In the Matter of the Qualifications of

EDWARD A. SLAVIN, JR.,

Counsel for Complainant in

In re Daniel Somerson, Complainant v. Eagle Express Lines Incorporated, Respondent, 2004-STA-12

ARB CASE NO. 04-088

ALJ CASE NO. 2004-MIS-2

DATE: April 29, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant and representing himself:
Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*

For the Assistant Secretary for Occupational Safety and Health, as amicus curiae:
Edward D. Sieger, Esq., Nathan I. Spiller, Esq., Allen H. Feldman, Esq., Howard M. Radzely, Esq., Solicitor, *United States Department of Labor, Washington, D.C.*

FINAL DECISION AND ORDER

The subject of this appeal is the Order Denying Authority to Appear (ODAA) that Associate Chief Administrative Law Judge Thomas M. Burke issued March 31, 2004, under 29 C.F.R. § 18.34(g)(3). The ODAA addresses the qualifications of Edward A. Slavin, Jr., who was counsel to Daniel Somerson, the Complainant in the above-noted whistleblower complaint. The ODAA denies Mr. Slavin "the authority to appear in a representative capacity in any proceeding before OALJ," with leave to apply for readmission to practice in no less than five years from the date of Judge Burke's Order. ODAA at 1, 126-27.

Judge Burke found that Mr. Slavin time and again incompetently represented clients before the DOL Office of Administrative Law Judges and lacked diligence in pursuing his client's claims. He repeatedly pursued nonmeritorious claims, made false statements, used improper means to influence judges and engaged in disruptive conduct. He was dishonest and his behavior was prejudicial to the administration of justice.

Specifically, Judge Burke reached his decision based on review of dozens of cases, in which he found evidence of more than one hundred and thirty violations of ten different professional conduct standards. The record provides evidence that Mr. Slavin's failure to meet deadlines and other basic requirements for court filings caused dismissal of his client's case in eight cases; that Mr. Slavin's disruptive conduct led to his disqualification from representation in five cases; that Mr. Slavin pursued frivolous claims or defenses in thirteen cases; and that Mr. Slavin made misrepresentations of fact or law to tribunals in four cases. The record also contains evidence that numerous Department of Labor administrative law judges, the Administrative Review Board (ARB), and state and federal courts admonished Mr. Slavin for misconduct, and that one federal court levied a $10,000 sanction against him under Fed. R. Civ. P. 11.

Judge Burke issued the ODAA following a judicial inquiry and show cause proceeding.[1] Judge Burke initiated the Section 18.34(g)(3) proceeding based on information regarding Mr. Slavin's conduct in numerous whistleblower cases that Judge Burke had gained through his role as coordinator of the Department of Labor (DOL) Office of Administrative Law Judges (OALJ) whistleblower program. ODAA at 2-3.

Mr. Slavin and the Complainant in the underlying whistleblower complaint (the Petitioners) filed this appeal.[2] The Solicitor of Labor (SOL), representing the Assistant

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[1] Subsequent to issuance of the March 31, 2004 ODAA, Mr. Slavin was suspended from practice by his licensing jurisdiction, on August 27, 2004, for a period of two years with the right to seek reinstatement after one year. *Bd. of Prof. Resp. of the Sup. Ct. of Tenn. v. Slavin*, 145 S.W.3d 538 (Tenn. 2004). The ARB imposed reciprocal disciplined based on the Tennessee Supreme Court order. *In the matter of the qualifications of Edward A. Slavin, Jr.*, ARB No. 04-172 (Final Order Suspending Attorney from Practice before the Administrative Review Board) (ARB Oct. 20, 2004). The Department of Labor Chief Administrative Law Judge also imposed reciprocal discipline based on the Tennessee Supreme Court order. *In the matter of the qualifications of Edward A. Slavin, Jr.*, ALJ No. 2004-MIS-5 (Dec. and Ord. Suspending Atty.) (ALJ Sept. 28, 2004). Counsel has appealed the Chief ALJ's order to the ARB, where it is currently pending. *In the matter of the qualifications of Edward A. Slavin, Jr.*, ALJ No. 2004-MIS-5, ARB No. 05-003, (Notice of App. and Ord. Establishing Briefing Sched.) (ARB Apr. 5, 2005).

[2] The merits of the Complainant's whistleblower complaint are not at issue here. Judge Burke stayed the proceedings in the whistleblower complaint when he issued the judicial inquiry notice pending resolution of the Section 18.34(g)(3) issue. Notice of Jud. Inq. and Ord. to Show Cause issued Dec. 24, 2003 (ALJ exh. 32-C) at 1. We also note that Eagle Express Lines, Inc., the respondent employer in that whistleblower complaint, did not participate in the Section 18.34(g)(3) proceeding before Judge Burke and has not participated in this appeal. We further point out that the Complainant's interest in this appeal arises from Judge Burke's disqualification of the Complainant's counsel in the underlying whistleblower complaint. ODAA at 1; *see* 29 C.F.R. § 18.34(g)(3) (incorporating Administrative Procedure

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Secretary, Occupational Safety and Health Administration (OSHA), filed an amicus brief. We have reviewed the ODAA, the case record, the parties' arguments, and the relevant authorities and we conclude that the procedure that Judge Burke followed complies with due process principles as incorporated in Section 18.34(g)(3). We further conclude that, with the few exceptions discussed below, Judge Burke's findings of fact are well-supported and his conclusions of law are consistent with relevant authorities. We also conclude that Judge Burke properly determined that Mr. Slavin's misconduct warrants disqualification for a period of no less than five years, pursuant to Section 18.34(g)(3).[3]

JURISDICTION AND STANDARD OF REVIEW

The Board's jurisdiction to review Judge Burke's Section 18.34(g)(3) disqualification derives from the Secretary's delegation of authority to the ARB to review recommended decisions of administrative law judges in whistleblower cases. Secretary's Ord. 1-2002, ¶ 4.c., 67 Fed. Reg. 64272, 64273 (Oct. 17, 2002); *see* 29 C.F.R. § 24.8; 29 C.F.R. §§ 1978.109(c), 1979.110, 1980.110, 1981.110; *see generally In the matter of the qualifications of Edward A. Slavin, Jr.*, ARB No. 04-172, slip op. at 7-8 (Fin. Ord. Suspending Atty. from Practice before the ARB) (ARB Oct. 20, 2004) (Secretary's delegation of authority encompasses responsibility for Board to ensure the integrity of proceedings before it).

With the exception of four whistleblower statutes, the Board reviews de novo both the factual findings and the legal conclusions on which an administrative law judge's recommended whistleblower decision is based. *Compare* 29 C.F.R. § 24.8 *with* 29 C.F.R. §§ 1978.109(b)(3), 1979.110(b), 1981.110(b) (2004); Notice of Final Rule, 29 C.F.R. Part 1980, 69 Fed. Reg. 52104, 52116 (Aug. 24, 2004) (text of § 1980.110(b)).

Act right to counsel provision, 5 U.S.C.A. § 555(b)); *see also Sec. and Exch. Comm'n v. Csapo*, 533 F.2d 7, 10-11 (D.C. Cir. 1976) (construing APA right to counsel provision); *In the matter of the disqualification of Edward A. Slavin, Jr., Counsel for Complainant in Jean F. Greene v. EPA Chief Judge Susan Biro, U.S. Envtl. Prot. Agency*, ARB No. 02-109, ALJ No. 2002-SWD-00001, slip op. at 3, 23-24 (ARB June 30, 2003) (upholding judge's resumption of proceedings in whistleblower adjudication after he provided the complainant thirty days in which to either engage new counsel or to proceed pro se following her attorney's exclusion pursuant to 29 C.F.R. § 18.36).

[3] Pursuant to Section 18.34(g)(3), the denial of authority to appear applies to representation of others but expressly does not apply to an individual's representation of himself, or a corporation, partnership, or association of which the person is a partner, officer or regular employee. 29 C.F.R. § 18.34(g)(3). *But see* 29 C.F.R. § 18.36 (authorizing presiding administrative law judge to disqualify an attorney from participation in a particular case, without limitation as to whether the attorney is acting pro se or representing another).

The regulations implementing the four exceptions limit the Board's review of an administrative law judge's factual findings.[4] Specifically, those regulations require the Board to adopt the administrative law judge's factual findings if they are supported by substantial evidence considered on the record as a whole. 29 C.F.R. §§ 1978.109(b)(3), 1979.110(b), 1981.110(b) (2004); Notice of Final Rule, 29 C.F.R. Part 1980, 69 Fed. Reg. 52104, 52116 (Aug. 24, 2004) (text of § 1980.110(b)). Because the various whistleblower programs within the ARB's jurisdiction require differing standards of review, we must go beyond those authorities to determine how best to fulfill our appellate role in this matter.

We conclude that de novo review of the procedure that Judge Burke followed for compliance with due process guidelines, and the factual findings and legal conclusions regarding the instances of misconduct at issue is proper. We will thus provide Mr. Slavin and the Complainant with the fullest possible benefit of the Board's review regarding those aspects of the ODAA. We agree, however, with the Assistant Secretary that we should apply an abuse of discretion standard to Judge Burke's choice of sanction. The Assistant Secretary cites this standard as that which is generally applied by the Federal appellate courts when reviewing a Federal district court's imposition of attorney discipline. Asst. Secretary's brief at 20 n.6. Moreover, we view Judge Burke as being in the best position to determine the impact of an attorney's misconduct on the orderly administration of justice at the OALJ, and applying an abuse of discretion standard to our review of the choice of sanction accords Judge Burke appropriate deference. *See In re Gouiran*, 58 F.3d 54, 58 (2d Cir. 1995); *In re Evans*, 801 F.2d 703, 706 (4th Cir. 1986) (citing *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 529-30 (1824)); *cf. New Mexico Nat'l Elec. Contractors Ass'n*, ARB No. 03-020, slip op. at 9 (ARB May 28, 2004) (citing *Bldg. and Const. Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983) and *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Insur. Co.*, 461 U.S. 29 (1983) regarding principle of deferring to agency based on its expert discretion, if the agency has properly explained its rationale).

PROCEDURAL HISTORY BEFORE THE BOARD

On July 21, 2004, the Petitioners filed an Initial Brief and Motion for Summary Reversal. The pleading was subcaptioned: Disclosure of All *Ex Parte* Contacts, Recusal and Oral Argument are Respectfully Requested. On October 5, 2004, the Board issued an Order Accepting Assistant Secretary's *Amicus Curiae* Brief and Permitting Filing of Response Brief. By facsimile on October 19 and by regular mail on November 8, 2004, the Petitioners filed a pleading entitled:

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[4] The four exceptions are as follows: the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105; the Wendell H. Ford Aviation Investment and Reform Act of the 21st Century, 49 U.S.C.A. § 42121; the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A; and the Pipeline Safety Improvement Act of 2002, 49 U.S.C.A. § 60129(a).

> Motion to Reschedule Briefing in Response to Solicitor's Brief[,] Notice of Filing and Motion to Take Judicial Notice, Motion to Disqualify DOL Solicitor's Office, Response to Order on *Amicus Curiae* Brief and Motion to Grant Unopposed Motions for Recusal and Disclosures, to Vacate Order to Show Cause, To File Whistleblower Program Evaluations, and to Order Full Disclosures of *Ex Parte* Contacts[,] and Alternative Motion to Modify Briefing Schedule.

On November 10, 2004, the Board issued an Order Granting Extension of Time and Notice Regarding Attorney's Suspension from Practice (November 10 Order). The November 10 Order afforded the Petitioners an extension of time, from October 19 until November 19, 2004, for filing a response to the brief that the Assistant Secretary filed October 1. The November 10 Order also advised the Complainant that Mr. Slavin was barred by the Board's October 20, 2004 Final Order Suspending Attorney from Practice before the Administrative Review Board from representing the Complainant further in this appeal. The November 10 Order advised that the Board would not accept further documents filed by Mr. Slavin on behalf of the Complainant, but would accept further documents filed by Mr. Slavin in his capacity as his own representative. The November 10 Order also stated that, if the Complainant required further time to obtain new representation in this appeal, he must file a request with the Board on or before November 19, 2004. Neither Mr. Slavin nor the Complainant has filed further documents in support of this appeal.

Before addressing the motions that are properly before us, we note that several of the motions that the Petitioners have filed relate to a separate Board matter regarding Mr. Slavin's qualifications and not to this appeal of Judge Burke's ODAA.[5] We address the merits of only the following motions, which are properly before us in this appeal.

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[5] The following motions were included in the October 19 pleading that the Petitioners filed, but the motions concern the matter before the Board in ARB 04-172, which culminated in the Board's issuance of the Final Order Suspending Attorney from Practice before the Administrative Review Board on October 20, 2004, and not this appeal of Judge Burke's ODAA. The Petitioners request:

> – that the Board vacate its September 14, 2004, Order to Show Cause why the Board should not impose reciprocal discipline based on Mr. Slavin's August 27, 2004 suspension by the Tennessee Supreme Court;
> – that the Board take judicial notice of an article in a professional publication regarding the Tennessee Supreme Court action; and

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The Petitioners' motion for recusal of the Board members and motion to disclose ex parte communications are virtually identical to motions that Mr. Slavin filed in ARB No. 04-172, and which we addressed and rejected in the October 20, 2004 Final Order Suspending Attorney from Practice before the Administrative Review Board. The reasons for rejecting these two motions that we clearly delineated in that Final Order, slip op. at 2-6, are equally applicable here. It is thus unnecessary for us to address further the Petitioners' motions for recusal and to disclose ex parte communications. *See* Initial Brief and Motion for Summary Reversal at 32-33.

We deny the Petitioners' motion to disqualify the Solicitor as the Assistant Secretary's representative because such action would be contrary to the intervention regulations at 29 C.F.R. §§ 24.6(f)(1), 1978.107(b), 1979.108(a)(1), 1980.108(a)(1), 1981.108(a)(1), and the representation provision at 29 C.F.R. § 18.34(f). Furthermore, the Solicitor's representation of the Assistant Secretary in this appeal from Judge Burke's disqualification of Mr. Slavin pursuant to Section 18.34(g)(3) accords with the Secretary's directive in *Rex v. Ebasco Servs.* that the Solicitor represent the Department's interests in attorney disqualification proceedings. *Rex*, No. 87-ERA-6, slip op. at 4 (Sec'y Oct. 3, 1994).

We deny the Petitioners' motion that the Board schedule oral argument, as we have determined that oral argument would not facilitate our deliberations in this appeal. We also deny the Petitioners' motion "to disclose DOL's policy evaluations of whistleblower programs" as both irrelevant to this appeal and outside this Board's ambit.[6]

– that the Board take judicial notice of a letter from Mr. Slavin to the SOL regarding the foregoing article.

Thus, we will not rule on these requests because they are irrelevant to this case.

[6] It is also unnecessary for us to address the merits of motions that the Petitioners filed on September 24, 2004, in a document entitled "Mr. Somerson's Urgent Motion to Supplement the Record RE: Death of Ten Texans at Respondents' Hands and Motion for Remand for OSHA Investigation and Trial" because it relates to adjudication of the Complainant's whistleblower complaint that has been stayed at the OALJ, *see* n.2, *supra.* Mr. Slavin used the ALJ case number assigned to the underlying whistleblower complaint in this case, ALJ No. 2004-STA-12, to identify the ARB appeal regarding which the pleading was filed. Instead of using the ARB docket number for this appeal, 04-088, to identify the pleading, however, Mr. Slavin included two other ARB numbers, 04-172 and 04-046. ARB docket number 04-172 identifies the matter in which the Board imposed reciprocal discipline on Mr. Slavin through issuance of the October 20, 2004 Final Order Suspending Attorney from Practice before the Administrative Review Board. *See* n.1, *supra.* ARB No. 04-046 involved a petition for writ of mandamus that the Petitioners filed, requesting that the ARB require the OALJ to proceed with a hearing on the whistleblower complaint ALJ No. 2004-

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ISSUES

1. Does Section 18.34(g)(3) authorize entry of an order barring a representative from appearing in future cases?

2. Did the procedure that Judge Burke followed comply with the notice and opportunity for hearing requirements of Section 18.34(g)(3), and thus adequately safeguard Mr. Slavin's due process interests?

3. Did Judge Burke improperly interpret Section 18.34(g)(3) as requiring clear and convincing evidence to support a denial of authority to appear?

4. Does the evidence fully support Judge Burke's factual findings?

5. Do Judge Burke's conclusions regarding violations of the Model Rules of Professional Conduct accord with relevant authorities, including those pertaining to an attorney's First Amendment protections?

6. Did Judge Burke abuse his discretion in choosing to disqualify Mr. Slavin from representing parties before the OALJ for a period of not less than five years?

DISCUSSION

I. Threshold questions regarding Section 18.34(g)(3)

Section 18.34(g)(3) provides that an ALJ can deny a person, such as an attorney or other representative, the privilege of appearing on behalf of a party. The section specifies the kinds of conduct that will disqualify the person from appearing, and requires

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STA-12, and thus to overrule the stay that Judge Burke had imposed on the whistleblower proceeding. In effect, the petition in ARB No. 04-046, filed January 15, 2004, challenged the judicial inquiry and show cause proceeding that Judge Burke had initiated on December 24, 2003, when Judge Burke also imposed the stay on adjudication of the Complainant's whistleblower complaint. On May 28, 2004, the Board dismissed the petition in No. 04-046 based on lack of jurisdiction. *Somerson v. Eagle Express Lines, Inc.*, ARB No. 04-046, ALJ No. 2004-STA-12 (ARB May 28, 2004). Because adjudication of the underlying whistleblower complaint, ALJ No. 2004-STA-12, is stayed at the OALJ, "Mr. Somerson's Urgent Motion to Supplement the Record . . . and to Remand for OSHA Investigation and Trial" filed September 24, 2004, is not properly before us.

that the attorney or other representatives be given notice and an opportunity for a hearing to defend against the charges before being disqualified from appearing. Section 18.34(g)(3) reads, in pertinent part:

> *Denial of authority to appear.* The administrative law judge may deny the privilege of appearing to any person, within applicable statutory constraints, e.g. 5 U.S.C. 555 [APA right to counsel provision, *see* n.2, *supra*], who he or she finds after notice of and opportunity for hearing in the matter does not possess the requisite qualifications to represent others; or is lacking in character or integrity; has engaged in unethical or improper professional conduct; or has engaged in an act involving moral turpitude. No provision hereof shall apply to any person who appears on his or her own behalf or on behalf of any corporation, partnership, or association of which the person is a partner, officer, or regular employee.

29 C.F.R. § 18.34(g)(3).

The Petitioners challenge the validity of Section 18.34(g)(3), based on its exemption of "any person who appears . . . on behalf of any corporation, partnership, or association of which the person is a partner, officer, or regular employee."[7] The Petitioners contend that this provision unfairly targets the representatives of whistleblower complainants while protecting in-house counsel, which represent many employers. The ARB is bound by the regulations duly promulgated by DOL and we are not authorized to rule on the validity of those provisions. Secretary's Ord. No. 1-2002, 67 Fed. Reg. 64,272, 64,273 (Oct. 17, 2002). We will accordingly not rule on the challenge to this Section 18.34(g)(3) provision.

The Petitioners also contend that Section 18.34(g)(3) does not authorize entry of an order barring a representative from appearing in future cases, like the ODAA that Judge Burke issued. In our decision *In the matter of the disqualification of Edward A. Slavin, Jr., Counsel for Complainant in Jean F. Greene v. EPA Chief Judge Susan Biro, U.S. Envtl. Prot. Agency,* we outlined the distinctions between Section 18.36, which allows for a representative's exclusion from further participation in a particular case following a relatively summary procedure, and Section 18.34(g)(3). *Slavin*, ARB No. 02-109, ALJ No. 2002-SWD-00001, slip op. at 8-12 (ARB June 30, 2003). As we discussed there, the Secretary, in the 1994 *Rex* decision, initially construed Section 18.34(g)(3), which requires a more formal proceeding, as authorizing a bar against participation in

[7] The Petitioners do not challenge the Section 18.34(g)(3) exemption for "any person who appears on his or her own behalf . . . ." 29 C.F.R. § 18.34(g)(3).

future OALJ cases. In *Rex*, the Secretary remanded the case for a hearing under Section 18.34(g)(3) regarding the qualifications of two attorneys. In doing so, the Secretary agreed with the then-Chief ALJ and the Wage and Hour Administrator – then responsible for DOL whistleblower programs – that it would be fairer to the two attorneys involved and more administratively efficient to hold one hearing regarding the attorneys' qualifications under Section 18.34(g)(3). The Secretary further directed that, if the resulting ALJ decision were upheld following Secretarial review, the decision would be binding in regard to the attorneys' qualifications to represent clients in future OALJ cases. *Rex v. Ebasco Servs.*, Nos. 87-ERA-6, -40 (Sec'y Oct. 3, 1994), slip op. at 3-7. We accordingly reject the Petitioners' contention that Section 18.34(g)(3) does not authorize issuance of an order denying authority to appear before the OALJ in future cases.

II. Whether the procedure that Judge Burke followed afforded Mr. Slavin due process[8]

A. The Notice of Judicial Inquiry and Order to Show Cause

On December 24, 2003, Judge Burke issued a Notice of Judicial Inquiry and Order to Show Cause (Notice). ALJ exh. 32-C. The Notice advised Mr. Slavin that Judge Burke was conducting an inquiry pursuant to Section 18.34 as to whether the attorney "should be denied the privilege of representing clients before" the OALJ because of "unethical or improper professional conduct."[9] ALJ exh. 32-C at 1. The Notice also cited Mr. Slavin's conduct in the adjudication of a previous complaint that the Complainant Somerson had filed as well as other cases in which ALJs, the ARB and

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[8] Because Judge Burke stayed the proceedings in the Complainant's whistleblower complaint when he issued the December 24, 2003 Notice, there is no question that the Complainant's right to be afforded a reasonable opportunity to obtain new representation has thus far been protected. *See* n. 2 *supra.* The Complainant also has an interest in whether the disqualification of his initial choice as counsel was fundamentally fair, and has thus joined Mr. Slavin in challenging its fairness in this appeal. *See id.* Although the due process analysis that follows in the text thus concerns both Mr. Slavin's and the Complainant's interests, in the interest of brevity, we will refer to only Mr. Slavin as the aggrieved party in that analysis.

[9] Section 18.34(g)(3) provides these four grounds for a representative's disqualification: the representative "does not possess the requisite qualifications to represent others; or is lacking in character or integrity; has engaged in unethical or improper professional conduct; or has engaged in an act involving moral turpitude." 29 C.F.R. § 18.34(g)(3) (*see* excerpt *supra* at Part I). In this case in which Mr. Slavin was representing clients as a licensed attorney at the time the misconduct occurred, Judge Burke's reliance on "unethical or improper professional conduct" was wholly appropriate.

other tribunals had found that Mr. Slavin had engaged in improper professional conduct. *Id.* at 2.

In addition, an Appendix citing additional instances of questionable conduct accompanied the Notice. The Appendix listed more than forty instances where presiding officials had documented Mr. Slavin's conduct in connection with his representation of parties before the OALJ, the ARB, and state and federal courts. ALJ exh. 32-C at 6-14. The Notice advised Mr. Slavin that Judge Burke would take official notice, pursuant to 29 C.F.R. § 18.45, of the findings of the various tribunals contained in the Appendix. *Id.* at 4.

The Notice also set a January 15, 2004 deadline for Mr. Slavin to file a response, specified the format to be used and recited the permissible means for accomplishing such filing in compliance with the OALJ Rules of Practice and Procedure.[10] ALJ exh. 32-C at 4. The Notice explained that an evidentiary hearing would be scheduled only if two criteria were met. First, Mr. Slavin's hearing request must clearly identify issues regarding which there existed a genuine question of material fact. Secondly, the hearing request must clearly identify the evidence to be presented at hearing and its relevance to the Judicial Inquiry. Specifically, the hearing request must describe the evidence that Mr. Slavin sought to present, link such evidence to particular issues of material fact, and explain why the evidence was "exculpatory or otherwise relevant." *Id.*

The Notice also described the consequences of not filing a hearing request that met the foregoing criteria. In that situation, the Notice stated, the Section 18.34(g)(3) issue would be resolved on the basis of Mr. Slavin's written response to the Notice and any additional briefing. ALJ exh. 32-C at 4-5. The Notice further advised that Mr. Slavin would not be permitted to re-litigate any matters contained in the Appendix which he "had full and fair opportunity to contest in the forums in which they occurred . . . ." *Id.* at 5. In addition, the Notice advised that, if Mr. Slavin failed to timely respond, Judge Burke would issue an order directing Mr. Slavin's immediate disqualification from serving as a representative in the underlying whistleblower case and from appearing in future cases before the OALJ. *Id.*

B. Mr. Slavin's filings and Judge Burke's preliminary rulings

On January 14, 2004, Mr. Slavin filed a letter requesting, among other things, that the January 15, 2004 deadline be extended for an unspecified length of time.[11] ALJ exh.

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[10] In the Notice, Judge Burke cautioned Mr. Slavin that, pursuant to 29 C.F.R. § 18.3(f), the OALJ did not accept filings by facsimile or e-mail unless such filings were approved in advance. ALJ exh. 32-C at 4 n.4.

[11] Instead of filing the response with Judge Burke as directed, Mr. Slavin filed it with the Chief Administrative Law Judge, John M. Vittone. ALJ exh. 32-D; *see also* ALJ 32-H

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32-D. Judge Burke granted an extension until February 20, 2004. ALJ exhs. 32-F, 32-I. Mr. Slavin's January 14 filing contained a few substantive contentions regarding the December 24, 2003 Notice and, despite the extended deadline for filing a further response, Mr. Slavin did not file further argument regarding the Notice.[12] *See* ALJ exhs. 32-E – P. In his January 14 filing, Mr. Slavin did not dispute the factual basis for the misconduct that was alleged in the Notice. Instead, Mr. Slavin urged that the Notice should be vacated and asserted that he and his client were being retaliated against by the OALJ. ALJ exh. 32-D at 1, 5. In addition, he suggested that his criticism of ALJs and ARB members was protected by the First Amendment. *Id.* at 6-8. Mr. Slavin also requested that "any [§] 18.34 hearing" be held in New Smyrna Beach, Florida, and stated that he would call former Chief Administrative Law Judge Nahum Litt to testify as an expert witness. *Id.* at 1. Mr. Slavin further stated that the former chief administrative law judge would testify regarding his knowledge of the "dysfunctionality in OSHA" and "the overall inefficiency of the DOL whistleblower system." *Id.*

On January 27, 2004, Mr. Slavin filed a request for permission to take videotaped depositions, at a site near Mr. Slavin's Florida residence, of the current Chief Administrative Law Judge, Judge Burke, an OALJ staff attorney, and counsel to the employer in the underlying whistleblower case. ALJ Exh. 32-G. Mr. Slavin did not, however, describe how such depositions were relevant to an evidentiary hearing on the allegations of misconduct cited in the December 24, 2003 Notice. *See id.*

On February 17, 2004, Judge Burke issued an Official Notice of Prior Proceedings ([Supp.] Notice), advising Mr. Slavin that he would be taking official notice of three additional ARB decisions that contained information regarding Mr. Slavin's professional conduct and which had been issued since the December 24, 2003 Notice. ALJ exh. 32-K. On February 20, 2004, Mr. Slavin requested a stay of the judicial inquiry proceedings pending disposition of the appeal that Mr. Slavin had filed with the ARB. ALJ exh. 32-L; *see* n.6 *supra*.[13] On February 24, 2004, Judge Burke issued an order

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(Mr. Slavin's request filed with Chief Judge Vittone to lift stay on proceedings in the Complainant's whistleblower case that Judge Burke had imposed).

[12] The Petitioners also filed requests and motions that relate to the merits of the underlying *Somerson* whistleblower complaint, despite the stay that Judge Burke had imposed prior to assignment of that case to a presiding administrative law judge. *See* ALJ exhs. 32-D, 32-G, 32-H. It is unnecessary for us to address those motions in order to analyze the fundamental fairness of the judicial inquiry procedure regarding whether Mr. Slavin should be disqualified from representing the Complainant and others.

[13] That appeal, ARB No. 04-046, involved the Petitioners' writ of mandamus petition filed with the ARB on January 15, 2004, in which they sought to have the ARB vacate the stay that Judge Burke had imposed on the underlying whistleblower complaint. As indicated supra at n.6, the petition in ARB No. 04-046 challenged the judicial inquiry and show cause

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denying that request, explaining that, contrary to Mr. Slavin's representation in the stay request, the Board had not issued an order setting a briefing schedule for the appeal. Rather, the ARB had issued a show cause order regarding why the appeal should not be dismissed. ALJ exh. 32-N; *see* ALJ exh. 32-J; n.12 *supra*.

C. Issuance of the ODAA

In the March 31, 2004 ODAA, Judge Burke concluded that Mr. Slavin had failed to demonstrate that an evidentiary hearing was necessary, as directed by the December 24, 2003 Notice. ODAA at 8-10. Judge Burke specifically found that Mr. Slavin did not expressly request such hearing although his filings implied an interest in an evidentiary hearing. *Id.* at 10. In addition, Judge Burke found that, although Mr. Slavin characterized Judge Burke's charges of witness intimidation in the earlier *Somerson* case as "[f]alse imputations," Mr. Slavin did not describe evidence on any issue of material fact that Mr. Slavin might present at hearing. *Id.* at 8-9. Judge Burke also addressed Mr. Slavin's January 27, 2004 motion to depose the Chief ALJ, Judge Burke, an OALJ staff attorney and opposing counsel in the underlying whistleblower complaint. ALJ exh. 32-G. Judge Burke found that Mr. Slavin failed to explain how such depositions would provide information that could reasonably be expected to lead to the discovery of admissible evidence regarding the charges of misconduct. ODAA at 9. Judge Burke also examined Mr. Slavin's statement that he intended to call a former Chief ALJ as an expert witness, and Judge Burke concluded that Mr. Slavin also failed to link such testimony to the charges of misconduct. *Id.* at 9.

Judge Burke accordingly proceeded to decide the Section 18.34(g)(3) issue by evaluating the evidence of misconduct that he had compiled, under the Model Rules of Professional Conduct (MRPC). ODAA at 10. Judge Burke also addressed Mr. Slavin's motions as well as his arguments regarding First Amendment protections. ODAA at 10, 17-20, 115-17.

D. The procedure that Judge Burke followed complied with due process requirements

Section 18.34(g)(3) expressly requires that the responding representative be provided notice and opportunity for hearing, but the regulation does not delineate a step-by-step process for rendering the Section 18.34(g)(3) determination. *See* 29 C.F.R. § 18.34(g)(3). This provision incorporates the requirement that Federal agencies ensure that such proceedings provide the procedural due process safeguards of notice and opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldsmith v. Bd. of Tax Appeals*, 270 U.S.

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proceeding that Judge Burke had initiated on December 24, 2003. The ARB dismissed appeal No. 04-046 for lack of jurisdiction on May 28, 2004. *Somerson v. Eagle Express Lines, Inc.*, ARB No. 04-046, ALJ No. 2004-STA-12 (ARB May 28, 2004).

117 (1926); *Rosen v. Nat'l Labor Rels. Bd.*, 735 F.2d 564 (D.C. Cir. 1984). In the absence of more specific guidance from Section 18.34(g)(3) regarding the procedure to be followed, the pertinent issue before the Board is whether Judge Burke's judicial inquiry complied with due process safeguards as interpreted within the context of attorney disciplinary proceedings. *See generally Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) (quoting principle stated in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961), "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.").

1. Judge Burke provided Mr. Slavin adequate notice

The notice to an attorney that disciplinary proceedings are being initiated must provide a clear, comprehensive description of the grounds on which the disciplinary inquiry is based. *See In re Ruffalo*, 390 U.S. 544, 550-52 (1968); *In re Levine*, 847 P.2d 1093 (Ariz. 1993); *State v. Turner*, 538 P.2d 966, 972 (Kan. 1975). The attorney must also be put on notice of the procedure that will follow. *See generally* 10 FCC Rcd. 10330 (FCC Sept. 18, 1995 order amending agency rules governing attorney misconduct proceedings to incorporate the procedures initially established by the Fed. Communications Comm'n in its decision in *Opal Chadwell*, 2 FCC Rcd. 3458 (1987)). Finally, the notice must describe the consequences of the attorney's failure to respond to the notice as well as the consequences of an ultimate failure to successfully defend against the charges. *See Ruffalo*, 390 U.S. at 550-52; *Meyer v. Norman*, 780 P.2d 283, 289-90 (Wyo. 1989). As the following discussion reflects, the Notice that Judge Burke issued on December 24, 2003, met the above requirements.

Concerning the grounds for the Judicial Inquiry, Judge Burke's Notice adequately summarized the "prior unethical or improper professional conduct" that had prompted the Notice. In addition to the discussion of specific examples that Judge Burke included in the body of the Notice, he also provided an eight-page Appendix identifying more than forty instances of alleged misconduct and admonishments that were substantiated in official court and administrative documents. ALJ exh. 32-C at 2, 6-14. Judge Burke also stated that he would take official notice of that evidence pursuant to 29 C.F.R. § 18.45. *Id.* at 4. The Appendix entries were organized under the following categories: participation in harassment and intimidation of witnesses and officers of the court; lying to tribunal; disqualifications for misconduct; refusal to comply with lawful order; admonishments; pursuit of frivolous complaints; client's case dismissed because of Mr. Slavin's actions; and general. ALJ exh. 32-C at App. A brief summary of the nature of the questioned conduct was included with each case entry. *Id.* In the February 17 [Supp.] Notice, Judge Burke advised that he would also consider Mr. Slavin's professional conduct in three additional ARB cases. ALJ exh. 32-K. The [Supp.] Notice

identified the three cases and stated that the ARB had dismissed the appeals based on Mr. Slavin's failure to meet procedural deadlines. *Id.*[14]

Judge Burke's Notice also properly apprised Mr. Slavin of the procedure that Judge Burke would follow. First, the December 24 Notice identified the deadline for filing a written response and stated that such response would not be accepted if filed by e-mail or facsimile, unless prior permission were obtained. ALJ exh. 32-C at 4. The Notice also clearly explained the two prerequisites that must be met before an evidentiary hearing would be scheduled. *See id.* To illuminate the two requirements further, the Notice explained the difference between raising a genuine issue of material fact and advancing a legal argument. ALJ exh. 32-C at 4 n.5. The Notice stated that Mr. Slavin had typically raised First Amendment and justification defenses for his conduct in the course of proceedings in the numerous cases cited in the Appendix, but had not disputed whether or not he had engaged in the conduct cited by the presiding officers in those cases. The Notice pointed out that Mr. Slavin had thus raised legal arguments to defend his conduct but in such instances had failed to raise a genuine issue of material fact regarding that conduct. *Id.* The Notice also emphasized that Mr. Slavin would not be allowed to re-litigate any of the matters cited in the Appendix that he had been afforded a

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[14] In the ODAA, Judge Burke stated that the Section 18.34(g)(3) decision was based on the following instances of misconduct: 1) the instances that were cited in the December 24, 2003 Notice; 2) the three additional instances cited in the February 17, 2004 [Supp.] Notice; and 3) "several rulings issued by the ARB and ALJs subsequent to issuance of the Notice of Judicial Inquiry." ODAA at 7 n.4. However, Judge Burke also added ARB and ALJ rulings that were not issued after the December 24, 2003 Notice but actually pre-dated that Notice by a year or more. *See, e.g.*, ODAA at 11, ref. to ALJ exh. 4-B (*Seater v. Southern Cal. Edison Co.*, ALJ No. 1995-ERA-13, ALJ Post-remand Order No. 7 dated Feb. 4, 1997); *id.* at 12, ref. to ALJ exh. 8-D (*Erickson v. U.S. Envtl. Prot. Agency*, ALJ Nos. 1999-CAA-2, 2001-CAA-8, -13, 2002-CAA-3, ARB Order to Show Cause dated Oct. 17, 2002). By adding the ARB and ALJ rulings that were not covered by the February 17 [Supp.] Notice, Judge Burke improperly expanded the charges beyond those regarding which Mr. Slavin had been given notice and an opportunity to respond. *See In re Riley*, 691 P.2d 695, 699-700 (Ariz. 1984). However, Mr. Slavin did not challenge this enlargement of the record, either by filing a reconsideration motion with Judge Burke or through any argument filed with the ARB. Regardless, Judge Burke's enlargement of the record without prior notice and opportunity for response does not constitute reversible error. The vast majority of Judge Burke's ultimate findings of MRPC violations are supported by documents that are properly in evidence, i.e., those that were generated in the course of the proceedings that Judge Burke cited in the December 24 Notice and the February 17 [Supp.] Notice. *See* discussion *infra* at Part III D. Consequently, the additional violations that Judge Burke found based on the evidence regarding which Mr. Slavin was not given proper notice are not legally significant. *Cf. In re Phelps*, 637 F.2d 171, 174 (10th Cir. 1981) (lower court erred in enlarging charges beyond those stated initially and not allowing attorney to respond to additional charges, but court upheld discipline based on charges of which attorney had been properly given notice and opportunity to respond).

full and fair opportunity to contest in the originating forums. *Id.* at 5. The Notice further advised that, if an evidentiary hearing were not properly requested, the Section 18.34(g)(3) decision would be based on Mr. Slavin's written response and any additional briefing. *Id.*

Finally, the Notice clearly advised Mr. Slavin of the consequences of a failure to timely respond to the notice or to successfully defend against the charges. The Notice stated that the judicial inquiry procedure was initiated with "the intention of the U.S. Department of Labor, Office of Administrative Law Judges to deny [Mr. Slavin] the privilege of appearing before this office on behalf of Daniel Somerson in 2004-STA-12" and to disqualify Mr. Slavin from "any future cases in which [he] seeks to represent a client before the OALJ." ALJ exh. 32-C at 4. In addition to explaining the actions that Mr. Slavin could take to defend against the charges, the Notice advised Mr. Slavin that, if he failed to timely respond, an order would issue directing his "immediate disqualification from representing Daniel Somerson in 2004-STA-12, and from appearing in future cases before OALJ." *Id.* at 5.

In sum, the December 24, 2003 Notice clearly identified the evidentiary basis for the Section 18.34(g)(3) inquiry and the types of professional misconduct that were at issue in the proceeding. *See Ruffalo*, 390 U.S. at 550; *Levine*, 847 P.2d at 1093; *Turner*, 538 P.2d at 972. The Notice also explained the procedure that would be followed and the means by which Mr. Slavin could defend against the charges, including the prerequisites for the scheduling of an evidentiary hearing. In the absence of published regulations detailing a procedure, it was especially important that the Notice provide this information. *Cf.* 10 FCC Rcd. 10330 (FCC Sept. 18, 1995 order amending agency rules governing attorney misconduct proceedings to incorporate procedures initially established by the Fed. Communications Comm'n decision in *Opal Chadwell*, 2 FCC Rcd. 3458 (1987)). Finally, the Notice unambiguously advised Mr. Slavin of the consequences of a failure to timely respond, a failure to meet the prerequisites for an evidentiary hearing, and a failure to successfully defend against the charges. *See Meyer*, 780 P.2d at 289-90.

2. Judge Burke also afforded Mr. Slavin the opportunity to fully and fairly present his defense

a. The bias allegation

Initially, we reject Mr. Slavin's contention that Judge Burke was not qualified to decide the Section 18.34(g)(3) issue because he was biased against Mr. Slavin. Judge Burke properly denied Mr. Slavin's request that Judge Burke "sua sponte" recuse himself. ODAA at 17-18; *see* ALJ exh. 32-D at 10.[15] As Judge Burke found, Mr. Slavin

[15] Mr. Slavin also asserted that the entire OALJ "Front Office" is biased against him and the Complainant, and, therefore, that none of the Department of Labor judges having

Continued . . .

failed either to argue circumstances demonstrating that Judge Burke was improperly biased against him or to submit an affidavit to support recusal due to such bias as required by 29 C.F.R. § 18.31(b). ODAA at 18. Administrative law judges are presumed to act impartially. *See Verduzco v. Apfel*, 188 F.3d 1087, 1089 (9th Cir. 1999). To overcome that presumption and demonstrate that Judge Burke should have recused himself, Mr. Slavin would have to allege that Judge Burke harbored bias stemming from an extra-judicial source, rather than what he learned regarding Mr. Slavin from the evidence and proceedings in this case. *See Colfor, Inc. v. Nat'l Labor Relations Bd.*, 838 F.2d 164, 168 (6th Cir. 1988) (applying *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)); *see also Jenkins v. U.S. Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 38, n.7 (ARB Feb. 28, 2003) (discussing judicial and extrajudicial sources of bias, as explained in *Liteky v. United States*, 510 U.S. 540 (1994)).

Furthermore, Mr. Slavin has failed to add any additional grounds to support his bias allegation in this appeal.[16] Mr. Slavin has not cited evidence indicating that Judge Burke conducted the Judicial Inquiry in a manner that demonstrated a deep-seated antagonism that would interfere with the judge's exercise of fair judgment. *See Reddy v. Commodity Futures Trading Comm'n*, 191 F.3d 109, 119-20 (2d Cir. 1999); *Calex Corp. v. Nat'l Labor Relations Bd.*, 144 F.3d 904, 910 (6th Cir. 1998). Instead, Mr. Slavin asserts that Judge Burke initiated the judicial inquiry as a means of retaliating against Mr. Slavin and the Complainant on behalf of other DOL officials. Mr. Slavin further theorizes that such retaliation was prompted by the Complainant's pursuit of complaints under the Surface Transportation Assistance Act and by both Petitioners' public criticisms of DOL officials. Initial Brief and Motion for Summary Reversal at unnumbered p. 2 – numbered p. 3; *id.* at 6, 12-13, 25-30, 31, 33-35.[17] Contrary to Mr. Slavin's contentions, his criticism of Judge Burke, as well as other DOL judges and officials, does not equate to a showing that Judge Burke could not render an impartial determination under Section 18.34(g)(3). *Cf. United States v. Wolfson*, 558 F.2d 59, 62 (2d Cir. 1977) (party's correspondence personally addressed to judge and party's attempt to publish letter in the New York Times calling for judge's removal from bench reflected only the party's view of judge, not the reverse); *Atty. Grievance Comm'n of Maryland v. Kerpelman*, 438 A.2d 501, 508, 513 (Md. 1981) (rejecting as "patently absurd" attorney's contention that judge should be disqualified from sitting on panel in disciplinary

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managerial authority is qualified to decide whether to deny Mr. Slavin authority to appear under Section 18.34(g)(3). *See* ALJ exh. 32-D at 1-10, 12-13.

[16] In this appeal, Mr. Slavin again asserts that, in addition to Judge Burke, the OALJ "Front Office" judges are biased against him. Initial Brief and Motion for Summary Reversal at 13, 14, 26, 28, 30, 31, 32, 34.

[17] The first two pages of the Initial Brief and Motion for Summary Reversal are unnumbered, and the numbering sequence that begins on the third page of the Brief actually starts with the number two.

proceeding because attorney had authored newspaper article critical of judge). To hold otherwise would also contravene the well-settled principle that an attorney should not benefit from the disqualification of a judge based on a controversy that the attorney has created. *See United States v. Zagari,* 419 F. Supp. 494, 505-07 (N.D. Cal. 1976) (applying seminal federal court decision in *Davis v. Bd. of School Comm'rs,* 517 F.2d 1044 (5th Cir. 1975)); *State ex rel. Fuente v. Himes,* 36 So.2d 433, 438-39 (Fla. 1948) (seminal state court decision regarding an attorney's creation of a controversy with a judge in an attempt to have the judge disqualified).

Furthermore, the evidence of record fully refutes Mr. Slavin's assertion that Judge Burke "create[d] a controversy" about Mr. Slavin when he issued the December 24, 2003 Notice of Judicial Inquiry and Show Cause Order. The evidence demonstrates that Mr. Slavin's professional misconduct was well-documented by DOL ALJs, the ARB, and state and federal courts before Judge Burke issued the Notice. *See* ALJ exhs. 1-31; discussion of evidence of misconduct at Part III, *infra*. Judge Burke initiated the Judicial Inquiry based on the information that he had gained regarding Mr. Slavin's misconduct in the whistleblower adjudications for which Judge Burke bore administrative responsibility. ODAA at 2-3. The record indicates that Judge Burke acted on his managerial and judicial responsibility to initiate a Section 18.34(g)(3) inquiry. *See* ODAA at 2-3; ALJ Exh. 32-C at 2. In so doing, he served a function similar to that of federal and state court judges who act on their ethical obligations to address attorney misconduct through the imposition of sanctions or the reporting of such misconduct to the proper disciplinary body. Such action does not indicate personal bias against an attorney or provide a basis for the judge's disqualification from cases involving the attorney. *See State v. Mata,* 789 P.2d 1122, 1125-26 (Haw. 1990). *See generally 5-H Corp. v. Padovano,* 708 So.2d 244, 246-49 (Fla. 1998) (discussing importance of judges' formal reports of attorney misconduct and the necessity of avoiding the interference that disqualifying judges on the basis of such action could cause). The record demonstrates that Judge Burke was motivated by wholly legitimate interests to initiate and conduct the Judicial Inquiry. *Cf. Gibson v. Berryhill,* 411 U.S. 564, 578-79 (1973) (state optometry board members' pecuniary interests in outcome of license revocation proceedings against optometrists who were employed by corporation rendered board incompetent to provide fair hearing).

Finally, we conclude that the record before us does not support a finding that Judge Burke should have recused himself or should now be disqualified by this Board because the Judicial Inquiry lacked the appearance of fairness. Even "in the absence of a probability of outside influences on the adjudicator," circumstances may warrant an administrative decision-maker's disqualification in order to preserve the appearance of a fair hearing. *Utica Packing Co. v. Block,* 781 F.2d 71, 77-78 (6th Cir. 1986). In the instant case, however, Mr. Slavin's contention that Judge Burke initiated the Judicial Inquiry to retaliate against Mr. Slavin and the Complainant for public criticism of DOL officials and judges is simply speculative, whereas Judge Burke's initiation of the Judicial Inquiry is well supported by the documentation generated in numerous cases heard by judges in various tribunals. We conclude that a reasonable person, familiar with all the circumstances, would not question Judge Burke's impartiality in rendering the

Section 18.34(g)(3) determination that is before us. *See generally Antoniu v. Sec. and Exch. Comm'n*, 877 F.2d 721, 724-26 (8th Cir. 1989) (concluding that Commissioner's participation in preliminary agency deliberations prior to his properly recusing himself tainted the agency's final decision, thus requiring that it be vacated); *Cinderella Career & Finishing Schs. v. Fed. Trade Comm'n*, 425 F.2d 583, 591-92 (D.C. Cir. 1970) (discussing appearance of fairness as one aspect of procedural due process).

We accordingly reject Mr. Slavin's argument that Judge Burke should have recused himself or should now be disqualified by this Board. Mr. Slavin's argument falls far short of demonstrating either actual bias or the appearance of same.

b. Restrictions on the scope and availability of an evidentiary hearing

In this appeal, Mr. Slavin generally objects to Judge Burke's issuing the ODAA without first holding an evidentiary hearing. For the following reasons, we conclude that the restrictions that Judge Burke imposed were fundamentally fair. We also conclude that Judge Burke properly found that Mr. Slavin had failed to demonstrate that an evidentiary hearing was necessary.

Although Judge Burke did not cite specific Rules of Practice and Procedure for hearings before the OALJ, the prerequisites that he imposed represent an adaptation of the OALJ rules to the Judicial Inquiry process. Judge Burke's requirement that Mr. Slavin clearly identify matters cited in the Notice and [Supp.] Notice regarding which there existed a genuine issue of material fact reflects the summary judgment principles incorporated into the summary decision provisions at 29 C.F.R. §§ 18.40, 18.41. As Section 18.41 indicates, evidentiary hearings are necessary when genuine questions of material fact must be decided. 29 C.F.R. § 18.41(a)(1), (b); *see* 29 C.F.R. § 18.40(d). The requirement that Mr. Slavin identify the evidence that he intended to offer at hearing and its relevance to the matters cited in the Notice and [Supp.] Notice is similar to the Section 18.7 requirement for a pre-hearing statement. *See* 29 C.F.R. § 18.7. Judge Burke's application of these threshold requirements is consistent with the procedural safeguards afforded an attorney who is the subject of a disciplinary proceeding. *Cf. In re Keiler*, 316 NLRB 763, 764-66 (1995) (discussing basic due process safeguards provided attorneys in disciplinary proceedings and by the agency's procedural rules, and concluding that attorney's response to the Board's show cause order failed to demonstrate a basis for an "oral or trial-type hearing").

Judge Burke did not err in barring Mr. Slavin from relitigating certain matters cited in the Notice and [Supp.] Notice. The December 24 Notice advised Mr. Slavin that he would not be allowed to relitigate any matter that he had been afforded a full and fair opportunity to contest in the case in which the misconduct occurred. ALJ exh. 32-C at 5. Reliance on the doctrine of issue preclusion to estop a party from relitigating an issue is generally appropriate when four requirements are met. In addition to the party having had a full and fair opportunity to litigate the issue in the original forum, issue preclusion requires that the issues in both proceedings be identical, that the issue was actually litigated and decided in the prior proceeding, and that the issue was necessary to support

a valid and final judgment on the merits in that proceeding. *Agosto v. Consolidated Edison Co. of New York,* ARB Nos. 98-007, 98-152, ALJ Nos. 96-ERA-2, 97-ERA-54, slip op. at 8 (ARB July 27, 1999). For purposes of attorney disciplinary proceedings, the fourth requirement has been adapted to require whether the issue was necessary to the court order imposing sanctions on the attorney. *See, e.g., In re Osborne,* 766 N.Y.S.2d 33 (N.Y. 2003). Issue preclusion is widely accepted as applicable to attorney disciplinary proceedings in certain circumstances, including reciprocal discipline based on another jurisdiction's imposition of discipline or discipline based on an attorney's criminal conviction. *See, e.g., In re McTighe,* 131 F. Supp. 2d 870 (N.D. Tx. 2001) (applying reciprocal discipline criteria established by *Selling v. Radford,* 243 U.S. 46 (1917)); *Florida Bar v. Heller,* 473 So.2d 1250 (Fla. 1985).

The record in this case contains a number of orders that impose a sanction against Mr. Slavin. *See* ODAA at 47-70 (discussing five cases under category of "Disqualifications for misconduct"); at 85, 94-95 (discussing federal district court's imposition of $10,000 sanction under Fed. R. Civ. P. 11); at 87 (discussing state court's imposition of $2,125.75 sanction under state Rule 11). The record indicates that the requirements for issue preclusion, including that Mr. Slavin had a full and fair opportunity to litigate the issue of his misconduct in those cases, are met. *See* ALJ exhs. 1-D – F, 3, 6, 16, 23-B. Significantly, Mr. Slavin did not argue before Judge Burke and has not argued in this appeal that he was denied a full and fair opportunity to litigate questions concerning his conduct in those cases. *Cf. In re Capoccia,* 709 N.Y.S.2d 640, 646 (N.Y. App. Div. 2000) (holding that attorney has burden to demonstrate that he should not be estopped from relitigation of issue because he had been denied a full and fair opportunity to litigate the issue in the prior proceeding). The December 24 Notice barring Mr. Slavin from relitigating such issues was thus consistent with relevant case law.

We also find that, as Judge Burke stated, he reviewed the "factual circumstances" evidenced by the court documents that were properly in the record, ODAA at 21. Judge Burke thus relied on the documents generated by the originating tribunals for their evidentiary value but did not give preclusive effect to any tribunal's legal determination. *Cf. Capoccia,* 709 N.Y.S.2d at 646 (distinguishing between preclusive effect of previous court findings that attorney had engaged in sanctionable frivolous litigation tactics and the legal question before the court of "whether such conduct constitutes a violation of the disciplinary rules . . . .").

Relevant to Judge Burke's reliance on the other cases in the record, we note that court or agency generated documents, including decisions and orders, that address an attorney's questionable conduct in a particular case may provide competent evidence in a later disciplinary proceeding regarding whether the attorney engaged in such conduct. *See, e.g., In re Truong,* 768 N.Y.S.2d 450, 452 (N.Y. 2003); *Keiler,* 316 NLRB at 765-66. Moreover, uncontrovertible proof, such as excerpts from pleadings that Mr. Slavin filed, provided the evidence of "factual circumstances" that Judge Burke relied on to evaluate Mr. Slavin's conduct in many cases. *See, e.g.,* ODAA at 67-70 (citing excerpts

from Mr. Slavin's brief that were quoted in ARB decision in *Williams v. Lockheed Martin Corp.*).

Judge Burke also properly concluded that Mr. Slavin failed to meet the threshold requirements for an evidentiary hearing. Judge Burke found that Mr. Slavin generally challenged the evidentiary basis on which one charge – that of witness intimidation – was based. But Judge Burke further found that Mr. Slavin failed to identify evidence that he would offer to controvert any specific issue of material fact, including the facts underlying the witness intimidation charge. ODAA at 8-9. Judge Burke also concluded that, although Mr. Slavin identified one prospective witness, a former DOL Chief ALJ, he did not identify how that individual's expert testimony regarding "dysfunctionality in OSHA" and "the overall inefficiency of the DOL whistleblower system" was relevant to the facts underlying the misconduct charges. ODAA at 9. Finally, Judge Burke found that Mr. Slavin's January 27 motion to depose the current Chief ALJ, Judge Burke, an OALJ staff attorney and opposing counsel in the underlying whistleblower complaint failed to explain how such depositions would provide information that could reasonably be expected to lead to the discovery of admissible evidence regarding the misconduct charges. *Id.* Review of the letter/motions that Mr. Slavin filed on January 14 and 27, 2004, supports Judge Burke's findings. *See* ALJ exhs. 32-D, 32-G. Judge Burke thus properly concluded that the evidence of Mr. Slavin's conduct that he cited in the Notice and [Supp.] Notice was effectively uncontroverted. ODAA at 10.

Having properly concluded that Mr. Slavin had failed to establish a basis for an evidentiary hearing, Judge Burke entertained the arguments that Mr. Slavin presented in the January 14 and 27 filings, which pertain to the First Amendment. ODAA at 10, 115-17; *see Ruffalo*, 390 U.S. at 550; *In re Chipley*, 448 F.2d 1234, 1235 (4th Cir. 1972). We therefore conclude that the procedure that Judge Burke followed complied with the due process safeguards of notice and opportunity for hearing that are incorporated into Section 18.34(g)(3).

3. Clear and convincing evidence

The evidence before Judge Burke consisted of documents from the official records of federal courts, state courts and DOL administrative proceedings. ODAA at 10-17 (detailed list of documents contained in ALJ Exhs. 1-32). In evaluating the evidence, Judge Burke found that these documents provided clear and convincing evidence that Mr. Slavin had engaged in conduct that violated various provisions of the MRPC and that DOL ALJs, the ARB and at least one state court judge had expressly admonished Mr. Slavin for such conduct. ODAA at 21–115. With the minor exceptions we discuss below, which are based on evidence not properly admitted into the record, we agree that the evidence provides clear and convincing evidence that Mr. Slavin engaged

in the misconduct that Judge Burke found established.[18] Judge Burke did not state, however, that he construed Section 18.34(g)(3) as *requiring* clear and convincing evidence to support a denial of authority to appear. *See* ODAA at 21–115. Citing the preponderance of the evidence standard of proof from the Secretary's 1994 decision in *Rex,* the Assistant Secretary points out that "Judge Burke may have given attorney Slavin more protection than the APA requires by applying a 'clear and convincing evidence' standard of proof." Asst. Secretary brief at 19; *see Rex v. Ebasco Servs.*, Nos. 87-ERA-6, -40, slip op. at 4-5 (Sec'y Oct. 3, 1994). We agree.

The preponderance of the evidence standard is the minimum standard of proof applicable to hearings that are required by statute to be "on the record" and which are thus governed by the formal hearing requirements of the APA, 5 U.S.CA. §§ 554, 556 and 557 (West 1996, Supp. 2004).[19] The Secretary adopted that standard for Section 18.34(g)(3) determinations in *Rex*. In remanding the case for a Section 18.34(g)(3) hearing regarding the qualifications of two attorneys, the Secretary stated that the Solicitor, representing the Wage and Hour Administrator – then the official responsible for the DOL whistleblower program – "should present the case for imposition of sanctions and will have the burden of proving the allegations by a preponderance of the evidence." *Rex,* slip op. at 4-5.

Judge Burke's fully supported conclusion that the evidence of misconduct rose to the level of clear and convincing proof obviates the necessity for evaluation of the evidence under the lower preponderance of the evidence standard, which applies pursuant to *Rex*. We therefore conclude that any error in Judge Burke's failure to apply the preponderance of the evidence standard is harmless.

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[18] Clear and convincing evidence represents the level of proof that is greater than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Yule v. Burns Int'l Sec. Serv.*, No. 93-ERA-12, slip op. at 8 and authorities there cited (Sec'y May 24, 1995). We note that the majority of licensing jurisdictions require clear and convincing evidence of misconduct to support attorney disciplinary actions, Rest. (3d) of Law Governing Lawyers, Ch. 1, Prof. Discipline Introductory Note (2000), and that a few federal agencies have adopted the higher standard of proof in attorney disciplinary matters, *see* Final Rule, NLRB, 29 CFR Pt. 102, 61 Fed. Reg. 65,323, 65,328-29 (Dec. 12, 1996) (noting that a majority of jurisdictions and a few Federal agencies have adopted the clear and convincing evidence standard, but rejecting it in favor of the preponderance of the evidence standard).

[19] The authority for Section 18.34(g)(3) derives from the OALJ's "implied power to determine who can practice before it," *Koden v. United States Dep't of Justice,* 564 F.2d 228, 234 (7th Cir. 1977), and not a particular statute. *See generally Polydoroff v. ICC,* 773 F.2d 372, 374 (D.C. Cir. 1985) (construing Agency Practice Act, Pub. L. No. 89-332, 79 Stat. 1281 (1965), codified as amended at 5 U.S.C. § 500, as neither limiting nor expanding agency authority to discipline attorneys, as that authority existed prior to this amendment to the APA).

III. Findings of fact and conclusions of law regarding MRPC violations

A. Overview of Judge Burke's findings of fact

As discussed above in regard to Judge Burke's determination that Mr. Slavin had not met the prerequisites for an evidentiary hearing, Judge Burke properly concluded that the evidence before him was essentially uncontested. ODAA at 10. As there were no facts in dispute, Judge Burke's task was to review the evidence and identify the relevant facts. Judge Burke identified instances of Mr. Slavin's action or inaction in the course of litigation that violated professional conduct standards embodied in the MRPC. *See, e.g.*, ODAA at 25-47 (discussing cases in which the client's case or appeal was dismissed because of Mr. Slavin's conduct). Judge Burke identified other instances, including Mr. Slavin's requests for peer review of ALJ action in particular cases and his petition for pro hac vice admission to practice before a court, that also involved conduct that violated MRPC standards. *See, e.g.*, ODAA at 93 (discussing Mr. Slavin's motion for pro hac vice admission that included request for recusal of all judges in the U.S. District Court for the Eastern District of Tennessee); at 106-07 (discussing Mr. Slavin's "pattern and practice" of filing unsupported peer review complaints against ALJs). Judge Burke clearly described the misconduct in each instance and used numerous excerpts from the official documents in evidence to support his findings. *See* ODAA at 21–115.

Judge Burke organized his factual findings regarding misconduct into these categories: participation in harassment and intimidation of officers of the court; client's case or appeal dismissed because of counsel's actions; disqualifications for misconduct; lying and making misrepresentations to tribunal; pursuit of frivolous complaints; refusal to comply with lawful order; admonishments; other conduct. With the few exceptions we identify infra at Part III D, Judge Burke's findings that specific instances of misconduct occurred are supported by clear and convincing evidence that was properly in the record before him.

B. Judge Burke's conclusions regarding specific violations of the MRPC

We initially address Judge Burke's application of the MRPC in this Section 18.34(g)(3) proceeding. As he advised Mr. Slavin in the December 24, 2003 Notice, Judge Burke initiated the Judicial Inquiry to examine whether Mr. Slavin had engaged in "unethical or improper professional conduct" as an attorney representing clients, within the meaning of Section 18.34(g)(3). ALJ exh. 32-C at 1; *see also* ODAA at 3 (stating that Judge Burke had determined that, "[T]he time had come to conduct a Judicial Inquiry into Slavin's qualifications as a legal representative."). Judge Burke's choice of the MRPC standards for attorney conduct to illuminate the Section 18.34(g)(3) inquiry was thus especially appropriate. Judge Burke concluded that the instances of questionable conduct that the evidence established constituted violations of the following MRPC provisions:

1) Rules 1.1 (lack of competent representation);

2) 1.3 (lack of diligence);
3) 3.1 (pursuit of non-meritorious claim or defense);
4) 3.3(a)(1) (making a false statement of fact to tribunal);
5) 3.5(a) (seeking to influence a judge by improper means);
6) 3.5(b) (improper ex parte communication with the presiding judge);
7) 3.5(d) (engaging in conduct intended to disrupt a tribunal);
8) 8.2 (making false statements about the qualifications or integrity of a judge);
9) 8.4(c) (engaging in conduct involving dishonesty); and
10) 8.4(d) (engaging in conduct prejudicial to the administration of justice)

ODAA at 21–115. Judge Burke's conclusions regarding MRPC violations are consistent with court decisions applying those provisions and the ABA commentary accompanying publication of the MRPC. *See* Ann. Mod. Rules Prof. Cond., Rules 1.1, 1.3, 3.1, 3.3(a), 3.5(a),(b),(d), 8.2(a), 8.4(c), (d) (2003). In addition, Judge Burke did not err in finding that Mr. Slavin's conduct in most instances violated more than one professional conduct standard. Several of the MRPC provisions that are relevant to this case are closely related, such as the Rule 3.5(d) prohibition against engaging in conduct intended to disrupt a tribunal and the Rule 8.4(d) prohibition against engaging in conduct prejudicial to the administration of justice. *See In re Swarts*, 272 P.3d 1011, 1019-33 (Kan. 2001).

C. First Amendment protections

Judge Burke examined his overall conclusions regarding MRPC violations in light of Mr. Slavin's First Amendment rights. ODAA at 115-17. Judge Burke properly concluded that much of Mr. Slavin's misconduct consisted of actions like failing to file pleadings in a timely manner, with proper information and in the required format, and that such action could not reasonably be construed as speech protected by the First Amendment. *See generally United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (discussing speech and non-speech elements combined in the same course of conduct). Judge Burke also properly concluded that Mr. Slavin's speech-based misconduct was subject to the constraints imposed on the language used by attorneys when filing documents with or otherwise communicating with a court. Judge Burke thereby properly rejected Mr. Slavin's contention that this Section 18.34(g)(3) proceeding was undertaken as retaliation for Mr. Slavin's exercise of his First Amendment rights through public criticism of the DOL whistleblower program. ODAA at 116-17. We add the following points in support of Judge Burke's conclusion.

Attorneys occupy a privileged position in the legal system and that position is burdened with corresponding obligations. *See Gentile v. St. Bar of Nev.*, 501 U.S. 1030, 1074-75 (O'Connor, J., concurring); *In re Snyder*, 472 U.S. 634, 644-45 (1985); *In re Sawyer*, 360 U.S. 622, 646 (1959) (Stewart, J., concurring). Among those obligations is the attorney's responsibility "to demonstrate respect for the legal system and for those

who serve it, including judges, other lawyers and public officials." ABA MRPC, Preamble, § 5 (2002 ed.). Attorneys are uniquely situated to evaluate the fairness and efficacy of our legal system. *See State ex rel. Okla. Bar Ass'n v. Porter,* 766 P.2d 958, 966-68 (Okla. 1988). Accordingly, input from the legal profession, either from individual practitioners or professional groups, regarding deficiencies in the legal system serves an important public interest. Such input may be instrumental in bringing about improvements to the system, including rectifying abuse or corruption. *See Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964); *Kentucky St. Bar Ass'n v. Lewis,* 282 S.W.2d 321 (Ky. 1955); ABA MRPC R. 8.2, Cmt. 1 (2002).

But attorneys criticism of officials serving in the legal system in a responsible manner and through appropriate channels to avoid interference with the fair administration of justice or wanton damage to the public's confidence in the legal system. *See Kentucky St. Bar Ass'n v. Heleringer,* 602 S.W.2d 165, 168 (Ky. 1980); *In re Lacey*, 283 N.W.2d 250, 252 (S.D. 1979). To protect the public interest in the proper functioning of the legal system, even out-of-court speech that would otherwise qualify for full First Amendment protection may be sanctioned when it presents a significant risk of prejudicing the administration of justice. *See Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1442 (9th Cir. 1995) (citing *Gentile,* 501 U.S. at 1074-75). Furthermore, it is well-settled that "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." *Gentile,* 501 U.S. at 1074-75 (O'Connor, J., concurring). Statements that an attorney makes in pleadings filed with a court or in correspondence addressed to a judge are also considered to be "in-court" speech, and are therefore subject to greater restrictions than are an attorney's public remarks. *See Florida Bar v. Ray,* 797 So.2d 556, 557-60 (Fla. 2001)*; Kentucky Bar Ass'n v. Waller,* 929 S.W.2d 181, 182-83 (Ky. 1996).

Like State and Federal courts, administrative agencies have a substantial interest in protecting the integrity of the adjudicative process. *See generally In the matter of the disqualification of Edward A. Slavin, Jr., Counsel for Complainant in Jean F. Greene v. EPA Chief Judge Susan Biro, U.S. Envtl. Prot. Agency,* ARB No. 02-109, ALJ No. 2002-SWD-00001, slip op. at 18-19 (ARB June 30, 2003) (stating that the parties' demonstration of proper respect for the presiding administrative law judge is fundamentally important to the fair, efficient administration of the law). Sanctioning a representative's speech-based conduct requires us to strike a balance between that interest and First Amendment protections. *See In re Westfall*, 808 S.W.2d 829, 833-36 (Mo. 1991) (tracing history of U.S. Supreme Court precedent regarding attorney criticism of the judiciary, beginning with *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 (1872)). Mr. Slavin's in-court speech violated two standards of professional conduct that have been the subject of successful First Amendment challenges, *viz.,* conduct intended to disrupt a tribunal, *see* MRPC 3.5(d), and false statements regarding the qualifications or integrity

of a judge, *see* MRPC 8.2(a). *See, e.g., In re Green,* 11 P.3d 1078 (Colo. 2000).[20] Mr. Slavin cites two such cases, *Yagman,* 55 F.3d at 1438-45, and *Porter,* 766 P.2d at 966-69, in support of his First Amendment argument in this matter. Initial Brief and Motion for Summary Reversal at misnumbered p. 22.

But the statements that were before the courts in *Yagman* and *Porter* are distinguishable from the statements in evidence here. *Yagman* and *Porter* did not involve in-court speech but statements that attorneys made publicly, to news media and a professional publication, that were critical of particular judges. *Yagman,* 55 F.3d at 1438, 1440, 1441; *Porter,* 766 P.2d at 960-61. The *Yagman* court determined that none of the attorney's statements were sanctionable because they did not constitute false statements of fact. Instead, the respective statements qualified for First Amendment protection as "pure opinion;" opinion based on undisputed, stated facts; and opinion based on implied facts that were not contested. *Yagman,* 55 F.3d at 1438-42. The *Porter* court similarly found the attorney's public statement qualified for First Amendment protection because the opinion was based on facts that were not contested. *Porter,* 766 P.2d at 969.

In contrast to *Yagman* and *Porter*, the statements for which Mr. Slavin is held culpable here under the standards of MRPC Rules 3.5(d) and 8.2(a) are in-court statements. *See, e.g.,* ODAA at 29-36 (pre-hearing motions and other pleadings filed with ALJ in *Puckett v. Tennessee Valley Auth.,* ALJ No. 2002-ERA-15); at 57-67 (pleadings filed with ALJ as well as telephone communications with ALJ and opposing counsel in *Johnson v. Oak Ridge Opers. Ofc.,* ALJ Nos. 1995-CAA-20, -21, -22, and appellate briefs filed in *Johnson,* ARB No. 97-057); at 67-70 (pre-hearing motions and other pleadings filed with ALJ in *Williams v. Lockheed Martin Corp.,* ALJ Nos. 1998-ERA-40, -42, and appellate briefs filed in *Williams,* ARB Nos. 99-054, -064); at 97-98 (appellate briefs filed with ARB in *Cox v. Lockheed Martin Energy Systems,* ALJ No. 1997-ERA-17, ARB No. 99-040); at 102-04 (appellate briefs filed with Workers' Comp. Panel of Tennessee Sup. Ct. in *Campbell v. Travelers Ins. Co.,* 2002 WL 215663 (Feb. 7, 2002); at 109 (motion for recusal of entire ARB panel in *Pickett v. Tennessee Valley Auth.,* ALJ No. 2000-CAA-9, ARB No. 00-076). The disruptive conduct standard of Rule 3.5(d) warrants more severe restriction on an attorney's in-court speech than on public statements. *See In re Garaas,* 652 N.W.2d 918, 925-26 (N.D. 2002) (discussing application of J. O'Connor's statement regarding the "extremely circumscribed" free speech rights attorneys enjoy in courtroom proceedings, *Gentile,* 501 U.S. at 1074-75)).

In addition, under Rule 8.2(a) Mr. Slavin's statements regarding judges' qualifications or integrity do not qualify for First Amendment protection as either

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[20] *Green* involved in-court speech, in the form of three letters that the charged attorney wrote requesting the judge to recuse himself, which he also served on opposing counsel. The court determined that the statements constituted expressions of "pure opinion," that were based on disclosed facts that were indisputably true, and that the statements thus were not sanctionable. *Green,* 11 P.3d at 1085-86.

expressions of pure opinion or as true factual assertions. *See, e.g.,* ODAA at 47-51 (*Greene v. U.S. Envtl. Prot. Agency:* in challenging Housing and Urban Development ALJ's assignment to hear case in which DOL ALJs had been disqualified based on the complainant being the wife of the former DOL Chief ALJ, Mr. Slavin asserted that the Memorandum of Understanding between HUD and DOL appointing the presiding judge "was established in secrecy" and not properly through the Office of Personnel Management, and accusing officials at HUD, EPA and DOL of conspiring to ensure that EPA, as the respondent employer, would prevail in the whistleblower case); at 67-70 (*Williams v. Lockheed Martin Corp.*: Mr. Slavin included personal insults against the ALJ in his brief filed with ARB, including statement that ALJ conducted a "kangaroo court," that ALJ showed "palpable, almost pathological" prejudice against whistleblowing, that the ALJ "misrepresented, ridiculed and twisted the facts," and that "the ALJ made anger, bitterness and insults into an art form, like a judicial Don Rickles"); at 102-04 (*Campbell v. Travelers Insur. Co.*: in brief filed with state supreme court workers' compensation appeals panel, Mr. Slavin made the unsupported assertion that the trial judge had "based his decision on prejudice: he drove under the inference [and] based his decision on information he did not know" and that the judge had "scorned First Amendment rights"); *see generally Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 18-19 (1990) (clarifying the limits on the range of statements for which the Court would extend Constitutional protection despite dictum in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) that, "under the First Amendment, there is no such thing as a false idea."). Rather, Mr. Slavin's in-court criticisms of judges are more properly likened to "outrageously false accusations," *Florida Bar v. Ray*, 797 So.2d 556, 559 (Fla. 2001); that are made "in retaliation for adverse judicial rulings," *In re Palmisano,* 70 F.3d 483, 486 (7th Cir. 1995). *See also In re Keiler,* 316 NLRB 763, 766 (1995) (noting that NLRB had become "all too familiar" with attorney's "groundless accusations against administrative law judges" and that Board was "beginning to grow weary of responding to Keiler's disingenuous cries of 'wolf'" in the form of attorney's contentions of ALJ bias and incompetency). Judge Burke thus properly concluded that Mr. Slavin was "being sanctioned for his disruptive actions and malfeasance during in-court proceedings where his First Amendment rights are subject to his ethical obligations as an attorney." ODAA at 117.

D. Adoption of Judge Burke's findings and conclusions regarding misconduct

With the exceptions specifically noted below, we adopt Judge Burke's findings of fact and conclusions of law at pages 21–117 of the ODAA. We also provide the following clarification regarding the organization of the misconduct findings in the ODAA.

Initially, we point out that Judge Burke organized his findings according to the categories of misconduct noted above, rather than discussing all the types of misconduct evidenced in each case under one entry for that case. Consequently, several specific ALJ or ARB decisions or orders are addressed under more than one category of misconduct. *See, e.g.,* ODAA at 72, 90-91 (addressing two types of misconduct evidenced by July 14,

2000 ARB decision in *Varnadore v. Oak Ridge Nat'l Lab.,* ARB No. 99-121, first under "Lying and Making Misrepresentations to a Tribunal" at p.72, and later under "Pursuit of Frivolous Claims" at pp. 90-91). Another factor that complicated Judge Burke's task, as well as this review of the ODAA, is the use of the same case names to identify the different proceedings that are necessary to adjudicate separate complaints filed sequentially by a particular complainant. Because the case names are the same when a complainant files additional complaints against one specific employer, references to those cases can be distinguished only by comparison of the case or docket numbers assigned by the OALJ and the ARB. *See, e.g.,* ODAA at 22-25 (discussing evidence of misconduct from proceedings regarding two separate complaints, docketed as *Somerson v. Mail Contractors of America).* Finally, we note that different phases in the adjudication of a single complaint – the ALJ hearing, the ARB appeal or a related action in Federal district court – may provide evidence of different categories of misconduct, and in those situations Judge Burke examined each phase separately, under the corresponding category. *See, e.g.,* ODAA at 90-91, 94-95, 106 (citing ALJ's April 14, 2003 order recommending award of attorney's fees with a twenty-five percent reduction based on Mr. Slavin's "papering" the ALJ with irrelevant documents in *Varnadore v. Oak Ridge Lab.,* ALJ Nos. 1992-CAA-2, -5, 1993-CAA-1, 1994-CAA-2, -3, ARB No. 99-121, at 106; citing July 14, 2000 ARB decision in *Varnadore* as evidence of pursuit of a frivolous claim in violation of MRPC 3.1, at 90-91; and citing September 6, 1996 ARB order regarding repayment of attorney's fees in the same case and two U.S. District Court orders regarding respondent employer's collection action in *Lockheed Martin Energy Systems, Inc. v. Slavin,* No. 3:98-CV-613, as evidence of refusal to comply with a lawful order, at 94-95.)

As the foregoing summary suggests, the ODAA provides an assiduous compilation of incidents of misconduct. Our review reveals that, with one exception, the findings at pages 21 through 115 of the ODAA do not contain duplicative findings of MRPC violations based on Mr. Slavin's conduct in a particular case.[21] As discussed above, however, Judge Burke improperly enlarged the record to include evidence from proceedings beyond those cited in the December 24, 2003 Notice and the February 17, 2004 [Supp.] Notice. *See* n.14 *supra.* Since Mr. Slavin did not have notice and an opportunity to respond to the findings of misconduct that Burke found established by this additional evidence, we cannot adopt those findings. *See In re Riley,* 691 P.2d 695, 699-

[21] We correct the following duplication of findings regarding MRPC violations that are based on a single ARB order dated September 29, 2000, in *Williams v. Lockheed Martin Corp.,* ARB Nos. 99-054, -064, ALJ Nos. 1998-ERA-40, -42 (ARB 9/29/00). Judge Burke relied on that ARB order, in which the Board admonished Mr. Slavin for engaging in factually inaccurate attacks on the ALJ in the brief filed with the Board, three times in finding the same violations of MRPC Rules 8.2(a), making a false statement about the qualifications or integrity of a judge, and 8.4(d), engaging in conduct prejudicial to the administration of justice. ODAA at 67-70, 73, 100-01.

700 (Ariz. 1984). We therefore reject the following findings that are based on that additional evidence:

> 1) ODAA at pages 44-45: the findings of Rules 1.1 and 1.3 violations that are based on ARB March 19, 2004 decision in *Blodgett v. Tennessee Dep't of Env't and Conservation*, ARB No. 03-043, ALJ No. 2003-CAA-7, ALJ exh. 26;[22]
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> 2) at pages 73-74: the violations of Rules 3.3(a)(1), 8.4(c), and 8.4(d) that are based on the ARB December 16, 2003 Order Denying Complainant's Motion to Vacate, ALJ exh. 15-I, in *Somerson v. Mail Contractors of America,* ARB No. 03-042, ALJ No. 2003-STA-11;
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> 3) at pages 74-75: the violations of MRPC Rules 3.3(a)(1), 8.4(c), and 8.4(d) that are based on the ALJ's February 24, 2004 Recommended Decision and Order recommending dismissal of the complaint, ALJ exh. 27-B, in *Santamaria v. U.S. Envtl. Prot. Agency,* ALJ No. 2004-ERA-6;
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> 4) at pages 79-82: reliance on the ARB and ALJ decisions in *Rockefeller v. U.S. Dep't of Energy*, ALJ Nos. 1999-CAA-21, -22, ARB No. 00-039 (ARB May 30, 2001); ALJ Nos. 2002-CAA-4, -5 (ALJ Jan. 24, 2003); and ALJ No. 2003-ERA-10 (ALJ Mar. 28, 2003) (*Rockefeller V* through *VIII*), along with the ARB and ALJ decisions in *Rockefeller I* through *IV*, to find violations of Rules 3.1, 3.5(d), and 8.4(d);[23]

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[22] Judge Burke did cite a different *Blodgett v. Tennessee Dep't of Env't and Conservation* case in the Appendix to the December 24, 2003 Notice, and properly relied on documents from the record in that case to find MRPC violations established. ALJ exh. 32-C at App. at 9 (citing *Blodgett v. Tennessee Dep't of Env't and Conservation,* ARB No. 03-138, ALJ No. 2003-CAA-15 (ARB Oct. 14, 2003)); ODAA at 45-46 (relying on ARB March 22, 2004 Final Decision and Order, ALJ exh. 20-B, to find violations of Rules 1.1 and 1.3).

[23] Judge Burke properly relied on the documents generated in *Rockefeller I* through *IV*, which were cited in the December 24, 2003 Notice, ALJ exh. 32-C at App. at 6-7, 7, 10, 11. In regard to *Rockefeller VIII*, *Rockefeller v. U.S. Dep't of Energy*, ALJ No. 2003-ERA-10 (ALJ Mar. 28, 2003), *recon. denied*, July 3, 2003, we also note that this Board did not uphold the ALJ's recommended dismissal order that Judge Burke relied on, ODAA at 81-82. *Rockefeller v. U.S. Dep't of Energy,* ALJ Nos. 2002-CAA-0005, 2003-ERA-10, ARB Nos. 03-048, 03-084 (ARB Aug. 31, 2004).

5) at pages 91-92: the finding of a Rule 3.1 violation that is based on the ALJ's February 27, 2004 Recommended Decision and Order, ALJ exh. 28-B, in *Howick v. Campbell-Ewald Co.,* ALJ No. 2004-STA-7;[24]

6) at pages 95-96: reliance on the ARB October 17, 2002 Order to Show Cause in *Erickson v. U.S. Envtl. Prot. Agency,* ARB Nos. 03-002, -003, -004, ALJ Nos. 1999-CAA-2, 2001-CAA-8, -13, 2002-CAA-3, ALJ exh. 8-D, as one of numerous ARB orders providing evidence of violations of Rules 1.1, 3.5(d), and 8.4(d);[25]

7) at page 105: the finding that the ALJ admonished Mr. Slavin for violation of Rule 3.1 that Judge Burke based on the ALJ's January 28, 2004 Order and February 24, 2004 Recommended Decision and Order, ALJ exhs. 27-A, -B, in *Santamaria v. U.S. Envtl. Prot. Agency*, ALJ No. 2004-ERA-6;

8) at pages 111-15: the findings of Rules 3.5(a), 3.5(b), 3.5(d), 8.2(a), 8.4(d) violations that are based on the post-ARB remand proceedings before the ALJ in *Seater v. Southern Cal. Edison Co.,* ALJ No. 1995-ERA-13, ALJ exhs. 4-B, -C.[26]

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[24] We note that Judge Burke did cite a different *Howick v. Campbell-Ewald Co.* case in the Appendix to the December 24, 2003 Notice, and properly relied on documents generated in that case to find MRPC violations established. ALJ exh. 32-C at App. at 12 (citing *Howick v. Campbell-Ewald Co.,* ALJ No. 2003-STA-6 (ALJ Sept. 18, 2003);ODAA at 25-29 (relying on ALJ's Order Denying Motion in Limine, Recommended Decision and Order – Dismissal of Complaint, and Order Denying Reconsideration in No. 2003-STA-6, ALJ exhs. 22-A, -B, -C, to find violations of Rules 1.1, 3.5(d), and 8.4(d)).

[25] Judge Burke did include citations to other *Erickson v. U.S. Envtl. Prot. Agency* cases in the December 24, 2003 Notice and properly relied on those matters as evidence of MRPC violations. ALJ exh. 32-C at App. at 10 (citing *Erickson v. U.S. Envtl. Prot. Agency,* ALJ No. 1999-CAA-2, ALJ's Jan. 24, 2002 order); *id.* at App. at 12 (citing *Erickson v. U.S. Envtl. Prot. Agency,* ALJ Nos. 2001-CAA-8, -9, 2002-CAA-3, -18, ALJ's Oct. 15, 2002 order, and ALJ No. 2003-CAA-11, ALJ's Apr. 14, 2003 order); ODAA at 87-89, 101, 106 (finding violations of Rules 1.1, 3.1, 3.5(d), 8.4(d) based on the aforementioned ALJ orders).

[26] Judge Burke did include in the December 24, 2003 Notice a reference to the ARB September 27, 1996 remand decision in *Seater v. Southern Cal. Edison Co.,* ARB/ALJ No.

Continued . . .

As explained above, at n.13, Judge Burke's enlargement of the record is not reversible error because the evidence properly in the record amply supports his other findings regarding violations under Rules 1.1., 1.3, 3.1, 3.3(a)(1), 3.5(a), 3.5(b), 3.5(d), 8.2(a), 8.4(c) and 8.4(d). *Cf. In re Phelps*, 637 F.2d 171, 174 (10th Cir. 1981) (lower court erred in enlarging charges beyond those stated initially and not allowing attorney to respond to additional charges, but court upheld discipline based on charges of which attorney had been properly given notice and opportunity to respond).

IV. The sanction

A. The criteria that Judge Burke applied to determine the appropriate sanction

To determine the time period for which the Section 18.34(g)(3) bar should be imposed, Judge Burke applied ABA guidelines for determining the appropriate level of discipline. Specifically, Judge Burke applied the ABA Standards for Lawyer Discipline and Disability Proceedings (1992) (ABA-SLD). ODAA at 118-20. The ABA-SLD provides a two-step process. That process begins with an evaluation of the seriousness of each instance of misconduct according to specific criteria, which leads to a preliminary determination of the appropriate sanction. Once the preliminary determination regarding the proper sanction is made, the decision-maker weighs mitigating and aggravating factors to reach a final decision. ABA-SLD, Theoretical Framework.

As discussed above, we review Judge Burke's determination of the appropriate sanction under an abuse of discretion standard. Before examining Judge Burke's findings under the ABA-SLD criteria, we address his choice of those standards for guidance in setting the proper period of disqualification. We find no abuse of discretion in Judge Burke's reliance on the ABA-SLD guidelines. The ABA-SLD provides a comprehensive model for determining the appropriate sanction upon which numerous licensing jurisdictions and at least one other Federal agency have relied. *See, e.g., In re Alper*, 617 P.2d 98 (Wash. 1980).[27] Judge Burke's use of standards that were developed for application to lawyers is wholly consistent with the subject of the Judicial Inquiry, *viz.*, whether an attorney should be barred from serving as a representative pursuant to Section 18.34(g)(3) based on his "unethical or improper professional conduct." ALJ exh. 32-C at

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1995-ERA-13, ALJ exh. 4-A, and thus properly relied on that document to find that Mr. Slavin had been admonished for conduct prejudicial to the administration of justice. ALJ exh. 32-C at App. at 10; ODAA at 101.

[27] The Standards for Lawyer Discipline and Disability Proceedings were initially published in 1979. In 1989, the ABA combined the Standards for Lawyer Discipline and Disability Proceedings and the 1985 Model Rules for Lawyer Disciplinary Enforcement into a single document titled the Model Rules for Lawyer Disciplinary Enforcement. American Bar Association Standards for Imposing Lawyer Sanctions, Preface (1991).

1 (Dec. 24, 2003 Notice of Judicial Inquiry and Order to Show Cause); *see* 29 C.F.R. § 18.34(g)(3).

To determine the seriousness of the misconduct under the ABA-SLD, each instance of misconduct must be evaluated under three criteria. First, the seriousness of each incident is assessed based on the type of duty that the attorney breached by engaging in that conduct. The attorney owes duties to the client, the public, the legal system and the profession, but breaches of duties owed the client represent the most serious violations. ABA-SLD Std. 3.0; *see* ABA-SLD, Theoretical Framework. Secondly, the seriousness of each instance of misconduct is further classified according to the mental state of the attorney in committing the conduct – acting with intent, acting with conscious awareness, or acting negligently. Finally, the misconduct is classified according to the extent of the actual or potential injury that results, whether it is serious injury, injury, or little or no injury. ABA-SLD Std. 3.0. To further assist the decision-maker in reaching the final determination regarding the appropriate sanction, the ABA-SLD provides lists of factors that may properly be considered as aggravating or mitigating. ABA-SLD Stds. 9.21, 9.31.

B. Judge Burke's findings under the ABA-SLD guidelines

Following the ABA-SLD two-step process, Judge Burke began by categorizing the instances of misconduct that he had found established as breaches of duties owed the client and of duties owed the legal system. ODAA at 118-20. He also considered Mr. Slavin's mental state in committing each violation and the extent of the actual or potential injury that resulted. *Id.* Finally, Judge Burke looked to the factors cited by the ABA-SLD that should be considered as aggravating or mitigating. *Id.* at 120-23.

1. Breaches of duties owed the client

Judge Burke determined that the evidence established included two types of misconduct that represented breaches of Mr. Slavin's duties owed the client: the failure to diligently represent clients and the failure to competently represent clients. ODAA at 118-19. Concerning the failure to diligently represent clients, Judge Burke concluded that Mr. Slavin's failure to comply with ARB pleading standards jeopardized his clients' cases, and that Mr. Slavin thereby "knowingly fail[ed] to perform services for a client and cause[d] serious or potentially serious injury to the client." ODAA at 118; *see* ABA-SLD Std. 4.4. Judge Burke similarly found that Mr. Slavin neglected a number of appeals before the ARB, resulting in dismissals for want of prosecution, and thus engaged "in a pattern of neglect with respect to client matters and cause[d] serious or potentially serious injury." ODAA at 118; *see* ABA-SLD Std. 4.4. Relevant to the duty to competently represent clients, Judge Burke found that Mr. Slavin had, on numerous occasions, "failed to plead essential elements of a whistleblower complaint, such that either the complaint should never have been brought" or that Mr. Slavin had "exhibited gross incompetence in failing to amend the complaint to remedy the defect." ODAA at 118-19; *see* ABA-SLD Std. 4.5. Judge Burke also concluded that Mr. Slavin's "inability or unwillingness to file

pleadings in compliance with straightforward ARB pleading requirements illustrates gross incompetence." ODAA at 119; *see* ABA-SLD Std. 4.5.

The foregoing reasoning is based on the facts the case record established. *See* ODAA at 25-29 (*Howick v. Campbell-Ewald Co.:* ALJ dismissed complaint based on Mr. Slavin and his client's repeated delays and other actions that "offended traditional notions of fair play and substantial justice"); at 29-36 (*Puckett v. Tennessee Valley Auth.*: ALJ dismissed complaint based on Mr. Slavin's dilatory and contumacious conduct); at 36-37 (*Pickett v. Tennessee Valley Auth.*: ARB dismissed attorney fee appeal based on Mr. Slavin's failure to timely file a brief in support of the appeal, despite having been afforded three extensions of time); at 37-40 (*Steffenhagen v. Securitas Sverige:* ARB dismissed complaint based on Mr. Slavin's failure to timely file a brief in support of the appeal or a motion for extension of time, or to demonstrate good cause for such failure; ALJ dismissed complaint based on Mr. Slavin's failure to serve the seventeen named respondents); at 40-42 (*Gass v. U.S. Dep't of Energy*, ARB No. 03-035*:* ARB dismissed appeal based on Mr. Slavin's failure to timely file a petition for review or to demonstrate good cause for such failure); at 43-44 (*Gass v. U.S. Dep't of Energy*, ARB No. 03-093: ARB dismissed appeal based on Mr. Slavin's failure to timely file a brief in support of appeal or a request for extension of time, or to demonstrate good cause for such failure).

As Judge Burke stated, the foregoing breaches of the duties to diligently and to competently represent clients support imposition of disqualification for a period of no less than five years under ABA-SLD Stds. 4.41 and 4.51.[28] ODAA at 118-19. Relevant to the failure to diligently represent, Std. 4.41 provides that a five-year sanction is generally appropriate when a lawyer knowingly fails to perform services for a client and such failure results in serious or potentially serious injury to the client, or when a lawyer engages in a pattern of neglect with regard to client matters and causes serious or potentially serious injury to the client. ABA-SLD Std. 4.41. Relevant to the failure to competently represent, Std. 4.51 provides that a five-year sanction is "generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury." The Commentary to Std. 4.51 explains that a single instance indicating incompetence will rarely warrant the five-year sanction, but that multiple instances that demonstrate that the attorney "cannot or will not master the knowledge and skills necessary for minimally competent practice" do support a five-year sanction. ABA-SLD Std. 4.51, Commentary.

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[28] In repeatedly stating that he found "disqualification under Section 18.34(g)(3)" to be warranted, ODAA at 118-20, Judge Burke was obviously using "disqualification" to refer to a Section 18.34(g)(3) bar extending for a period of no less than five years. Under the ABA-SLD, "disbarment" is the term used to refer to a denial of the authority to practice law for a period of no less than five years. ABA-SLD Std. 2.2 ¶ (1).

2. Breaches of duties owed the legal system

Judge Burke identified three types of misconduct that the record established that constitute breaches of an attorney's duties owed the legal system. First, Judge Burke cited the evidence that Mr. Slavin had made false statements and misrepresentations to a tribunal. Second, Judge Burke cited the evidence that Mr. Slavin had abused the legal process. Finally, Judge Burke pointed to the evidence that Mr. Slavin had improperly communicated with individuals in the legal system. ODAA at 119. Evaluating each of these violations under the corresponding ABA-SLD standard, Judge Burke concluded that Mr. Slavin's violations of all three types of misconduct warranted a five-year disqualification.

Regarding false statements and misrepresentations, Judge Burke determined that Mr. Slavin had "repeatedly made factual and legal misrepresentations and presented outright untruths to DOL tribunals," and that this conduct met the Std. 6.11 five-year sanction criterion. ODAA at 119. Under Std. 6.11, a five-year sanction is generally appropriate when an attorney acts with the intent to deceive the court by making a false statement, submitting a false document, or withholding material information, and thereby causes serious or potentially serious injury to a party, or a significant or potentially significant adverse effect on the legal proceeding. Judge Burke accurately stated that the evidence established that Mr. Slavin repeatedly made such misrepresentations of law and fact. ODAA at 119; *see* ODAA at 53-57 (*Powers v. Pinnacle Airlines:* the ALJ disqualified Mr. Slavin pursuant to 29 C.F.R. § 18.36 for, among other things, filing a complaint with OSHA in which he misrepresented the ALJ's preliminary rulings in the case); at 70-71 (*Somerson v. Mail Contractors of America,* ARB Nos. 03-042, 03-055*:* in pleadings that Mr. Slavin filed with the ARB in the respective appeals in two different cases, he misrepresented the date that an ARB order was received, resulting in the striking of the client's briefs and the dismissal of each appeal); at 71-72 (*Rockefeller v. Carlsbad Area Ofc., U.S. Dep't of Energy (Rockefeller I – IV):* in arguments filed with the ARB, Mr. Slavin misrepresented the holdings in several decisions that the Secretary of Labor had issued and misrepresented the decision of the Department of Energy's Office of Hearings and Appeals on a Freedom of Information Act request); at 72 (*Varnadore v. Oak Ridge Nat'l Lab.*: ARB admonished Mr. Slavin for misrepresenting an ARB ruling regarding the admissibility of evidence that the Board had made when the case was previously before them). The record also demonstrates that Mr. Slavin's misrepresentations repeatedly caused serious or potentially serious injury to his client or a significant or potentially significant adverse effect on those legal proceedings. *See id.* Judge Burke's factual findings are thus supported by the record, and he properly concluded that a five-year disqualification was warranted under Std. 6.11.

Regarding Mr. Slavin's abuse of the legal process, Judge Burke determined that Mr. Slavin had "habitually and knowingly violated court orders or rules," to the detriment of his clients and DOL whistleblower proceedings. Judge Burke further found that Mr. Slavin had "habitually abused the legal process by proffering non-meritorious claims or defenses, often with the intent to use legal process to harass or intimidate." ODAA at

119. Pursuant to Std. 6.21, a five-year sanction is generally appropriate when an attorney "knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another," and the attorney's action results in serious or potentially serious injury to a party or interference with a legal proceeding. ABA-SLD Std. 6.21. The record amply supports Judge Burke's findings of habitual and knowing violation of court orders or rules and intentional proffering of non-meritorious claims or defenses. *See, e.g.*, ODAA at 76-77 (*Williams v. Lockheed Martin Corp.:* ARB upheld ALJ's dismissal of complaint that was based on allegation, wholly unsupported by facts, that employer had surreptitiously tape recorded meeting as part of campaign to covertly monitor whistleblower employees); at 83-84 (*High v. Lockheed Martin Energy Systems,*: ARB upheld ALJ's dismissal of complaint under whistleblower statutes that alleged loss of complainant's case record while in transit between ARB and OALJ was a prohibited retaliatory action against the complainant); at 85 (*Lockheed Martin Sys. v. Slavin:* U.S. District Court imposed Fed. R. Civ. P. 11 sanction of $10,000 and stated that attorney's refusal to return attorney's fees as ordered by ARB and the attorney's contesting of respondent employer's collection action conveyed "a disregard for the legitimacy of the decisions" of the U.S. Court of Appeals for the Sixth Circuit and the ARB); at 96 (*Kesterson v. Y-12 Nuclear Weapons Plant*: ARB found that Mr. Slavin's filing of discovery requests on respondent employer ten months after deadline that ALJ had set for completion of discovery demonstrated a "cavalier attitude toward the proper exercise of the ALJ's authority."). The relevant evidence also demonstrates that Mr. Slavin's actions resulted in serious interference with legal proceedings on numerous occasions. *See, e.g.*, ODAA at 87-89 (*Erickson v. U.S. Envtl. Prot. Agency:* Mr. Slavin filed motion to consolidate whistleblower complaints that had been filed by two different complainants, against two different employers, and which had each reached an entirely different phase of adjudication, in an effort to circumvent the effect of an ALJ's refusal to recuse himself from one of the cases). Judge Burke thus properly found the Std. 6.21 criterion for a five-year disqualification met.

Regarding improper communications with individuals in the legal system, Std. 6.31 provides that a five-year sanction is proper if one of three circumstances exist, including engaging in ex parte communications with a judge with the intent of affecting the outcome of a proceeding and thereby causing significant or potentially significant interference with the outcome of the proceeding. Judge Burke found that Mr. Slavin had "habitually and intentionally" communicated with DOL ALJs, in some instances in a prohibited ex parte manner, "in an attempt to harass and intimidate" the ALJ and thereby gain advantage in the proceeding. ODAA at 120. The record supports Judge Burke's findings. *See, e.g.*, ODAA at 29-36 (*Puckett v. Tennessee Valley Auth.*: After ALJ denied Mr. Slavin's discovery-related motions, Mr. Slavin sent a letter to the district chief administrative law judge asking for that official's views regarding the ALJ's rulings, stating that Mr. Slavin was not requesting "formal peer review at this time," and providing a copy of that letter to the presiding ALJ); at 57-67 (*Johnson v. Oak Ridge Opers. Ofc.*: After ALJ denied Mr. Slavin's discovery-related motions, Mr. Slavin engaged in various improper ex parte communications including voice mails left for ALJ and her staff critical of the ALJ's handling of the case and warning ALJ that Mr. Slavin had met with Government Accounting Office investigators regarding the ALJ's

"mishandling" of the case). Judge Burke thus properly determined that this aspect of Mr. Slavin's misconduct warranted a five-year disqualification according to the ABA-SLD.

3. Aggravating and mitigating factors

Judge Burke found clear and convincing evidence of nine of the eleven aggravating factors provided by Std. 9.22, and found that the other two aggravating factors did not apply.[29] He concluded that the aggravating factors "overwhelming[ly] support disqualification." ODAA at 123. Judge Burke specifically found:

> a) Mr. Slavin had previously been sanctioned and/or admonished for disciplinary offenses by the U.S. District Court for the Eastern District of Tennessee, by Tennessee state courts, the ARB and various ALJs.
>
> b) Mr. Slavin's intention in filing some documents was to follow a personal agenda to show contempt for DOL administration of whistleblower laws rather than to serve the best interests of his clients.
>
> c) Mr. Slavin had engaged in a pattern of such misconduct involving multiple offenses.
>
> d) Prior admonitions and sanctions had failed to produce moderation in Mr. Slavin's professional conduct, but rather seem to have emboldened him toward misconduct of greater frequency and brashness.
>
> e) Mr. Slavin had intentionally, and in bad faith, refused to comply with simple and unambiguous directives in these Judicial Inquiry proceedings not to file documents by fax and to properly file documents with Judge Burke rather than with the Chief ALJ, and had thereby exhibited contempt for the authority of the OALJ.
>
> f) Mr. Slavin attempted to intimidate Judge Burke by requesting a Secretarial and OIG investigation into the legality of this Judicial Inquiry.
>
> g) Mr. Slavin engaged in deceptive practices during the Judicial Inquiry by filing with the ARB a petition for writ

[29] The two aggravating factors that are not applicable here are indifference to making restitution and obstruction of fee arbitration awards. ABA-SLD Std. 9.22(j), (k).

> of mandamus to require the OALJ to schedule a hearing on the merits of the underlying STAA complaint, and failing to apprise the ARB that adjudication by the OALJ of that complaint was stayed because of the Judicial Inquiry into the attorney's qualifications to continue representing clients before the OALJ.
>
> h) Mr. Slavin's responses to the Notice of Judicial Inquiry demonstrated that he did not acknowledge the wrongful nature of his conduct, but viewed it as "a badge of honor."
>
> i) Mr. Slavin took advantage of his clients' lack of knowledge about administrative judicial process to promote a private agenda.
>
> j) Mr. Slavin has well over ten years of experience in the practice of law, the bulk of which involved practice before DOL OALJ.

ODAA at 121-23. The record supports the foregoing findings. Judge Burke also examined the fourteen mitigating factors that Std. 9.31 provides. He determined that one of the factors did not apply to the circumstances in this case and that ten others were clearly not established by the evidence.[30] ODAA at 123. Judge Burke then examined the evidence relevant to the three remaining mitigating factors.

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[30] Std. 9.31 provides the following mitigating factors:

> (a) absence of a prior disciplinary record;
> (b) absence of a dishonest or selfish motive;
> (c) personal or emotional problems;
> (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
> (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
> (f) inexperience in the practice of law;
> (g) character or reputation;
> (h) physical or mental disability or impairment;
> (i) unreasonable delay in disciplinary proceeding, provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from the delay;
> (j) interim rehabilitation;
> (k) imposition of other penalties or sanctions;
> (l) remorse;

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Regarding Std. 9.31(g), character or reputation, Judge Burke addressed the argument that Mr. Slavin had made in response to the Notice of Judicial Inquiry. Specifically, Mr. Slavin had argued that he had been successful in representing clients before Federal agencies, including winning punitive damage awards, and that such success demonstrated his good reputation. Judge Burke pointed out that the only case Mr. Slavin cited was the ALJ's November 2003 decision in *Erickson v. U.S. Envtl. Prot. Agency*, and that other circumstances in that case did not support Mr. Slavin's argument. Judge Burke noted that the ALJ had admonished Mr. Slavin against "systematic personal attacks, name calling and obtuse behavior," and also that Mr. Slavin failed to timely file a petition for fees and costs in that case. ODAA at 124. Judge Burke thus concluded that the attorney had not demonstrated reputation to be a mitigating factor. *Id.* Judge Burke's reasoning is based on facts in evidence and his conclusion is sound.

Under mitigation Std. 9.31(k), imposition of other penalties or sanctions, Judge Burke noted the numerous admonitions and sanctions imposed on Mr. Slavin that were documented in this case record. Judge Burke explained, however, that the purpose of the Judicial Inquiry was to determine whether the cumulative effect of the conduct on which those admonitions and sanctions were based warranted barring the attorney from representing any parties before the OALJ in the future. ODAA at 124. Judge Burke accordingly concluded that such prior discipline does not support mitigation of the discipline to be imposed in this proceeding. *Id.*

Concerning mitigation Std. 9.31(m), remoteness in time of the misconduct, Judge Burke noted that some of the cited misconduct had occurred in the mid-1990's. Judge Burke added that those instances had been referred to the Tennessee Supreme Court by the Chief ALJ and that proceedings were still on-going in the Tennessee courts regarding the appropriate discipline for those and other offenses. Judge Burke also observed that, in a case such as this where the cumulative effect of the misconduct is key, a review of the attorney's "conduct over time" would be necessary. Judge Burke concluded that the remoteness in time of some of the cited offenses constituted an "inconsequential element of mitigation." ODAA at 124-25. We interpret Judge Burke's analysis as reasonably concluding that the consistency of the attorney's conduct over the years since the 1990's refutes any mitigation argument based on the remoteness in time of *some* of the offenses.

As we indicated earlier, we review Judge Burke's choice of sanction under an abuse of discretion standard. In reviewing the sanction Judge Burke chose, we consider whether Judge Burke properly addressed all relevant factors and provided a reasoned

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(m) remoteness of prior offenses;
(n) prompt compliance with a fee arbitration award.

ABA-SLD Std. 9.31. Judge Burke found that factor (n) was irrelevant and that the record did not warrant further consideration of factors (a) – (f), (h) – (j), or (l). ODAA at 123-24.

explanation for his conclusion that Mr. Slavin should be disqualified under Section 18.34(g)(3) for a period of no less than five years. *See In re Gouiran,* 58 F.3d 54, 46 (2d Cir. 1995); *see also New Mexico Nat'l Elec. Contractors Ass'n,* ARB No. 03-020, slip. op. at 9 (ARB May 28, 2004) (in case arising under Davis-Bacon Act, discussing *Bldg. and Constr. Trades' Dept., AFL-CIO,* 712 F.2d 611, 616 (D.C. Cir. 1983) and *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Insur. Co.,* 461 U.S. 29, 48-49, 56-57 (1983) concerning necessity for agency to explain basis on which it exercised its expert discretion).

As the foregoing discussion demonstrates, Judge Burke carefully followed the comprehensive formula that the ABA standards provide and determined that disqualification for an indefinite period of no less than five years was appropriate. He thoroughly explained his conclusions that Mr. Slavin had breached duties to his clients and to the legal system. Judge Burke also explained his findings that there are no factors that weigh against imposing this severe sanction and that there are a number of aggravating factors that provide further support for the sanction. Judge Burke thus provided an adequate explanation of the methodology that he applied. The conclusions that he reached regarding the relevant factors – i.e., the duties breached, Mr. Slavin's state of mind, the seriousness of the actual or potential damage, and the mitigating or aggravating factors – are clear and his reasoning in support of those conclusions is sound. We therefore conclude that Judge Burke did not abuse his discretion in determining that disqualification for an indefinite period of no less than five years was appropriate.

CONCLUSION AND ORDER

On the foregoing bases, we conclude that the Judicial Inquiry procedure that Judge Burke followed complied with Section 18.34(g)(3) notice and opportunity for hearing requirements, and thus adequately protected the Petitioners' due process interests. With the exceptions specifically noted above, we also conclude that Judge Burke's findings of fact are supported by clear and convincing evidence properly included in the case record. We similarly agree with Judge Burke's conclusions regarding Mr. Slavin's violations of the Model Rules of Professional Conduct, and his determination that Mr. Slavin's speech-based conduct does not qualify for First Amendment protection. Finally, we conclude that Judge Burke did not abuse his discretion in choosing to disqualify Mr. Slavin from appearing in a representative capacity before the Office of Administrative Law Judges for an indefinite period of no less than five years.[31] We accordingly adopt

[31] The five-year period covered by Judge Burke's disqualification order began to run with issuance of the ODAA on March 31, 2004. ODAA at 127. We note that the ODAA is wholly independent from the reciprocal discipline order that Chief Judge Vittone issued on September 28, 2004, which suspended Mr. Slavin from practice before the OALJ for a period of two years with leave to apply for reinstatement after a one-year period, and which is

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the findings and conclusions presented in the ODAA, and affirm the disqualification of Mr. Slavin pursuant to Section 18.34(g)(3) for an indefinite period of not less than five years.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

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pending on appeal before this Board. *See* n.1 *supra.* The pendency of that appeal has no bearing on the finality of this decision upholding the ODAA.