PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 10. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 11. In § 602.101, paragraph (c) is amended as follows:

1. The following entries are removed from the table:

§ 602.101 OMB Control numbers.

* * * * *

(c) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.108(c)–1T	1545–1421
* * * * *	
1.163(d)–1T	1545–1421
* * * * *	
1.1044(a)–1T	1545–1421
* * * * *	
1.6655(e)–1T	1545–1421

2. The following entries are added in numerical order to the table:

§ 602.101 OMB Control numbers.

* * * * *

(c) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.108(c)–1	1545–1421
* * * * *	
1.163(d)–1	1545–1421
* * * * *	
1.1044(a)–1	1545–1421
* * * * *	
1.6655(e)–1	1545–1421

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Approved: November 1, 1996.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

[FR Doc. 96–31362 Filed 12–11–96; 8:45 am]

BILLING CODE 4380–01–U

26 CFR Parts 1 and 602

[TD 8687]

RIN 1545–AT92

Source of Income From Sales of Inventory and Natural Resources Produced in One Jurisdiction and Sold in Another Jurisdiction; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final and temporary regulations.

SUMMARY: This document contains corrections to final and temporary regulations (TD 8687), which were published in the Federal Register on Friday, November 29, 1996 (61 FR 60540) governing the source of income from sales of natural resources or other inventory produced in the United States and sold outside the United States or produced outside the United States and sold in the United States.

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Anne Shelburne (202) 622–3880, (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that are the subject of these corrections are under section 863 of the Internal Revenue Code.

Need for Correction

As published, the final regulations contain errors which may prove to be misleading and are in need of clarification. Correction of Publication

Accordingly, the publication of the final regulations (TD 8687), which are the subject of FR Doc. 96–30617, is corrected as follows:

1. On page 60540, column 3, in the preamble, under the caption **DATES**, line 3, the language ''*Applicability*: Taxpayers may apply'' is corrected to read ''*Applicability*: These regulations apply to taxable years beginning after December 30, 1996. However, taxpayers may apply''.

§ 1.863–1 [Corrected]

2. On page 60546, column 3, §1.863–1 (e), is corrected to read as follows:

§ 1.863–1 Allocation of gross income.

* * * * *

(e) *Effective dates.* The rules of paragraphs (a), (b) and (c) of this section will apply to taxable years beginning after December 30, 1996. However, taxpayers may apply the rules of this section for taxable years beginning after July 11, 1995, and on or before December 30, 1996. For years beginning before December 30, 1996, see §1.863–1 (as contained in 26 CFR part 1 revised as of April 1, 1996).

* * * * *

§ 1.863–2 [Corrected]

3. On page 60547, column 1, § 1.863–2 (c), line 2, the language ''apply to taxable years beginning'' is corrected to read ''apply to taxable years beginning after''.

4. On page 60547, column 2, § 1.863–2 (c), line 2 from the top of the column, the language ''1995, and before December 30, 1996.'' is corrected to read ''1995, and on or before December 30, 1996.''.

§ 1.863–3 [Corrected]

5. On page 60550, column 3, § 1.863–3 (h), is corrected to read as follows:

§ 1.863–3 Allocation and apportionment of income from certain sales of inventory.

* * * * *

(h) *Effective dates.* The rules of this section apply to taxable years beginning after December 30, 1996. However, taxpayers may apply these regulations for taxable years beginning after July 11, 1995, and on or before December 30, 1996. For years beginning before December 30, 1996, see §§ 1.863–3A and 1.863–3AT.

* * * * *

Cynthia E. Grigsby,

Chief, Regulations Unit, Assistant Chief Counsel (Corporate).

[FR Doc. 96–31717 Filed 12–10–96; 2:21 pm]

BILLING CODE 4830–01–U

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

Rules Governing Misconduct by Attorneys or Party Representatives

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board issues a final rule modifying its current rules governing misconduct by attorneys and party representatives.

EFFECTIVE DATE: January 13, 1997.

FOR FURTHER INFORMATION CONTACT: John J. Toner, Executive Secretary, National Labor Relations Board, 1099 14th Street, NW, Room 11600, Washington, DC 20570. Telephone: (202)273–1940.

SUPPLEMENTARY INFORMATION: In a notice of proposed rulemaking (NPR) published on May 20, 1996 (61 FR 25158), the Board proposed various

changes to § § 102.44 and 102.66(d) of its rules governing misconduct by attorneys and party representatives at unfair labor practice and representation hearings, respectively. The proposed changes consolidated the current misconduct rules into a single rule, revised the rules to cover misconduct at any and all stages of any Agency proceeding, attempted to clarify the types of misconduct covered by the revised rule by substituting the phrase ''misconduct, including unprofessional or improper behavior'' for the current phrase, ''misconduct of an aggravated character,'' and set forth the procedures for processing allegations of misconduct. In addition, the proposed rule revised § 102.21 of the Board's rules governing the filing of answers to unfair labor practice complaints to make that section's disciplinary provisions applicable to non-attorney party representatives as well as attorneys.

The Board received 11 comments in response to the NPR. Those submitting comments included the NLRA Practice and Procedure Committee of the American Bar Association (ABA) Labor and Employment Law Section (hereafter ABA Practice and Procedure Committee),[1] seven management-side law firms or attorneys, one union-side attorney,[2] and two labor organizations (AFL-CIO and UAW). Many of the comments were extensive and stated a number of objections to the proposed rule changes or offered suggestions as to ways to improve the rule. These objections or suggestions are addressed by subject matter below.

I. Scope of Rule

The Board's current misconduct rules are unlike the misconduct rules adopted by many other Federal agencies in that they apply only to misconduct at hearings. As indicated above, the Board's NPR proposed that the rules be extended to cover misconduct at any and all stages of any Agency proceeding, including the investigative, pre-hearing and/or compliance stages of a representation or unfair labor practice proceeding. As explained in the NPR, the purpose of this change was to provide the Board with the same authority held by other Federal agencies to take appropriate and effective disciplinary action against attorneys or other representatives who have engaged in misconduct occurring outside of hearings. As noted in the NPR, because the current rule lacks such a provision, the Board in the past has been unable to impose such discipline, and instead has been forced to request the applicable state bar to investigate and process such allegations. See, e.g., *Townsend Mfg. Co.,* 317 NLRB 1169 (1995) (Board referred to state bar allegation that attorney suborned perjury during pre-complaint investigation of unfair labor practice charge).

Six of the 11 comments filed in response to the NPR specifically addressed this aspect of the proposed rule. Of these, three (filed by the ABA Practice and Procedure Committee, the AFL–CIO, and the UAW) supported the change, and three (filed by management law firms Seyfarth, Shaw, Fairweather & Geraldson and Semler & Pritzker; and attorney Martin L. Garden) opposed it. The ABA Practice and Procedure Committee, the AFL–CIO, and the UAW all stated that they generally favored extending the rule beyond the hearing stage as proposed, and recommended that this be made even more explicit in the rule. The three management law firms opposing the change, on the other hand, argued that extending the rule to the pre and post-hearing stages, combined with the ''vague'' and ''nebulous'' proposed new language or standard for suspension or disbarment, could lead to attempts to intimidate party representatives during the investigative or preliminary stages of unfair labor practice or representation proceedings and chill aggressive or vigorous representation of clients.

Having carefully considered these comments, we have decided to retain this change in the final rule. In reaching this decision, we have been particularly influenced by the favorable comment submitted by the bipartisan ABA Practice and Procedure Committee. Further, as discussed below, we have decided not to retain the new language or standard for suspension or disbarment proposed in the NPR. Thus, we anticipate that, to the extent that proposed new language or standard was the primary or major source of the concerns expressed by those opposing the proposed extension of the rule, those concerns will be allayed. Finally, as noted above, modifying the Board's misconduct rule in this regard will conform it to the rules issued by numerous other Federal agencies which are not limited to misconduct occurring at hearings. See Federal agency rules discussed, infra.

Accordingly, the proposed extension of the rule is retained in the final rule. As suggested, we have also made this change even more explicit in the rule.

II. Standard for Discipline

As indicated above, the Board's NPR proposed that the phrase, ''misconduct, including unprofessional or improper behavior,'' be substituted for the current phrase, ''misconduct of an aggravated character.'' As indicated in the NPR, the intent of this proposal was to clarify to some extent the current language which had been criticized by some in the past as awkward or confusing. As emphasized in the NPR, the intent was not to make any substantive change in the current standard for imposing suspension or disbarment, and the Board would continue to consider both aggravating and mitigating circumstances in determining the appropriate sanction.

The comments submitted in response to the NPR indicate that the Board's attempt to clarify the rule in this respect was not generally well received, despite the Board's assurances that the clarification was not meant to make any substantive change. Thus, the ABA Practice and Procedure Committee and all of the management-side law firms or attorneys submitting comments strongly opposed the proposal on the ground that the proposed new language was vague and undefined and/or because it appeared to lower the current standard for suspension or disbarment by deleting the phrase ''of an aggravated character.'' The ABA Practice and Procedure Committee therefore urged that the Board retain the current standard, or, at a minimum, more clearly define what the new standard entails.

The AFL–CIO and UAW did not explicitly oppose the proposed new language or urge the retention of the current language, but likewise argued that the proposed new rule needed to be clarified. Thus, for example, the AFL–CIO argued that the Board should alert practitioners that certain conduct would be subject to discipline by including a non-exhaustive, illustrative list of the types of activities that would be subject to the rule.

In addition, both the AFL–CIO and the UAW offered specific suggestions as to what type of conduct should be included. Thus, the UAW argued that the rule should make clear that counseling or actively participating in the commission of an unfair labor practice would be subject to discipline.

[1] The comments of the ABA Practice and Procedure Committee were submitted by James J. Brady and Victor Schachter, the Union and Management Co-Chairs, respectively, of the ABA Practice and Procedure Committee's Subcommittee on Unauthorized Practice.

[2] The comment submitted by the union-side attorney (Victor J. Van Bourg of Van Bourg, Weinberg, Roger & Rosenfeld) did not address the substance of the proposed changes, but simply urged that the changes not be applied retroactively. The provisions set forth in the instant final rule, to the extent they are inconsistent or constitute a change from the current rule and/or practice, will operate prospectively only.

And while the AFL–CIO took no position on whether all unfair labor practices or violations of the Board's rules should be covered, it similarly argued that certain unfair labor practices or violations of the Board's rules should be subject to discipline, including violations of the Act or the Board's rules that relate to and would undermine the integrity of the Board's processes or where the representative's participation in a professional capacity was necessary to carry out the unlawful conduct. Specific examples offered by the AFL–CIO included: counseling parties to resist compliance with a valid subpoena in the absence of any valid objections thereto; aiding or assisting employers in committing violations of Section 8(a)(4) of the Act; aiding or assisting employers in committing certain Sec. 8(a)(1) violations, such as interrogating employees in preparing a defense to a complaint without following the safeguards set forth in *Johnnie's Poultry*, 146 NLRB 770 (1964), and requesting employees to provide copies of statements given to the Board; assisting employers in filing non-meritorious or preempted retaliatory lawsuits against employees or unions and attempting to conduct discovery in such proceedings to obtain information that could not otherwise be obtained in Board proceedings, such as the names of employees who attend organizational meetings, authorization cards, organizing documents, or Board affidavits; and conduct which violates the Board's rules governing the formal election process, including misconduct which protracts the representation hearing and objectionable conduct that necessitates a second election.

In view of the foregoing comments, which as indicated largely opposed the change, we have decided to reconsider the Board's original proposal in this regard. The Board's original proposal was based on two assumptions: (1) That the phrase ''of an aggravated character'' in the current rule sometimes caused confusion as to whether certain conduct was subject to suspension or disbarment, as opposed to lesser discipline such as a reprimand; and (2) that clarification would also be helpful in view of the proposal to extend the rule to cover misconduct occurring outside of hearings. Based on these assumptions, the Board reviewed the various types of misconduct rules issued by other agencies and decided to propose a minor modification to the language in the hope that this would provide some clarification and would be more understandable to practitioners. As indicated above and in the discussion accompanying the proposed rule, there was no intent to make any substantive change to the current standard.

However, as noted, virtually all of the comments expressed opposition to the Board's proposed new language on the ground that it was vague and undefined and appeared to lower the current standard. Moreover, a few also specifically questioned the Board's underlying assumptions. Thus, Jackson, Lewis, Schnitzler & Krupman, one of the management law firms submitting comments, argued that the current language is in fact clearly understood by practitioners and should be retained. As indicated above, the ABA Practice and Procedure Committee also urged the Board to retain the current language.

Having carefully considered these comments, we conclude that the proposed new language, ''misconduct, including unprofessional or improper behavior,'' rather than bringing greater clarity, would, at least in the short run, actually cause more confusion among practitioners. Although the Board took pains to emphasize in the discussion accompanying the proposed rule that it was not attempting to make any change in the standard by substituting this language for ''misconduct of an aggravated character,'' and that it would continue to consider both aggravating and mitigating circumstances in imposing discipline, it is obvious from the comments received that deletion of the phrase ''of an aggravated character'' from the rule is unlikely to gain widespread public understanding, acceptance or approval. Accordingly, we have decided not to adopt that proposal in the final rule. Further, as it appears that the current language is understood and accepted by practitioners, we have decided to retain the current language as urged by the ABA Practice and Procedure Committee.

However, for the reasons set forth in the NPR, and particularly in light of the other changes that are being proposed to extend the scope of the rules to cover misconduct outside hearings, we continue to believe that some clarification of the current rule would be helpful in order to provide guidance in future cases arising under the newly revised rule.

The question therefore remains as to the best way to clarify the rule. A review of the disciplinary rules issued by other agencies indicates that there are essentially three different alternatives available to the Board. The first alternative, and the one adopted by the Board in the NPR, is to attempt to define ''misconduct'' by the use of certain familiar adjectives. This approach has been adopted by the Securities and Exchange Commission (SEC) and the Commodity Futures Training Commission (CFTC). See 17 CFR 201.102(e)(providing that SEC may suspend or disbar any person found to have engaged in ''unethical or improper professional conduct''); and 17 CFR 10.11(b)(providing that CFTC may suspend or disbar any person found to have engaged in ''unethical or improper unprofessional conduct either in the course of an adjudicatory, investigative, rulemaking or other proceeding before the Commission or otherwise'').

A second alternative is to reference the standards of ethical conduct applied by the bars and/or courts, and require practitioners to conform to those standards.[3] This alternative, either by itself or in conjunction with the first alternative, has been adopted by the Federal Communications Commission (FCC), Federal Trade Commission (FTC), Federal Energy Regulatory Commission (FERC), and Department of Transportation (DOT). See 47 CFR Sec. 1.24 (providing the FCC may suspend or disbar any person who has ''failed to conform to standards of ethical conduct required of practitioners at the bar of any court of which he is a member;'' and/or displays conduct which if displayed toward any court of the United States would be cause for such discipline); 16 CFR 4.1(e)(providing that ''all attorneys practicing before the [FTC] shall conform to the standards of ethical conduct required by the bars of which the attorneys are members'' and that the Commission may suspend or disbar any attorney who ''is not conforming to such standards, or * * * has been otherwise guilty of conduct warranting disciplinary action''); 18 CFR 385.2012 (providing that any person appearing before FERC ''must conform to the standards of ethical conduct required of practitioners before the Courts of the United States,'' and that the Commission may suspend or disbar any person found to have engaged in ''unethical or improper professional conduct''); and 14 CFR 300.1, 300.6 and 300.20 (providing that ''every person representing a client in matters before DOT and in all contacts with DOT employees shall strictly observe the standards of professional conduct,'' that the rules of conduct set forth by DOT ''are to be interpreted in light of those standards,'' and that DOT may temporarily or permanently suspend from practice before it any person found to have engaged in ''unethical or improper professional conduct'').

The third alternative is to include an illustrative list of activities or conduct

that would warrant discipline. This alternative, which is essentially the alternative suggested by the AFL–CIO, has been adopted by the Immigration and Naturalization Service (INS), and the Internal Revenue Service (IRS). See 8 CFR 292.3 (INS); 31 CFR 10.51 (IRS).

As indicated above, in light of the comments received in response to the NPR, we have decided to abandon the first alternative. Although we do not believe that that alternative is an unreasonable or invalid one,[4] given the negative reaction to the Board's original proposal, we will no longer pursue that alternative and will turn to the other two alternatives.

In our view, the second alternative is the better of the two remaining approaches. Although the third alternative has the obvious advantage of providing clear notice that the conduct included in the list would be subject to discipline, it also has obvious disadvantages. For example, because such a list is non-exhaustive, it may lead practitioners to conclude that conduct that is not included in the list is not subject to discipline. In such circumstances, if a case subsequently arose involving conduct that was not included in the list, the attorney or other representative could argue that the Board had failed to provide sufficient notice that the conduct was subject to discipline, and indeed had suggested that the conduct was not considered inappropriate or sufficiently serious to warrant discipline by failing to mention it in the list.

Moreover, in our view the advantages of the second alternative outweigh the advantages of the third. Clearly, the standards of ethical conduct adopted by the bars and courts are standards with which attorneys are familiar. Further, they are standards which have guided the Board in past cases arising under the current rule involving hearing misconduct. See, e.g., *Joel Keiler*, 316 NLRB 763, 765–767 (1995) (citing ABA Model Rules for Lawyer Disciplinary Enforcement and cases applying ABA Model Code of Professional Responsibility and state rules of professional conduct); Sargent Karch, 314 NLRB 482, 486–487 (1994) (citing ABA Standards for Imposing Lawyer Sanctions); and Roy T. Rhodes, 152 NLRB 912, 917 (1965) (citing ABA Canons of Professional Ethics). See also *Rowland Trucking Co.*, 270 NLRB 247 n.1 (1984) (Board cited ABA Model Code of Professional Responsibility in condemning conduct of respondent's counsel). Thus, by referring to such standards in the new rule, it would be made clear in the rule that the Board intends to continue following those standards in future cases involving misconduct occurring outside as well as inside hearings.

We recognize that there are those who believe that some aspects of such standards of ethical conduct are themselves too vague. Indeed, for this reason, Haynsworth, Baldwin, Johnson and Greaves (hereafter ''Haynsworth, Baldwin''), one of the management law firms submitting comments, specifically urged the Board not to adopt Rule 8.4(d) of the Model Rules of Professional Conduct or DR1–102(A)(5) of the Model Code of Professional Responsibility, which state that it is professional misconduct for an attorney to ''engage in conduct that is prejudicial to the administration of justice.''

Further, as indicated in the NPR, unlike the courts, the Board does not require that all those who appear as party representatives before the Board be attorneys. See Secs. 102.38 and 102.66 of the Board's Rules and Regulations. Non-attorneys, of course, may not be as familiar with such ethical standards as attorneys. Thus, it could be argued that nonattorney party representatives should not be held to the same ethical standards applicable to attorneys.

However, neither of these arguments carries substantial weight in our view. The standards of ethical conduct applicable to attorneys have been well defined over the years in a wealth of caselaw applying those standards to a wide variety of situations. This is true not only with respect to the more specific provisions of such rules, but also with respect to broader provisions such as those prohibiting lawyers from engaging in conduct that is ''prejudicial to the administration of justice.'' Although such provisions are frequently criticized and have not been adopted by a few jurisdictions such as New Hampshire on the ground that they are too vague and/or overbroad, as indicated above such a provision was included in the Model Rules of Professional Conduct adopted by the ABA House of Delegates in 1983. Further, such provisions have generally been upheld by the courts. See ABA/BNA Lawyers' Manual on Professional Conduct (1996)(hereinafter ''Lawyers' Manual'') at 101:501, and cases cited there. See also *Howell* v. *State Bar*, 843 F.2d 205, 208 (5th Cir.), cert denied 488 U.S. 982 (1988)(holding that the phrase ''prejudicial to the administration of justice'' is neither overbroad nor vague on its face as case law, court rules, and the ''lore of the profession'' provide sufficient guidance).

Nor do we believe it unfair or unjust to hold nonattorney party representatives to the same standards as attorneys who appear and practice before the Agency. Indeed, the Board currently does so under its current ''aggravated'' misconduct standard, and has previously disciplined nonattorney representatives under that standard. See, e.g., *Herbert J. Nichol*, 111 NLRB 447 (1955)(suspending union's representative for six months for threatening decertification petitioner during recess in hearing). Although as noted above nonattorney representatives may not be as familiar with the standards of ethical conduct applied to attorneys by the bars and courts, we do not believe that this warrants the application of a different standard to such representatives. The primary purpose of disciplinary rules is to protect the integrity of the adjudicatory and administrative process, including the rights of parties, witnesses, and other participants. Were we to permit nonattorney party representatives to engage in conduct which would be prohibited if engaged in by attorneys, we would, in effect, be sanctioning conduct that undermines that process and may also prejudice or otherwise harm the parties and other participants. Like other agencies, we therefore have little hesitancy in requiring nonattorney party representatives to familiarize themselves with the standards of conduct applicable to attorneys and to comply with those standards. Cf. 18 CFR 385.2101 (requiring any person who appears before the FERC, which may include attorneys and other qualified representatives, to conform to the standards of ethical conduct required of practitioners before the courts).[5]

Accordingly, for all the foregoing reasons, we decline to adopt the third

[4] Indeed, we note that the SEC's rule, which as indicated above the proposed new language was largely modeled after, has been in existence for over half a century and has never been held invalid by any court. See *Sheldon* v. *SEC*, 45 F.3d 1515 (11th Cir. 1995); *Davy* v. *SEC*, 792 F.2d 1418, 1421–1422 (9th Cir. 1986); and *Touche Ross & Co.*, v. *SEC*, 609 F.2d 570, 578 (2d Cir. 1979).

[5] In so finding, we do not mean to suggest that there may never be any circumstances where a nonattorney representative's lack of understanding of or experience with such standards might appropriately be taken into account as a mitigating factor in determining the appropriate discipline. However, as a general matter, we believe it appropriate to apply the same standards to nonattorney representatives as we do to attorneys. Indeed, it is for this reason that the Board also proposed in the NPR to revise Sec. 102.21 of the Board's rules to subject nonattorney's to the same requirement and sanctions as attorneys with respect to the filing of answers. As discussed, infra, we have decided to also adopt that proposed change in the final rule.

approach suggested by the AFL–CIO,[6] and instead adopt the second approach followed by such agencies as the FCC, FTC, FERC and DOT by adding a provision at the beginning of the rule referencing the standards of ethical and/or professional conduct applicable to practitioners before the courts.

As indicated above and in the rule, the purpose of adding this provision is to codify the practice under the current rule and thereby make clear that the Board will continue to be guided by such standards of ethical and/or professional conduct in applying the new, revised rule. As in past cases arising under the current rule, such ''standards'' may include the ABA Model Rules of Professional Conduct (and/or any other standards adopted by the ABA in the future),[7] applicable state bar rules, and court decisions applying such rules. See cases cited, supra.

As with the Board's original proposal, we emphasize that the purpose of adding this provision is *not* to change the standard for imposing discipline. Indeed, as indicated above, we have decided to retain the current language which states that only ''misconduct of an aggravated character'' will subject an attorney or representative to suspension or disbarment. Nor is it the Board's intent in adding this provision to thereby suggest or imply that the Agency will take disciplinary action with respect to any and all alleged violations of each and every provision of such professional or ethical standards. Obviously, in determining whether to take disciplinary action in a particular case the Agency will take into consideration the alleged misconduct's actual or potential adverse impact on the administrative process. In those circumstances where the alleged conduct has little or no such impact, rather than take action under the Board's own misconduct rules, the Agency may refer the allegations to the appropriate state bar association for disciplinary action. See NLRB Notice of establishment of a Privacy Act system of records for Agency Disciplinary Case Files, 58 FR 57633 (Oct. 26, 1993), as amended 61 FR 13884 (March 28, 1996) (providing that Agency may refer misconduct files to a bar association or similar Federal, state, or local licensing authority where the record or information indicates a violation or potential violation of the standards of professional conduct established or adopted by the licensing authority).[8]

Accordingly, under the final rule which we have adopted, the first four paragraphs of the revised rule will read as follows:

(a) Any attorney or other representative appearing or practicing before the Agency shall 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 the provisions of this section.

(b) Misconduct by any person at any hearing before an administrative law judge, hearing officer, or the Board shall be grounds for summary exclusion from the hearing. Notwithstanding the procedures set forth below for handling allegations of misconduct, the administrative law judge, hearing officer, or Board shall also have the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing.

(c) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper shall, in the discretion of the administrative law judge or hearing officer, be grounds for striking all testimony previously given by such witness on related matters.

(d) Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline. Such misconduct of an aggravated character shall be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.

III. Procedures

Several of the comments also addressed the procedures the Board proposed in the NPR for processing allegations of misconduct. The issues raised by those comments are addressed below.

A. General Counsel's Prosecutorial Authority

In its original proposal, the Board proposed to delegate to the General Counsel the unreviewable authority to decide whether to initiate disciplinary proceedings against an attorney or other representative by issuing a disciplinary complaint. Two of the comments (filed by management law firm Semler & Pritzker and attorney Ronald L. Mason of Emens, Kegler, Brown, Hill & Ritter) objected to this proposal on the ground that giving the General Counsel such authority would enable the General Counsel to intimidate a respondent's counsel by threatening disciplinary prosecution.

Although we have carefully considered these comments, we have decided to retain the original proposal in the final rule. We recognize that the decision whether to institute disciplinary proceedings (i.e. the decision to issue a notice to show cause why disciplinary sanctions should not be imposed or to order a disciplinary hearing) has in the past rested with the Board rather than the General Counsel, and that the proposal to delegate such unreviewable authority to the General Counsel constitutes a change in that practice. However, we are not persuaded that this change would give birth to the kind of abuse suggested. Certainly nothing in the past history of misconduct cases suggests that such abuse would occur. Indeed, although the Regional Directors and General Counsel have always had the authority to recommend disciplinary action to the Board, they have only infrequently done so. Further, no example is cited, and we are aware of none, where a Regional Director or the General Counsel has in the past recommended disciplinary action to the Board without a substantial basis and/or to intimidate or retaliate against opposing counsel.

Moreover, although the Board in the past has made the decision whether to hold a disciplinary hearing, the General Counsel has normally served as the prosecutor at any such hearing ordered by the Board. See, e.g., *Cherry Hill Textiles, Inc.(Stuart Bochner),* 318 NLRB 396 (1995); *Sargent Karch,* supra; and *Roy T. Rhodes,* supra. Thus, to the extent the objections to the proposal are based on concerns over the General Counsel prosecuting the disciplinary action, this has always been the standard practice.

In addition, we have made clear in the rule that the final determination on whether to institute disciplinary

[6] We therefore also decline to address herein the suggestion made by the AFL–CIO and the UAW that some or all violations of the NLRA by attorneys or other representatives should be subject to disciplinary sanction under the Board's misconduct rules. We note, however, that the Board's misconduct rules have not in the past been used as an enforcement tool under the NLRA, and it was not, and is not, our intent in revising the rule to signal any change in this past practice. By the same token, however, it is also not our intent herein to preclude the Board in some future case from suspending and/or disbarring an attorney or other representative for aggravated misconduct simply because that conduct might also constitute an unfair labor practice. We leave this issue to be decided by the Board on a case-by-case basis. Similarly, by declining to adopt a non-exclusive list of activities or conduct warranting discipline, we do not express a view as to whether the conduct contained in the AFL–CIO's proposed list would justify discipline. These issues are also appropriate for case-by-case resolution.

[7] As indicated above, the ABA replaced the Model Code of Professional Responsibility with the Model Rules of Professional Conduct in 1983. The Model Rules have since been adopted in whole or in part by the vast majority of the states. See Lawyers' Manual at 01:301. See also id. at 01:3 (listing 42 states that have adopted Model Rules as amended).

[8] The Agency, of course, also reserves the right, and indeed has the obligation, to refer cases involving actual or potential violations of federal law to other agencies and the Department of Justice for prosecution where appropriate. See id.

proceedings shall be made by the General Counsel in Washington, D.C., and not by the Regional Director or Regional personnel who may have handled the underlying unfair labor practice or representation proceeding. Thus, to the extent objections to the proposal may question the propriety of Regional personnel having authority to make this determination, this concern is unfounded.

Finally, although the General Counsel will now have the authority under the proposed rule to initiate such disciplinary proceedings, the General Counsel will not have the authority to determine the appropriate sanction. As in the past, although the General Counsel may recommend the appropriate sanction, the administrative law judge and/or the Board will continue to make the determination as to what sanction, if any, is appropriate.

Accordingly, for all the foregoing reasons, and taking into account that no objection to this aspect of the proposal was made by the ABA Practice and Procedure Committee or in the other eight comments, we have decided to adopt the proposed provision delegating to the General Counsel the authority to initiate formal disciplinary proceedings in the final rule.

B. Investigatory Powers and Procedures

Three of the comments also recommended certain changes to the proposed rule with respect to the disciplinary investigation. Thus, the ABA Practice and Procedure Committee and the UAW recommended that a provision be added to the proposed rule to make clear that the General Counsel shall have the usual powers of investigation under Section 11 of the Act. In addition, the ABA Practice and Procedure Committee and one of the management law firms (Haynsworth, Baldwin) recommended that a provision be added that the subject attorney or other representative shall be given notice and an opportunity to respond prior to the General Counsel's issuance of any disciplinary complaint.

Having carefully considered these comments, we have decided to adopt both recommendations. With respect to the first, it could be argued that such a provision is unnecessary given that the Board's original proposal already includes a provision stating that §§ 102.24 to 102.51 of the Board's rules governing unfair labor practice proceedings will apply to disciplinary proceedings to the extent consistent, and thus already effectively incorporates § 102.31 of the Board's rules regarding issuance of subpoenas both prior to and during the hearing. However, in order to avoid any later uncertainty in this regard, we have decided to include an additional provision as recommended by the ABA Practice and Procedure Committee and the UAW clearly stating that the General Counsel will have the usual investigatory powers under Section 11 of the Act.

With respect to the second recommendation, we note that pre-complaint notice and opportunity to respond is a routine part of the General Counsel's investigative process. Moreover, it appears that such notice is provided by Rule 11.B(2) of the ABA Model Rules for Lawyer Disciplinary Enforcement (see Lawyers' Manual at 01:611), by either rule or practice in most jurisdictions (See id. at 101:2101–2104), and by at least one other Federal agency (see IRS Rules and Regulations, 31 CFR 10.54). Thus, while it may be unnecessary to specifically include it, we have decided to include such a provision in the proposed rule, as recommended in the comments.

Accordingly, based on the recommendations of the ABA Practice and Procedure Committee and other comments, and for all the reasons set forth above, we have added provisions to the final rule providing that the General Counsel will have the usual powers of investigation under Section 11 of the Act, and that the subject attorney or representative shall be given notice and an opportunity to respond to the allegations prior to issuance of any disciplinary complaint.

C. Statute of Limitations

No limitations period was set forth in the Board's original proposal for bringing the allegations of misconduct. In its comments on the Board's NPR, one of the management law firms (Haynsworth, Baldwin) suggested that some limitations period be fixed for such proceedings in the rule, as the passage of time could affect the fundamental fairness of the proceedings.

Although we have carefully considered this recommendation, we decline to adopt it. There is no contention, nor could there be, that the six-month limitations period established in Section 10(b) of the Act applies to the Agency's disciplinary proceedings, since that section is applicable by its terms only to unfair labor practice proceedings. See Annotation, Delay in Disciplinary Proceedings, 93 ALR3d 1057 (1979)(statute of limitations is inapplicable to disciplinary proceedings unless it is specifically made applicable to such proceedings by its terms). Further, inasmuch as the purpose of such disciplinary proceedings is to protect the Agency's processes and the public, we find, in agreement with Rule 32 of the ABA Model Rules for Lawyer Disciplinary Enforcement and most jurisdictions, that no statute of limitations should apply. See Lawyers' Manual at 01:628 and 101:2113.[9]

Accordingly, as in the original proposal, we have not included a limitations period in the final rule.

D. Standard of Proof

In its original proposal, the Board provided that the General Counsel must establish the alleged misconduct by a ''preponderance of the evidence.'' In its comments, one of the management law firms (Haynsworth, Baldwin) objected to this proposal, and recommended that the Board instead adopt the ''clear and convincing evidence'' standard.

Although we have carefully considered this recommendation, we decline to adopt it. We recognize that the ''clear and convincing evidence'' standard has been adopted in Rule 18.D of the ABA Model Rules for Lawyer Disciplinary Enforcement and by a majority of jurisdictions. See Lawyers' Manual at 01:616 and 101:2112. However, the Board has never applied that standard to its disciplinary proceedings in the past, and indeed has at least implicitly applied the ''preponderance of the evidence'' standard by directing that the rules governing unfair labor practice proceedings shall apply to such proceedings. See, e.g., *Cherry Hill Textiles, Inc.(Stuart Bochner),* supra; Sargent Karch, supra, and 309 NLRB 78, 88 (1992); and Roy T. Rhodes, supra.[10] Further, unlike the courts, the Board is governed by the Administrative Procedure Act, which effectively establishes the traditional ''preponderance of the evidence'' standard in Federal administrative adjudicatory proceedings, including disciplinary proceedings. See *Steadman* v. *SEC*, 450 U.S. 91 (1981). See also *Checkosky* v. *SEC*, 23 F.3d 452, 475 (D.C. Cir. 1994) (per curiam) (opinion of Circuit Judge Randolph).[11] Finally,

[9] This is not to suggest, however, that there would never be any circumstances where significant delay would be considered by the Board as a defense or mitigating factor in determining the appropriate discipline. See Lawyers' Manual at 101:2113. We simply find, in agreement with the ABA Model Rules and most jurisdictions, that there should be no absolute time limitation in all cases.

[10] The ''preponderance of the evidence'' standard is the standard of proof specifically established in Section 10(c) of the National Labor Relations Act for unfair labor practice proceedings.

[11] Although it appears that a few agencies, such as the INS and the Patent and Trademark Office, apply the ''clear and convincing'' standard in their disciplinary proceedings, they appear to be in the minority. In any event, it seems clear, based on the

there is no contention or evidence cited in any of the comments that the Board's past application of the traditional ''preponderance of the evidence'' standard has worked an injustice. Indeed, as indicated above, no objection whatsoever was made to the application of this standard by the ABA Practice and Procedure Committee or in any of the other nine comments.

Accordingly, we have retained the ''preponderance of the evidence'' standard in the final rule.

E. Public Hearing

In its original proposal, the Board included a provision that the disciplinary hearing shall be public unless otherwise ordered by the Board or the administrative law judge. The ABA Practice and Procedure Committee and one of the management law firms submitting comments (Haynsworth, Baldwin) objected to this proposal and recommended that such hearings be private on the ground that allegations of misconduct can ruin an attorney's career regardless of whether the allegations are ultimately sustained.

Although we have carefully considered these comments, we believe the provision should be retained for several reasons. First, the provision merely codifies what is the current and past practice in disciplinary proceedings, and is identical to similar provisions contained in Sections 102.34 and 102.64 of the Board's rules governing unfair labor practice and representation proceedings. Second, such a provision is consistent with Rule 16.B of the ABA Model Rules for Lawyer Disciplinary Enforcement, which provides for such public proceedings following the filing and service of formal charges (see Lawyers' Manual at 01:615), and with the disciplinary rules adopted by other agencies such as the SEC (see 17 CFR 201.102(e)(7)). Third, although we recognize that any public proceeding may cause injury to the reputation of the respondent, in agreement with other agencies that have considered the issue, we believe that such concerns are clearly outweighed by the benefits of public proceedings. See, e.g., SEC Final Rule Amendment, 53 FR 26427 (July 13, 1988) (finding, in adopting amendment to SEC rules to provide for public hearings in disciplinary proceedings against professionals, that conducting open proceedings will avoid the appearance that the Agency is more concerned about the reputations of respondent attorneys and representatives than of other respondents in other proceedings; remove an incentive for respondents to delay the proceeding; provide professionals and the public with knowledge of conduct that the agency determines warrants issuance of a disciplinary complaint; and permit legitimate public oversight of the Agency's proceedings).

Accordingly, we have retained the provision for public hearings in the final rule.

F. Role of Complainant

The Board's original proposal also addressed the role of the person bringing the allegations of misconduct or petitioning for disciplinary proceedings against the respondent attorney or representative.[12] The proposal provided that any such person shall be permitted to participate in the disciplinary hearing to a limited extent by examining and cross-examining witnesses called by the General Counsel and the respondent, but shall not be a party to the proceeding or afforded the rights of a party to call witnesses or introduce evidence, to file exceptions to the administrative law judge's decision, or to appeal the Board's decision. The Board explained that such provisions would allow such interested persons the opportunity to participate to some extent in the proceeding while ensuring that the responsibility for prosecuting the disciplinary complaint will at all times remain with the General Counsel and that the disciplinary proceeding would not be transformed into an adversary proceeding between the complaining person and the respondent. The Board noted in this regard that courts have long held that attorney disciplinary proceedings are in the nature of internal investigations concerning the protection and integrity of the adjudicatory process rather than adversarial disputes involving the conflicting rights or obligations of private parties, and, accordingly, have refused to grant party status or a right to appeal to the complaining person or individual in such proceedings, even if that person or individual was a party or party representative in the case where the alleged misconduct occurred and/or was permitted to participate in the disciplinary hearing. See *Ramos Colon* v. *U.S. Attorney for the District of Puerto Rico*, 576 F.2d 1 (1st Cir. 1978); *Application of Phillips*, 510 F.2d 126 (2d Cir. 1975); *In re Echeles*, 430 F.2d 347 (7th Cir. 1970); and *Mattice* v. *Meyer*, 353 F.2d 316 (8th Cir. 1965). See also *Matter of Doe*, 801 F. Supp. 478 (D. N.M. 1992).

Two of the comments (filed by the ABA Practice and Procedure Committee and the UAW) addressed this aspect of the Board's proposed rule. The ABA Practice and Procedure Committee commented that it generally agreed with allowing the complainant a limited role, but argued that the complainant should not be permitted to examine or cross-examine the respondent attorney or representative at the hearing. In addition, both the ABA Practice and Procedure Committee and the UAW recommended that the rule be amended or clarified to permit the complainant to appeal any settlement entered into by the General Counsel and the respondent attorney or representative or approved by an administrative law judge.

Having carefully considered these comments, we have in essence decided to adopt the former recommendation (and indeed to eliminate the complainant's right to examine or cross-examine *any* witnesses), but not to adopt the latter recommendation. With respect to the provision in the original proposal permitting the complainant to examine or cross-examine witnesses at the disciplinary hearing, we do not necessarily agree with the ABA Practice and Procedure Committee that the original proposal would have denied the respondent attorney or representative due process to the extent it permitted the complainant to examine or cross-examine the respondent.[13] However,

cited cases, that agencies are not required to apply that standard to their disciplinary proceedings under the Administrative Procedure Act.

[12] The NPR provided that allegations of misconduct may be brought by ''any person,'' and we have retained this provision in the final rule. The provision essentially codifies the current practice which permits any person, including but not limited to the participants in the underlying unfair labor practice or representation proceeding, to request disciplinary action against an attorney or representative. No special form is required to make such allegations. As in the past, a party may simply write to the Agency requesting such action, or an ALJ may recommend in his/her decision that the Board refer the matter to the General Counsel for such action under the rule. As under the current rule, the Board itself may also refer a matter to the General Counsel for investigation and appropriate action, either sua sponte or in response to a request or recommendation. As discussed, supra, however, under the new rule the General Counsel will have the final authority to decide whether to issue a disciplinary complaint.

[13] In its comments on this provision, the ABA Practice and Procedure Committee suggested that such a provision would deny the respondent attorney or representative due process because he/she would not be able to examine or cross-examine the complainant. However, the Board's new rule specifically provides that the rules applicable to unfair labor practice proceedings shall apply to the extent they are not contrary to the provisions of the new rule, and § 102.38 of those rules provides that a respondent shall have the right to call, examine, and cross-examine witnesses. See also Rule 611(c) of the Federal Rules of Civil Procedure regarding examination of hostile witnesses. Thus, the respondent attorney or representative will in fact

Continued

essentially for the reasons set forth by the Board in the NPR for denying party status to complainant, and consistent with the past practice,[14] on further consideration we believe that the rights of the respondent attorney or representative and the integrity of the disciplinary process would be better protected by limiting participation at the hearing, other than as a witness, to the General Counsel and the respondent attorney or representative or his/her counsel. Accordingly, we have deleted the provision in the original proposal which allowed complainants to examine or cross-examine witnesses at the hearing.

For similar reasons, we also decline to afford the complainant the right to appeal from a settlement reached by the General Counsel and the respondent. The Board did not include such a provision in the original proposal because the Board believed that to do so would be inconsistent with the Board's determination to deny party status to the complainant, and we adhere to that view. Cf. *NLRB* v. *Food & Commercial Workers Union, Local 23,* 484 U.S. 112 (1987) (discussing charging party's right to appeal settlements in unfair labor practice cases). Accordingly, we have not added such a provision to the final rule.

G. Judicial Review

In its original proposal, the Board included a provision stating that any person found to have engaged in misconduct warranting disciplinary sanctions may seek judicial review of the administrative determination. In its comments on the Board's original proposal, management law firm Haynsworth, Baldwin recommended that the Board outline the exact procedure for seeking judicial review, suggesting that the Board provide for judicial review in a federal district where the respondent attorney or representative resides or has a principal place of business.

Although we have carefully considered this recommendation, we have decided not to adopt it. The Board included a provision in the original proposal generally referencing the right to seek judicial review of final Board orders imposing discipline because the NLRA itself only specifically provides for judicial review of final Board orders in unfair labor practice proceedings. Thus, the Board's intent was simply to make clear that a respondent attorney or representative aggrieved by such an order may seek judicial review thereof. See the Administrative Procedure Act (APA), 5 U.S.C. 702.

Further, it appears to remain somewhat unsettled as to whether the district courts or the courts of appeals have jurisdiction over such appeals. There have been only two cases to our knowledge where a disciplined attorney or representative has sought judicial review of the Board's disciplinary order: *John L. Camp,* 96 NLRB 51 (1954); and *Joel Keiler, supra.* In the first, although review was sought in the district court, which vacated the Board's order, the jurisdictional issue was not specifically addressed by the court in its opinion. See *Camp v. Herzog,* 104 F.Supp. 134 (D.D.C. 1952). In the second, which is still pending, the Agency recently took the position before the U.S. Court of Appeals for the D.C. Circuit, relying in part on the *Camp* v. *Herzog* case, that the district court rather than the court of appeals had jurisdiction over Keiler's appeal, and the court of appeals, in apparent agreement with the Agency, issued an order on January 23, 1996 (per curiam) transferring the case to the district court. The court's order was unpublished, however, and thus is not considered binding precedent under the Circuit's rules. See Circuit Rule 28(b).

Finally, even assuming arguendo that the foregoing cases do substantially settle the jurisdictional issue, we do not believe it is our place to dictate in our rules in which court or venue a party may seek judicial review. As indicated by the litigation in the *Keiler* case, such issues are for the courts themselves to determine applying law and precedent. See, e.g., 28 U.S.C. Sec. 1391(e) (providing for proper district court venue where Federal agency is a defendant).

Accordingly, we have retained the original provision in the final rule without substantial change.

H. Public Disclosure of Discipline

In their separate comments on the Board's NPR, the ABA Practice and Procedure Committee and the AFL-CIO recommended that the Board make available to the public the final determination or disposition of any disciplinary complaint or hearing, be it the result of a settlement or decision, to assure the bar and public that the Board is acting in an even-handed manner and to provide guidance to practitioners.

We generally agree with this recommendation, and, as in the past, the Agency will continue to make public any such final dispositions or determinations consistent with the Agency's obligations under the Freedom of Information Act (FOIA), 5 U.S.C. 552 *et seq.*, absent special circumstances warranting or justifying withholding all or part of such a disposition.[15] However, neither the ABA Practice and Procedure Committee nor the AFL–CIO specifically recommended that a provision be included in the rule to this effect, and we see no need to do so since, as indicated, the matter is essentially governed by FOIA. Accordingly, we have not added such a provision to the final rule.

I. Notification to State Bar

In their separate comments on the Board's original proposal, the ABA Practice and Procedure Committee, the AFL–CIO, and the UAW also recommended that the Board automatically or routinely notify the appropriate state bar(s) where it has imposed a disciplinary sanction on an attorney. Further, the UAW specifically recommended that a provision providing for such automatic referral be included in the rule.

We generally agree that the appropriate state bar(s) should be notified of any disciplinary sanctions imposed on an attorney and, as with public disclosure of such sanctions, it is

have the opportunity under appropriate circumstances to call, examine, and/or cross-examine the complainant and other witnesses at the disciplinary hearing.

[14] A review of past cases where a disciplinary hearing has been held indicates that only the General Counsel and the respondent attorney or representative participated in the disciplinary hearing. *See John L. Camp,* 96 NLRB 51 (1951), vacated on other grounds 104 F. Supp. 134 (D.D.C. 1952); *Roy T. Rhodes,* supra; *Sargent Karch,* supra; and *Stuart Bochner,* JD (NY)–10–96 (Feb. 20, 1996) (currently pending before the Board on exceptions). Further, in its original (unpublished) order directing a disciplinary hearing in *In re Attorney,* supra, the Board specifically indicated that the opposing counsel in the underlying representation case was not entitled to participate in the hearing other than as a witness.

[15] Such special circumstances may include where certain identifying information is redacted pursuant to the settlement agreement. See, e.g., *In re An Attorney,* 307 NLRB 913 (1992) (Board agreed to redact attorney's name from published decision and not to seek further discipline against attorney by referring matter to state bar as part of settlement agreement which provided for immediate six-month suspension of attorney). The Agency in the past has taken the position in such circumstances that the redacted information may properly be withheld from public disclosure pursuant to Exemptions 7(A) and (C) of FOIA, 5 U.S.C. 552(b)(7) (A) and (C), which authorize the withholding of information compiled for law enforcement purposes to the extent disclosure could reasonably be expected to interfere with enforcement proceedings or to constitute an unwarranted invasion of personal privacy. Although we agree that disclosure is preferable to non-disclosure/redaction, we recognize that there may be situations where the Agency may find such redaction to be a relatively small price to pay for an immediate consent order suspending an errant attorney or representative from further practice before the Agency. Redaction of certain identifying information from a settlement in no way deprives the public of information necessary to obtain guidance concerning the Board's policies on misconduct and discipline.

our policy to do so absent special circumstances.[16] Moreover, pursuant to a May 18, 1995, request from the ABA Standing Committee on Professional Discipline, it is also our policy and intention to report such disciplinary actions to the ABA National Lawyer Regulatory Data Bank, which collects reports of public sanctions imposed against lawyers from all 50 states and the District of Columbia, as well as a number of federal courts and agencies.

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 as suggested by the UAW. We will, however, consider adding such a provision to the Agency's Casehandling Manual.

IV. Answers Filed by Non-Attorneys

In its original proposal, the Board also proposed to revise Section 102.21 of its rules governing the filing of answers to unfair labor practice complaints. As discussed in the NPR, the current rule provides that the answer of a party represented by counsel shall be signed by at least one attorney of record; that the attorney's signature constitutes a certificate by the attorney that he/she has read the answer, there is good ground to support it to the best of his/her knowledge, information and belief, and it is not interposed for delay; and that the attorney may be subjected to appropriate disciplinary action for willful violations of the rule or if scandalous or indecent matter is inserted.

As indicated above and in the NPR, however, it is not required under the Board's rules that a party representative be an attorney. Further, it is not infrequent that a party will be represented by a non-attorney and that the nonattorney party representative will sign the answer on behalf of the party. Accordingly, the Board proposed to revise Section 102.21 to make the foregoing provisions of that section applicable to nonattorney party representatives as well as attorneys.

Only two of the comments addressed this aspect of the proposal. One, filed by management law firm Seyfarth, Shaw, Fairweather & Geraldson, supported the proposal. The other, filed by attorney Ronald L. Mason, argued that the proposal encourages the use of nonlawyer labor consultants.

Having considered these comments, we continue to believe that the proposed change is warranted. Contrary to the assertion by attorney Mason, we do not believe that the proposal either encourages or discourages the use of nonlawyer labor consultants, but merely subjects such representatives to the same requirements and sanctions as attorneys with respect to the filing of answers. Accordingly, we have retained this provision in the final rule.

As required by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the NLRB certifies that these rules will not have a significant economic impact on a substantial number of small business entities as they merely require attorneys and other representatives who appear and practice before the Agency to conform their conduct to the standards of ethical and professional conduct applicable to practitioners before the courts in order to protect the integrity of the administrative process and the rights of the parties and other participants in that process.

List of Subjects in 29 CFR Part 102

Administrative practice and procedure, Labor management relations.

For the reasons set forth above, the NLRB amends 29 CFR Part 102 as follows:

PART 102—RULES AND REGULATIONS

1. The authority citation for 29 CFR part 102 continues to read as follows:

Authority: Section 6, National Labor Relations Act, as amended (29 U.S.C. 151, 156). Section 102.117(c) also issued under Section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)). Sections 102.143 through 102.155 also issued under Section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

2. Section 102.21 is revised to read as follows:

§ 102.21 Where to file; service upon the parties; form.

An original and four copies of the answer shall be filed with the Regional Director issuing the complaint. Immediately upon the filing of his answer, respondent shall serve a copy thereof on the other parties. An answer of a party represented by counsel or non-attorney representative shall be signed by at least one such attorney or non-attorney representative of record in his/her individual name, whose address shall be stated. A party who is not represented by an attorney or non-attorney representative shall sign his/her answer and state his/her address. Except when otherwise specifically provided by rule or statute, an answer need not be verified or accompanied by affidavit. The signature of the attorney or non-attorney party representative constitutes a certificate by him/her that he/she has read the answer; that to the best of his/her knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If an answer is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the action may proceed as though the answer had not been served. For a willful violation of this section an attorney or non-attorney party representative may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

§ 102.44 [Removed]

3. Section 102.44 is removed.

§ 102.66 [Removed and amended]

4. Paragraph (d) of § 102.66 is removed, and paragraphs (e), (f), and (g) are redesignated paragraphs (d), (e), and (f), respectively.

5. The following new Subpart W—Misconduct By Attorneys or Party Representatives, consisting of new section 102.177, is added to read as follows:

Subpart W—Misconduct by Attorneys or Party Representatives

§ 102.177 Exclusion from hearings; Refusal of witness to answer questions; Misconduct by attorneys and party representatives before the Agency; Procedures for processing misconduct allegations.

(a) Any attorney or other representative appearing or practicing before the Agency shall 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 the provisions of this section.

(b) Misconduct by any person at any hearing before an administrative law judge, hearing officer, or the Board shall be grounds for summary exclusion from the hearing. Notwithstanding the procedures set forth in paragraph (e) of this section for handling allegations of misconduct, the administrative law judge, hearing officer, or Board shall also have the authority in the proceeding in which the misconduct occurred to admonish or reprimand,

[16] As with public disclosure, such special circumstances may include where the Board agrees not to do so pursuant to a settlement agreement. See *In re An Attorney*, supra. Even in such circumstances, however, other persons (including any person who is not a party to such a settlement) would be free to refer the matter to the appropriate state bar(s).

after due notice, any person who engages in misconduct at a hearing.

(c) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper shall, in the discretion of the administrative law judge or hearing officer, be grounds for striking all testimony previously given by such witness on related matters.

(d) Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline. Such misconduct of an aggravated character shall be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.

(e) All allegations of misconduct pursuant to paragraph (d) of this section, except for those involving the conduct of Agency employees, shall be handled in accordance with the following procedures:

(1) Allegations that an attorney or party representative has engaged in misconduct may be brought to the attention of the Investigating Officer by any person. The Investigating Officer, for purposes of this paragraph, shall be the Associate General Counsel, Division of Operations-Management, or his/her designee.

(2) The Investigating Officer or his/her designee shall conduct such investigation as he/she deems appropriate and shall have the usual powers of investigation provided in Section 11 of the Act. Following the investigation, the Investigating Officer shall make a recommendation to the General Counsel, who shall make the determination whether to institute disciplinary proceedings against the attorney or party representative. The General Counsel's authority to make this determination shall not be delegable to the Regional Director or other personnel in the Regional Office. If the General Counsel determines not to institute disciplinary proceedings, all interested persons shall be notified of the determination, which shall be final.

(3) If the General Counsel decides to institute disciplinary proceedings against the attorney or party representative, the General Counsel or his/her designee shall serve the Respondent with a complaint which shall include: a statement of the acts which are claimed to constitute misconduct including the approximate date and place of such acts together with a statement of the discipline recommended; notification of the right to a hearing before an administrative law judge with respect to any material issues of fact or mitigation; and an explanation of the method by which a hearing may be requested. Such a complaint shall not be issued until the Respondent has been notified of the allegations in writing and has been afforded a reasonable opportunity to respond.

(4) Within 14 days of service of the disciplinary complaint, the respondent shall file an answer admitting or denying the allegations, and may request a hearing. If no answer is filed or no material issue of fact or relevant to mitigation warranting a hearing is raised, the matter may be submitted directly to the Board. If no answer is filed, then the allegations shall be deemed admitted.

(5) Sections 102.24 through 102.51, rules applicable to unfair labor practice proceedings, shall be applicable to disciplinary proceedings under this section to the extent that they are not contrary to the provisions of this section.

(6) The hearing shall be conducted at a reasonable time, date, and place. In setting the hearing date, the administrative law judge shall give due regard to the respondent's need for time to prepare an adequate defense and the need of the Agency and the respondent for an expeditious resolution of the allegations.

(7) The hearing shall be public unless otherwise ordered by the Board or the administrative law judge.

(8) Any person bringing allegations of misconduct or filing a petition for disciplinary proceedings against an attorney or party representative shall be given notice of the scheduled hearing. Any such person shall not be a party to the disciplinary proceeding, however, and shall not be afforded the rights of a party to call, examine or cross-examine witnesses and introduce evidence at the hearing, to file exceptions to the administrative law judge's decision, or to appeal the Board's decision.

(9) The respondent will, upon request, be provided with an opportunity to read the transcript or listen to a recording of the hearing.

(10) The General Counsel must establish the alleged misconduct by a preponderance of the evidence.

(11) At any stage of the proceeding prior to hearing, the respondent may submit a settlement proposal to the General Counsel, who may approve the settlement or elect to continue with the proceedings. Any formal settlement reached between the General Counsel and the respondent, providing for entry of a Board order reprimanding, suspending, disbarring or taking other disciplinary action against the respondent, shall be subject to final approval by the Board. In the event any settlement, formal or informal, is reached after opening of the hearing, such settlement must be submitted to the administrative law judge for approval. In the event the administrative law judge rejects the settlement, either the General Counsel or the respondent may appeal such ruling to the Board as provided in § 102.26.

(12) If it is found that the respondent has engaged in misconduct in violation of paragraph (d) of this section, the Board may issue a final order imposing such disciplinary sanctions as it deems appropriate, including, where the misconduct is of an aggravated character, suspension and/or disbarment from practice before the Agency, and/or other sanctions.

(f) Any person found to have engaged in misconduct warranting disciplinary sanctions under paragraph (d) of this section may seek judicial review of the administrative determination.

Dated, Washington, D.C., December 9, 1996.

By direction of the Board:

John J. Toner,

Executive Secretary.

[FR Doc. 96–31571 Filed 12–11–96; 8:45 am]

BILLING CODE 7545–01–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD07–96–067]

RIN 2115–AE46

Special Local Regulations; Continental Airlines Boat Parade; Fort Lauderdale, FL

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: Special Local Regulations are being adopted for the Continental Airlines Boat Parade. The event will be held on December 14, 1996, from 5:20 p.m. EST (Eastern Standard Time) until 9:30 p.m. EST. These regulations are needed for the safety of life on navigable waters during the event.

EFFECTIVE DATE: These regulations will become effective at 5 p.m. EST and terminate at 10 p.m. EST, on December 14, 1996.

FOR FURTHER INFORMATION CONTACT: LTJG J. Delgado, Project officer, Coast Guard Group Miami, Florida at (305) 535–4461.