of a state may represent the state commission or the department or political subdivision of the state”).

³⁶18 C.F.R. § 385.2101(a) (adding to the SEC’s formulation that a member of an “organized group” can represent the group and that an officer or employee of an “other governmental authority” can represent that governmental authority).

³⁷8 C.F.R. § 292.1(a)(2).

³⁸8 C.F.R. § 292.1(a)(3).

³⁹8 C.F.R. §§ 292.1(a)(4), 292.2. EOIR publishes a list of recognized organizations and accredited representatives at www.usdoj.gov/eoir/statspub/raroster.htm.

⁴⁰8 C.F.R. §§ 292.1(a)(5), (a)(6).

⁴¹See Wash. R. Admission to Practice 28 (Limited Practice Rule for Limited License Legal Technicians).

⁴²See Cal. Rules of Ct., R. 9.49.1 (Provisional Licensure with Pathway to Full Licensure for Certain Individuals).

⁴³The most comparable agency in this respect is USPTO, which also has an extensive process, including a

allows anyone to be an “agent” representative. There are no limits on who may serve as an “agent,” but to become accredited, an agent must file a “self-certification of admission information concerning practice before any other court, bar, or State or Federal agency, an affirmative determination of character and fitness by VA, and a written examination.”⁴⁴ In addition, and unique among the agencies in the sample (and to my knowledge, all agencies), both attorneys and agents must satisfy a CLE requirement of 3 hours during the year following accreditation,⁴⁵ and 3 hours of CLE within 3 years of accreditation and every 2 years after that.⁴⁶ Non-attorney agents do not get the presumption of good character that attorneys get. Instead, they must affirmatively demonstrate good character and reputation as well as competence.⁴⁷ But both attorneys and agents must submit the same information to the VA relative to character and reputation⁴⁸ and the same types of evidence showing a lack of good character and reputation applies to both groups.⁴⁹ In addition, both types of representative must achieve a passing score on a written exam administered by the VA.⁵⁰ Finally, the VA has two special rules for certain non-attorney representatives. The first enables certain service organizations to become “recognized” and designate members or employees of that organization to be accredited representatives of that organization if certain requirements are satisfied.⁵¹ The second permits some non-attorneys to serve as a representative for a single claim without going through the full accreditation process if the representative does not take compensation for the services provided.⁵²

Agency permission of non-attorney representation raises several questions that go beyond the scope of this study. One question is how often claimants use attorney representatives compared to non-attorney representatives, or no representation. SSA has a data base on this question from 1979-2015.⁵³ The percentage of cases in which a claimant was represented by an attorney ranged from a low of 43% in 1979 to a high of 81% in 2006 and 2007, with an average

patent registration examination, for anyone, including a lawyer, seeking to become a registered patent practitioner. See Jon J. Lee, *Double Standards: An Empirical Study of Patent and Trademark Discipline*, 61 B.C. L. Rev. 1613, 1631-32 (2020) (describing the process for admission to practice in patent matters). On the trademark side, however, the USPTO requires attorneys only to be licensed and in good standing, and the agency generally does not permit non-attorney practitioners. *Id.* at 1632-33.

⁴⁴38 C.F.R. § 14.629(b)(1)(i).

⁴⁵38 C.F.R. § 14.629(b)(1)(iii).

⁴⁶38 C.F.R. § 14.629(b)(1)(iv).

⁴⁷38 C.F.R. § 14.629(b)(2).

⁴⁸38 C.F.R. § 14.629(b)(2).

⁴⁹38 C.F.R. § 14.629(b)(3) (“Evidence showing lack of good character and reputation includes, but is not limited to, one or more of the following: Conviction of a felony, conviction of a misdemeanor involving fraud, bribery, deceit, theft, or misappropriation; suspension or disbarment from a court, bar, or Federal or State agency on ethical grounds; resignation from admission to a court, bar, or Federal or State agency while under investigation to avoid sanction.”).

⁵⁰38 C.F.R. § 14.629(b)(6).

⁵¹38 C.F.R. § 14.629(a).

⁵²38 C.F.R. § 14.630.

⁵³The data base is available at www.ssa.gov/open/data/representation-at-ssa-hearings.html.

of 65% and an upward trend. The percentage of cases in which a claimant was represented by a non-attorney ranged from a low of 9% in 2006, 2007, and 2008 to a high of 21% in 1989, with an average of 15% and a downward trend. Another question that would be useful to study is how the quality of representation provided by non-attorney representative compares to that of attorney representatives.

IV. STRUCTURE OF THE AGENCY PROFESSIONAL CONDUCT RULES

Nearly fifty agencies have published professional conduct rules in the Code of Federal Regulations (CFR), and these rules appear in twenty-six of CFR's fifty titles. Agency rules governing representative conduct vary widely in how they are structured within the CFR. This section considers several aspects of rule structure as distinct from content (which is considered in the next section): (1) how the rules are labeled; (2) the number and location of the rules within the CFR; (3) whether the rules are coordinated with the rules of other agencies; and (4) whether the rules incorporate other ethics rules, such as the ABA Model Rules of Professional Conduct, state disciplinary rules, or federal court rules.

A. Labeling of the Rules

Agency label their rules governing representative conduct in adjudicative matters in a variety of ways. In contrast to the ABA, which refers to its ethics rules as "Rules of Professional Conduct," only one agency, the USPTO, refers to its ethics rules precisely that way.⁵⁴ Among the agencies sampled for this study, several refer to at least some of their rules using a slight variant of the ABA terminology, such as "standards of professional conduct," "professional conduct," "rules of conduct," or "standards of conduct." These agencies are SEC (Sarbanes-Oxley rules),⁵⁵ USDA,⁵⁶ DHS,⁵⁷ and the VA.⁵⁸ SSA uses the amalgam, "Rules of Conduct and Standards of

⁵⁴37 C.F.R. §§ 11.101-901 (USPTO) (Rules of Professional Conduct). Another agency, the Surface Transportation Board, refers to its professional conduct rules as "Canons of Ethics," reflecting the name and content of the original (from 1908) set of ABA ethics rules, the Canons of Professional Ethics. The ABA substantially revised its ethics rules in 1969 as the Model Code of Professional Responsibility (a term not currently used by any agency) and adopted the Model Rules of Professional Conduct in 1983.

⁵⁵17 C.F.R. Pt. 205 (Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer); *cf.* 17 C.F.R. §201.102(e)(Appearance and Practice Before the Commission).

⁵⁶7 C.F.R. § 97.157 (USDA)(Commodity Laboratory Testing Programs, Plant Variety and Protection, Attorneys and Agents, Professional Conduct); *cf.* 7 C.F.R. Subpt. A, Pt. 1, Subpt. L (Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *id.* Pt. 110 (Rules of Practice).

⁵⁷8 C.F.R. § 292.3 (Professional Conduct for Practitioners – Rules and Procedures). *See also*; 8 C.F.R. 1003.102-.103 & 1292.3 (EOIR)(Professional Conduct for Practitioners – Rules and Procedures); 32 C.F.R. 776.18-.71 (JAG)(Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General); *cf.* 14 C.F.R. Pt. 300 (DOT)(Rules of Conduct in DOT Proceedings Under This Chapter).

⁵⁸38 C.F.R. § 14.632 (Standards of Conduct for Persons Providing Representation Before the Department). *See also* 12 C.F.R. § 1209.73-.74 (FHFA)(Standards of Conduct); 49 C.F.R. Pt. 511 (NHTSA)(Adjudicative Procedures: Appearances; Standards of Conduct).

Responsibility,”⁵⁹ while the NLRB uniquely refers to its disciplinary rule as “Misconduct by Attorneys or Party Representatives.”⁶⁰ Other agencies instead include their representative rules as part of their general “rules of practice and procedure” or simply “rules of practice” or “rules of procedure.” In the sample, the agencies following this approach for at least some of their professional conduct rules are DOL⁶¹ and USDA.⁶² FERC puts its professional conduct rules under the general heading of rules of procedure,⁶³ but then uses “appearance and practice” to refer specifically to its professional conduct rules under that heading.⁶⁴ The SEC also uses the term “appearance and practice” to refer to its general professional conduct rule.⁶⁵

The more common reference by agencies to the rules as procedural or practice rules rather than rules of conduct may reflect the fact that many (though not all) of these professional conduct rules apply only to representation in adjudicatory proceedings, whereas the ABA Model

⁵⁹20 C.F.R. § 404.1740.

⁶⁰29 C.F.R. § 102.177.

⁶¹18 C.F.R. Pt. 18 (Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges). *See also* 10 C.F.R. Ch. 1, Pt. 2, Subpt. C (NRC)(Agency Rules of Practice and Procedure, Rules of General Applicability); 12 C.F.R. Pt. 19 (OCC), Pt. 263 (FRB), Pt. 308 (FDIC), Pt. 747 (NCUA) (all titled Uniform Rules of Practice and Procedure); 28 C.F.R. Pt. 68 (DOJ)(Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allocations of Unlawful Employment of Aliens, Unfair Immigration-Related Practices, and Document Fraud); 47 C.F.R. Ch. I, Subch. A, Pt. 1, Subpt. A (FCC)(General Rules of Practice and Procedure; Parties, Practitioners, and Witnesses; Censure, Suspension, or Disbarment of Attorneys); *cf.* 4 C.F.R. Pt. 22 (GAO)(Rules of Procedure of the Government Accountability Office Contract Appeals Board); 13 C.F.R. Pt. 134, Subpt. B (SBA)(Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, Rules of Practice); 29 C.F.R. Pt. 2200 (OSHR)(Rules of Procedure, Parties and Representatives, Appearances and Withdrawals).

⁶²7 C.F.R. Subt. A, Pt. 1, Subpt. L (Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes) and Pt. 110 (Rules of Practice). USDA consolidated its procedure and practice rules in 1977. *See also* 12 C.F.R. Pt. 1081, Subpt. A (BCFP)(Rules of Practice for Adjudication Proceedings, General Rules); 13 C.F.R. Pt. 134, Subpt. B (SBA)(Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, Rules of Practice); 16 C.F.R. Ch. I, Subch. A, Pt. 4 (FTC)(Organization, Procedures and Rules of Practice, Miscellaneous Rules: Appearances, Ex Parte Communications); 16 C.F.R. Pt. 1025 (CPSC)(Rules of Practice for Appellate Proceedings; Appearances, Standards of Conduct); 17 C.F.R. Pt. 10 (CFTC)(Rules of Practice, General Provisions); 39 C.F.R. Pt. 955 (USPS)(Rules of Practice Before the Postal Service Board of Contract Appeals); 45 C.F.R. Pt. 500 (FCSC)(Rules of Practice, Appearance and Practice), 49 C.F.R. Pt. 821, Subpt. J (Rules of Practice is Air Safety Proceedings, Ex Parte Communications)

⁶³FERC revised its rules in 1982 to put all its practice and procedure rules in one Part.

⁶⁴*See* 18 C.F.R. Part 385 (FERC) (Procedural Rules, Rules of Practice and Procedure); *id.* Pt. 385, Subpt. U (FERC)(Appearance and Practice Before the Commission). Other agencies taking a similar approach include Federal Housing Finance Agency, *see* 12 C.F.R. Pt. 1209 (Rules of Practice and Procedure); Consumer Product Safety Commission, *see* 16 C.F.R. Pt. 1025 (Rules of Practice for Appellate Proceedings; Appearances, Standards of Conduct); Occupational Safety Health Review Commission, *see* 29 C.F.R. Pt. 2200 (Rules of Procedure, Parties and Representatives, Appearances and Withdrawals); and National Highway Traffic Safety Administration, *see* 49 C.F.R. Pt. 511 (Adjudicative Procedures: Appearances; Standards of Conduct).

⁶⁵17 C.F.R. §201.102(e) (Appearance and Practice Before the Commission). *See also* 31 C.F.R. Pt. 501, Subpt. D (OFAC) (Appearance and Practice); 45 C.F.R. Pt. 500 (FCSC) (Rules of Practice, Appearance and Practice). Yet another variant is “duties and restrictions related to practice,” a label used by the Bureau of Alcohol, Tobacco & Firearms, 31 C.F.R. §§ 8.31-8.42 & 8.52, and the IRS, 31 C.F.R. §§ 10.22-10.37.

Rules of Professional Conduct, on which all states base their lawyer disciplinary rules, apply to all lawyers, including transactional lawyers who do not practice before a tribunal. In addition, state courts, which often have the responsibility for adopting that state's ethics rules for lawyers, as well as federal courts, which often incorporate the ethics rules of the state in which they are located, have acquiesced to some extent in separating "ethics rules" governing lawyer conduct from "rules of procedure." For example, the Federal Rules of Civil Procedure do not include a rule on conflicts of interest and disqualification based on those conflicts; instead, courts generally apply the state ethics rules to resolve disqualification motions alleging a conflict of interest. On the other hand, some procedural and ethics rules overlap; for example, Rule 11 of the Federal Rules of Civil Procedure and Model Rule 3.1 both address frivolous claims, albeit with somewhat different requirements.

B. Number and Location of the Rules

A second structural question is whether agencies choose to describe their professional conduct rules as a single rule or a series of rules, and, if the latter, whether the agencies locate their professional conduct rules in a single location or scatter them in different locations. A few agencies have a single, broad rule. In the interviewed sample, the NLRB is the only agency that takes this approach.⁶⁶ Other agencies opt for a single rule with multiple sub-parts or, similarly, a set of multiple rules grouped together that cover a variety of topics. The best example of an agency taking this approach is USPTO, whose rules most closely track the ABA's Model Rules of Professional Conduct. Agencies in the interviewed sample that have adopted comprehensive and detailed rules and group them together are DHS,⁶⁷ SSA,⁶⁸ and the VA.⁶⁹

Apart from NLRB and DHS, however, all the agencies in the sample put their professional conduct rules in more than one location. The agencies do this for a variety of reasons, and some agencies do it for more than one reason. One reason for putting different conduct rules in different locations is that the rules may apply to different types of claims or adjudications. For example, SSA has two sets of detailed rules, each contained in a single section with multiple subsections, divided into Purpose and Scope, Affirmative Duties, and Prohibited Actions.⁷⁰ One set of rules governs proceedings concerning Federal Old-Age Survivors and Disability Insurance

⁶⁶29 C.F.R. § 102.177. Another example of an agency adopting a single, broad professional conduct rule is the Drug Enforcement Administration, *see* 31 C.F.R. § 1316.51(b).

⁶⁷DHS is unique among the agencies because although its professional conduct rules are all in one location, that location is under the rules of EOIR. *See* 8 C.F.R. § 292.3(b) (stating that the grounds for disciplinary sanctions are those stated in 8 C.F.R. § 1003.102, which is in the EOIR rules). I discuss this unique coordination between agencies below.

⁶⁸*See* 20 C.F.R. 404.1740; 20 C.F.R. 416.1540.

⁶⁹*See also* Department of Transportation, *see* 29 C.F.R. Part 300 (Rules of Conduct in DOT Proceedings Under This Chapter); Bureau of Alcohol, Tobacco, Firearms and Explosives, *see* 31 C.F.R. Part 8 Subpart D (Duties and Restrictions Relating to Practice); Internal Revenue Service, *see* 31 C.F.R. Part 10 (Duties and Restrictions Relating to Practice Before the Internal Revenue Service); and Surface Transportation Board, *see* 49 C.F.R. Part 1103 (Canons of Ethics).

⁷⁰SSA is the only agency that divides its professional conduct rules in this way.

(Part 404)⁷¹ and the other set governs proceedings Supplemental Security Income for the Aged, Blind, and Disabled (Part 416).⁷² The rules in these two locations are, however, identical. No other agency puts identical rules in separate locations.

Other agencies that have different rules for different types of claims or adjudications are the VA and USDA. The VA has detailed professional conduct rule governing claims for veterans' benefits⁷³ and a more broadly framed group of professional conduct rules for claims of discrimination against the VA.⁷⁴ USDA has a particularly complex structure for its representative conduct rules, based not only on the type of proceeding but on who enforces the rule (a topic further considered below). The various rules are located in three different sub-parts of the Department's "Administrative Regulations." First, USDA has a general rule, enforced by the Secretary, that applies, under Subpart B (Departmental Proceedings) in "any hearing or other proceeding before the Department of Agriculture,"⁷⁵ Second, USDA has a *different* general rule, enforced by a Judge, that is part of Subpart H, Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes.⁷⁶ Third, yet another sub-part, Subpart L, Procedures Related to Administrative Hearings Under the Program Fraud Civil Remedies Act of 1986 has a different rule applicable to misconduct by a "party or representative."⁷⁷ Finally, under the "Regulations of the Department of Agriculture," there are two other general rules, enforced by the Presiding Officer, under the Commodity Laboratory Testing Programs of the Agricultural Marketing Service.⁷⁸

A second reason an agency might locate their professional conduct rules in different locations is that the rules apply not to proceedings under different statutes but that the rules apply at different stages of a proceeding. Among the sampled agencies, the VA has a professional conduct rule in addition to those mentioned above that applies only to appellate practice before the Board of Veterans' Appeals.⁷⁹

A third reason for having different professional conduct rules in different locations is that in some cases, the rules may apply to different people. For example, the DOL has one set of professional conduct rules applying to representatives⁸⁰ and a second set of rules that applies not

⁷¹20 C.F.R. § 404.1740.

⁷²20 C.F.R. § 416.1540. By contrast, the USPTO has one set of professional conduct rules in one location even though the patent and trademark functions within the agency are separate.

⁷³38 C.F.R. § 14.632 (Standards of Conduct for Persons Providing Representation Before the Department).

⁷⁴38 C.F.R. §§ 18b.15 (Exclusion from Hearing for Misconduct), 18b.90-92 (Judicial Standards of Practice).

⁷⁵7 C.F.R. § 1.26(b) (Representation before the Department of Agriculture).

⁷⁶7 C.F.R. §§ 1.141(c) & (d)(1) (Procedure for Hearing).

⁷⁷7 C.F.R. § 1.328 (Sanctions).

⁷⁸7 C.F.R. §§ 97.157 (Professional Conduct), 110.8(h)(3) & (4) (Administrative Procedures).

⁷⁹38 C.F.R. § 20.6 (Withdrawal of Services by a Representative).

⁸⁰29 C.F.R. § 18.22(d) & (e) (Representatives); *id.* §18.23(a)(1)(iii) (Disqualification of Representatives). Section 18.22 addresses "Duties," "Prohibited Actions," and "Withdrawal of Appearance." Section 18.23 adds some

only to representatives but also to parties,⁸¹ though all the rules are located under the heading of “Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.” Similarly, one of USDA’s rules applies to both representatives and parties,⁸² while the others are limited to representatives. Another variation of an agency taking this approach is the SEC. One of its conduct rules applies to a witness as well as the witness’s counsel.⁸³ which has different professional conduct rules applicable to different types of representatives. But the SEC also has several other sets of professional conduct rules that apply to different categories of representatives. The SEC’s general rule on Appearance and Practice Before the Commission apply to specified non-attorney representatives as well as attorneys,⁸⁴ whereas the Sarbanes-Oxley rules are limited to attorneys but apply to some foreign attorneys as well as U.S.-licensed attorneys.⁸⁵

Finally, agencies may put rules covering different types of representative conduct in different locations. For example, FERC has a conduct rule governing investigations in one location,⁸⁶ a rule governing discovery abuse in another location,⁸⁷ and a rule addressing disruptive conduct and other unethical behavior in a proceeding in a third location⁸⁸ (the latter two rules are in different sub-parts of FERC’s Rules of Practice and Procedure).⁸⁹ The SEC also has a rule applicable to investigations.⁹⁰ In addition, the SEC has a general rule governing Appearance and Practice contained in the SEC’s Rules of Practice (Part 201),⁹¹ and, in a different part (Part 205) a distinct set of rules implementing the requirements of the Sarbanes-Oxley statute.⁹² These rules focus on an attorney’s duties in responding to client wrongdoing and

further prohibitions. These sections do not cross-reference the other professional conduct rule provisions.

⁸¹29 C.F.R. § 18.35(b) (Representations to the Judge); *id.* § 18.87(b) (Standards of Conduct).

⁸²7 C.F.R. § 1.328(a) (stating that an ALJ “may sanction a person, including any party or representative,” for various types of misconduct).

⁸³17 C.F.R. § 203.7(e) (Rights of Witnesses).

⁸⁴17 C.F.R. § 201.102(b) (describing who may serve as a representative); *id.* § 201.102(e) (setting forth standards of conduct for representatives who appear and practice before the SEC). This rule also references another professional conduct rule limiting the appearances of former SEC employees. 17 C.F.R. § 201.102(c); *id.* § 200.735-8 (Practice by former members and employees of the Commission). The referenced rule is located in a set of SEC rules applicable to SEC employees (Part 200).

⁸⁵17 C.F.R. Part 205 (Standard of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer); *id.* § 205.2(a) (defining “appearing and practicing” and excluding a “non-appearing foreign attorney”); *id.* § 205.2(j) (defining “non-appearing foreign attorney”).

⁸⁶18 C.F.R. § 1b.16.

⁸⁷18 C.F.R. § 385.411.

⁸⁸18 C.F.R. § 385.2102.

⁸⁹The FERC Rules of Practice and Procedure are in Part 385 of Title 18 of the CFR. Subpart D, which includes § 385.411 is labeled Discovery Procedures for Matters Set for Hearing Under Subpart E. Subpart U, which includes 385.2102, is labeled Appearance and Practice Before the Commission.

⁹⁰17 C.F.R. § 203.7(e) (Rights of Witnesses).

⁹¹17 C.F.R. § 201.102(e) (Appearance and Practice before the Commission).

⁹²17 C.F.R. Part 205 (Standard of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer).

are mostly directed at non-adjudicatory practice of lawyers, but those rules do specifically include lawyer representing an issuer in an “administrative proceeding.”⁹³

C. Coordination with Other Agencies

Most agencies do not coordinate their representative conduct rules with the rules of other agencies. Even when different agencies appear in the same title of the Code of Federal Regulation, and therefore have at least some general subject matter overlap, their rules of these agencies generally differ in some way, such as topics covered, substance, or style. For example, the SEC’s rules are in Title 17 of the CFR, which also includes the Commodity Futures Trading Commission (CFTC). Yet the representative conduct rules of the two agencies are significantly different.⁹⁴ Similarly, the NLRB rule⁹⁵ and the DOL rules⁹⁶ are both located in Title 29, which also includes the Occupational Safety and Health Review Commission (OSHRC) rules,⁹⁷ but the professional conduct rules of these three agencies are markedly different. The same pattern of distinct rules for agencies within the same CFR title occurs in numerous other titles.⁹⁸

Some, but not all, of these differences are likely the result of the different functions the agencies serve (such as primarily investigative, primarily adjudicative, or a combination). For example, the reason given by an NLRB interviewee for that agency’s distinct rule is that the NLRB is an independent agency, not part of the DOL, and so the NLRB does not coordinate its activities at all with the DOL. For its part, DOL identifies more closely with agencies such as SSA and DHS, given its responsibility for overseeing benefits under various employment statutes and employment visas related to immigration.⁹⁹

On the other hand, one agency in the interviewed sample is an exception to this general

⁹³17 C.F.R. 205.2(a)(1)(ii).

⁹⁴The CFTC rules are located in 17 C.F.R. § 10.11 (Appearance in Adjudicatory Proceedings) & Part 14 (Rules Relating to suspension or Disbarment from Appearance and Practice).

⁹⁵29 C.F.R. § 203.177 (Misconduct by Attorneys and Party Representatives before the Agency).

⁹⁶19 C.F.R. §§ 18.22(d) & (e) (Representatives), 18.23(a) (Disqualification of Representatives), 18.35 (Representations to the Judge), 18.87 (Standards of Conduct).

⁹⁷29 C.F.R. §§ 2200.23(b) (Withdrawal of Counsel); 2200.104 (Standards of Conduct); 2200.105(b) (Ex Parte Communication).

⁹⁸See Title 10 (Nuclear Regulatory Commission, 10 C.F.R. § 2.314; Department of Energy, 10 C.F.R. § 1003.3(b); Defense Nuclear Facilities Safety Board, 10 C.F.R. §§ 1708.110, 1708.112); Title 16 (Federal Trade Commission, 16 C.F.R. § 4.1(b) & (e), and Consumer Product Safety Commission, 16 C.F.R. § 1025.66); Title 19 (US International Trade Commission, 19 C.F.R. §§ 210.2, 210.4 and International Trade Administration, 19 C.F.R. § 351.303(g)); Title 31 (Bureau of Alcohol, Tobacco, Firearms and Explosives, 31 C.F.R. §§ 8.31-8.42, 8.52; Internal Revenue Service, 31 C.F.R. §§ 10.22-10.37, and Office of Foreign Asset Control, 31 C.F.R. § 501.704(d)); Title 39 (US Postal Service, 39 C.F.R. § 955.34, and Postal Regulatory Commission, 39 C.F.R. § 3010.143(d)); and Title 40 (Chemical Safety and Hazard Investigation Board, 40 C.F.R. § 1610.1 and Environmental Protection Agency, 40 C.F.R. §§ 27.3, 27.15, 27.29).

⁹⁹In its 2015 revisions to 29 C.F.R. § 18.22, the DOL relied on the SSA professional conduct rules. 80 Fed. Reg. 28768, 28774 (May 19, 2015).

pattern. DHS, whose rules are in Title 7, incorporates the professional conduct rules of the Executive Office of Immigration Review (EOIR), also located in Title 8.¹⁰⁰ In addition, as discussed below, DHS and EOIR closely coordinate enforcement of their professional conduct rules. Another significant example of coordination involves the agencies regulating the financial sector, whose rules are in Title 12. Some (not all) of these agencies have adopted “Uniform Rules of Practice and Procedure.”¹⁰¹ Unfortunately, I was not able to include one of those agencies in my interview sample.

D. Incorporation of Other Ethics Rules

A final structural question is whether the agencies incorporate other (non-agency) ethics rules and, if so, which rules they incorporate and whether those rules are in addition to or instead of the agency’s own articulated rules. Federal agencies rules do not attempt to preempt discipline by states or other jurisdictions under their own ethics rules.¹⁰² Incorporating other ethics rules simply means that the agency can impose discipline on lawyers or other representatives who engage in conduct before the agency that the agency finds violates those rules, even if the state disciplinary authority has not acted to discipline that conduct.¹⁰³ If the state has disciplined a lawyer, whether for other conduct or conduct before the agency, the agency may impose reciprocal sanctions. Reciprocal discipline is considered below in the section on Enforcement.

Slightly more than half of all agencies with professional conduct rules have some kind of incorporation rule. In the interviewed sample, the only agencies that have professional conduct rules but that have no incorporation rule are DHS¹⁰⁴ and SSA.¹⁰⁵ At the other end of the

¹⁰⁰The EOIR rules are in 8 C.F.R. § 1003.102. The DHS rules incorporating the EOIR rules are C.F.R. § 292.3(a)(1)(“It will be in the public interest to impose disciplinary sanctions against a practitioner who is authorized to practice before DHS when such person has engaged in criminal, unethical, or unprofessional conduct, or in frivolous behavior, as set for in 8 C.F.R. 1003.102.”), 293.2(b)(“It is deemed to be in the public interest for the adjudicating official or the Board to impose disciplinary sanctions as described in paragraph (a)(1) of this section against any practitioner who falls within one or more of the categories enumerated in 8 C.F.R. 1003.102.”).

¹⁰¹See 12 C.F.R. §§ 19.1-19.41 (Office of Comptroller of the Currency); 12 C.F.R. §§ 263.1-263.41 (Federal Reserve Board); 12 C.F.R. §§ 308.1-308.41 (Federal Deposit Insurance Corporation); 12 C.F.R. §§ 747.1-747.41 (National Credit Union Administration).

¹⁰²See *Gadda v. Ashcroft*, 388 F.3d 934, 939 (9th Cir. 2004) (holding that “federal law does not preempt the Supreme Court of California’s authority to suspend or disbar attorneys admitted to practice in California state courts”).

¹⁰³To my knowledge, agencies neither use, nor claim the authority to use, these incorporation rules to discipline lawyers for conduct outside the agency adjudicative proceeding or otherwise not involving practice before the agency. Although as discussed below, many agencies have reciprocal discipline rules, those rules apply only when another jurisdiction has actually imposed discipline, not when an agency determines that another jurisdiction could have imposed discipline for prior conduct not involving practice before the agency. Similarly, the agency rules on admission and qualification of lawyers, discussed above, do not contemplate an agency conducting an independent inquiry into a lawyer’s prior conduct not involving practice before the agency, unless that prior conduct actually resulted in discipline.

¹⁰⁴DHS does incorporate the EOIR ethics rules, as discussed above, in 8 C.F.R. § 292.3(a)(1).

¹⁰⁵Other agencies with significant professional conduct rules that lack an incorporation rule include the IRS

spectrum, the only agency in the sample whose sole rule of professional conduct is an incorporation rule is the NLRB.¹⁰⁶ Thus, most agencies in the sample both include an incorporation rule and supplement that rule at least to some extent with their own rules.

As is the case with other structural issues, and perhaps surprisingly, the agencies with an incorporation rule vary significantly in which rules they incorporate. One approach is to adopt a specified set of rules and make those rules applicable to all representatives, which has the advantage of uniformity across all representatives, including nonlawyer representatives, and reduces the burden on the ALJs within an agency by eliminating the need for them to become familiar with more than one professional conduct rules. A version of this approach, not taken by any of the interviewed agencies but used by some others, is to incorporate the ABA Model Rules of Professional Conduct¹⁰⁷ or, for agencies holding proceedings in the District of Columbia, the District of Columbia Rules of Professional Conduct.¹⁰⁸ An alternative version of this approach, taken by one of the USDA conduct rules, is to incorporate the rules applicable in the U.S. District Court for the District of Columbia,¹⁰⁹ which essentially is equivalent to incorporating the District of Columbia Rules of Professional Conduct.¹¹⁰

A second approach, applicable only to lawyer representatives, is to incorporate the ethics rules of the jurisdiction or jurisdictions in which an attorney is licensed to practice. The VA¹¹¹ and DOL¹¹² take this approach, as do several other agencies.¹¹³ This approach has the advantage

and USPTO.

¹⁰⁶29 C.F.R. § 102.177(a). The only other agencies that have only an incorporation rule are the Drug Enforcement Administration, 21 C.F.R. § 1316.51(b), and the Postal Regulatory Commission, 39 C.F.R. § 3010.143(d).

¹⁰⁷Two agencies that adopt this approach are Bureau of Alcohol, Tobacco, Firearms and Explosives, *see* 31 C.F.R. § 8.41(b)(2)(i) and Occupational Safety and Health Review Commission, *see* 29 C.F.R. § 2200.104(a). The Department of Interior requires practitioners to “observe the Canons of Professional Ethics of the American Bar Association” as well as the ethics rules of the Federal Bar Association. 43 C.F.R. § 1.6(a). It’s not clear whether the Department of the Interior intends to incorporate the ABA’s current rules or the former Canons of Professional Responsibility. Nor is it clear how the agency resolves any conflicts between the rules of the ABA and those of the Federal Bar Association.

¹⁰⁸*See* 39 C.F.R. § 3010.143(d) (Postal Regulatory Commission).

¹⁰⁹7 C.F.R. § 1.26(b)(1) (also incorporating “any applicable standards of ethical conduct established by statutes, executive orders and regulations”).

¹¹⁰Rules of the United States District Court for the District of Columbia, LCvR 83.15(a).

¹¹¹38 C.F.R. § 14.632(d). For an example of the VA discussing a state ethics rule, though ultimately deciding that the rule was not violated, *see* *Harvey v. Shulkin*, 30 Vet. App. 10 (U.S Ct. App. Vet. Claims) (2018) (discussing a potential violation of Rule 3.7).

¹¹²29 C.F.R. § 18.22(c).

¹¹³These agencies include the Bureau of Consumer Financial Protection, §12 C.F.R. 1081.107(c)(1); the Federal Trade Commission, 16 C.F.R. § 4.1(e)(1)(i)(B); the US Postal Service, 39 C.F.R. § 955.34(a); and the Federal Communications Commission, 47 C.F.R. § 1.24(a)(2). The Civilian Board of Contract Appeals of the General Services Administration has an interesting variation that applies “the rules of professional conduct and ethics of the jurisdictions in which the attorney is licensed to practice, *to the extent that those rules are relevant to conduct affecting the integrity of the Board, its process, or its proceedings.*” 48 C.F.R. § 6101.35(a) (emphasis

of reducing the burden on attorneys, who need not familiarize themselves with an additional set of ethics rules. But because these incorporation rules do not apply to nonlawyer representatives, those representatives will potentially operate under different standards and without sufficient guidance. In addition, this approach differs from that of the ABA Model Rules of Professional Conduct, which generally subject lawyers involved in litigation to the disciplinary rules of the jurisdiction in which the tribunal in which they are practicing is located, unless the tribunal's rules provide otherwise, even if those rules differ from the rules of the jurisdiction in which the lawyer is licensed.¹¹⁴

A final approach is to incorporate the ethics rules generally applicable in federal courts without specifying a particular jurisdiction. This is the approach taken by several USDA¹¹⁵ (USDA appears to be the only agency that has adopted different incorporation rules for different contexts) as well as by FERC.¹¹⁶ A variation of this approach is to incorporate general ethical standards, again without specifying a particular jurisdiction or set of rules. This is the approach taken by the NLRB¹¹⁷ and the SEC.¹¹⁸ This approach provides greater flexibility but raises the possibility of choice of law problems when the rules of different jurisdictions conflict. Nevertheless, an interviewee from SEC expressed the view that the approach of reinforcing and complementing the state bar rules generally works well. Moreover, in practice, the SEC apparently interprets its incorporation rule to mean that the agency will look to the ethics rules in the jurisdiction in which the lawyer is licensed.¹¹⁹

The potential choice of law problem is not limited to disciplinary matters in the agencies themselves. In jurisdictions that have adopted Rule 8.5(b)(1) of the ABA Model Rules of Professional Conduct, if a lawyer is disciplined in a state disciplinary system for conduct before the agency acting as a "tribunal" under Rule 1.0(m) of the ABA Model Rules, that state disciplinary authority would have to determine how to follow the requirement of Rule 8.5(b)(1)

added).

¹¹⁴ABA Model Rule 8.5(b)(1).

¹¹⁵7 C.F.R. §§ 1.141(c), 97.157, 110(h)(3).

¹¹⁶18 C.F.R. § 385.2101(c); *See also* 10 C.F.R. § 1708.112(a) (Defense Nuclear Facilities Safety Board); 49 C.F.R. 1103.11 (Surface Transportation Board).

¹¹⁷29 C.F.R. § 102.177(a) ("Any attorney or other representative appearing or practicing before the Agency must conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by those standards in interpreting and applying provisions of this section.").

¹¹⁸17 C.F.R. § 201.102(e)(1)(ii)(permitting the SEC to sanction any person found "to have engaged in unethical or improper professional conduct"). Congress in the Sarbanes-Oxley Act of 2002 incorporated this language into the language of the statute, removing doubts about the agency's authority to implement this rule. 15 U.S.C. § 78d-3(a)(2). *See also* 12 C.F.R. § 308.109(a)(1)(ii) (FDIC); 14 C.F.R. §§ 300.1, 300.6(a), 300.12(a) (Department of Transportation); 17 C.F.R. § 14.8(c) (Commodity Futures Trading Commission); 28 C.F.R. § 68.33(c)(3)(iii) (Department of Justice); 45 C.F.R. § 500.4(a)(2) (Foreign Claims Settlement Commission).

¹¹⁹The D.C. Circuit upheld this interpretation in *Altman v. SEC*, 666 F.3d 1322 (D.C. Cir. 2003) (upholding SEC discipline of a lawyer for violating NY ethics rules prohibiting "conduct involving dishonesty, fraud, deceit, or misrepresentation," "conduct that is prejudicial to the administration of justice," and "conduct that adversely reflects on the lawyer's fitness as a lawyer").

that it apply the “rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.”¹²⁰ One possibility would be that the disciplinary authority would apply the rules of the jurisdiction in which the agency hearing occurs, for example, the District of Columbia, because the tribunal’s rule does not identify a specific alternative set of rules. That would mean that a lawyer could be disciplined under different rules by an agency tribunal applying the agency’s rules and by the state disciplinary authority, a result Rule 8.5(b)(1) seems not to contemplate. Alternatively, the state disciplinary authority could conclude that even though the agency has not adopted specific rules but merely a broad incorporation rule, the “rules of the tribunal provide otherwise” and the state authority would have to try to apply the “general” ethics or court rules contemplated by the agency incorporation rule.

V. CONTENT OF THE AGENCY PROFESSIONAL CONDUCT RULES

In my prior article discussing professional conduct rules in federal agencies, I found that the most common topics covered by those rules concerned agency adjudication¹²¹ and most of the rules on these topics parallel, and are generally consistent with, the ABA Model Rules of Professional Conduct “Advocate” rules.¹²² Of the adjudication-focused rules, the most common topic was disruptive conduct,¹²³ followed by *ex parte* contact with agency officials,¹²⁴ frivolous claims,¹²⁵ compliance with agency rules,¹²⁶ and obstruction of justice.¹²⁷ Among the sampled

¹²⁰Not all jurisdictions have adopted this rule or adopted in the form proposed by the ABA. For example, New York’s version of Rule 8.5(b)(1) substitutes the word “court” for “tribunal,” and an ethics opinion from New York finds that “court” for purposes of that rule does not include administrative agencies acting in an adjudicative capacity. N.Y. Eth. Op. 968 (2013).

¹²¹Cohen, *supra*, at 1978.

¹²²ABA Model Rules of Professional Conduct, Rules 3.1-3.9. Rules incorporating other ethics rules, discussed in the previous section, are also in the group of most common rules. I have attached to this Report as an appendix a spreadsheet listing all the professional conduct rules of the federal agencies that I could identify as well as the corresponding rule in the ABA Model Rules of Professional Conduct. Even among the ABA’s “Advocate” rules, almost no agencies, and none in the sample, include parallels to Rules 3.6 (Trial Publicity), 3.7 (Lawyer as Witness), 3.8 (Special Responsibilities of a Prosecutor), or 3.9 (Advocate in Nonadjudicative Proceedings). The omission of these rules is not a big surprise, since agencies have separate conduct rules for agency lawyers (so no need for Rule 3.8), do not have juries (the primary concern of Rules 3.6 and 3.7), have separate rules for nonadjudicative proceedings (so no need for Rule 3.9). The only agencies with rules that parallel these rules are USPTO, *see* 37 C.F.R. §§ 11.306 (parallel to Rule 3.6), 11.307 (parallel to Rule 3.7), 11.309 (parallel to Rule 3.9); the Surface Transportation Board, 49 C.F.R. § 1103.26 (parallel to Rule 3.6); JAG, *see* 32 C.F.R. §§ 776.45 (parallel to Rule 3.6), 776.46 (parallel to Rule 3.7), 776.47 (parallel to Rule 3.8), 776.48 (parallel to Rule 3.9).

¹²³The parallel ABA Model Rule is 3.5(d) (“A lawyer shall not ... engage in conduct intended to disrupt a tribunal.”). *See also* 28 U.S.C. § 1927 (“Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”).

¹²⁴The parallel ABA Model Rule is 3.5(b) (“A lawyer shall not ... communicate *ex parte* with [a judge, juror, prospective juror or other official] during the proceeding unless authorized to do so by law or court order.”).

¹²⁵The parallel ABA Model Rule is 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”). *See also* Fed. R. Civ. P. 11.

agencies, as noted above, only NLRB has a single general rule of conduct with no specific requirements or prohibitions.¹²⁸ Of the remaining seven sampled agencies with specific professional conduct rules, there are eleven topics covered by the rules of four or more agencies (sometimes with more than one rule covering a topic), including all five of the most common topics across all agencies just listed. The other six most common topics in the sample group are competence,¹²⁹ withdrawal,¹³⁰ delay,¹³¹ candor toward the tribunal,¹³² improperly influencing a judge or official,¹³³ and commission of a criminal act.¹³⁴ Only one of the sampled agencies, DOL, has professional conduct rules covering all eleven of the most common topics, even though three other sampled agencies (SSA, DHS, and VA) have professional rules covering more topics overall.¹³⁵

The topics covered by the professional conduct rules of the seven sampled agencies with

¹²⁶The parallel ABA Model Rule is 3.4(c) (“A lawyer shall not ... knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.”).

¹²⁷The parallel ABA Model Rule is 8.4(d) (“It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice.”). Rule 8.4(d) is not part of the “Advocate” rules, but rather part of a group of rules on “Maintaining the Integrity of the Profession.” Rule 8.4 is titled “Misconduct” and lists several general categories of misconduct, including but not limited to misconduct during an adversary proceeding.

¹²⁸29 C.F.R. § 102.177(a).

¹²⁹The parallel ABA Model Rule is 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”). Rule 1.1 is not part of the “Advocate” rules, but rather part of a group of rules on the “Client-Lawyer Relationship.”

¹³⁰The parallel ABA Model Rule is 1.16(c) (“A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.”). Like Rule 1.1, Rule 1.16 is part of the set of rules on the “Client-Lawyer Relationship.”

¹³¹The parallel ABA Model Rule is 3.2 (“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”).

¹³²The parallel ABA Model Rules are 3.3(a)(1) (“A lawyer shall not knowingly ... make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”) and 3.3(a)(3) (“A lawyer shall not knowingly ... offer evidence that the lawyer knows to be false. If the lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”). I have grouped these rules together because some of the agencies do so in their rules.

¹³³The parallel ABA Model Rule is 3.5(a) (“A lawyer shall not ... seek to influence a judge, juror, prospective juror or other official by means prohibited by law.”).

¹³⁴The parallel ABA Model Rules is 8.4(b) (“It is professional misconduct for a lawyer to ... commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”). Like Rule 8.4(d), Rule 8.4(b) is part of the Misconduct rule in the group of rules covering “Maintaining the Integrity of the Profession.”

¹³⁵The seven sampled agencies with specific professional conduct rules in order from greatest to least number of covered topics are: SSA (23), DHS (19), VA (18), DOL (13), SEC (9), USDA (6), and FERC (4). The total number of topics covered by professional conduct rules for all the agencies in this sample is 33, of which 24 are topics covered by at least two of the sampled agencies.

specific rules exhibit no discernible pattern. In fact, none of the eleven most common topics among the sampled agencies is covered by all the sampled agencies, and, with one exception, no two of these topics are covered by the same configuration of agencies. The most addressed topics among the interviewed agencies with specific professional conduct rules are disruptive conduct and candor toward the tribunal, with six agencies each having rules on these two topics. The agencies with one or more rules on disruptive conduct (often referred to in agency rules as “contumacious” conduct) are USDA,¹³⁶ DHS,¹³⁷ FERC,¹³⁸ SSA,¹³⁹ DOL,¹⁴⁰ and VA.¹⁴¹ The agencies with one or more rules on candor toward the tribunal are USDA,¹⁴² DHS,¹⁴³ SEC,¹⁴⁴ SSA,¹⁴⁵ DOL,¹⁴⁶ and VA.¹⁴⁷ Thus, FERC has a rule on disruptive conduct but not one on candor toward the tribunal, while SEC has a rule on candor toward the tribunal but not one on disruptive conduct.

The next most addressed topics among the interviewed agencies with specific professional conduct rules are delay, compliance with agency rules, *ex parte* contact, and obstruction of justice. The agencies with one or more rules on delay are USDA,¹⁴⁸ DHS,¹⁴⁹ SSA,¹⁵⁰ DOL,¹⁵¹ and VA.¹⁵² The agencies with a rule on *ex parte* contact are USDA,¹⁵³ SEC,¹⁵⁴ SSA,¹⁵⁵ DOL,¹⁵⁶ and VA.¹⁵⁷ *Ex parte* contact rules are somewhat tricky to categorize, however,

¹³⁶7 C.F.R. §§ 1.141(d), 1.328(a)(3), 110.8(h)(4).

¹³⁷8 C.F.R. 1003.102(g).

¹³⁸18 C.F.R. § 385.2012(b).

¹³⁹20 C.F.R. §§ 404.1740(c)(7)(ii), 416.1540(c)(7)(ii).

¹⁴⁰29 C.F.R. §§ 18.22(d)(4), 18.87(b).

¹⁴¹38 C.F.R. §§ 18b.15, 18b.90.

¹⁴²7 C.F.R. § 1.303(b). This section is not limited to representatives but is directed at “any person who makes a written statement” to USDA.

¹⁴³8 C.F.R. § 1003.102(c). This rule is patterned on ABA Model Rules 3.3(a)(1) and 3.3(a)(3), with some important differences. Most notably, the rule is violated if a representative acts “with reckless disregard” as well as “knowingly.”

¹⁴⁴17 C.F.R. § 205.3(d)(2)(ii). This rule is part of the Sarbanes-Oxley rules and permits disclosure to the SEC to prevent an issuer in an administrative proceeding from committing perjury or related offenses.

¹⁴⁵20 C.F.R. §§ 404.1740(a)(2), (b)(6), (c)(3), (c)(7)(ii)(B); 416.1540(a)(2), (b)(6), (c)(3), (c)(7)(ii)(B).

¹⁴⁶29 C.F.R. §§ 18.22(d)(2), 18.87(b).

¹⁴⁷38 C.F.R. §§ 14.632(a)(2), 633(c)(2).

¹⁴⁸7 C.F.R. § 1.328(a)(2).

¹⁴⁹8 C.F.R. § 1003.102(l).

¹⁵⁰20 C.F.R. §§ 404.1740(c)(4), 416.1540(c)(4). The SSA rule references § 404.911(b), which sets forth an extensive list of “good cause” reasons for delay.

¹⁵¹29 C.F.R. §§ 18.22(c) & (d)(3), 18.87(b).

¹⁵²38 C.F.R. § 14.632(c)(7).

¹⁵³7 C.F.R. §§ 1.151(b), 1.316, 110.8(n), 15.68.

¹⁵⁴17 C.F.R. § 201.114(a).

¹⁵⁵20 C.F.R. §§ 404.1740(c)(7)(ii)(C), 416.1540(c)(7)(ii)(C).

¹⁵⁶29 C.F.R. § 18.87(b).

because many agencies have a rule prohibiting *ex parte* contact that applies to representatives as well as claimants but state consequences only for the claimant, not separate consequences for the representative. I have erred on the side of including all *ex parte* rules unless it is clear that the only potential sanction is against the claimant. The agencies with a rule on obstruction of justice are VA, DHS, FERC, SSA, and DOL. Thus, VA, SSA, and DOL all have rules governing this group of topics.

The remaining five topics in the eleven most addressed topics are covered by rules of just more than half (four) of the seven sampled agencies with specific rules of professional conduct. These topics are competence, withdrawal, frivolous claims, improperly influencing a judge or official, and commission of a criminal act. The agencies with one or more rules on competence are DHS,¹⁵⁸ SSA,¹⁵⁹ DOL,¹⁶⁰ and VA.¹⁶¹ The agencies with one or more rules on withdrawal are SEC,¹⁶² SSA,¹⁶³ DOL,¹⁶⁴ and VA.¹⁶⁵ The agencies with one or more rules on frivolous claims are USDA,¹⁶⁶ DHS,¹⁶⁷ DOL,¹⁶⁸ and VA.¹⁶⁹ The agencies with a rule on improperly influencing a judge or official are DHS,¹⁷⁰ SSA,¹⁷¹ DOL,¹⁷² and VA.¹⁷³ Finally, the agencies with one or more rules on commission of a criminal act are DHS,¹⁷⁴ SSA,¹⁷⁵ DOL,¹⁷⁶ and VA.¹⁷⁷ These last two

¹⁵⁷38 C.F.R. § 18b.92.

¹⁵⁸8 C.F.R. § 1003.102(o). This rule is the only agency rule that tracks the language of ABA Model Rule 1.1 exactly. It also adds the text of comment [5] to Rule 1.1.

¹⁵⁹20 C.F.R. 404.1740(a)(1) & (b)(3)(i), 416.1540(a)(1) & (b)(3)(i). Section 1740(b)(3)(i) tracks the language of ABA Model Rule 1.1, but adds: “A representative must know the significant issue(s) in a claim, have reasonable and adequate familiarity with the evidence in the case, and have a working knowledge of the applicable provisions of the Social Security Act, as amended, the regulations, the Social Security Rules, and any other applicable provisions of law.”

¹⁶⁰29 C.F.R. § 18.22(b).

¹⁶¹38 C.F.R. § 14.632(b)(1), 14.633(d). VA also includes mandatory CLE requirements concerning veterans’ benefits law in § 14.629. In addition, VA and SSA are the only two agencies that expressly require knowledge of the statutes and regulations relevant to practice before those agencies.

¹⁶²17 C.F.R. § 201.102(d)(4) (notice only).

¹⁶³20 C.F.R. §§ 404.1740(b)(3)(iv), 416.1540(b)(3)(iv).

¹⁶⁴29 C.F.R. § 18.22(e).

¹⁶⁵38 C.F.R. §§ 14.631(c), 20.6 (special withdrawal rule for Board of Veterans’ Appeals).

¹⁶⁶7 C.F.R. § 1.303(a) (rule not specifically directed at representatives).

¹⁶⁷8 C.F.R. § 1003.102(j) & (u) (“boilerplate” filings). Section 102(j) is based more on Fed. R. Civ. P. 11 than on ABA Model Rule 3.1.

¹⁶⁸29 C.F.R. § 18.35.

¹⁶⁹38 C.F.R. § 14.633(c)(4).

¹⁷⁰8 C.F.R. § 1003.102(b).

¹⁷¹20 C.F.R. §§ 404.1740(c)(6), 416.1540(c)(6).

¹⁷²29 C.F.R. § 18.22(d)(1)

¹⁷³38 C.F.R. § 18b.91.

¹⁷⁴8 C.F.R. § 1003.102(h).

¹⁷⁵20 C.F.R. §§ 404.1740 (c)(8), 416.1540(c)(8).

¹⁷⁶29 C.F.R. § 18.23(a)(1)(iii).

topics are the only ones with the same configuration of agencies adopting rules on them. These are also the four interviewed agencies with the greatest number of professional conduct rules.

The remaining topics, not covered by a majority of the sampled agencies, fall into a range of categories. Three topics, duty to disclose adverse authority, witness tampering, and discovery abuse, are topics covered by the ABA Model Rules section on “Advocacy.”¹⁷⁸ Topics outside this group covered by the rules of three of the sampled agencies include several addressing the lawyer-client relationship: diligence, communication, fees, and confidentiality. The only other topic outside the “Advocacy” group covered by the rules of three of the sampled agencies is engaging in unethical conduct or acting unethically through another. Topics outside the “Advocacy” group covered by the rules of two of the sampled agencies include aiding and abetting a violation of rules or law, gifts from clients, conflict of interest of former agency employees, truthfulness in statements to third parties, and general dishonesty or misrepresentation. Finally, topics outside the “Advocacy” group covered by the rule or rules of only one of the sampled agencies include representative authority, duties of an organizational client, duties of managerial or supervisory representatives or their subordinates, and advertising and solicitation.

VI. IMPLEMENTATION AND ENFORCEMENT OF THE AGENCY PROFESSIONAL CONDUCT RULES

One of the primary reasons for conducting this study was to try to get a better sense of how the agencies implement and enforce their professional conduct rules. The interviews included several questions attempting to get at these issues. First, do agencies make their professional conduct rules easily available, and what kind of guidance, if any, do agencies give to attorney and non-attorney representatives to assist them in determining their responsibilities under these rules? Second, does the agency publicize its disciplinary actions? Third, how often do agencies raise disciplinary issues or bring formal disciplinary proceedings? Fourth, do agencies refer disciplinary matters to state disciplinary agencies or receive referrals from those agencies? Fifth, and related, does the agency engage in any kind of reciprocal discipline? And sixth, who enforces the rules within the agency? This section reports on the answers to these questions received in the interviews, supplemented with references to the relevant agency rules.

A. Accessibility and Guidance

¹⁷⁷38 C.F.R. § 14.632(c)(4) & (11).

¹⁷⁸See ABA Model Rules of Professional Conduct, Rule 3.3(a)(2) (“A lawyer shall not knowingly ... fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”); Rule 3.4(b) (“A lawyer shall not ... falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”); Rule 3.4(d) (“A lawyer shall not ... in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party.”).

Rulemakers often try to reduce the burden of complying with their rules by increasing accessibility to the rules or providing interpretive guidance. Although agency professional conduct rules are available in the Code of Federal Regulations, which itself is accessible in various ways, the findings from the previous section suggest that representatives may not find it easy to locate these rules in the CFR, especially if those representatives do not generally practice before an agency. That may not matter if the professional conduct rules are easily accessible elsewhere, such as on the agency's website.¹⁷⁹ Most of the sampled agencies include their professional conduct rules on their websites, though rather than separate out the professional conduct rules, the agencies often simply list or link to all agency rules, or all the rules of practice and procedure for that agency.¹⁸⁰ Two agencies in the sample, NLRB and SEC, provide links to the eCFR System maintained by the National Archives.¹⁸¹ Two other agencies in the sample group, FERC and DHS, do not include their rules on their websites.¹⁸²

Apart from accessibility, agencies generally provide little guidance on their professional conduct rules. Unlike the ABA in its Model Rules of Professional Conduct and many state disciplinary authorities, no agencies in the interviewed sample provide comments, illustrations, or ethics opinions on their rules. The DHS/EOIR rules do include several comments from the ABA Model Rules of Professional Conduct in the text of the rules.¹⁸³ Some agencies publish a practice and procedure manual,¹⁸⁴ fact sheet,¹⁸⁵ or web page¹⁸⁶ that discusses their professional

¹⁷⁹The Administrative Conference has previously adopted recommendations regarding the accessibility of agency adjudication rules. Admin. Conf. of the U.S., Recommendation 2018-5, Public Availability of Adjudication Rules, 84 Fed. Reg. 2142 (Feb. 6, 2019).

¹⁸⁰See <https://oalj.oha.usda.gov/rules> (USDA); https://www.ssa.gov/representation/conduct_standards.htm (SSA); www.va.gov/ogc/accreditation.asp (VA) (link to a pdf for Standards of Conduct under Fact Sheets); www.dol.gov/agencies/oalj/topics/libraries/LIBRULES (DOL). The DOL webpage includes a helpful section on the regulatory history of its rules of practice and procedure.

¹⁸¹See www.nlr.gov/guidance/key-reference-materials/rules-regulations (NLRB); <https://www.sec.gov/about/rulesofpractice.shtml> (SEC). Interestingly, the link on the SEC webpage is only to Part 200, not to Part 205 (Sarbanes-Oxley Rules), though once in the eCFR system, one can get to the Part 205 rules.

¹⁸²An interviewee from FERC stated that the agency follows the Department of Energy practice manual, but I was not able to locate that on the DOE website. Although DHS does not include its rules or any other information relating to its conduct rules on its website, EOIR, with which DHS closely coordinates on these issues, does publish several policy manuals, referenced below.

¹⁸³See 8 C.F.R. § 1003.102(o) (incorporating part of Comment [5] to ABA Model Rule 1.1); 8 C.F.R. § 1003.102(q) (incorporating part of Comments [2]-[4] of ABA Model Rule 1.3).

¹⁸⁴NLRB publishes a Guide to Board Procedures, which can be accessed on its website, www.nlr.gov/guidance/key-reference-materials/manuals-and-guides. The Guide includes a brief section entitled Misconduct by an Attorney or Other Representative. The section references (but does not include the text of) Rule 102.177, cites to several cases, and states that allocations of misconduct “may be brought to the attention of the Associate General Counsel in the Division of Operations-Management by any person.” EOIR, which coordinates with DHS, has several different types of practice manuals. It has a Policy Manual with Chapters on OCIJ (Office of Chief Immigration Judge) Practice (Chapter 10 of which is entitled Discipline of Practitioners, and includes a section on Filing a Complaint) and BIA (Board of Immigration Appeals) Practice (Chapter 11 of which is entitled Discipline, and includes a section on Complaints). See www.justice.gov/eoir/eoir-policy-manual.

¹⁸⁵The EOIR Fact Sheet can be accessed through the web page for the EOIR Policy Manual, cited above, which in Part I – Introduction includes Chapter 6 on Attorney Discipline. That web page in turn has a link to the

conduct rules, though those publications generally focus more on the procedures for enforcing the rules than substance. An interviewee from the SEC said that the agency does offer Practicing Law Institute presentations, including Power Point slides, discussing its professional conduct rules, but does not publish those on its website. An interviewee from the VA said that the VA gives presentations in which the agency discusses past violations of its professional conduct rules, but these presentations are also not available on the agency website.

B. Publication of Disciplinary Orders

Even if agencies do not provide much guidance in general about their professional conduct rules, they could provide information about actual discipline they impose, which could inform practitioners about the types of conduct the agencies find most objectionable. Most of the interviewed agencies do not, however, publish this information. Three of the interviewed agencies – USDA, FERC, and the VA – provide no information at all about discipline cases. Another interviewed agency – EOIR (DHS) – publishes lists of disciplined practitioners but not the grounds for discipline.¹⁸⁷ That suggests the main intent is to provide information for claimants looking for information about representatives rather than for practitioners. The NLRB

“Attorney Discipline website.” Clicking on that link leads to a web page entitled Attorney Discipline Program, www.justice.gov/eoir/attorney-discipline-program, which includes a link to an Attorney Discipline Fact Sheet (both in English and Spanish), a link to a form for submitting a complaint (again, both in English and Spanish), and lists of Recognized Organizations, Accredited Representatives, and Currently and Previously Disciplined Practitioners. Various forms can also be found at www.justice.gov/eoir/formslst.htm. Under the lists of Currently and Previously Disciplined Practitioners, one finds links to the materials in the Federal Register from the 2000 and 2008 revisions to the Professional Conduct rules. It seems somewhat odd to put those links on these web pages rather than on the Attorney Discipline Program web page.

The VA publishes several Fact Sheets on its website under the Office of General Counsel/Accreditation & Discipline web page. See www.va.gov/ogc/accreditation.asp. These include pdfs on the Standards of Conduct and How to File a Complaint Regarding Representation.

¹⁸⁶See https://www.ssa.gov/representation/conduct_standards.htm. The SSA web page is entitled Standards of Conduct for Representatives. It contains links to the conduct rules, as well as to the SSA’s Program Operations Manual (POMS) and Hearings, Appeals, and Litigations Law Manual (HALLEX). The web page also states: “Any person who believes that an attorney or non-attorney representative has acted in a manner that violates the Rules of Conduct should promptly report that representative to an SSA field or hearing office.” The web page also gives the address of the Office of General Counsel of SSA.

¹⁸⁷Under 8 C.F.R. § 292.3(h)(3), DHS “may ... disclose[] to the public” disciplinary actions other than private censures (unless those are introduced as evidence of prior discipline in a subsequent proceeding). Similarly, under 8 C.F.R. § 1003.106(c) states: “If disciplinary sanctions are imposed against a practitioner or a recognized organization (other than a private censure), the Board may require that notice of such sanction be posted at the Board, the Immigration Courts, or DHS for a period of time during which the sanctions are in effect, or for any other period of time as determined by the Board.” The EOIR website (but not the DHS website) has links to Currently and Previously Disciplined Practitioners at www.justice.gov/eoir/attorney-discipline-program and www.justice.gov/eoir/profcond/chart.htm. The lists include the name of the practitioner, the date of discipline, the nature of the discipline imposed, and whether the practitioner was reinstated (Currently Disciplined Practitioners are generally those who have not been reinstated, whereas Previously Disciplined Practitioners are generally those who have been reinstated). Although there are links to pdf files, those files do not include any information about the nature of the allegations, or the specific rules relied on.

publishes its disciplinary opinions, but these are not easily accessible on the NLRB website.¹⁸⁸ Only one agency – the SEC¹⁸⁹ – regularly publishes on its website disciplinary orders that include information about the grounds for discipline. DOL has published a few disciplinary orders, which are accessible on its website, but those orders do not always discuss the grounds for discipline.¹⁹⁰ An interviewee from SSA reports that the agency publishes a list of disqualified representatives, but I was not able to locate a current list on the SSA website,¹⁹¹ at least on the web pages dealing with representative conduct.¹⁹²

C. Frequency of Discipline

One reason for the paucity of information about discipline is that there are not many disciplinary cases in the agencies. That seems to be the case for most agencies in the interviewed sample. An interviewee from the VA did not have information about the frequency of disciplinary actions in that agency. An interviewee from FERC reported that professional conduct problems were rare and cited the fact that practitioners who appear before the agency are a relatively small bar of repeat players. An interviewee from USDA was not aware of a lawyer ever being debarred from practicing before the agency, and the interviewee did not view the

¹⁸⁸NLRB does have a Case Search web page at www.nlr.gov/search/case, but searches for “102.177” (the NLRB’s professional conduct rule) or “Rule 102” or “Misconduct by Attorneys or Other Representatives” (the title of the NLRB’s professional conduct rule) yielded no results.

¹⁸⁹SEC disciplinary orders can be found on the SEC website under Enforcement and then Administrative Proceedings, www.sec.gov/litigation/admin.htm. Although the web page includes all SEC orders in administrative proceedings, not simply those related to practitioners, an interview from the SEC informed me that attorney discipline cases can easily be found by searching under “Respondents” for “Esq.,” which I confirmed to be the case.

¹⁹⁰DOL disciplinary orders can be found on the DOL website under the Office of Administrative Law Judge and then Keyword Search/Case Number Search under the Search Tools tab. An interviewee from DOL informed me that attorney discipline cases (of which there is only one in recent years) can be found by clicking on Search by Case Number and then typing in MIS (for miscellaneous) under Case Type (though not all MIS cases are disciplinary cases). The most recent case is In the Matter of the Qualifications of Kevin M. Tracy, Esq. and Susan M. Jeanette, Case No. 2017-MIS-0001 (June 11, 2019). The published order in that matter does not reveal the grounds for discipline. On the other hand, In the Matter of the Qualifications of Edwin H. Rivera, Case No. 2009-MIS-2 (Feb. 6, 2009) does discuss the concerns giving rise to a judicial inquiry, though the actual basis for discipline was failure to cooperate with that inquiry.

¹⁹¹The SSA website does have a list of Sanctioned Representatives filed in response to a FOIA request, but that list has not been updated since 2018. See https://www.ssa.gov/foia/OGC_SanctionedReps_current.pdf. The list simply includes the name of the disciplined representative, the representative’s state and zip code, whether the representative is an attorney or non-attorney, the type of sanction (disqualified, suspended, not recognized), and the date of discipline. The list does not indicate the grounds for discipline.

¹⁹²Another agency that publishes final disciplinary decisions is USPTO. USPTO publishes these decisions on its OED (Office of Enrollment and Discipline) Reading Room website, which can be accessed by clicking on Learning and Resources, then Patent and Trademark Practitioners, then Finding a patent (or trademark) practitioner, and then clicking on the link for OED Final Decisions in the FOIA Reading Room under Disciplined Practitioners. The Reading Room web page enables a searcher to organize the information by Proceeding Number, Decision Related Text (type of decision), Respondent Name, Decision Type (Discipline, Fees, Legal, Moral, Reinstatement), and Date (going back to 1996). Clicking on a Final Order leads to a pdf with an opinion discussing the grounds for discipline.

professional conduct of representatives as a significant problem. An interviewee from NLRB reported that from 1951-2008, the NLRB issued approximately 16 disciplinary decisions, a very low number.¹⁹³ An interviewee from that agency speculated that one possible reason there are not more cases is that, because the NLRB has only a general incorporation rule of conduct and no specific supplementary rules, the NLRB generally pursues only egregious cases of obvious misconduct.¹⁹⁴

Similarly, an interviewee from DOL stated that misconduct by representatives is not a big issue in the agency. That interviewee stated that fewer than 30 total cases have gone to the chief judge for consideration of sanctions, including only one case in recent years involving the failure to supervise staff.¹⁹⁵ Before 2015, when the agency revised its rules, the interviewee was aware of one reciprocal discipline case in which an immigration attorney engaged in fraud, and one case involving an allegation of withholding of evidence from an ALJ in an agency proceeding, which had ultimately been referred to a state disciplinary system rather than being resolved within DOL.¹⁹⁶ The interviewee also stated that the agency was fairly tolerant of zealous advocacy and that ALJs did not want to intervene too often out of respect for the representative's role.

Disciplinary actions were more common in the other three interviewed agencies. An interviewee from the SEC did not have any definitive information about frequency of discipline but noted a significant number of reported cases. An interviewee from DHS reported that approximately 30,000 attorneys appear before the agency.¹⁹⁷ From that pool, DHS gets approximately 150 disciplinary cases per year (only .5% of the total number of lawyers, but still a nontrivial number of cases). EOIR gets approximately 600-700 cases per year (around 2% of the total number of lawyers, assuming the same lawyers practice before both agencies).

Finally, an interviewee from SSA did not have information about the frequency of disciplinary cases but did note several recurring professional conduct issues, including representatives' failing to provide requested information to the agency in a timely manner and

¹⁹³See, e.g., In re: Kirk Caraway, 347 NLRB 884(2006); In re: James Simpson, 347 NLRB 883 (2006); In re: Stuart Bochner, 322 NLRB 1096 (1997); Joel Keiler, 316 NLRB 763 (1995); Sargent Karch, 314 NLRB 482 (1994); Rowland Trucking, 270 NLRB 247 (1984); Roy T. Rhodes, 152 NLRB 912 (1965); Herbert J. Nichol, 111 NLRB 447 (1955) (non-attorney union representative suspended for threatening decertification petitioner during recess in hearing). In a recent ruling, the NLRB referred allegations of unethical conduct against two lawyers to the Investigating Officer for investigation and such disciplinary action as may be appropriate. National Association of Broadcast Employees & Technicians, 371 NLRB No. 15 n.4 (Aug. 25, 2021).

¹⁹⁴That speculation is consistent with the NLRB's conduct rule, which states that only misconduct of an "aggravated character" may be grounds for sanction. 29 C.F.R. § 102.177(c).

¹⁹⁵In the Matter of the Qualifications of Kevin M. Tracy, Esq. and Susan M. Jeanette, Case No. 2017-MIS-0001 (June 11, 2019).

¹⁹⁶Lawyer Disciplinary Board v. Smoot, 716 S.E.2d 491 (W.Va. 2010) (suspending lawyer from practice for one year for violating Rules 3.4(c), 8.4(c) and 8.4(d) of the West Virginia Rules of Professional Conduct).

¹⁹⁷As a comparison, there are approximately 48,000 active patent practitioners. Jon J. Lee, *Double Standards: An Empirical Study of Patent and Trademark Discipline*, 61 B.C. L. Rev. 1613, 1632 (2020).

failing to communicate with clients. However, in the interviewee’s view, the agency initiates relatively few disciplinary cases, in part because it is difficult for an ALJ to accuse attorneys of not doing a good job. ALJs are conscious of the fact that the legal community of SSA lawyers is relatively small, and ALJs are hesitant to take action that could ruin a representative’s career. The SSA interviewee also suggested that historically, the Office of General Counsel (OGC), which is responsible for initiating formal discipline within SSA, generally takes the “lowest hanging fruit” and the “worst of the worst,” including people already disqualified elsewhere (reciprocal discipline is discussed below). According to the interviewee, OGC generally needs “hard evidence” to proceed and so is reluctant to do so. The SSA interviewee’s observations are confirmed by the last available public list of disciplined practitioners. From 1983 to 2018, the SSA imposed formal discipline on 303 practitioners, an average of approximately 9 per year.¹⁹⁸

Although not included in the interview sample, the USPTO was recently the subject of an empirical study, which found that over a 16-year period from 2003 to 2018, USPTO disciplinary rates “though increasing slightly ..., lag far behind state disciplinary authorities.”¹⁹⁹ The study found that over this period, the USPTO issued 410 public disciplinary orders,²⁰⁰ averaging 26 disciplinary cases per year,²⁰¹ which is approximately a .04% disciplinary rate compared to .27% disciplinary rate for state discipline.²⁰² The top areas for discipline were diligence, misrepresentation, conduct prejudicial to the administration of justice, conduct reflecting adversely on fitness to practice, and client communication.²⁰³

D. Referrals

When agency officials learn of potential professional misconduct by an attorney representative, the officials may, either in addition to, or instead of, pursuing disciplinary action within the agency, choose to refer the matter either to a state disciplinary authority or to another agency. In some cases, referral may even be ethically required.²⁰⁴ As in other areas, the agencies take different approaches to the question of referral, both in terms of their rules and their

¹⁹⁸ See https://www.ssa.gov/foia/OGC_SanctionedReps_current.pdf.

¹⁹⁹ Lee, *supra*, at 1619. The study also concluded that “patent practitioners are disciplined more frequently, more severely, and more publicly than their trademark counterparts.” *Id.*

²⁰⁰ *Id.* at 1657.

²⁰¹ *Id.* at 1659.

²⁰² *Id.* at 1661.

²⁰³ *Id.* at 1669.

²⁰⁴ See ABA Model Rules of Professional Conduct, Rule 8.3(a) (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”); ABA Model Code of Judicial Conduct, Rule 2.15(B) (“A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.”). An administrative law judge is a “judge” within the meaning of the Code, *id.* Rule 1(B). “Knowledge” under both rules is defined as “actual knowledge,” which “may be inferred from circumstances.” ABA Model Rules of Professional Conduct, Rule 1.0(f); ABA Model Code of Judicial Conduct, Terminology.

practices. In addition, some interviewees reported that their agencies receive referrals *from* state disciplinary authorities.

Among the sampled agencies, three – FERC, USDA, and SSA – have no referral rule and the interviewees from those agencies were not aware of a regular practice of doing so. Two other interviewed agencies – the SEC and the NLRB – have no referral rule but, according to the interviewees from those agencies, do have a practice of referring cases to other disciplinary authorities. An interviewee from the SEC reported that the agency both makes referrals to and receives referrals from state disciplinary authorities. The interviewee also reported, based on that person’s experience, that state agencies take referrals from the SEC seriously.

According to an interviewee from NLRB, that agency has a policy of notifying any appropriate state bar, as well as the ABA National Lawyer Regulatory Data Bank, of disciplinary sanctions the agency imposes on an attorney. The NLRB noted this policy when it published its 1996 revision to its professional conduct rule, which the NLRB declined to amend by putting the policy in the rule.²⁰⁵ In addition, based on the NLRB’s Casehandling Manual, the General Counsel of the NLRB may report ethical violations to a state bar, usually after the NLRB completes its internal process. An interviewee from the NLRB also recalled one case in which the Board referred to the state bar an allegation that an attorney had suborned perjury during the pre-complaint investigation of an unfair labor practice charge.²⁰⁶ In that case, the NLRB was unable to discipline the lawyer within the agency because at that time (before the 1996 rule revision), the agency’s professional conduct rule was limited to misconduct in hearings. Finally, the interviewee reported that earlier this year, an ALJ had considered reporting a lawyer’s conduct to a state disciplinary authority without making an independent finding of misconduct.

The other three agencies – VA, DOL, and DHS – have referral rules, which differ in several respects. The VA has a permissive referral rule, which states: “In cases where the accreditation of an agent or attorney is cancelled, the Office of the General Counsel may notify all agencies, courts, and bars to which the agent or attorney is admitted to practice.”²⁰⁷ In addition, the VA in practice sometimes makes referrals to state agencies when it concludes that the state disciplinary authority is in a better position to investigate the alleged misconduct. Relevant factors include whether the alleged misconduct goes beyond VA-specific issues, whether the VA has applicable rules and appropriate penalties to address the misconduct, and the desirability of making the matter public. An interviewee from the VA reported that state

²⁰⁵ 61 Fed. Reg. 65323, 65330-31 (Dec. 12, 1996) (“We generally agree that the appropriate state bar(s) should be notified of any disciplinary sanctions imposed on an attorney and ... it is our policy to do so absent special circumstances. ... However, as such notification of a public disciplinary action does not itself constitute discipline or create any rights or impose any obligations on the respondent attorney, we see no need to include a provision to this effect in the rule”). The NLRB stated the “special circumstances” as potentially including a situation where the Board agrees not to refer the matter pursuant to a settlement agreement, *id.* n.16, which could raise ethical issues, at least for lawyers and ALJs.

²⁰⁶ *Townsend Mfg. Co.*, 317 NLRB 1169 (1995).

²⁰⁷ 38 C.F.R. § 14.633(i).

authorities have sometimes referred matters to the VA, and sometimes have even sent a case back to the VA that the VA had referred over to the state authority. According to the interviewee, that happens because statute authorities do not always understand the VA's special fee rules or its adjudication system.

DOL has a mandatory referral rule that applies whenever it disqualifies an attorney representative. The rule requires the Chief Judge to provide a copy of the decision and order not only to the jurisdictions in which the attorney is licensed to practice, but also to the National Lawyer Regulatory Data Bank maintained by the ABA Standing Committee on Professional Discipline.²⁰⁸ DOL reported that ALJs make referrals both to state disciplinary authorities and, for immigration cases, to DHS.

DHS has the most elaborate referral rule of all the interviewed agencies. The rule states:

*In addition to, or in lieu of, initiating disciplinary proceedings against a practitioner, the DHS disciplinary counsel may notify any appropriate Federal and/or state disciplinary or regulatory authority of any complaint filed against a practitioner. Any final administrative decision imposing sanctions against a practitioner (other than a private censure) will be reported to any such disciplinary or regulatory authority in every jurisdiction where the disciplined practitioner is admitted or otherwise authorized to practice.*²⁰⁹

Unlike the VA and DOL referral rules, the DHS rule explicitly incorporates the option to discipline a practitioner internally in addition to referring the matter to another disciplinary authority or simply to refer the matter and not discipline the practitioner within DHS. In addition, unlike the VA and DOL referral rules, the DHS rule expressly permits DHS to make a referral at the complaint stage; DHS need not wait to make a referral until it completes its internal process. Like DOL's rule, the DHS rule includes a mandatory referral provision for any case in which DHS imposes sanctions. In addition to this referral rule, both DHS and EOIR have mandatory mutual referral rules to each other, and in fact often jointly file charges against a practitioner.²¹⁰ Finally, although not required by the EOIR referral rule, EOIR disciplinary counsel reports public discipline to the ABA's National Lawyer Regulatory Data Bank, as DOL does.

An interviewee from DHS reported that the agency does in fact make referrals to state disciplinary authorities. The agency does not, however, always learn the outcome of these matters because some discipline is confidential. The DHS interviewee reported that sometimes

²⁰⁸29 C.F.R. 18.23(b).

²⁰⁹8 C.F.R. § 292.3(g) (emphasis added). EOIR has the same referral rule. 8 C.F.R. § 1003.106(d).

²¹⁰8 C.F.R. § 292.3(d)(1) ("The DHS disciplinary counsel will notify EOIR disciplinary counsel of any disciplinary complaint that pertains, in whole or in part, to a matter before the Board or the Immigration Courts."); 8 C.F.R. § 292.3(e)(3) ("A copy of the Notice of Intent to Discipline shall be forwarded to the EOIR disciplinary counsel."); 8 C.F.R. § 1003.105(b): "A copy of the Notice of Intent to Discipline filed by the EOIR disciplinary counsel shall be forwarded to DHS.")

state authorities hesitate to take on immigration matters, and, as with the VA, refer disciplinary cases in this subject area to DHS/EOIR because the state authorities may not have much knowledge of immigration law, especially in jurisdictions that do not have many immigration cases.²¹¹

E. Reciprocal Discipline

Related to referral rules, reciprocal discipline rules have been adopted by many agencies.²¹² Reciprocal discipline means that a representative disciplined in another jurisdiction or by another agency may, for that reason alone (rather than for misconduct before the agency now seeking to impose discipline), be disqualified from serving as a representative initially,²¹³

²¹¹The interviewee comments are consistent with the cooperative approach to discipline contemplated by the Attorney General when proposing amendments to the regulations governing the discipline system in the Bureau of Immigration Affairs and Immigration Courts in 2000:

EOIR and the [Immigration and Naturalization] Service [now DHS] anticipate working closely with the various state bars when investigating disciplinary complaints.... Cooperation between the federal and government and the 51 state bar disciplinary authorities will optimize resources and minimize duplication of investigations. In general, state bars have not been resistant to the Federal government's efforts to assist in protecting the public by scrutinizing the professional conduct of attorneys.

Professional Conduct for Practitioners; Rules and Procedures, 65 Fed. Reg. 39, 513, 39,524 (June 27, 2000). In the context of non-attorney representation, an example of this state-agency cooperation can be found in a New Jersey Unauthorized Practice of Law Opinion from 2005 concerning the problem of non-attorney representatives providing incompetent, overpriced, or fraudulent immigration services, often before a hearing before the agency:

We believe that the interests of the public will be better served if this Committee works cooperatively with federal authorities in this regulatory area. In most complaints filed with our Committee it appears that the ministrations of unauthorized representatives are rarely brought before immigration agencies; if they are, defects in the filings and proceedings often already have resulted in irreparable harm to the unwary litigant-victims. In a cooperative venture, our Committee will continue to receive complains from attorneys and the public alleging unauthorized practice of law in immigration matters. The Committee will then examine the alleged qualifications of the respondent under 8 C.F.R. § 292.1 and his or her compliance with the conditions set forth in the pertinent subsection under which representation is undertaken. If a respondent before our Committee is found to be unaccredited or otherwise not permitted to provide representation or services in immigration matters, the Committee will communicate with Department of Justice, Executive Office for Immigration Review, the local immigration court, the Department of Homeland Security Office of Citizenship and Immigration Services and Immigration and Customs enforcement asking whether the agencies intend to mandate compliance or whether the federal authorities will cede jurisdiction, in appropriate cases, to the Committee on the Unauthorized Practice of Law.

N.J. UPL Op. 42 (2005).

²¹²In addition to the agencies in the interviewed sample, other agencies that have an express reciprocal discipline rule of some kind include the Federal Reserve Board, 12 C.F.R. §§ 263.94(d) & (g); Federal Deposit Insurance Corporation, 12 C.F.R. § 308.109(b)(1); Commodity Futures Trading Commission, 17 C.F.R. § 14.6; Bureau of Alcohol Tobacco and Firearms, 31 C.F.R. § 8.52(h); Judge Advocate General (Navy) 32 C.F.R. § 776.71; US Patent and Trademark Office, § 11.804(h); Department of Interior, 43 C.F.R. § 1.6(a); and Federal Communications Commission, 47 C.F.R. § 1.24(c).

²¹³Reciprocal discipline does not run afoul of the APA rule discussed above because an attorney disciplined in another jurisdiction would not be "in good standing" in that jurisdiction and so not permitted to practice under the APA rule. *See* 5 U.S.C. § 500(b) ("An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration

and is also subject to discipline by the agency if the person has already been serving as a representative despite the restriction on practice elsewhere.²¹⁴ Reciprocal discipline may be the most common form of agency discipline. An interviewee from DOL reported that to be the case in that agency, and that is also a finding of a recent empirical study of the USPTO.²¹⁵ Once again, the agencies in the sample vary in their approaches to reciprocal discipline. Some have no rule, some have different rules depending on when in the proceeding the agency becomes aware of the outside discipline, and some expressly require an attorney representative to self-report discipline against that attorney in another jurisdiction or agency.²¹⁶

FERC, NLRB, and USDA have no express reciprocal discipline rule.²¹⁷ The other five interviewed agencies have one or more reciprocity rules. The SEC rule is the simplest, stating that “[a]ny attorney who has been suspended or disbarred by a court of the United States or of any State ... shall be forthwith suspended from appearing or practicing before the Commission.”²¹⁸ The rule adds that the discipline triggering the reciprocity is deemed to occur at the time of the initial order, even if the attorney has the right to appeal that order.

that he is currently qualified as provided by this subsection and is authorized to represent the particular person on whose behalf he acts.”). The matter is less clear if an attorney is disciplined in one jurisdiction but still a member of good standing in another jurisdiction. Read literally, § 500(b) only requires an attorney to be a member in good standing of the bar of “a” State. However, if a jurisdiction has adopted ABA Model Rule 5.5, a lawyer disciplined in one state would not be able to take advantage of the rule allowing the lawyer to practice before a federal agency located in a different state where the lawyer is not licensed, because that rule only allows such practice if the lawyer is not “disbarred or suspended from practice in *any* jurisdiction.” ABA Model Rule 5.5(c) & (d) (emphasis added). On the other hand, that rule would not prohibit a lawyer licensed in states A and B and disciplined only in state A from practicing before a federal agency located in state B. For a case upholding the imposition of reciprocal discipline by USPTO based on discipline the lawyer received in one state, but where the lawyer had not been given reciprocal discipline in other states in which the lawyer was licensed, see *Chaganti v. Lee*, 187 F. Supp.3d 682, 693 (E.D. Va. 2016) (finding that “the decisions of other state bars are irrelevant to the PTO’s decision whether to impose reciprocal discipline in accordance with its own standards”). The court in *Chaganti* noted that an order suspending an attorney from practice before the USPTO must be done in accordance with the APA, *id.* at 690, but did not specifically discuss § 500(b), likely because the practitioner’s attorney did not raise that argument.

²¹⁴The ABA includes a reciprocal discipline provision in its Model Rules for Lawyer Disciplinary Enforcement (Rule 22), and many states have reciprocal discipline rules. Whether a state disciplinary authority must apply reciprocal discipline to a final disciplinary order by an agency is beyond the scope of this report. *See In re Kelly*, 857 So.2d 451 (La. 2003) (disciplining a lawyer who had previously been disqualified by SSA but on the basis of an independent review of the facts rather than reciprocal discipline); *Attorney Grievance Commission of Maryland v. Miller*, 528 A.2d 481 (Md. 1987) (holding that a US Court of Appeals’ affirmance of an Interstate Commerce Commission suspension was not a “disciplinary hearing by a judicial tribunal” and its decision was not conclusive proof of an attorney’s guilt for purposes of state discipline).

²¹⁵*Lee, supra*, at 1659 (finding that reciprocal discipline represents almost half of all public discipline imposed by USPTO).

²¹⁶In addition to the interviewed agencies, the USPTO rules also include a self-reporting duty. 37 C.F.R. § 11.24.

²¹⁷USDA has an internal reciprocity rule, under which a lawyer who is found to have engaged in unethical conduct in one proceeding before the agency, is precluded from acting as counsel in any other proceeding before the agency. 7 C.F.R. § 1.141(d)(2). USDA likely has such a rule because of the fragmented nature of its practice rules under different statutory regimes overseen by the agency, as discussed above.

²¹⁸17 C.F.R. § 201.102(e)(2).

The VA and DOL split their reciprocal discipline rules into rules denying the representative the right to appear in the first instance (which VA calls accreditation and DOL calls admission) and rules imposing a sanction after the representative has already been engaged in appearing and practicing before the agency (which VA calls cancellation and DOL calls disqualification). The post-appearance reciprocity rules of the two agencies are similar²¹⁹ but the pre-appearance rules differ in a few ways. First, the VA non-accreditation rule is mandatory, with only a limited exception for a situation in which an attorney has been reinstated by a jurisdiction that imposed discipline but has not yet been reinstated by another jurisdiction that had imposed reciprocal discipline based on the first jurisdiction's discipline.²²⁰ By contrast, the DOL's admission rule gives the ALJ the discretion to admit a lawyer disciplined elsewhere to practice before the agency.²²¹ Second, the DOL rule, but not the VA rule, imposes a duty on an attorney to self-report any disciplinary action against that attorney.²²²

Like DOL, both DHS and SSA include a self-reporting duty in their rules.²²³ But neither

²¹⁹The VA rule states: "Accreditation or authority to provide representation on a particular claim shall be canceled when the General Counsel finds, by clear and convincing evidence, one or more of the following: ... Suspension or disbarment by any court, bar, or Federal or State agency to which such individual providing representation under §14.630, representative, agent, or attorney was previously admitted to practice, or disqualification from participating in or appearing before any court, bar, or Federal or State agency and lack of subsequent reinstatement." 38 C.F.R. § 14.633(c)(5). The DOL further splits its post-appearance reciprocity rule in two. 29 C.F.R. 18.23(a)(1)(i) ("Representatives qualified under 18.22 may be disqualified for ... Suspension of a license to practice law or disbarment from the practice of law by any court or agency of the United States, highest court of a State, Commonwealth, or Territory of the United States, or the District of Columbia."); 29 C.F.R. 18.23(a)(1)(ii) ("Representatives qualified under 18.22 may be disqualified for ... Disbarment from the practice of law on consent or resignation from the bar of a court or agency while an investigation into an allegation of misconduct is pending.).

²²⁰38 C.F.R. § 14.629(b)(5) ("VA will not accredit an individual as an agent or attorney if the individual has been suspended by any court, bar, or Federal or State agency in which the individual was previously admitted and not subsequently reinstated. However, if an individual remains suspended in a jurisdiction on grounds solely derivative of suspension or disbarment in another jurisdiction to which he or she has been subsequently reinstated, the Chief Counsel with subject-matter jurisdiction may evaluate the facts and grant or reinstate accreditation as appropriate."). *See also* 38 C.F.R. § 14.629(b)(3) ("Evidence showing lack of good character and reputation includes, but is not limited to, one or more of the following: ... suspension or disbarment from a court, bar, or Federal or State agency on ethical grounds; or resignation from admission to a court, bar, or Federal or State agency while under investigation to avoid sanction.").

²²¹29 C.F.R. § 18.22(b)(1)(ii) ("An attorney who is not in good standing in his or her licensing jurisdiction may not represent a party or subpoenaed witness before the Office of Administrative Law Judges, unless he or she obtains the judge's approval. Such an attorney must file a written statement that establishes why the failure to maintain good standing is not disqualifying. The judge may deny approval for the appearance of such an attorney after providing notice and an opportunity to be heard.").

²²²29 C.F.R. § 18.22(b)(1)(iii) ("An attorney representative must promptly disclose to the judge any action suspending, enjoining, restraining, disbarring, or otherwise currently restricting the attorney in the practice of law in any jurisdiction where the attorney is licensed to practice law."). According to the DOL interviewee, this requirement was added after a case in which a lawyer had been disbarred in one jurisdiction but was still in good standing in other jurisdictions and did not inform the agency of the disbarment.

²²³The DHS self-reporting rule states: "a practitioner must notify DHS disciplinary counsel if the

agency has an express pre-appearance rule (though presumably if an attorney self-reported discipline at the outset, as required, an ALJ could deny that attorney the right to appear before either agency). The primary reciprocal discipline rules of the two agencies are similar,²²⁴ but each agency adds distinct reciprocal discipline rules. DHS includes a reciprocal discipline rule with EOIR, consistent with its general coordination with that agency,²²⁵ as well as a reciprocal discipline rule (incorporated via EOIR) for a lawyer found to have provided ineffective assistance of counsel by a court or ALJ in an immigration proceeding, if a disciplinary complaint concerning the matter is subsequently filed.²²⁶ SSA has a rule providing guidance to a Hearing Officer tasked with considering reciprocal discipline.²²⁷ The rule permits the Hearing Officer not to disqualify the practitioner if the prior discipline was imposed solely for “administrative reasons” such as failure to pay dues or complete CLE requirements. On the other hand, the rule permits the Hearing Officer to disqualify the practitioner regardless of how long the other imposed discipline lasts, and also directs the Hearing Officer not to “re-examine or revise the factual or legal conclusions that led to the disbarment, suspension, or disqualification.”²²⁸

That last aspect of the SSA rule, relating to whether in effect a practitioner can collaterally challenge before the agency discipline previously imposed by another disciplinary authority, raises potential due process questions. DHS pointed out that it has long been guided by

practitioner has been ... suspended or disbarred by, or while a disciplinary investigation or proceeding is pending has resigned from, the highest court of any State, possession, territory, or Commonwealth of the United States, or the District of Columbia, or any Federal court; or placed on an interim suspension pending a final resolution of the underlying disciplinary matter.” 8 C.F.R. § 292.3(c)(4); *see also* 8 C.F.R. § 1003.103(c) (EOIR). SSA divides the self-reporting duty into three separate rules. 20 C.F.R. § 404.1740(b)(7) (stating that a representative must disclose “whether the representative is or has been disbarred or suspended from any bar or court to which he or she was previously admitted to practice”); 20 C.F.R. § 404.1740(b)(8) (stating that a representative must disclose “whether the representative is or has been disqualified from participating in or appearing before any Federal program or agency”); 20 C.F.R. § 404.1740(b)(9) (stating that a representative must disclose “whether the representative has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person’s character, integrity, judgment, reliability, or fitness to serve as a fiduciary”).

²²⁴The DHS rule, via EOIR, subjects a lawyer to discipline if the lawyer: “Is subject to a final order of disbarment or suspension, or has resigned while a disciplinary investigation or proceeding is pending.” 8 C.F.R. § 1003.102(e). *See, e.g.,* *Gadda v. Ashcroft*, 377 F.3d 934 (9th Cir. 2004) (disbarring a lawyer from practicing before the Ninth Circuit where the lawyer had first been disbarred by the California disciplinary authority and then had been reciprocally disciplined by DHS based on the state discipline). SSA again breaks up the reciprocal discipline rule into three separate sections, the first two of which apply to any representative and the third of which applies only to non-attorney representatives. 20 C.F.R. § 404.1745(d) (sanctions can be imposed if a representative “[h]as been, by reason of misconduct, disbarred or suspended from any bar or court to which he or she was previously admitted to practice”; 20 C.F.R. § 404.1745(e) (sanctions can be imposed if a representative “[h]as been, by reason of misconduct, disqualified from participating in or appearing before any Federal program or agency”); 20 C.F.R. § 404.1745(f) (sanctions can be imposed on a non-attorney representative who “has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person’s character, integrity, judgment, reliability, or fitness to serve as a fiduciary.”).

²²⁵8 C.F.R. § 292.3(e)(3).

²²⁶8 C.F.R. § 1003.102(k).

²²⁷20 C.F.R. § 404.1770(a)(2).

²²⁸*Id.*

a precedent requiring the agency seeking to impose reciprocal discipline to “include the opportunity [for the practitioner] to show that the [previous] state order was based on an invalid procedure or patently inadequate evidence.”²²⁹ In this regard, it is worth noting that USPTO allows reciprocal discipline to be collaterally challenged based on due process or related concerns with the prior discipline is USPTO.²³⁰

F. Who Enforces the Rules within the Agency

Finally, all the agencies with professional conduct rules include procedural rules for enforcing the conduct rules, including who within the agency is responsible for initiating formal charges, who makes the initial determination, and who can hear appeals. The agencies again vary in all these areas as well as in the level of detail provided. The discussion in the interviews focused on how enforcement works in practice.

Several of the interviewed agencies have rules that provide little procedural detail. USDA simply notes under its various conduct provisions who makes the determination that the rules have been violated.²³¹ The SEC rule simply states that the Commission enforces the conduct rule.²³² The FERC rule states that the rules of conduct can be enforced by the “presiding officer” or the “Commission.”²³³ Similarly, DOL states that the Chief Judge makes a disqualification determination, based on “reliable, probative and substantial evidence of record.”²³⁴ An interviewee from DOL, however, stated that most disciplinary issues are resolved by the ALJ during the course of a hearing in an informal way.

Unlike these agencies VA puts the initial responsibility for cancelling accreditation in the

²²⁹In re Bogart, 15 I&N Dec. 552, Interim Decision 2465, 1975 WL 31580 (1976) (Attorney General opinion). The INS (predecessor agency to DHS) had imposed reciprocal discipline to disbar the lawyer from practice based on a prior criminal conviction, *People v. Bogart*, 7 Cal. App.3d 257 (1970), and an order from the California Supreme Court suspending him from practice in California, under a rule that at the time allowed the Board, with the approval of the US Attorney General, to suspend any attorney who had been suspended from practice in any court. The Ninth Circuit reversed this determination, stating that the lawyer “has a constitutional right to a hearing before the agency before being denied the right to further practice before the agency, department regulations to the contrary notwithstanding.” *Bogart v. Carter*, 445 F.2d 321 (9th Cir. 1971) (citing *In re Ruffalo*, 390 U.S. 544(1968) and *Theard v. United States*, 354 U.S. 278 (1057)). Subsequently, the lawyer was suspended from practice in California, *In re Bogart*, 511 P.2d 1167 (Cal. 1973), and the INS again sought to disbar the attorney, now based on the state discipline. The Attorney General decision followed that action. To date, no other courts or agencies outside DHS have cited the Ninth Circuit opinion or the Attorney General opinion.

²³⁰37 C.F.R. § 11.24(d)(1)(i)-(iv).

²³¹See 7 C.F.R. § 1.26(b)(2) (Secretary); 7 C.F.R. § 1.141(d)(1) & 1.151(d) (Judge or Judicial Officer); 7 C.F.R. § 1.328(a) (Administrative Law Judge); 7 C.F.R. § 110.8(h)(3) (Presiding Officer).

²³²17 C.F.R. § 201.102(e)(1); see also 17 C.F.R. § 205.6 (again simply referring to enforcement by the SEC).

²³³18 C.F.R. §§ 385.411(a)(5) & (b); 385.2101(a) & (b).

²³⁴29 C.F.R. 18.23(a)(2).

hands of the General Counsel,²³⁵ who must find a violation by “clear and convincing evidence.”²³⁶ The General Counsel’s decision is a “final adjudicative determination” that may be appealed only to the Board of Veterans’ Appeals.²³⁷

The other three interviewed agencies have a more detailed procedural structure. In SSA, after referral to a regional Office of General Counsel (OGC) office, that office begins an investigation. OGC will then determine whether to issue a “notice containing a statement of charges.”²³⁸ That can lead to a hearing before an ALJ hearing officer, designated by the Deputy Commissioner for the Office of Hearings Operations.²³⁹ According to an SSA interviewee, three to four ALJs regularly handle these matters. The ALJ’s decision is final,²⁴⁰ but can be appealed to the Appeals Council.²⁴¹

NLRB gives an ALJ, a Hearing Officer, or the Board authority on their own to “admonish or reprimand” a representative who engages in misconduct at a hearing.²⁴² More formal proceedings can be triggered by any person, including an ALJ or the Board itself, filing an allegation, which sets in motion a more elaborate set of procedures.²⁴³ No special form is needed.²⁴⁴ An Investigating Officer, who is generally the head of the Division of Operations – Management,²⁴⁵ conducts an investigation and makes a recommendation to the General Counsel.²⁴⁶ If the General Counsel decides to go forward with disciplinary proceedings, the accused representative is served with a formal complaint, given an opportunity to answer, and given a public hearing before an ALJ.²⁴⁷ Prior to the hearing, a settlement may be reached with the General Counsel. The settlement must be approved by the ALJ and, if disciplinary action is included, the Board.²⁴⁸ If the hearing goes forward and misconduct is found, the Board may then issue a final order imposing sanctions.²⁴⁹ The sanctioned practitioner may then seek judicial review.²⁵⁰

²³⁵38 C.F.R. § 14.633(b).

²³⁶38 C.F.R. § 14.633(c).

²³⁷38 C.F.R. § 14.633(h).

²³⁸20 C.F.R. § 404.1750(a).

²³⁹20 C.F.R. § 404.1765(b).

²⁴⁰20 C.F.R. § 404.1770.

²⁴¹20 C.F.R. § 404.1780.

²⁴²29 C.F.R. § 102.177(b).

²⁴³29 C.F.R. § 102.177(e).

²⁴⁴61 Fed. Reg. 65323-02 n.12.

²⁴⁵29 C.F.R. § 102.177(e)(1).

²⁴⁶29 C.F.R. § 102.177(e)(2).

²⁴⁷29 C.F.R. § 102.177(e)(3)-(7).

²⁴⁸29 C.F.R. § 102.177(e)(11).

²⁴⁹29 C.F.R. § 102.177(e)(12). Although the rule states that the Board can order suspension, disbarment, or “other sanctions,” an interviewee from NLRB was not clear what “other sanctions” the Board might impose.

²⁵⁰29 C.F.R. § 102.177(f).

In DHS, a complaint can be made by any person who believes a representative has engaged in unprofessional conduct,²⁵¹ though most complaints come from ALJs or other officers, often because they notice missing documentation. Although the rule contemplates complaints coming from clients or former clients, in fact, according to an interviewee from DHS, few complaints come from clients, making it hard to learn of misconduct toward clients as opposed to misconduct toward the agency. The complaint is filed with the DHS disciplinary counsel. At the present time, according to an interviewee, DHS has only one disciplinary counsel to handle all complaints. If the matter is not informally resolved, the disciplinary counsel may issue a Notice of Intent to Discipline,²⁵² with a copy to EOIR disciplinary counsel.²⁵³ A hearing then occurs with a right to appeal.²⁵⁴ According to a DHS interviewee, the Chief Immigration Judge appoints an immigration judge as the adjudicating official. The judge must not be a judge before whom the practitioner regularly appears or who is the complainant or witness in the matter.²⁵⁵

VII. CONCLUSIONS AND RECOMMENDATIONS

This study has attempted to shed light on the operations of federal agency disciplinary systems applicable to practitioners representing parties involved in adjudicatory matters before the agencies. Overall, the biggest conclusion, which confirms my earlier work on this topic, is the great variety of approaches the agencies take on almost every possible issue, from how the agencies regulate who may engage in practice, to how they structure the professional conduct rules, to how they implement and enforce those rules. Because of time constraints and the limited sample size, drawing any broad conclusions about what, if anything, should be done about this variety is difficult. Variety is not necessarily bad and may simply reflect the great differences among the agencies generally in their missions, governing statutes, other rules, structures, and cultures. On the other hand, excessive variety can also create inefficiencies in running the administrative state and may reflect a lack of knowledge of problems and alternative approaches and administrative inertia.

With a few exceptions, the interviews did not reveal any great concern by the

²⁵¹8 C.F.R. § 292.3(d)(1). Under this provision, the DHS disciplinary counsel must notify EOIR disciplinary counsel if the allegation pertains to a matter before the Board or the Immigration Courts.

²⁵²8 C.F.R. § 292.3(e).

²⁵³8 C.F.R. § 292.3(e)(3).

²⁵⁴8 C.F.R. § 292.3(f). The procedures for the hearing and appeal are set out in the EOIR rules, 8 C.F.R. § 1003.106.

²⁵⁵The disciplinary procedure in USPTO is summarized in Lee, *supra*, at 1633-36. The process initiates when the Office of Enforcement and Discipline (OED) Director receives information warranting an investigation. If the Director finds that a violation has occurred, and does not reach a settlement agreement or believe that a warning letter is sufficient, the Director may convene the Committee on Discipline, a three-member panel appointed by the USPTO Director, which then makes an independent determination of whether there is probable cause to proceed. If the Committee recommends going forward, there is a hearing before an ALJ who can impose sanctions. The practitioner has a right to appeal to the OED Director, and then to the U.S. District Court for the Eastern District of Virginia.

interviewees with how the rules currently operate. Perhaps most professional conduct issues that arise are successfully handled informally and the instances of serious ethical wrongdoing are rare. There are reasons, however, to be cautious in drawing that conclusion. First, some interviewees raised concerns about the lack of resources for handling disciplinary matters and the tendency to ignore all but the most egregious cases of misconduct. Second, the interviewees were all agency representatives rather than claimants or parties, private practitioners, or outside observers. Those from outside the agencies may have a different perspective. Third, the recent empirical study of USPTO discipline documented a far lower percentage of practitioners being disciplined by the agency than by state disciplinary authorities, thus providing some evidence that there may be an underenforcement problem.

Nevertheless, despite the limited nature of the study, the possibility of beneficial or harmless variety, and the lack of expressed concern over the current operation of the rules, this section will offer several recommendations that the agencies might consider to improve the operation of their internal disciplinary systems. The suggestions can be usefully grouped into three categories: information and transparency, coordination, and harmonization.

A. Information and Transparency

There are several ways agencies could improve on providing information about agencies' professional conduct rules and discipline under those rules. First, agencies could do a better job of making their rules easier to find, both for claimants and practitioners. The agencies could group their professional conduct rules together in a single location, or at least cross-reference rules located elsewhere. The agencies could publish the rules on their websites, not simply lumped in with other regulations or even rules of procedure but on separate web pages dedicated to explaining the necessary qualifications, roles, and responsibilities of attorney and non-attorney representatives, including how to file claims against representatives who have engaged in misconduct. Second, agencies could provide more guidance for practitioners apart from the rules themselves, whether in the form of examples and illustrations based on past cases or other experience, or presentations to practitioners that the agency subsequently makes available on its website, or summaries of past issues in disciplinary cases.²⁵⁶ Guidance could be particularly helpful to non-attorney representatives and thus could improve the quality of their representations and perhaps facilitate the greater use of these representatives. Third, the agencies could provide more complete information about disciplinary sanctions on their websites.²⁵⁷ Although some agencies publicize up-to-date lists of disciplined representatives, not all do. Even when agencies do provide these lists, they may not include information about the rules violated and/or the nature of the violation. And even if that information is available by, say, downloading a pdf of a disciplinary judgment, no agency provides the capability to search for cases involving

²⁵⁶In his study of the USPTO, Professor Lee endorses the promulgation of ethics opinions by the agency. Lee, *supra*, at 1684.

²⁵⁷For arguments supporting greater disciplinary transparency in state disciplinary systems, see Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 209 Geo. J. Legal Ethics 1 (2007); Jacquelyn M. Desch, Note, *Attorney Discipline Online*, 29 Geo. J. Legal Ethics 921, 923 (2016).

a certain rule or type of conduct, which would be more useful to practitioners.²⁵⁸ Even for non-public sanctions, agencies could publicize redacted information in particular cases or periodic summary reports describing the rules violated and the nature of the misconduct.²⁵⁹

Another way to increase transparency and guidance would be for ACUS to publicize and update a collection of agency rules similar to the spreadsheet that I created for my earlier article. An updated version of that spreadsheet is attached as an appendix to this report. ACUS could also create a webpage dedicated to practice by representatives before federal agencies that would provide other information as well, such as links to the relevant agency webpages containing the rules of professional conduct, lists of disciplined representatives, information about filing claims, and information about qualifications. Agencies could use this resource to compare their rules more easily to those of other agencies as well as to the ABA Model Rules of Professional Conduct. Practitioners could also benefit from having a broader set of guidance on which to draw. Apart from collecting the rules, ACUS or could collect and publicize important cases and ethics opinions addressing agency representative practice generally. Alternatively or conjunctively, the ABA Administrative Law Section could participate in these activities.

B. Coordination

A second area for improvement is to increase coordination among agencies and between agencies and outside groups to facilitate reciprocal discipline, share information about best practices and common issues, to and to discuss potential rule additions or modifications. With respect to reciprocal discipline, interviewees several agencies reported their agency's participation in the ABA National Lawyer Regulatory Data Bank. Given the agency rules and practices on referral and reciprocal discipline, it seems that all agencies with such rules, if not all agencies with professional conduct rules, should participate in this Data Bank, both to refer disciplined representatives and to check on the status of representatives before the agencies. With respect to information sharing, interviewees from some agencies reported their agency's involvement with the National Organization of Bar Counsel or the National Association of State

²⁵⁸ In his study of the USPTO disciplinary system, Professor Lee writes:

The OED section of the [USPTO] website is difficult to navigate and requires users to actively look for information on discipline. ... Although the OED Reading Room website allows users to search for public discipline, users need to understand how disciplinary actions are organized in order to perform an effective search. Even then, the search returns PDF versions of documents with descriptive labels such as 'Final Order,' which means a user has to read the entire document to learn the specifics about the practitioner's misconduct and sanction imposed. Again, there is no compiled information on the public website about the frequency of public discipline or the types of misconduct that may lead to public discipline.

Lee, *supra*, at 1683. He argues that the USPTO could redesign its website to look more like North Carolina's, which enables "users to search past disciplinary orders, read a roadmap of the disciplinary process, view annual disciplinary reports, and learn how to file a grievance or engage in alternative dispute resolution." *Id.* n.361,

²⁵⁹ See Lee, *supra*, at 1684 (noting the "opportunity to share redacted information" related to private discipline as well as the possibility of providing "short summaries of ... actions").

Attorneys General. More federal agencies could participate in meetings with these groups to learn of current problems and to improve coordination for purposes of reciprocal discipline. In addition (or alternatively), those charged with enforcing the professional conduct rules within agencies could create a group analogous to the National Association of Bar Counsel to discuss common disciplinary issues in federal agencies, to compare rules and practices, and to discuss proposed amendments. ACUS or the ABA Administrative Law section could potentially provide support to facilitate such coordination.

C. Harmonization

Focusing on greater information, transparency, and coordination could naturally lead to greater harmonization of agency rules and procedures governing representative practice in adjudicatory matters. Taking further steps to increase harmonization might be excessively costly given available resources, politically infeasible, not justified by an agency's structure or mission, or simply unnecessary. Nevertheless, the fact that we have the ABA Model Rules of Professional Conduct and a Restatement of the Law Governing Lawyers, as well as uniform rules for government lawyers practicing in federal agencies, suggests that may value in providing some common ground for rules of professional conduct, even though that common ground leaves room for jurisdictional variation. Thus, it is worth setting out some justifications for greater harmonization and some possible ways it could be pursued.

There are several potential benefits to harmonization for all participants in the administrative system and others who interact with it. For attorney practitioners, greater harmonization of rules of professional conduct reduces problems of being subject to different, and possibly conflicting, rules in a matter. For non-attorney practitioners, greater harmonization could, depending on how it is implemented, increase the likelihood that they will be subject to the same rules as attorney practitioners. For all practitioners, greater harmonization, even in how the professional conduct rules are labeled, would provide a greater range of potentially relevant precedent to guide their decisions or respond to allegations. It could also facilitate practicing before multiple agencies without having to learn different rules of conduct.

Greater harmonization could also benefit the agencies and actors within those agencies. Like practitioners, agency participants in the disciplinary system could also benefit from having a greater range of potentially relevant precedent to guide their enforcement and adjudicatory decisions. Harmonization could facilitate information sharing and the provision of joint agency guidance, which would save time and cost. In addition, greater harmonization could facilitate movement among agencies. For example, a federal statute provides that an agency that is understaffed with ALJs can borrow ALJs selected by the Office of Personnel Management from other agencies with consent of those agencies.²⁶⁰ Greater harmonization would make it easier for ALJs who develop an expertise in agency discipline could to be used to hear disciplinary cases in

²⁶⁰5 U.S.C. § 3344. *See, e.g., In re Slavin*, 2003 WL 21499867 n.1 (DOL Adm. Rev. Bd) (describing an ALJ for HUD being temporarily detailed under this statute to assist DOL in a whistleblower case).

multiple agencies. Somewhat more aggressively, if agency rules were more uniform, it would be easier to establish an independent enforcement agency that could handle agency disciplinary cases and issue ethics opinions.

Greater harmonization could provide other benefits as well. Increased uniformity could also help state disciplinary authorities in making decisions about referrals and reciprocal discipline and in applying ABA Model Rules 3.4(c)²⁶¹ and 8.5(b)(1).²⁶² And greater uniformity could also benefit the public more generally. If harmonization facilitates the ability of both attorney and non-attorney representatives to move with greater ease across agencies, that could reduce the cost of representation. If harmonization reduces costs to the agencies, that could also benefit the public through better agency service by redirecting agency expenditures in ways that better serve the public.

Harmonization can take several possible forms. The most minimal form of harmonization would be harmonization of style: rules could have similar labels and use similar language. For example, encouraging all agencies to refer to their disciplinary rules as “professional conduct rules,” or something similar, would make the rules of different agencies easier to find and compare. Another form of harmonization would be harmonization of rules within an agency. Although most agencies have uniform rules within the agency, USDA does not. Another approach would be harmonization among agencies in a similar practice or subject area, as the financial agencies have done to some degree with their Uniform Rules of Practice and Procedure. Yet another approach would try to increase harmonization among agencies performing similar adjudicatory functions, such as applications for government benefits or regulatory enforcement actions.

Agencies could also attempt to harmonize the content of their rules in various ways. The eleven most common topics among the interviewed agencies discussed above could be a good starting point for agencies to start thinking about greater harmonization of their professional practice rules. At the most aggressive end of the spectrum would be harmonization of all agency rules with the ABA Model Rules, with variation as needed to deal with agency-specific issues, similar to the approach USPTO has taken.

²⁶¹ABA Model Rule 3.4(c) makes it an ethical violation for a lawyer to “knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.” An agency acting in an adjudicatory capacity is a “tribunal” under Model Rule 1.0(m)

²⁶²ABA Model Rule 8.5(b)(1) states that when a state disciplinary authority acts, the rules of professional conduct the disciplinary authority applies to “conduct in connection with a matter pending before a tribunal” are “the rules of the jurisdiction sits, *unless the rules of the tribunal provide otherwise.*” As noted in the previous footnote, an agency acting in an adjudicatory capacity is a “tribunal” under Model Rule 1.0(m) and it will often have its own rules of professional conduct rather than adopt the ethics rules of the jurisdiction in which the tribunal sits. See Phila. Eth. Op. 96-12 n.3 (1996) (stating that “Rule 8.5 and its comments ... make it clear that when the conduct is in connection with a proceeding in an agency, it is the agency’s rules that apply”).