AMERICAN IMMIGRATION LAWYERS ASSOCIATION

September 25, 2026

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Assistant Director
Office of Policy
Executive Office for Immigration Review
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Submitted via https://www.regulations.gov

Re: **American Immigration Lawyers Association Comment on Civil Money Penalty for Actions in Contempt of an Immigration Judge's Proper Exercise of Authority Docket No. EOIR-26-AB02; RIN 1125-AB02**

Dear Assistant Director Comans,

The American Immigration Lawyers Association (AILA) submit the following comments in response to the above-referenced Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) notice of proposed rulemaking (NPRM), Civil Money Penalty for Actions in Contempt of an Immigration Judge's Proper Exercise of Authority (EOIR-26-AB02).[1] The NPRM proposes new regulations under which an Immigration Judge could propose, and the Chief Immigration Judge or a designee could impose, civil money penalties on private attorneys and representatives, respondents, and witnesses for five enumerated categories of conduct that an Immigration Judge determines has "delayed, disrupted, or obstructed the adjudicatory process."[2]

Established in 1946, AILA is a voluntary bar association of over 18,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

Although EOIR cites 8 U.S.C. § 1103(g)(2) and 8 U.S.C. § 1229a(b)(1) as support for its authority to promulgate these regulations, the NPRM fails to explain why existing regulations, Federal rules, state bar rules, and a court's inherent power to sanction for contempt are inadequate or ineffective. Notably, the NPRM exempts Department of Homeland Security (DHS) attorneys, government witnesses, and employees from an Immigration Judge's sanction authority, which is inconsistent with federal rules permitting sanctions against *anyone* appearing in federal court. This fosters an impression of unfairness and effectively establishes separate standards of conduct for private sector attorneys versus their public sector counterparts. Further, key terms in the NPRM are vague and undefined, which will inevitably lead to the imposition of sanctions on attorneys for

[1] 91 Fed. Reg. 47979 (July 30, 2026).
[2] Proposed 8 CFR § 1003.124(a).

benign conduct and inconsistent outcomes. Although we urge EOIR to withdraw this proposed rule, we offer recommendations to mitigate potential harms should the rule ultimately be finalized.

I. The Proposed Rule is Unnecessary Because Existing Rules Already Provide Adequate Means for Disciplining Lawyers.

A. Proposed Amendments to 8 C.F.R. § 1003.102(c)

The regulations at 8 C.F.R. § 1003.102 set forth the grounds for the imposition of disciplinary sanctions against attorneys appearing in immigration court. 8 C.F.R. § 1003.102(c) currently permits disciplinary sanctions against an attorney who:

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

The proposed rule would amend 8 C.F.R. § 1003.102(c) by modifying the last sentence to read:

> (c) * * * If a practitioner has offered material evidence or made a false statement of material fact or law and receives notice, or reasonably should have known, of the falsity, the practitioner shall take appropriate remedial measures, and a failure to take such remedial measures shall subject the practitioner to disciplinary sanctions in the public interest under this paragraph (c);

Under the current rule, a practitioner is required to take remedial measures if he or she offers material evidence and comes to know of its falsity. Under the proposed rule, a practitioner is required to take remedial measures if he or she offers material evidence or makes a "false statement of material fact or law" and "receives notice, or reasonably should have known of the falsity" of such evidence or statement. An attorney who fails to take remedial measures is subject to sanctions under the proposed rule.

The addition of "false statement of material fact or law" makes it explicit that remedial obligations apply not only to the proffering of false evidence, but also to false statements of material fact or law. However, as discussed below, it is imperative that the professional obligation of candor toward a tribunal not be transformed into authority to sanction attorneys merely for advancing valid, but unsuccessful legal positions.[3] In addition, the inclusion of "reasonably should have known" imports a negligence-based standard into a disciplinary rule that currently turns on actual knowledge or reckless disregard. "Reckless disregard" requires more than a failure to discover a problem; it requires conscious indifference to the consequences of an act.[4]

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[3] *See* note –, *infra*.
[4] *See* Black's Law Dictionary 12th ed. 2024.

The proposed rule would therefore expose attorneys to discipline whenever an adjudicating official concludes that the attorney should have discovered the falsity of evidence or a statement, even absent proof of actual knowledge or reckless disregard. Because the existing rule already provides an adequate basis to discipline practitioners who knowingly submit false evidence or act with reckless disregard, the "reasonably should have known" language is unnecessary, overbroad, and should be removed.

By analogy, ABA Model Rule 3.3, Candor to the Tribunal, provides that "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. Comment 8 to Model Rule 3.3 states:

> [8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood

Therefore, current section 1003.102(c) is already broader than ABA Model Rule 3.3 because it includes a "reckless disregard" standard in addition to a "knowing" standard. The proposed addition of "reasonably should have known" would go even further, exposing an attorney to sanctions even if they did not know the statement or evidence was false and did not act with reckless disregard. The addition of this language–which amounts to a negligence standard–means that practitioners would be required to investigate all statements and documents a client provides even where there is no reason to doubt their veracity and the client represents that the information is true. In addition, whereas the current regulation requires attorneys who come to know of the falsity of material evidence to take "appropriate remedial measures," whether an attorney "reasonably should have known" of a falsity is an inquiry that can only be made after the fact by an adjudicator with the benefit of hindsight and information the practitioner did not have. The proposed rule therefore penalizes the failure to cure a falsehood the practitioner had no contemporaneous reason to suspect.

Moreover, 8 U.S.C. § 1362 guarantees a respondent in removal proceedings the privilege of representation by counsel of the person's choice at no expense to the government. A negligence-based disciplinary standard that permits sanctions whenever counsel "reasonably should have known" of a falsity risks chilling effective advocacy and may deter practitioners from representing clients.

Like the current rule, the proposed rule fails to define "appropriate remedial measures," creating uncertainty about what conduct is required once a practitioner receives notice of the falsity. A practitioner may remonstrate with a client and urge correction or withdrawal of a false statement, but the rule does not say whether withdrawal from representation is sufficient if the client refuses to cooperate, or whether the practitioner must disclose the matter to the Immigration Judge or DHS. Under the Model Rules, disclosure required by Rule 3.3 overrides the duty of confidentiality: Rules 3.3(a) and (b) "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."[5] The proposed rule likewise fails to account for Model Rule 1.16, which requires a lawyer to withdraw if representation will result in a violation of the Rules of Professional Conduct or other law, or for 8 C.F.R. § 1003.17(a)(3), under which a practitioner who has filed a Form EOIR-28 "remains the practitioner of record unless an immigration judge permits withdrawal or substitution during proceedings." The ambiguity is especially serious because failure to take undefined remedial measures would subject the practitioner to disciplinary sanctions and potential penalties under the proposed rule. This problem is compounded in jurisdictions such as California, where professional conduct rules restrict disclosure to a tribunal to protect client confidentiality; a practitioner who withdraws but does not disclose client falsity could still face discipline under the proposed language.[6]

For these reasons, should EOIR finalize the rule, it should remove the "reasonably should have known" standard, define "appropriate remedial measures," and explain in the supplementary information the intersection with relevant ABA Model Rules and State professional responsibility obligations.

B. *Proposed Amendments to 8 CFR 1003.102(g)*

8 C.F.R. § 1003.102(g) currently permits disciplinary sanctions against an attorney who:

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

The proposed rule would amend this provision to read:

> (g) Engages in contumelious or otherwise obnoxious conduct, with regard to a case in which he or she acts in a representative capacity, which would constitute contempt of court in a judicial proceeding or a proceeding under subpart H of this part. The assessment of a final order for a civil money penalty in proceedings under subpart H of this part, and the conduct underlying such an order, are factors that may be considered when determining if contumelious or otherwise obnoxious conduct has occurred.

The proposed amendment to 8 C.F.R. § 1003.102(g) should be withdrawn or at least narrowed. The current rule disciplines practitioners for contumelious or otherwise obnoxious conduct that would constitute contempt of court in a judicial proceeding. The proposed rule would allow the assessment of a final civil money penalty and the conduct underlying such an order, to be considered in determining whether such conduct occurred. This improperly bootstraps a civil penalty finding into a professional disciplinary determination without requiring an independent finding that an attorney engaged in contemptuous conduct. Civil money penalty proceedings may involve conduct that does not rise to the level of contempt warranting professional discipline. Should EOIR retain this language, it must clarify that a civil money penalty is not itself evidence

[5] Model Rule 3.3(c).
[6] *See* California Business and Professions Code 6068(e)(1) which imposes a duty on an attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

of contumelious or obnoxious conduct unless the disciplinary authority independently finds, after notice and an opportunity to respond, that the conduct would constitute contempt in a judicial proceeding or comparable misconduct proceeding.

C. Proposed Addition of 8 C.F.R. § 1003.102(x)

The proposed rule would also add an entirely new disciplinary ground for a practitioner who "[r]epeatedly fails to pay a civil money penalty as described in § 1003.129." EOIR has provided no independent justification for this provision in the preamble, and it converts a monetary sanction into a professional sanction. Under proposed § 1003.129(c), an attorney who fails to pay a civil money penalty within 30 days receives a notice from the EOIR disciplinary counsel and must pay a $50 late fee (on top of the penalty) within 15 days or face suspension from practice before EOIR.

Proposed 8 C.F.R. § 1003.102(x) makes the nonpayment itself a separate, independently chargeable disciplinary ground, wrestling in a disproportionate cumulative effect. A practitioner who does not dispute the penalty but cannot pay promptly faces suspension, a permanent disciplinary record, and a second charge arising from the same nonpayment. The Department should either withdraw proposed 8 C.F.R. § 1003.102(x) or, at minimum, provide that it applies only where the failure to pay is willful. EOIR should also establish a mechanism to receive installment payments for solo, small-firm, and nonprofit attorneys who may require special accommodation.

II. The Rule's Asymmetrical Approach to the Imposition of Penalties is Patently Unfair and Disrupts Impartiality in Immigration Court Proceedings

The proposed rule's most troubling defect is that the rule would apply to parties appearing in only one side of the proceedings. The proposed rule would allow Immigration Judges to initiate, and the Chief Immigration Judge to impose civil money penalties on private attorneys and representatives, respondents, and witnesses, while expressly excluding "attorneys or witnesses who are employees or contractors of the federal government acting in their official capacity" including those representing the Federal Government in immigration court proceedings.[7]

This asymmetry is embedded in the architecture of the rule. The NPRM defines "covered individuals" subject to the rule as: attorneys or representatives who have filed appearances before the Immigration Court, noncitizens who are the subjects of proceedings, and witnesses in proceedings before the Immigration Judge, but excludes official-capacity federal attorneys and federal witnesses from that same regime.[8] As drafted, the rule allows Immigration Judges to initiate sanctions against respondents and their advocates, while placing government attorneys beyond the reach of the court's sanctioning authority. This would only serve to deepen the already lopsided structure of immigration adjudications.

EOIR defends the carve-out by referencing its disciplinary rules and noting that government attorneys "are subject to the jurisdiction of the Office of the Inspector General for the Department of Homeland Security" and, if warranted, "will be disciplined pursuant to DHS's

[7] 91 Fed. Reg. at 47981.
[8] 91 Fed. Reg. at 47990.

attorney discipline procedures."[9] But that justification cannot be read in isolation. The same Department has separately proposed to insulate its own attorneys from the very oversight EOIR now invokes as a substitute.

In March 2026, DOJ proposed a rule that would give the Attorney General "the right to review … in the first instance" any allegation that a Department attorney violated an ethics rule in the course of federal duties, and would have the Department "request that the bar disciplinary authority suspend any parallel investigation until the completion of the Department's review."[10] Should bar authorities decline, the proposal provides that "the Department shall take appropriate action to enforce this regulation or to prevent the bar disciplinary authorities from interfering with the Attorney General's review of the allegations."[11]

Read together, the two proposals move in opposite directions. Private immigration attorneys would face judge-initiated financial sanctions, backed by suspension for nonpayment, for conduct as elastic as, for example, "abusive language in any filing with the court."[12] Government attorneys, meanwhile, would not only be exempt from such penalties but would also see state-bar discipline paused at the Department's request. A tribunal that can fine one side of a contested proceeding but not the other, and whose sponsoring Department is simultaneously working to shield its own lawyers from external accountability, does not present the balanced posture that due process and public confidence require.

This distinction matters because the proposed rule is not limited to extreme or objectively verifiable misconduct. As described in detail in section III, *infra*, it reaches conduct that may arise in the course of ordinary, necessary, and ethically required advocacy. In a court system housed within the Executive Branch, where Immigration Judges are employees of the same Department that promulgates the rule, challenges to bias, impartiality, case management, evidentiary rulings, or due process violations are not contemptuous by nature. They are often indispensable to preserving the record and protecting a respondent's statutory and constitutional rights.

The danger is particularly acute in cases involving humanitarian protections, where the consequences of timid advocacy may be irreversible. A respondent seeking asylum, withholding of removal, or protection under the U.N. Convention Against Torture depends on counsel to object to truncated testimony, challenge unreliable government evidence, question whether a hearing schedule permits meaningful preparation, seek continuances for unavailable witnesses or records, or preserve a claim that the adjudicator's conduct has compromised fairness. The proposed rule would chill counsel from taking precisely those actions, especially where a financial penalty could be imposed based on a judge's subjective view of language, tone, or persistence.

The proposed rule therefore threatens to deter the very advocacy on which the agency depends to learn of judicial misconduct. Under proposed 8 C.F.R. §§ 1003.109 and 1003.130, complaints about an Immigration Judge's conduct are directed to the judge's supervisor, to EOIR's Judicial Conduct and Professionalism Unit, or to the Department's Office of Professional Responsibility. The agency's oversight of its own adjudicators thus depends on private counsel raising concerns. The imposition of a financial sanction against a lawyer who raises concerns about

[9] 91 Fed. Reg. at 47981, citing 8 CFR 1003.101(b), 292.3(i), and 5 CFR 2635.106(b).
[10] 91 Fed. Reg. 10780 (Mar. 5, 2026).
[11] Proposed 28 C.F.R. 77.5(a).
[12] 91 Fed. Reg. at 47990.

an Immigration Judge's conduct weakens that oversight at its source. In a system where many respondents already struggle to secure representation, the prospect of personal monetary penalties, discipline, late fees, and suspension for nonpayment will predictably deter attorneys from entering appearances in difficult, high-conflict, or politically sensitive cases. The NPRM proposes penalties ranging from $1,000 to $1,500 for a first contempt order, $1,500 to $2,500 for a second, and $2,500 to $3,500 for subsequent orders. The NPRM also permits appeals within 10 days (for a proposed $675 appeal fee), and consequences that include late fees and practitioner suspension for nonpayment.[13] For small-firm, nonprofit, pro bono, low bono, and solo practitioners who represent asylum seekers, detained individuals, and families of modest means, these penalties are not abstract. They are material risks that will influence the type of cases such practitioners are willing to accept. Nothing in the rule refunds the appeal fee to a practitioner who prevails.

The asymmetry is especially indefensible because the statute does not require it. The NPRM relies on INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1), which authorizes Immigration Judges, under regulations prescribed by the Attorney General, "to sanction by civil money penalty *any* action (or inaction) in contempt of the judge's proper exercise of authority" under Chapter 4 of Title II of the Immigration and Nationality Act (emphasis added).[14] There is no indication that Congress intended the contempt authority to be available only against respondents, private counsel, and non-government witnesses. To the contrary, if the purpose of contempt authority is to protect the integrity and orderly functioning of proceedings, the relevant question should be whether the conduct disrupts, delays, obstructs, or defies the tribunal, not whether the actor is employed by the government.

EOIR could have proposed a neutral rule. It could have created a court-centered accountability mechanism that applies equally to all attorneys and witnesses who appear before Immigration Judges, including OPLA attorneys and official-capacity federal witnesses. It could have codified an alternative or supplemental process for referral to the Office of Inspector General, agency counsel, or other internal disciplinary channels, at least for misconduct that occurs in the courtroom or directly affects the adjudicatory process. Instead, the proposed rule withholds sanction authority precisely where equal courtroom accountability is crucial: from the government's own advocates, who appear in every removal case and whose conduct can just as readily delay, disrupt, or obstruct proceedings.

The practical result is a structural litigation imbalance in favor of the government. Under the proposal, a respondent's attorney may face a monetary sanction for pointedly challenging a judge's impartiality, objecting to a filing deadline, resisting an evidentiary ruling, or making an argument later characterized as abusive or reckless.[15] A government attorney, by contrast, would not be subject to the same civil money penalty even if they engage in comparable conduct in the same hearing.

This imbalance is incompatible with the rule of law. Immigration court proceedings are adversarial; The government seeks removal, while the respondent may seek the right to remain, family unity, protection from persecution or torture, or other life-altering relief. A rule that permits the adjudicator to set in motion a financial sanction against one party to the proceeding but not the other undermines the appearance and reality of neutral adjudication. It risks transforming contempt

[13] 91 Fed. Reg. at 47984.
[14] 91 Fed. Reg. at 47980.
[15] 91 Fed. Reg. at 47981.

authority from a tool of courtroom order into an enforcement aligned instrument that compels respondents and their counsel to remain silent, compliant, and cautious even when vigorous advocacy is required.

The Department's own authority cuts against the exemption. EOIR relies on *Nelson v. Steiner* for the proposition that contempt power should be sparingly used.[16] That case affirmed findings of civil contempt against the District Director of Internal Revenue and the Chief of the Claims Division of the Department of Justice, rejecting the defense "[t]hat the action of defendants was taken pursuant to instructions of superior authority" and concluding that "[t]he executive branch of government has no right to treat with impunity the valid orders of the judicial branch."[17] The single decision EOIR invokes to describe the character of contempt authority is a decision applying that authority to government lawyers acting on instructions from above — precisely the category this rule exempts.

III. The Proposed Rule Fails to Clearly Define the Conduct Subject to Contempt Sanctions and Risks Chilling Legitimate Advocacy.

It is clear that Congress authorized Immigration Judges to sanction contemptuous conduct through civil money penalties and directed the Attorney General to prescribe regulations governing the exercise of that authority.[18] The question presented by this rulemaking is therefore not whether EOIR may establish contempt authority, but how such an extraordinary authority should be defined and constrained.

The Department itself has recognized the importance of that distinction. In recounting the history of this rulemaking, the NPRM notes that the Attorney General previously directed EOIR to develop regulations creating a "strictly defined and clearly delineated authority" to impose civil monetary penalties for contempt.[19] The NPRM further recognizes that contempt is an "exceptional tool that should be rarely invoked."[20] Yet several of the standards contained in the proposed rule are neither strictly defined nor clearly delineated. Instead, they rely on undefined and inherently subjective terms that leave attorneys and representatives without adequate notice of where permissible conduct ends and contempt begins.

This lack of clarity is especially concerning in an adversarial adjudicatory system. Attorneys appearing before EOIR have professional obligations to advocate vigorously for their clients, challenge erroneous rulings, preserve issues for appellate and judicial review, and, when warranted, question whether a proceeding has comported with due process.[21] A contempt regulation that does not clearly distinguish sanctionable misconduct from legitimate advocacy

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[16] 279 F.2d 944, 948 (7th Cir. 1960), 91 Fed. Reg. at 47982.
[17] 279 F.2d at 948.
[18] INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1).
[19] 91 Fed. Reg. at 47980.
[20] 91 Fed. Reg. at 47982, citing *Nelson v. Steiner*, 279 F.2d 944, 948 (7th Cir. 1960) (''The power to punish for contempt is to be sparingly used . . . .'' (citation omitted)).
[21] Model Rules of Prof'l Conduct R. 1.3 cmt. 1 (ABA 2026) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

risks chilling precisely the conduct necessary to ensure the fair adjudication of removal proceedings.

A. *The Proposed Rule Does Not Adequately Define "Repeated Failure."*

Proposed § 1003.124(a)(1) and (2) make certain conduct sanctionable only when it constitutes a "repeated failure."[22] The proposed regulatory text, however, does not define "repeated."

The preamble states that the term is intended to encompass "persistent and sustained failures" and explains that Immigration Judges may consider the total number of failures, their proximity to one another, their severity, actual prejudice to the proceeding, and "any other relevant factors."[23] Although these considerations may assist an adjudicator after the fact, they do not provide meaningful prospective notice to an attorney or other covered individual as to when conduct becomes sanctionable.

Fundamental questions remain unanswered. Does "repeated" require two instances, three instances, or more? Must the conduct occur within the same proceeding? May conduct occurring in unrelated cases be aggregated? If so, must those cases be before the same Immigration Judge or even within the same immigration court? What period of time is relevant? May an instance occurring years earlier be considered? Does conduct that previously resulted in no warning nevertheless count toward a later finding that a failure has become "persistent and sustained"? A contempt regulation should tell regulated parties where the line is before they cross it, rather than permit the adjudicator to define that line retrospectively.

We therefore urge the Department to define "repeated" in the regulatory text. At minimum, the regulation should specify the minimum number of occurrences necessary to constitute repeated conduct, establish a reasonable lookback period, and clarify whether conduct may be aggregated across separate proceedings, immigration judges, or immigration courts. Conduct that occurred before the issuance of a warning should not be aggregated with subsequent conduct to establish a "repeated failure" unless the regulation clearly provides otherwise.

B. *The Definition of "Disorderly or Abusive" Conduct Is Impermissibly Subjective and Risks Chilling Legitimate Challenges to Immigration Judge Conduct.*

Proposed § 1003.124(a)(3) permits sanctions for "disorderly or abusive behavior or language" in or around the courtroom and for abusive language contained in filings.[24] The NPRM explains that this includes language that "impugns the integrity of the court" or "unfairly maligns the competence or impartiality of the presiding Immigration Judge."[25] This language presents particularly serious constitutional concerns.

[22] 91 Fed. Reg. at 47990.
[23] 91 Fed. Reg. at 47981.
[24] 91 Fed. Reg. at 47,981.
[25] *Id.*

The Fifth Amendment guarantees due process before a person is deprived of life, liberty, or property, and removal proceedings are subject to that guarantee. In the Article III courts, the corresponding disqualification standard is codified: a "justice, judge, or magistrate judge of the United States" must disqualify himself or herself "in any proceeding in which his impartiality might reasonably be questioned," or where he or she has "a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."[26] While section 455 does not apply to Immigration Judges (who are Department attorneys rather than judicial officers of the United States), we cite it to show that where Congress has addressed the question, the possibility that a judge's impartiality may reasonably be questioned is treated as a matter to be raised and resolved on the record — not as misconduct by the lawyer who raises it.

Like Article III courts, to ensure due process, an attorney sometimes must question the conduct, impartiality, or reasoning of the Immigration Judge presiding over the case. Counsel may need to object to conduct during a hearing, move for recusal, assert that the Immigration Judge has demonstrated actual or apparent bias, argue that restrictions imposed upon testimony violated due process, or create a record sufficient to preserve those claims for review by the Board of Immigration Appeals or a federal court of appeals. Indeed, the Department has issued detailed policies and procedures for issuing recusal orders in immigration court proceedings.[27]

The proposed regulation provides no objective standard for determining when such an argument "unfairly maligns" an Immigration Judge rather than appropriately challenges the Immigration Judge's conduct or impartiality. More troubling, the initial determination that the criticism is "unfair" would be made by the very Immigration Judge whose conduct, competence, or impartiality has been questioned.

The NPRM attempts to address this concern in proposed 8 C.F.R. § 1003.109, which directs complaints about an EOIR adjudicator to the adjudicator's supervisor, the EOIR Judicial Conduct and Professionalism Unit, or to the Department's Office of Professional Responsibility. Proposed 8 C.F.R. § 1003.130 further subjects Immigration Judge's exercise of sanction authority to oversight by the Chief Immigration Judge. But this does not resolve the problem, nor does it spare the practitioner the cost of responding to a Notice of Intent to Impose Civil Money Penalty or, if a penalty issues, the $675 fee required to appeal it.

An administrative complaint concerning judicial conduct is not a substitute for preserving an objection in the proceeding itself. An attorney who believes an Immigration Judge's conduct has deprived a respondent of a fair hearing may be required to raise that issue contemporaneously and develop the factual record necessary for appellate or judicial review. Counsel cannot preserve a due process or bias claim before the Board or a court of appeals by silently withholding the objection from the record and instead submitting an internal administrative complaint.

This difficulty is compounded by the nature of the record. Immigration Court proceedings are captured by audio recording, so certain aspects of a judge's demeanor exist in the record only if described by counsel. As such, counsel may find themselves on the receiving end of a monetary

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[26] 28 U.S.C. § 455.
[27] *Procedures For Issuing Recusal Orders In Immigration Proceedings*, OPPM 05-02, Exec. Office for Immigration Review, U.S. Dep't of Justice, (March 21, 2005).

penalty for "unfairly maligning" an Immigration Judge when they were simply seeking to preserve a bias claim in an audio recording of a proceeding. Under proposed 8 C.F.R. § 1003.126(e), any statement or warning "that [was] not recorded must be summarized in writing by the Immigration Judge" for inclusion in the contempt Record of Proceeding—a record the Chief Immigration Judge may not look beyond. Thus, when it comes to unrecorded exchanges, the adjudicator whose conduct is in question is the author of the account.

The regulation therefore must distinguish objectively abusive behavior from criticism of an adjudicator made in furtherance of legitimate advocacy. AILA recommends incorporating an express provision that, standing alone, a good-faith objection to an Immigration Judge's conduct, motion for recusal, allegation of bias or lack of impartiality supported by a factual or legal basis, due process objection, preservation of a constitutional claim, criticism of an Immigration Judge's reasoning or ruling, or argument seeking modification, limitation, or reversal of precedent does not constitute disorderly or abusive behavior or language. Without such a safeguard, the proposed language risks creating an unacceptable choice for attorneys: preserve a client's rights and risk being accused of contempt, or remain silent and potentially waive the client's claim.

C. *The Proposed "False Statement of Law" Standard Fails to Distinguish Misrepresentation From Good-Faith Legal Advocacy*

Proposed § 1003.124(a)(4) would permit contempt sanctions for "knowingly or recklessly making a false statement of material fact or law."[28] Although intentionally presenting false evidence or knowingly misrepresenting facts to a tribunal is plainly distinguishable from legitimate advocacy, the concept of a "false statement of . . . law" presents substantially different concerns.

Legal propositions are frequently disputed. Statutes and regulations are susceptible to competing interpretations, precedent may be distinguishable, the courts of appeals may disagree with one another, agency precedent may conflict with judicial precedent, and questions of first impression necessarily require advocates to advance positions that have not previously been accepted. Indeed, the development of law depends upon attorneys' ability to argue that existing precedent should be distinguished, limited, modified, extended, or overruled. As an officer of the court, a lawyer "should seek improvement of the law," and the Model Rules state the corollary squarely: "While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process."[29] A regulation that makes the first duty hazardous does not advance the second. The NPRM, as written, threatens attorneys' ability to uphold their duties and responsibilities to their clients and the law. A legal argument does not become "false" merely because an Immigration Judge disagrees with it or ultimately rejects it.

A recklessness standard is workable as applied to statements of fact and to evidence, where there is an objective reference against which a statement is either true or false. This is why the current rule's "reckless disregard" standard has been administrable. It is not workable as applied to statements of law, where the content of the proposition is itself the matter in dispute.

[28] 91 Fed. Reg. at 47990.
[29] Model Rules of Professional Conduct: Preamble and Scope, paragraph [5].

The proposed regulation does not explain when an incorrect characterization of the law crosses the line from mistake, good-faith disagreement, or advocacy into a "recklessly" false statement of law. Without an objective standard, an attorney could reasonably fear that advancing a novel legal interpretation, distinguishing precedent in a manner the Immigration Judge finds unpersuasive, or arguing for the modification of existing law could later be characterized as reckless.

The Department cites Model Rule of Professional Conduct 3.3 in support of its proposed treatment of false statements of law.[30] But the professional obligation of candor toward a tribunal should not be transformed into authority to sanction attorneys merely for advancing unsuccessful legal positions. The contempt regulation should clearly distinguish intentional deception regarding legal authority from good-faith legal advocacy.

Therefore, if this rule is finalized, we urge EOIR to expressly provide that:

> "A good-faith argument concerning the interpretation, application, extension, modification, limitation, or reversal of existing law shall not constitute a false statement of law for purposes of this section."

The Department should further define a sanctionable false statement of law using objective conduct, such as knowingly citing fabricated or nonexistent authority, knowingly and materially misquoting or misrepresenting the holding of authority, or knowingly failing to disclose directly controlling adverse authority where disclosure is legally or ethically required.

At minimum, the regulation must make it unmistakably clear that disagreement with an immigration judge concerning the meaning or application of law is not contempt.

D. "Misleading," "Misinforming," and "Deceiving" Require Further Definition.

Proposed 8 C.F.R. § 1003.124(a)(5) separately authorizes sanctions for "willfully misleading, misinforming, threatening, or deceiving" any person "concerning any relevant matter relating to a case."[31] Although the requirement that the conduct be "willful" provides some parameters, the regulation does not define the underlying conduct.

The term "misinforming," in particular, could encompass conduct far removed from intentional deception. Attorneys regularly provide clients and witnesses with assessments of uncertain legal questions, predictions concerning possible outcomes, and explanations of complex procedural requirements. An attorney's prediction may ultimately prove incorrect. A legal assessment may later be undermined by new precedent or a change in agency policy. None of that should constitute contempt.

Likewise, an attorney should not be deemed to have "misled" the court merely because the Immigration Judge believes counsel placed insufficient emphasis on a particular fact or authority.

[30] 91 Fed. Reg. at 47982 n.9.
[31] 91 Fed. Reg. at 47990.

Contempt should require more than an after-the-fact determination that a statement created an incorrect impression.

AILA therefore recommends that the Department define these terms narrowly and require an intent to deceive or materially misrepresent the information presented. Innocent mistakes, negligence, reasonable legal disagreement, and good-faith professional judgment should be expressly excluded.

E. *The Requirement That Conduct "Delay, Disrupt, or Obstruct" the Proceeding Does Not Cure the Vagueness of the Underlying Standards.*

Although proposed 8 C.F.R. § 1003.124 provides that an Immigration Judge may initiate the civil money penalty process only after making a prima facie determination that the conduct "delayed, disrupted, or obstructed the adjudicatory process," this limitation is not enough to cure the ambiguity of the underlying definitions.[32]

First, the requirement addresses the effect of the alleged conduct, not whether the conduct itself was prohibited. A practitioner still must determine whether a legal argument is "false," whether criticism "unfairly maligns" an Immigration Judge, or whether prior conduct has become "repeated."

Second, legitimate litigation activity can itself delay or disrupt the ordinary course of a proceeding. A motion to recuse may require postponement of a hearing. A due process objection may interrupt examination of a witness. A novel legal argument may require additional briefing. Contesting removability or alienage may require the scheduling of a contested removability hearing. A request to make an offer of proof may prolong a hearing, particularly after an Immigration Judge denies an attorney's motion to admit evidence. Those consequences do not transform protected and professionally appropriate advocacy into contemptuous conduct.

The Department should therefore make it clear that delay, disruption, or obstruction caused by the good-faith exercise of procedural rights or fulfillment of professional obligations cannot, standing alone, trigger the imposition of civil money penalties.

IV. The Rule Will Not Achieve Its Stated Efficiency Goals — and Will Add Delay and Process Burdens to the Courts.

AILA shares the Department's interest in a fair and efficient immigration court system and does not challenge the courts' authority to administer justice, maintain order in its proceedings, and preserve due process for both parties. As noted in the preamble, the purpose of the proposed rule is "to promote the fair, efficient, and consistent adjudication of immigration proceedings; to uphold the dignity and authority of such proceedings; and, "to deter behavior that delays, disrupts, or obstructs the due course of those proceedings."[33] EOIR says it is "now imperative" to implement the civil penalty authority, "to ensure Immigration Judges can exercise contempt authority to efficiently manage removal proceedings," and it points to a single operative fact: "EOIR currently

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[32] 91 Fed. Reg. at 47982.
[33] Proposed 8 CFR 1003.122(a); Purpose, 91 Fed. Reg. at 47980.

has a backlog of over 3.5 million cases."[34] From that premise, EOIR reasons that, "it is crucial for Immigration Judges to have every tool available — including the authority to impose civil money penalties—to control the proceedings before them and address and deter conduct that prevents efficient completion of removal proceedings."[35] The rule will not deliver that efficiency.

A. *EOIR's Own Record Refutes the Premise That Attorney Misconduct Is a Meaningful Cause of the Backlog.*

The rule rests on an unstated assumption that contemptuous conduct by attorneys, respondents, and witnesses is a significant contributing cause of the 3.5 million case backlog. EOIR offers no data for that assumption, and its own record fails to support it.

EOIR already maintains, and actively uses, a practitioner-discipline mechanism for attorney misconduct: the disciplinary process initiated and led by the EOIR disciplinary counsel.[36] By EOIR's own count in this NPRM, that mechanism produced, "immediate suspension or final disciplinary action … imposed on approximately 46 practitioners in 2025 and 37 practitioners in 2026 to date."[37] EOIR's public List of Currently Disciplined Practitioners confirms that this channel operates continuously, imposing immediate suspensions and final orders across a range of misconduct.[38]

Those figures should be measured against the volume of practice before the Immigration Courts. For Paperwork Reduction Act (PRA) purposes, EOIR estimates that 1,536,921 Notices of Entry of Appearance as Attorney or Representative (Form EOIR-28) are filed with the Immigration Courts each year. Against that volume of appearances, EOIR imposed immediate suspension or final discipline on approximately 46 practitioners in 2025 — on the order of three for every hundred thousand appearances filed. EOIR itself acknowledges that the individuals reached by this proposed rule are "a broader group of individuals than practitioners subject to EOIR's professional conduct rules," so the new penalty regime extends beyond even that record of misconduct.

EOIR does not explain how sanctioning conduct at that scale could move a backlog measured in the millions. The drivers of the backlog—case volume, court resources, and staffing—are untouched by this rule. So are the developments described elsewhere in this comment: the removal of almost 100 of approximately 700 immigration trial judges during 2025, the reduction of the Board from 28 members to 15, and case-completion quotas.[39] A penalty aimed at a handful of party participants cannot cure a structural caseload problem EOIR's own statistics attribute to other causes.

Independent analyses of the court backlogs reinforce this point. In congressional testimony, the Government Accountability Office (GAO) reported that, "[t]he increase in the immigration

[34] 91 Fed. Reg. at 47980 & n.5, quoting the preamble and citing EOIR, Adjudication Statistics: Pending Cases (Apr. 22, 2026).
[35] 91 Fed. Reg. at 47980.
[36] 91 Fed. Reg. at 47980, citing 8 CFR 1003.105.
[37] 91 Fed. Reg. at 47986 n.22, quoting and citing EOIR, List of Currently Disciplined Practitioners (July 13, 2026).
[38] EOIR, List of Currently Disciplined Practitioners, reviewed; The annual totals are quoted from EOIR's own count at 91 *Fed. Reg.* 47,986 n.22.
[39] GAO-18-701T, at 7, and CRS R47077, at 19–29; the 2025 removal of trial judges, the reduction of the Board from 28 to 15, and case-completion quotas: AILA Policy Brief, "America Needs Independent, Fair, and Efficient Immigration Courts," at 1–3 (Mar. 19, 2026), and Brennan Center for Justice, "The Empty Promise of the Board of Immigration Appeals" (Apr. 10, 2026)

court case backlog occurred as immigration courts completed fewer cases annually," with annual completions "declin[ing] by 31 percent from fiscal year 2006 to fiscal year 2015—from about 287,000 cases completed in fiscal year 2006 to about 199,000 completed in 2015."[40] When GAO catalogued the reasons why the case backlog increased and case completion times slowed, it framed the problem as one of "EOIR's workforce planning, hiring, and technology utilization," recommending, for example, that EOIR repair a hiring process that took "an average of 647 days … more than 21 months" to seat a judge.[41] GAO's 2023 study, examining the backlog as it tripled to about 1.8 million pending cases at the start of fiscal year 2023, likewise recorded that "EOIR officials identified resource shortages as contributing to the backlog, alongside increases in caseloads and the legal complexity of cases" — not participant misconduct.[42]

The Congressional Research Service (CRS), in its study of the pending case backlog, likewise found that "[f]actors associated with the growth in the immigration courts backlog … include immigration court resources and staffing, increased DHS interior and border enforcement, changing migrant arrival patterns at the U.S.-Mexico border, and impacts from the COVID-19 pandemic."[43] Its dedicated "Factors Associated with the Backlog" analysis enumerates funding disparities between EOIR and DHS, immigration-judge staffing and productivity, interior and border enforcement, and pandemic-related court closures — with no factor attributed to attorney, respondent, or witness misconduct.[44] And CRS's survey of proposed responses to the backlog — which canvassed the hiring of more judges and staff, the provision of docket-management tools, changes to IJ quotas and performance measures, accelerated dockets, asylum-process changes, and an independent Article I court—nowhere includes penalizing the conduct of the parties before the court.[45] When the government's own auditors and Congress's own research service both diagnose and propose cures for the backlog, attorney and respondent misconduct appears on neither list — a striking silence for a rule that seemingly rests on the opposite premise.

The mismatch is even stronger because the same government invoking the efficiency goal to cure the court backlog has been reducing the very input its auditors identify as the binding constraint—the judges themselves. The Immigration Judge corps shrank by roughly a quarter in a single year, from 726 permanent judges in February 2025 to 553 in February 2026, through terminations and departures, even as the backlog approached four million; the courts also lost more than 400 legal assistants, attorneys, and administrative specialists.[46] The retrenchment has reached the entire court system: the San Francisco immigration court, which had 22 judges in 2025 and two when it closed on May 1, 2026, leaving nearly 120,000 pending cases to be transferred to the

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[40] *See* GAO, "Immigration: Progress and Challenges in the Management of Immigration Courts and Alternatives to Detention Program," GAO-18-701T, at 6 (Sept. 18, 2018) — GAO congressional testimony before the Senate Committee on Homeland Security and Governmental Affairs.

[41] *Id*. at 7 and 9.

[42] GAO-23-105431, "Immigration Courts: Actions Needed to Address Workforce, Performance, and Data Management Challenges," at 1 (Apr. 2023).

[43] See "U.S. Immigration Courts and the Pending Cases Backlog," at Summary page, Congressional Research Service, (R47077) (April 25, 2022).

[44] *Id.* at 19–29.

[45] *Id*. at 30–43.

[46] NPR, "The numbers behind Trump's dismissals of immigration judges" (Feb. 23, 2026) — reviewed via the published report; the figures are NPR's, drawn from EOIR data; secondary source; confirm against EOIR personnel data before filing.

smaller Concord Immigration Court, 28 miles away [47] A proposed solution cannot credibly be defended as a backlog-reduction tool by an agency that is at the same time removing the adjudicators GAO and CRS identify as the constraint. If reduced delays were the main objective, sufficient judges and court supporting personnel would be the place to start.

B. *EOIR Invokes "Fraud and Abuse," but Cites No Evidence of It—and Its Only Support Is an Enforcement Directive Aimed at One Side.*

Alongside efficiency, EOIR offers a second justification: the rule is "consistent with the Administration's goal of combatting fraud and abuse of legal processes, including in the immigration system, which may lead to delays in the adjudication of cases before the agency."[48] The preamble supplies no evidence for that premise. It cites no study, no rate, and no case count quantifying fraud or abuse by attorneys, respondents, or witnesses, and nothing linking such conduct to delay. The two authorities it invokes are both statements of policy—the 2006 Gonzales memorandum[49] and the March 22, 2025, Presidential Memorandum[50]—neither of which contains data.

The 2025 Presidential Memorandum, EOIR's cited support for the current "fraud and abuse" rationale, contains no statistics. It asserts that, "[r]ecent examples of grossly unethical misconduct are far too common" and categorically smears the immigration bar, claiming that it "... and powerful Big Law pro bono practices, frequently coach clients to conceal their past or lie about their circumstances when asserting their asylum claims," and that "this fraud in turn undermines the integrity of our immigration laws and the legal profession more broadly." These assertions are made without any supporting data.[51]

A justification unsupported by any evidence cannot credibly bear the weight of such a penalty regime. Executive Order 13563, which the NPRM itself invokes, directs agencies to use "the best available methods to quantify costs and benefits," and EOIR has quantified nothing on this point.[52] Nor has EOIR shown that the conduct it seeks to penalize is the only conduct that delays proceedings. As noted above, the rule exempts the government's own attorneys and official-capacity witnesses,[53] yet EOIR offers no data—and makes no finding—that government attorneys never engage in fraud, abuse, or other conduct that "delay[], disrupt[], or obstruct[] the adjudicatory process." A rule genuinely aimed at "fraud and abuse of legal processes … which may lead to delays" would begin by asking whether such conduct occurs on both sides. This proposed rule exempts one side by definition on no evidentiary record.

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[47] The Guardian, "'Everyone has a breaking point': the immigration judges at the sharp end of Trump's deportation drive" (May 9, 2026).

[48] 91 Fed. Reg. at 47980 & n.6.

[49] 91 Fed. Reg. at 47980 & n.1–2.

[50] 91 Fed. Reg. at 47980 n.6, citing Presidential Memorandum, "Preventing Abuses of the Legal System and the Federal Court" (Mar. 22, 2025).

[51] Presidential Memorandum, "Preventing Abuses of the Legal System and the Federal Court" (Mar. 22, 2025).

[52] 91 Fed. Reg. at 47986.

[53] Proposed 8 CFR § 1003.123(b); preamble, 91 Fed. Reg. at 47981.

C. EOIR Concedes the Penalty Will Be "Rarely Invoked" — Which Defeats Its Own Efficiency Rationale.

The efficiency justification also collapses under EOIR's own description of how often the rule will be used. Throughout the NPRM, EOIR insists the penalty is an "extraordinary sanction" that "should be used sparingly" and rarely invoked.[54] In its Regulatory Flexibility Act (RFA) certification, EOIR states that, on this basis, the rule "will not have a significant economic impact on a substantial number of small entities."[55]

EOIR cannot have it both ways. Either the penalty will be imposed rarely, in which case it is, by definition, incapable of making a measurable dent in a 3.5-million-case backlog, and the efficiency rationale fails on its own terms; or it will be imposed often enough to matter, in which case EOIR's RFA and PRA analysis is incorrect and the chilling and process harms described in this comment are correspondingly large. There is no version of the rule in which it both meaningfully reduces the backlog and is the low-impact, rarely-used measure EOIR represents it to be. AILA submits that EOIR's own repeated characterization is the accurate one: the penalty will be rare. That conclusion cannot be reconciled with the claim that this proposed rule is a backlog-reduction tool.

D. EOIR's Deterrence Theory Is Speculative And, by Its Own Terms, Minimal.

EOIR's efficiency claim ultimately rests not on the penalties actually collected but on a predicted deterrent effect. EOIR "anticipates" that the prospect of a penalty, "will have a deterrent effect on overall sanctionable conduct, thereby reducing the time Immigration Judges spend attempting to enforce courtroom decorum instead of adjudicating cases."[56] EOIR offers no evidence that time spent on courtroom decorum is a measurable contributor to the backlog or that a money penalty would deter the conduct targeted by the proposed rule. Again, a deterrent that EOIR predicts will rarely be triggered, aimed at conduct EOIR never shows to be a material cause of delay, is not a backlog remedy.

E. Far from Saving Time, the Proposed Rule Builds an Entire New Adjudicatory Track That Consumes Court Resources.

One of the deepest flaws in the stated efficiency rationale is that instead of increasing efficiency, the rule adds a second proceeding parallel to a removal case. The machinery the NPRM erects is substantial, and every step consumes court time and resources that are already strained by the backlog:

- **Initiation by the Immigration Judge.** Before any penalty, the judge must issue a "clear and unambiguous warning," deliver it orally on the record and then "memorialize the warning in writing as soon as practicable" (or issue and serve a written warning), and, if the conduct continues, "make a finding on the record" of continued conduct.[57] The court must then "create a contempt Record of Proceeding, separate and apart from any underlying case Record of Proceeding," and populate it — transcribing oral statements, warnings, and responses given

[54] Proposed 8 CFR 1003.122(b), 91 Fed. Reg. at 47983, *quoting Nelson v. Steiner*, 279 F.2d 944, 948 (7th Cir. 1960).

[55] 91 Fed. Reg. at 47986.

[56] Executive Order 12866, 91 Fed. Reg. at 47986.

[57] Proposed 8 CFR 1003.125(b), (e); 91 Fed. Reg. at 47,990–91.

on the record, and requiring the Immigration Judge to summarize in writing any that were not recorded.[58] These are new clerical and adjudicative tasks imposed in the very cases where docket time is scarcest.

- **Review by the Office of the Chief Immigration Judge.** Jurisdiction over every penalty "vests with the Chief Immigration Judge," who (or whose Deputy Chief designee) must "consider and rule on all motions," decide on a closed record,[59] and "may not remand."[60] A single supervisory office is thus made the nationwide adjudicator in the first instance for every contempt penalty, on 30-day response and motion practice.[61]

- **Appeal at the BIA, plus Attorney General review.** The rule creates a new Board appeal process on a new Form EOIR-86, with a simultaneous briefing schedule due from both parties within 20 days of the Board order setting the schedule and no more than 35 days after the appeal was filed.[62] The Board "may publish decisions" as binding precedent and "shall refer cases under this subpart to the Attorney General for review."[63] This loads a new docket onto a Board that, as noted, has been cut from 28 members to 15 while its backlog reached an all-time high.[64]

- **Collateral Proceedings.** Nonpayment triggers a separate suspension track—a disciplinary-counsel notice, a petition to the Board, and immediate-suspension litigation.[65] Oversight adds periodic Chief Immigration Judge and Director reviews and standing-order suspensions of a judge's authority.[66] And the NPRM contemplates federal-court review of penalty orders.[67]

By EOIR's own design, none of these processes accelerate the underlying removal case. The proposed rule provides that a penalty proceeding against a respondent may not "stay or otherwise interfere with the proceedings before the Immigration Judge or … the removal of the alien," and that filing an appeal "automatically stays the order and the requirement to pay the penalty."[68] The contempt track proceeds parallel to the merits case, drawing on the same judges, the same Board, and the same clerks, without moving the merits case forward. A rule justified as a cure for delay instead creates a second stream of adjudication for a system that cannot keep up with the first.

F. <u>The Department's Own Actions Do Far More to Undermine the Stated Objective Than the Conduct This Rule Targets.</u>

The efficiency rationale fails for a reason larger than any single defect noted in this comment. If the Department's objective is to reduce delay and keep removal proceedings moving, the levers that matter most are within its own control, and it is using them the wrong way. On the

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[58] Proposed 8 CFR 1003.126(e); 91 Fed. Reg. at 47,982 n.11, 47991.
[59] The record of proceedings for a civil monetary penalty (CMP) is outlined in Proposed 8 C.F.R. § 1003.126(e). The CMP Notice allows a response to be filed within thirty (30) days of issuance.
[60] Proposed 8 CFR 1003.127(a)–(b); 91 Fed. Reg. at 47,992.
[61] Proposed 8 CFR 1003.126(b)(3), (d); 91 Fed. Reg. at 47,991–92.
[62] Proposed 8 CFR 1003.3(c)(1), 1003.128; 91 Fed. Reg. at 47984, 47993.
[63] Proposed 8 CFR 1003.128(d)(3); 91 Fed. Reg. at 47993.
[64] *See* AILA Policy Brief, "America Needs Independent, Fair, and Efficient Immigration Courts," at 1–3 (Mar. 19, 2026); Brennan Center for Justice, "The Empty Promise of the Board of Immigration Appeals" (Apr. 10, 2026).
[65] Proposed 8 CFR § 1003.129(c); 91 Fed. Reg. at 47993.
[66] Proposed 8 CFR § 1003.130; 91 Fed. Reg. at 47985 n.16, 47993.
[67] 91 Fed. Reg. at 47985 n.15.
[68] Proposed 8 CFR § 1003.126(a), 1003.127(e); 91 Fed. Reg. at 47,991–92.

one hand, it has reduced the adjudicative capacity that the cited GAO and CRS reports identify as the primary constraint on the backlog: it cut the immigration-judge corps by roughly a quarter in a single year and shed more than 400 support staff, and then began refilling the bench with short-term, inexperienced appointees serving renewable six-month terms.[69] On the other hand, it has narrowed remote access to the Immigration Courts. Stakeholders told GAO that remote hearings allow "respondents increased access to private bar attorneys," and GAO reports that the choice of medium rests "[a]t the individual discretion of the immigration judge."[70] In November 2025, EOIR limited Webex access to parties appearing remotely and directed non-party observers to attend in person; under the fact sheet now in effect, remote observation is available only where no physical courtroom is in use and is capped at twenty virtual visitors.

These actions, the loss of judges, the loss of more than 400 legal assistants, attorney advisors, and legal administrative specialists, and the contraction of reliable remote access, bear on both the size of the backlog and the fairness of proceedings far more directly than the rare, individualized misconduct this penalty reaches. A Department genuinely focused on the backlog it invokes would restore adjudicative capacity and preserve dependable remote access before it turned to fining the attorneys, respondents, and witnesses who appear before it. That the Department proposes this penalty while moving in the opposite direction on the inputs that bear most directly on court delay indicates that the rule will not achieve the efficiency it promises and that efficiency is not what the rule actually advances.

V. Conclusion

For the foregoing reasons, the proposed rule should be withdrawn. EOIR purports to have identified a structural gap—that an Immigration Judge presiding over a proceeding may only file a disciplinary complaint in the same manner as a member of the general public—but it has not cited a single instance in which that gap left misconduct unremedied, and it has not shown that practitioners have escaped accountability because the current standards are too narrow. In the absence of any demonstrated enforcement gap, the proposed amendments would only expand disciplinary exposure beyond what is necessary, chill vigorous representation, erode due process, and create uncertainty for practitioners who must already comply with existing disciplinary rules and state professional responsibility obligations.

Should EOIR proceed with the rule, we urge the Department to correct the asymmetry by applying any contempt-related civil money penalty authority equally to all attorneys and witnesses appearing before EOIR, including OPLA attorneys and official-capacity federal witnesses, or by creating an equivalent, court-enforceable accountability mechanism for government misconduct occurring in or affecting proceedings. A rule designed to preserve the authority and integrity of

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[69] Judge capacity as the binding backlog constraint: GAO-18-701T, at 7, GAO-23-105431, at 1, and CRS R47077, at 19–29; the corps' reduction from 726 to 553 and loss of 400+ support staff: NPR, "The numbers behind Trump's dismissals of immigration judges" (Feb. 23, 2026); Up-to-600 military-lawyer temporary judges, elimination of the experience requirement, and renewable six-month terms: "Trump Appoints Military Lawyers to Serve as Immigration Judges," American Immigration Council (Sept. 5, 2025).

[70] GAO-26-108110, Highlights & at 1 (July 15, 2026); EOIR, Fact Sheet, "Observing Immigration Court Hearings" (Nov. 1, 2025).

the Immigration Court system cannot exempt one party's advocates from the court's authority. Equal justice requires equal accountability.

Further, the extraordinary nature of contempt authority demands precision. That is particularly true where the contemplated sanctions arise within adversarial proceedings and where the adjudicator initiating the contempt process may also be the subject of the allegedly contemptuous criticism. We therefore urge the Department to revise proposed § 1003.124 to:

(1) Define "repeated failure" using objective criteria and remove the "reasonably should have known" standard, as well as define "appropriate remedial measures," and explain in the supplementary information the intersection with relevant ABA Model Rules and State professional responsibility obligations;

(2) Distinguish knowingly deceptive statements about legal authority from good-faith legal argument;

(3) Narrowly define "disorderly or abusive" conduct based upon objectively abusive or materially disruptive behavior rather than criticism of the adjudicator;

(4) Clarify the meaning of "misleading," "misinforming," and "deceiving";

(5) Establish an express safe harbor protecting good-faith litigation activity and the preservation of issues for appellate and judicial review; and

(6) Clarify how to interpret and resolve conflicts with state Rules of Professional Conduct 1.6, confidentiality, and 1.16, termination of representation.

These changes would not prevent Immigration Judges from addressing genuine contemptuous conduct. They would instead ensure that the authority Congress provided is exercised consistently, predictably, and only in the exceptional circumstances contemplated by the Department.

The Department has stated that its objective is to establish a "strictly defined and clearly delineated authority" and that contempt sanctions should be an "exceptional tool that should be rarely invoked."[71] The final regulation, if any, should fulfill those principles. A contempt regulation should provide practitioners clear notice of where the line lies before sanctions are threatened, not leave that line to be drawn after the fact by the adjudicator whose rulings, conduct, or impartiality may itself be the subject of legitimate advocacy.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

[71] 91 Fed. Reg. at 47982, citing *Nelson v. Steiner*, 279 F.2d 944, 948 (7th Cir. 1960).