

**Before the  
U. S. Copyright Royalty Judges  
Copyright Royalty Board  
Library of Congress**

In the Matter of:

Proceedings of the Copyright Royalty Board;  
Violation of Standards of Conduct

Docket No. 17-CRB-0013 RM

**COMMENTS OF MUSIC COMMUNITY PARTICIPANTS**

SoundExchange, Inc. (“SoundExchange”), the Recording Industry Association of America, Inc. (“RIAA”), the American Association of Independent Music (“A2IM”), the American Federation of Musicians of the United States and Canada (“AFM”), the Screen Actors Guild – American Federation of Television and Radio Artists (“SAG-AFTRA”), the Alliance of Artists and Recording Companies, Inc. (“AARC”) and the National Music Publishers’ Association (“NMPA,” and all of the foregoing collectively, the “Commenting Parties”) respectfully provide these Comments in response to the Copyright Royalty Judges’ proposed rule concerning standards of conduct for proceedings before the Judges. 82 Fed. Reg. 18,601 (Apr. 20, 2017).

The Commenting Parties wholeheartedly agree “that all persons appearing in proceedings before the Judges [should] act with integrity and in an ethical manner.” 82 Fed. Reg. at 18,602. Accordingly, the Commenting Parties support the premise of the proposed rule that the Judges should be able to take actions necessary to ensure the integrity of proceedings before them. However, the Commenting Parties are concerned that the proposed rule is broader than necessary or appropriate. In particular, the Commenting Parties suggest caution in addressing issues other than the risk of fraudulent distribution claims, which seems to provide the primary impetus for

the proposed rule. If the Judges wish to adopt a more general system of discipline, the Commenting parties suggest eliminating or at least substantially narrowing proposed Section 350.9(b)(2), which would impose on corporate entities such as the Commenting Parties a significant compliance burden, and reduce their hiring flexibility, while having little or no positive effect in the integrity of proceedings before the Judges. The Commenting Parties also suggest certain other refinements to the scope of the proposed rule that the Commenting Parties believe would tailor it more appropriately to the purposes it is designed to achieve.

**I. Interests of the Commenting Parties**

SoundExchange is the nonprofit collective that the Judges have designated to receive statements of account, royalty payments and reports of use from licensees under Sections 112(e) and 114 of the Copyright Act and to distribute such royalty payments to copyright owners and performers. It collects and distributes digital performance royalties on behalf of more than 130,000 featured recording artist and copyright owner accounts. It is a participant in the *SDARS III* proceeding before the Judges (Docket No. 16-CRB-0001 SR/PSSR (2018-2022)), and it has participated in all previous proceedings under Sections 114 and 112(e) of the Copyright Act since jurisdiction over such proceedings was vested in the Judges.

RIAA is a nonprofit trade organization that represents the major record companies in the United States, and A2IM is a nonprofit trade organization representing a broad coalition of over 400 independently-owned U.S. music labels. RIAA and A2IM's members collectively create, manufacture and/or distribute nearly all of the sound recordings commercially produced and distributed in the United States. RIAA and A2IM are represented on the board of directors of SoundExchange and currently participating directly in *SDARS III*. Through SoundExchange,

they have been involved in previous proceedings under Sections 114 and 112(e) as well. RIAA's member companies also participated in the pending *Phonorecords III* proceeding (Docket No. 16-CRB-0003-PR (2018–2022)), and RIAA has participated in all past such proceedings since provisions were made for adjusting statutory mechanical royalty rates in the Copyright Act of 1976.

AFM is the largest union in the world representing professional musicians, and SAG-AFTRA is the nation's largest labor union representing working entertainment and media artists. Musicians represented by the AFM and artists represented by SAG-AFTRA are recipients of the featured artist and non-featured musician and artist shares of the royalties distributed pursuant to Section 114. AFM and SAG-AFTRA are represented on the board of directors of SoundExchange and currently are participating directly in *SDARS III* as well.

AARC is the leading organization representing featured recording artists and sound recording copyright owners with respect to royalties paid for the manufacture and distribution of digital audio recording devices and media. AARC has regularly participated in distribution proceedings under Section 1007 of the Copyright Act.

Founded in 1917, NMPA is the principal trade association representing the U.S. music publishing and songwriting industry. NMPA protects and advances the interests of music publishers and songwriters in matters relating to both the domestic and global protection of music copyrights. NMPA represents publishers and songwriters of all catalog and revenue sizes, from large international corporations to small businesses and individuals. Taken together, compositions owned or controlled by NMPA members account for the vast majority of the market for musical composition licensing in the U.S. NMPA has represented the interests of music copyright owners in all proceedings to set royalty rates and terms for the compulsory

license under Section 115 of the Copyright Act, including the *Phonorecords III* proceeding currently pending before the Judges.

**II. The Commenting Parties Agree that the Judges Should Be Able to Enforce Standards of Conduct, but Urge Caution in Regulating Issues beyond Fraudulent Distribution Claims**

As frequent participants in proceedings before the Judges who represent constituents with a significant economic stake in the outcome of proceedings, the Commenting Parties are in complete agreement with the Judges that persons appearing before the Judges should “act with integrity and in an ethical manner.” 82 Fed. Reg. at 18,602. While good-faith mistakes may occasionally occur, it is unquestionably important that participants in proceedings before the Judges do their best to present truthful testimony and other evidence to the Judges.

The *Federal Register* notice announcing the proposed rule addresses at length certain distribution claims made by a person previously convicted of submitting fraudulent distribution claims. A large pool of statutory royalties available for distribution presents an attractive target for fraudsters. For that reason, SoundExchange and AARC employ various procedures to mitigate the risk of fraudulent claims against the royalties they administer. Similarly, it makes sense for the Judges to take care to mitigate baseless claims in their distribution proceedings, and particularly to prevent repeated claims by persons who have previously been found to have submitted baseless claims. Rigorous standards of conduct might well be justified for that purpose.

It is far less apparent that the Judges need to establish a broad-ranging system of discipline for attorneys and other professionals who may appear before them and for participants in rate-setting proceedings. To be sure, there are other administrative agencies that have adopted

regulations allowing them to control which attorneys or other professionals are permitted to practice before them. *E.g.*, 37 C.F.R. Part 11 (practice before the Patent and Trademark Office); 31 C.F.R. Part 8 (practice before the Bureau of Alcohol, Tobacco and Firearms). However, there are already standards of conduct and disciplinary procedures for attorneys and other licensed professionals that do much of what the proposed rule seeks to do. For example, the Judges' rules of procedure already specify duties of an attorney practicing before the Judges to ensure that the documents the attorney signs are reliable. 37 C.F.R. § 350.6(e)(1). If an attorney made false statements to the Judges, the attorney would also violate ethical standards applicable to attorneys generally and be subject to discipline. *E.g.*, ABA Model Rules of Prof'l Conduct R. 3.3 (candor toward the tribunal), 8.4 (misconduct). Likewise, if a disbarred or currently-suspended attorney sought to represent a client before the Judges, that attorney would be engaged in the unauthorized practice of law. That would be grounds for further discipline in jurisdictions in which the attorney was licensed. *E.g.*, *id.* R. 5.5. In some jurisdictions, a disbarred or currently-suspended attorney may even face criminal liability for representing a client before the Judges. *E.g.*, Md. Bus. Occ. & Prof. Code § 10-601; Va. Code Ann. § 54.1-3904.

Suspending or debarring participants in rate-setting proceedings (as opposed to individuals associated with them) could interfere with the public interest in such proceedings, because only a limited number of entities have a sufficient stake and resources to participate in such proceedings. *See, e.g.*, 17 U.S.C. § 803(b)(2)(C) (disqualifying persons who "lack[] a significant interest in the proceeding"). If an important licensee or licensor representative was excluded from participation, the Judges might be left with an incomplete record on which to base statutory royalty rates and terms, which could disadvantage those bound by the outcome of the proceeding who do not have the resources to participate themselves.

Moreover, the adversarial procedures employed in rate-setting proceedings before the Judges are good for uncovering problems in evidence that is presented, and the approaches the Judges have previously employed for addressing issues in witness testimony seem to have worked satisfactorily. That is what happened in the situation from *Phonorecords I* that the Judges also identified in the *Federal Register* notice announcing the proposed rule. While the testimony at issue there had inaccuracies, and so did not rise to the level to which participants in proceedings should aspire, there is no reason to believe that fraud was intended. Instead, as commonly happens, the inaccuracies were revealed in the ordinary course of discovery and cross examination, and the Judges declined to credit the testimony.

The Commenting Parties have concerns about participants trying to use the proposed standards of conduct, if adopted, to gain a tactical advantage over their litigation adversaries by suggesting their suspension or debarment. Due to the nature of proceedings before the Judges, the same participants, and frequently the same counsel, litigate against each other recurrently. Presenting the opportunity to have a perennial adversary or the adversary's counsel knocked out of future proceedings may tempt participants to pursue suspension or debarment proceedings against their adversaries in cases involving good-faith differences of opinion that are to be expected in hotly-contested proceedings, or in cases involving inadvertent errors of the kind that sometimes occur when complicated analyses are prepared under time pressure. While the Judges presumably would not impose harsh discipline in such cases, the possibility for tactical use of the proposed rules suggests that caution is warranted. The Judges may wish to consider more narrowly addressing the risk of fraudulent distribution claims, rather than wading into the more complicated topics of discipline for attorneys, other professionals and participants in rate-setting proceedings.

**III. The Commenting Parties Are Concerned that Certain Aspects of the Proposed Rule Are Broader than Necessary to Ensure the Integrity of Proceedings**

The Commenting Parties are concerned that the proposed rule reaches more broadly than necessary to serve its salutary purpose. If the Judges ultimately wish to adopt a general system of discipline, the Commenting Parties believe the proposed rule should be modified to address the three issues discussed below.

**A. Proposed Section 350.9(b)(2) Seems Unnecessary, and Should be Eliminated or at Least Be More Narrowly Tailored to Proceedings before the Judges**

Paragraph (2) of proposed Section 350.9(b) stands apart from the other paragraphs of that section because it does not merely reserve to the Judges the power to exclude certain individuals from appearing before them. Instead, Section 350.9(b)(2) applies broadly to corporate entities appearing before the Judges, and potentially subjects them to suspension or debarment for employing “in any capacity” involving royalty distribution or submission of evidence to the Judges an individual who has ever had a professional license suspended or been convicted of a potentially ambiguous crime “involving moral turpitude.” Because of the very broad reach of this provision, it would impose a significant compliance burden on corporate participants in rate proceedings, and it could prevent them from hiring well-qualified applicants for employment who experienced issues earlier in life but currently pose no risk to the integrity of proceedings before the Judges. The provision should be eliminated from the proposed rule or very substantially narrowed.

**1. Proposed Section 350.9(b)(2) Applies to a Potentially Broad Set of Participant Employees**

As an initial matter, it should be understood that the corporate entities that appear in proceedings before the Judges are often substantial entities with many employees, the vast

majority of whom have no role at all with respect to decision-making concerning proceedings before the Judges but might nonetheless be implicated by proposed Section 350.9(b)(2).

This is particularly the case for SoundExchange, because SoundExchange has been designated by the Judges to collect and distribute all statutory royalties under Sections 112(e) and 114 of the Copyright Act. SoundExchange has approximately 160 employees, and only a handful of them are typically involved materially in proceedings before the Judges. However, because the vast majority of what SoundExchange does is “administering the distribution of royalties to claimants,” anyone employed by SoundExchange could be said to assist in some capacity with that function and thus to be reached by proposed Section 350.9(b)(2).

While other Commenting Parties may be less pervasively affected by Section 350.9(b)(2) of the proposed rule than SoundExchange, all of the Commenting Parties are involved to some extent in preparing evidence used in proceedings before the Judges. Section 350.9(b)(2) extends not only to employees of participants who appear as witnesses before the Judges, but also to employees involved “in any capacity” in gathering evidence (either for inclusion in another employee’s witness statement or in response to a discovery request), even if those employees have limited and purely ministerial roles. Because proceedings before the Judges are typically wide-ranging, it is difficult to know in advance who on a participant’s staff might be asked for information relevant to a proceeding.

In addition to reaching a broad range of positions within a corporate participant, proposed Section 350.9(b)(2) also potentially reaches a broad range of individuals who might fill those positions. While attorneys are the licensed professionals who tend to be involved in proceedings

in the largest numbers, and attorneys have “special duties” to the Judges as officers of the court,<sup>1</sup> proposed Section 350.9(b)(2) applies to “any person described in paragraph (b)(1),” and that includes “any person whose license to practice as an accountant, engineer, or other professional . . . has been revoked or suspended in any State.” While largely irrelevant to proceedings before the Judges, there are a great many regulated professions, and more than a few professionals whose license to practice could be considered to have been revoked or suspended.

For example, in the District of Columbia, the Department of Consumer and Regulatory Affairs regulates more than 125 occupational and professional categories, including interior designers and cosmetologists.<sup>2</sup> Almost none of these regulations or professions have anything to do with the integrity of proceedings before the Judges, and practitioners of those professions would not typically have any professional involvement in proceedings before the Judges. However, proposed Section 350.9(b)(2) would arguably be implicated if SoundExchange hired a formerly-suspended interior designer to redesign the workspace of its Distribution Services Department. Proposed Section 350.9(b)(2) would seem to be implicated if any of the Commenting Parties hired a formerly-suspended cosmetologist to work in any position that might someday involve gathering information that might be submitted to the Judges.

Proposed Section 350.9(b)(2) also extends to hiring of persons convicted of a crime “involving moral turpitude” (because a person convicted of such a crime is one “described in

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<sup>1</sup> ABA Model Rules of Prof’l Conduct R. 3.3 cmt. 2; *see also* 37 C.F.R. § 350.6(e)(1) (certification implied by attorney’s signature on documents submitted to the Judges).

<sup>2</sup> <https://dcra.dc.gov/service/get-professional-license>. The D.C. Department of Health also regulates dozens of health-related professions. <https://doh.dc.gov/service/licensing-boards>. And the D.C. Superintendent of Education regulates various education-related professional categories. <https://osse.dc.gov/service/educator-credentialing-and-certification>.

paragraph (b)(1)). The concept of a crime “involving moral turpitude” is long-established in the law. *E.g.*, D.C. Code § 11–2503(a) (providing for disbarment of an attorney convicted of an offense involving moral turpitude). However, applying professional discipline on that basis has in recent decades been disfavored. As explained in a comment to the ABA Model Rules of Professional Conduct:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving “moral turpitude.” That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.

ABA Model Rules of Prof'l Conduct R. 8.4 cmt. 2. In practice, moral turpitude has been found in the case of serious crimes such as mail fraud,<sup>3</sup> but also in the case of crimes less obviously related to the integrity of proceedings before the Judges, such as misdemeanor improper sexual contact.<sup>4</sup> Proposed Section 350.9(b)(2) would seem to be implicated if a Commenting Party hired a person who had been convicted of any of a large and potentially ambiguous set of crimes involving not only honesty but also morality, in a position in any way related to royalty distribution or that might someday involve generating a piece of evidence that might be submitted to the Judges.

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<sup>3</sup> *E.g.*, *In re Firestone*, 824 A.2d 47 (D.C. 2003).

<sup>4</sup> *In re Bewig*, 791 A.2d 908 (D.C. 2002).

**2. Proposed Section 350.9(b)(2) Applies to Employment of Individuals Who Probably Would Not Be Suspended or Debarred by the Judges**

While Section 350.9(b) simply reserves to the Judges the power to suspend or debar individuals or corporate entities based on specific findings, proposed Section 350.9(b)(2) effectively asks corporate participants to guess at how the Judges would view the situation of particular individuals at the time they make hiring decisions. Section 350.9(b)(2) does not seem to be limited to employment of persons who have actually been suspended or debarred by the Judges, but appears to extend to employment of individuals who are potentially subject to future suspension or debarment. Proposed Section 350.9(b)(2) also appears to ask corporate participants not to hire a person formerly suspended by the Judges, even if that person has been reinstated by the Judges. A corporate entity that wishes regularly to appear before the Judges would never wish to risk its ability to do so by potentially subjecting itself to suspension or debarment. Accordingly, paragraph (2) is for the Commenting Parties effectively an instruction from the Judges not to hire “any person described in paragraph (b)(1),” even if the Judges probably would not view a particular situation as problematic.

**3. Proposed Section 350.9(b)(2) Would Impose a Significant Compliance Burden and Could Discourage Hiring of Qualified Applicants**

Because of the breadth of proposed Section 350.9(b)(2) as described above, it would impose a significant compliance burden on corporate participants in rate proceedings, and it could prevent them from hiring well-qualified applicants.

The point here is *not* that the Commenting Parties desire to hire criminals or professionals with blemishes on their records, and particularly not for purposes of work relating to proceedings before the Judges. Each Commenting Party cares deeply about the integrity of its staff, both in

general and specifically with respect to its presentations to the Judges. The point is that proposed Section 350.9(b)(2) would strongly motivate entities who wish to appear in proceedings before the Judges to apply to their hiring for a large number of their positions, including ones only very remotely related to proceedings before the Judges, screening for past professional issues or convictions that may have occurred long ago and been entirely unrelated to the work for which the hiring is occurring.

For example, consider a person who was at one time licensed as a cosmetologist, had a cosmetology license suspended, and after completing college, became an accountant. It is possible that after years of experience as an accountant, that person could be the best applicant for a mid-level accounting job that might once every five years involve generating a report of financial data that could find its way into testimony submitted to the Judges. The long-past suspension of the cosmetology license would not have any obvious bearing on the applicant's fitness as an accountant, and is a fact that probably would not be discovered in the ordinary course of recruiting for a staff accountant position. If hired, there is no reason to believe the long-past suspension of the accountant's cosmetology license would have any effect on the reliability of a financial report generated by that person or the resulting testimony submitted to the Judges.

However, proposed Section 350.9(b)(2) would nonetheless put the employer at risk of suspension or debarment from proceedings before the Judges if it hired the formerly-suspended cosmetologist as a staff accountant. Thus, proposed Section 350.9(b)(2) would provide a strong incentive for corporate entities that wish to be able to participate in proceedings before the Judges to redesign their hiring practices to ensure that they never hire a "person described in paragraph (b)(1)," even though the applicant had not been suspended or debarred from practice

before the Judges, and even though it is unlikely that the Judges would suspend or debar the employer if the issue was presented to them. Doing so would be difficult, and would impose an ongoing compliance burden out of proportion to any possible benefits for the integrity of proceedings before the Judges.

The constraints on hiring suggested by proposed Section 350.9(b)(2) also raise complex employment law issues for corporate entities appearing before the Judges. The U.S. Equal Employment Opportunity Commission takes the position that an employer cannot (1) treat applicants for a position with similar criminal background checks differently, as that could constitute disparate treatment discrimination, or (2) broadly prohibit the hiring of anyone with a criminal conviction if doing so would result in decisions having a disparate impact on protected groups such as African Americans or Hispanics.<sup>5</sup> The Commission may well view screening for past professional suspensions similarly. If proposed Section 350.9(b)(2) were adopted, conscientious companies that wish to participate in proceedings before the Judges could find themselves in a real bind trying to minimize the risk of hiring a “person described in paragraph (b)(1)” while nonetheless avoiding a charge of discriminatory hiring practices.

Some state and local laws also restrict criminal inquiries in hiring. For example, in the District of Columbia, employers are prohibited from making any inquiry of an applicant regarding a criminal conviction prior to making a conditional offer of employment. D.C. Code

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<sup>5</sup> See generally U.S. E.E.O.C., Pre-Employment Inquiries and Arrest & Conviction, *available at* [https://www.eeoc.gov/laws/practices/inquiries\\_arrest\\_conviction.cfm](https://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm); U.S. E.E.O.C., Enforcement Guidelines, *available at* [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

§ 32–1342(b).<sup>6</sup> A conditional offer can be withdrawn based on a criminal record only in limited circumstances. D.C. Code § 32–1342(d). The point of such “ban-the-box” laws is to prevent youthful indiscretions from becoming life-long bars to gainful employment once the affected person has paid his or her debt to society. The Commenting Parties agree that there is merit to offering people who have made mistakes a second chance. Proposed Section 350.9(b)(2) runs counter to that goal.

**4. Proposed Section 350.9(b)(2) Is Much Broader than Necessary to Ensure the Integrity of Proceedings before the Judges**

Weighing against the problems described above, proposed Section 350.9(b)(2) would do little or nothing to contribute to the integrity of proceedings before the Judges. The Commenting Parties wish to be very clear that they think it would be appropriate for the Judges to reserve to themselves the power to suspend or debar particular individuals for conduct involving dishonesty or other issues of professional conduct or competence. However, if the Judges choose to do that by adopting some version of proposed Section 350.9(b)(1), there is little else to be gained by also reserving the right to suspend or debar a corporate entity that employs a person subject to suspension or debarment.

Even if separate suspension or debarment of corporate entities could, in some circumstances, create desirable incentives for employers to police the conduct of their employees, proposed Section 350.9(b)(2) goes far beyond what is necessary to ensure the integrity of proceedings. For example, a formerly-suspended cosmetologist working as an

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<sup>6</sup> While this requirement does not apply if a federal or District law or regulation requires consideration of an applicant’s criminal history for purposes of employment, D.C. Code § 32–1342(c)(1), it is not clear that proposed Section 350.9(b)(2) would rise to the level of such a requirement.

accountant in the finance department of a participant is unlikely to be a decision-maker with respect to a participant's case, even if that person might be called upon to provide revenue or expense data included in testimony or otherwise submitted as evidence. In such a situation, the participant's counsel have a special duty not to participate knowingly in submission of false testimony on behalf of the participant.<sup>7</sup> The relevant witness and the decision-makers within the participant entity are also well-motivated to take reasonable measures to provide the Judges an accurate revenue or expense number even without proposed Section 350.9(b)(2), because any inaccuracies are likely to be exposed through discovery, review of the witness's testimony by the other side's experts and attorneys, and examination of the witness at trial. The integrity of the proceeding would not clearly be advanced by creating an incentive for the participant to hire a different (potentially less qualified) staff accountant who did not have a prior cosmetology licensing issue.

It is not apparent to the Commenting Parties that Section 350.9(b)(2) is necessary or justified, given the power of the Judges under the other paragraphs of Section 350.9(b) to suspend or debar particular individuals of concern. Accordingly, the Commenting Parties suggest eliminating Section 350.9(b)(2) from the proposed rule. If the Judges believe it is necessary to address employment by a participant in a proceeding of an individual subject to discipline, a corporate entity should be subject to suspension or debarment only if it employs a

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<sup>7</sup> 37 C.F.R. § 350.6(e)(1); ABA Model Rules of Prof'l Conduct R. 3.3.

person who is then barred from practice before the Judges in a role relating to a proceeding before the Judges.<sup>8</sup>

**B. The Scope of Proposed Section 350.9(b)(1) Should Be Clearer**

Proposed Section 350.9(b)(1) broadly allows the Judges to suspend or debar from appearance before the Judges any individual who has ever had any kind of professional license suspended or revoked or who has ever been convicted of any crime involving moral turpitude. While the Commenting Parties do not have significant concerns about this provision, because suspension or debarment would require a discretionary act by the Judges in each individual case, the scope of the provision is unclear in at least a couple of respects. The Commenting Parties believe it would be preferable to draw a clearer line that unquestionably relates proposed Section 350.9(b)(1) to its purpose of promoting the integrity of proceedings before the Judges.

First, proposed Section 350.9(b)(1) appears to be motivated by a concern about professional misconduct, but arguably is written broadly enough to apply to non-disciplinary license suspensions and revocations, including ones occurring automatically by operation of law. The *Federal Register* notice describing the proposed rule explains that it “clarifies the expectation and requirement that all persons appearing in proceedings . . . act with integrity and in an ethical matter.” 82 Fed. Reg. at 18,602. In the case of attorneys, the proposed rule specifies that it applies to an “attorney who has been suspended or disbarred *by a court*.” 82 Fed. Reg. at 18,603 (emphasis added). It thus appears that the Judges intend this provision to reach

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<sup>8</sup> For example, proposed Section 350.9(b)(2) might be revised to refer to “Any entity that employs or retains, to assist in submitting or preparing royalty claims or evidence to be used in a proceeding before the Copyright Royalty Board, any individual who is then suspended or debarred from appearing before the Copyright Royalty Board.”

suspension or disbarment of an attorney, or revocation or suspension of another professional license, for disciplinary reasons rather than to reach automatic suspension for administrative reasons such as late payment of license fees, failure to meet continuing education requirements, or voluntary forfeiture of a license in the absence of a disciplinary proceeding.

Of course, a currently-suspended attorney (even one who is merely administratively suspended) should not be able to represent a participant before the Judges, and a currently-suspended CPA should not hold himself out as a CPA in a proceeding before the Judges.<sup>9</sup> However, reserving the power to suspend or debar any currently-licensed professional who has formerly had a license suspended for administrative reasons goes well beyond disciplinary authority reserved by analogous rules of practice, and would not seem to serve the Judges' purpose of ensuring the integrity of proceedings before them. *See, e.g.*, ABA Model Rules of Prof'l Conduct R. 8.4 (defining attorney misconduct); 37 C.F.R. § 11.19(b) (specifying grounds for discipline by the Patent and Trademark Office). Conversely, a recent academic investigation found that administrative suspension of attorneys for reasons such as late payment of bar dues is "quite common."<sup>10</sup> Similarly, it appears that licenses of certified public accountants may lapse or expire due to non-renewal or failure to meet education requirements, and there are straightforward mechanisms for reinstating such licenses without any suggestion that the past

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<sup>9</sup> If a participant's Chief Financial Officer was formerly a CPA, but chose to let that credential lapse because he or she no longer practiced public accountancy, that person might nonetheless be an appropriate fact witness to testify concerning the participant's finances.

<sup>10</sup> Arthur F. Greenbaum, *Administrative and Interim Suspensions in the Lawyer Regulatory Process - A Preliminary Inquiry*, 47 *Akron L. Rev.* 65, 67 (2015).

lapse bears on prospective professional fitness.<sup>11</sup> The Judges should clarify that proposed Section 350.9(b)(1) applies to past disciplinary suspension or revocation, rather than past administrative issues such as a late payment of professional license fees or late completion of continuing education requirements.

Second, as noted in Part III.A above, the concept of moral turpitude is broad and potentially ambiguous, and has been interpreted to include matters of personal morality as well as honesty. To tailor the provision more narrowly to address the integrity of proceedings before the Judges, the Judges may wish to emulate the model provided by the ABA Model Rules of Professional conduct, which define attorney misconduct involving criminal acts as those “that reflect[] adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer . . . .” ABA Model Rules of Prof’l Conduct R. 8.4(b).

**C. The Judges Should Consider Incorporating in Section 350.9(b) the Principle that a Reciprocal Suspension Typically Will Be for the Period Determined by the Relevant State Licensing Authority**

Proposed Section 350.9(b)(1) in effect provides a form of reciprocal discipline, debarring attorneys and other professionals from practice before the Judges based on a suspension or revocation of a professional license by a relevant state licensing authority. Debarment from practice before the Judges is potentially open-ended, subject to a right to seek reinstatement annually.

It appears unusual to impose reciprocal discipline based on suspension of a professional license without any linkage to the discipline imposed by the primary licensing authority. For

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<sup>11</sup> *E.g.*, D.C. Code § 47-2851.10 (lapse and reinstatement of D.C. professional licenses in general); D.C. Mun. Regs. 17 § 2530.3 (continuing education requirements for reinstatement of a lapsed CPA license).

example, under the rules of the D.C. Bar, an attorney who is dual-licensed in D.C. and another jurisdiction, and is disciplined in the other jurisdiction, will receive the same sanction in D.C. absent certain specific factors suggesting a different sanction in D.C. D.C. Bar R. XI, § 11(c). The reciprocal discipline is “ordinarily serve[d] . . . concurrently with the suspension imposed in the original disciplining jurisdiction.” *In re Soininen*, 853 A.2d 712, 728 (D.C. 2004). Reciprocal discipline at the Patent and Trademark Office is broadly similar. 37 C.F.R. § 11.24(d) (generally requiring “identical” discipline), (f) (requirements for imposing discipline retroactive to the time of the primary discipline).

This principle makes sense. The original licensing authority typically will have made a searching examination of the relevant facts, and a reasoned decision concerning the discipline to be imposed. State courts and regulators are also likely to have better-developed standards and procedures for disciplinary matters, and more experience conducting disciplinary proceedings. To conserve the Judges’ scarce time, avoid the need for duplicative proceedings, and maximize the ability of clients appearing before the Judges to be represented by counsel or other professionals of their choice, the Judges should not normally conduct *de novo* disciplinary proceedings and impose different sanctions. The Judges should consider incorporating in the proposed rule the general principle of reciprocal discipline that a suspension is typically for the period determined by the licensing authority originally imposing discipline.

### **III. Conclusion**

The Commenting Parties appreciate this opportunity to address the Judges’ proposed rules of conduct. If the Judges wish to adopt such rules, the Commenting Parties urge the Judges to revise the proposed rule as described herein.

May 22, 2017

Respectfully submitted,

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