

In the case of a conflict, state ethics rules take precedence. To practice before immigration courts, a lawyer must be eligible to practice law and be a member in good standing of the bar of the highest court of any state, possession, territory, or commonwealth of the United States.⁵ Thus, as a prerequisite to practice in immigration court, an attorney must maintain state licensure. In the event of a conflict between a state ethics rule and an EOIR rule, the best practice would be to advise the immigration court, on the record, of the conflict and why an attorney cannot comply with a request of the court by virtue of being bound by state ethics rules.

Could federal preemption require lawyers to place ethical rules issued by EOIR above their own state rules? The answer is likely it does not—state ethical rules still take precedence. First, while EOIR has the authority to discipline practitioners before the immigration court, the disciplinary committee may report a case to the lawyer’s state bar for the purpose of allowing the state to then handle the issue of counsel’s ethics violation.⁶ It then becomes up to that state to proceed as they see fit or as their rules provide. Second, in a Ninth Circuit case the court specifically addressed this issue, reasoning that federal preemption did not prevent a state bar from disciplining an attorney for conduct related to representation in immigration court.⁷ The court noted that the federal scheme contemplated cooperation between federal and state authorities in disciplinary matters.⁸ In fact, 8 CFR §1003.103 requires immediate suspension of any lawyer who has been found guilty of a serious crime or suspended or disbarred by any state. Whether a state would reciprocally require that an individual be disbarred or disciplined if disbarred or disciplined before the immigration court would be a matter of state ethics rules. ABA Model Rule 8.5, which provides for choice of law in disciplinary matters, would suggest that each jurisdiction is to make its own determination as to whether conduct violates its rules, and therefore, violation of EOIR rules may not per se result in violation of state rules.

If a conflict arises between EOIR rules of conduct and state ethics rules, then state ethics rules may defend the individual from sanctions in the state in which they are licensed. However, this would not necessarily stop the EOIR disciplinary counsel from disciplining counsel in immigration court. It is likely little comfort to immigration lawyers practicing removal defense that they could be disciplined out of immigration court, but still eligible to practice law in their state. However, practically speaking, an attorney would likely be able to avoid this situation by (1) striving to know and follow both state and EOIR rules; and (2) advising the immigration court on the record of any conflict in state ethics rules that prohibits an attorney from complying with the request of the court.

New EOIR Guidance for Disciplinary Action

Being familiar with the rules of Professional Conduct for Practitioners promulgated by EOIR is particularly important in light of new efforts by the Department of Justice regarding reporting attorneys for disciplinary action. On December 18, 2018, Director James R. McHenry III issued a memorandum titled “Internal Reporting of Suspected Ineffective Assistance of Counsel and

⁵ 8 CFR §1.2 (defining “attorney”).

⁶ 8 CFR 1003.103.

⁷ *Gadda v. Ashcroft*, 377 F.3d. 934 (9th Cir. 2004).

⁸ *Id.*