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October 20, 2003

William W. Thompson, II, Esquire
Executive Director
Office of Compliance
Room LA 200
110 Second Street, S.E.
Washington, D.C. 20540-1999

Re: Comments to Proposed Amendments to the Rules of Procedure of the Office of Compliance

Dear Mr. Thompson:

Pursuant to section 303(b) of the Congressional Accountability Act of 1995 (the "CAA"), the Office of the Senate Chief Counsel for Employment submits the following comments to the Proposed Amendments to the Rules of Procedure published on September 4, 2003.

Section 1.03(d) - Filing and Computation of Time

As written, this section is ambiguous as to whether the phrase "in which proof of delivery to the addressee is provided" modifies "express mail." Accordingly, the sentence should be rewritten as follows: "Whenever these rules permit or require service of filing of documents by certified mail, return receipt requested, such documents may also be served or filed by express mail or other forms of expedited delivery. In all instances, however, proof of delivery to the addressee must be provided."

Section 1.05 - Designation of Representative

In the introductory statement to the Proposed Amendments to the Rules of Procedure, the Office of Compliance ("Office") states that such rules are proposed under section 303 of the Congressional Accountability Act. That section, entitled "Procedural Rules," authorizes the Executive Director, subject to the approval of the Board, to "adopt rules governing the procedures of the Office, including procedures of the hearing officer . . . ."

The Office issued the extant rule 1.05, which permits non-attorney representatives, in excess of the Office's authority. Nothing in the CAA gives the Executive Director the authority to have issued rule 1.05 in the first instance.

Furthermore, the issuance of the extant rule 1.05 has created a situation that is untenable and inconsistent with the CAA by permitting complainants, including those who have filed unrelated charges against the same office, to represent each other in their respective mediations. The attendance of one complainant at the mediation of another complainant violates the express language of section 416 (b) of the CAA, which states that all mediations shall be strictly confidential. Because the CAA is a waiver of sovereign immunity, all conditions of that waiver, including the strict confidentiality requirement, must be strictly followed.

The proposed amendment to rule 1.05 appears to attempt to correct the above problem by authorizing the Executive Director to disqualify any and all representatives. This proposed amendment, however, not only ignores that the extant rule was issued improperly in the first instance but also exceeds the Executive Director's authority. The CAA does not authorize the Executive Director of the Office to override a party's choice of attorney.

The proper correction of rule 1.05 is to repeal the provision permitting non-attorney representatives.

Furthermore, the proposed amendment to rule 1.05 authorizes the Executive Director to extend the counseling and mediation periods in contravention of the express language of the CAA. Section 402 of the CAA states that the period for counseling "shall be 30 days unless the employee and the Office agree to reduce the period," and section 403 of the CAA states that mediation may be extended "at the joint request of the covered employee and the employing office." Accordingly, the Executive Director has no authority to extend the counseling period beyond 30 days or to extend unilaterally the mediation period. Because the CAA is a waiver of sovereign immunity, all conditions of that waiver, including those delineated in sections 402 and 403, must be strictly adhered to.

Section 2.03 - Counseling

(1). Section 403 of the CAA provides that an employee can file a request for mediation no later than 15 days after receipt of the notification of the end of the counseling period. As stated above, such a limitation on the waiver of sovereign immunity must be strictly complied with. Accordingly, it is essential that one be able to verify when the employee received the notice of the end of counseling. If the Office elects to deliver the notification by personal delivery, then the Office must contemporaneously prepare a proof of delivery and provide a copy to opposing counsel.

Section 2.04 - Mediation

In practice, the joint written request of the parties to extend the mediation has been submitted by the mediator, and this system has worked quite well. Accordingly, the following sentence should be added after the first sentence in section (2): "The joint written request may be submitted by the neutral with the consent of the parties."

(i). For reasons similar to those stated above, if the Office chooses to hand-deliver the notice, the Office must contemporaneously prepare a proof of hand-delivery and provide a copy to opposing counsel.

To ensure that the criteria Congress established in waiving its sovereign immunity under the CAA are strictly adhered to as required by law, the rules should provide that upon the filing of a request for mediation the Office will forward copies of the request for counseling and the request for mediation to the employing office.

Section 2.06 - Filing of Civil Action

The proposed addition of subsection (c) should be deleted in its entirety for several reasons. First, promulgation of the rule exceeds the authority of the Executive Director of the Office. As stated, section 303 of the CAA limits the Executive Director to issuing procedures for the Office and procedures of the hearing officers. The proposed subsection (c) does neither of these; rather, it is a substantive rule that attempts to control the actions of litigants in federal district court. The Federal Rules of Civil Procedure, not the rules of the Office, govern federal court litigants.

Furthermore, Rule 1.6(a) of the Rules of Professional Conduct for the District of Columbia mandate that an attorney "shall not" reveal a confidence or secret of a client. Client confidences include all information gained in the course of the professional relationship that the client requests be held inviolate, or the disclosure of which would be embarrassing or detrimental to the client. Such confidences include public documents such as court files; the duty of confidentiality "exists without regard to the nature or source of the information or the fact that others share the knowledge." Rules of Prof. Conduct, Rule 1.6, Note 6. Accordingly, an attorney breaches a client's confidences by disseminating court pleadings or disclosing that a client has been sued. *See Lawyer Disciplinary Bd. v. McGraw,* 461 S.E.2d 850, 859 (Sup. Ct. App. W.Va. 1995) (an attorney's duty to protect confidential information "is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other sources available for such information, or by the fact that the lawyer received the same information from other sources") (citation omitted); *Sullivan County Regional Refuse Disposal Dist. v. Town of Acworth,* 686 A.2d 755, 758 (Sup. Ct. N.H. 1996) (an attorney's duty to protect confidential information "does not disappear simply because portions of that information have been included in public documents or discussed in public forums"); *X Corp. v. Doe,* 805 F. Supp. at 1309 (the duty of confidentiality exists without regard to the fact that others

share the knowledge).[1] The Office does not have the authority to supercede the Rules of Professional Conduct by requiring the disclosure of client confidences.

Section 7.02 - Sanctions

The proposed addition of subsection (a) is not a rule regarding the procedures of the Office or of the hearing officer; rather, it is a substantive change to the rules. Nothing in the CAA authorizes the hearing officer to impose sanctions on a party representative. Further, the grounds for sanctions – "inappropriate or unprofessional conduct" – are vague and ambiguous. For these reasons, subsection (a) of the proposed rules should be deleted.

Section 8.01 - Appeal to the Board

Subsection (3) should be deleted in its entirety. While the CAA authorizes the Board to consider a petition for review, it does not authorize the Board to delegate any of its responsibilities with respect to that review to the Executive Director. Furthermore, section 302(4) of the CAA, the grant of authority to the Executive Director, does not authorize him to grant an extension of time to file any document. Accordingly, subsection (3) would grant to the Executive Director authority not granted to him under the CAA.

Moreover, subsection (3) is inappropriate because it is inconsistent with the jurisdictional requirements of the CAA. The CAA expressly provides that a party may not petition for review by the Board later than 30 days after the entry of the decision in the records of the Office. The proposed subsection (3), however, authorizes the Executive Director to entertain requests for extensions of time to file such a document, among others. Accordingly, subsection (3) is inconsistent with the conditions upon which Congress has waived its sovereign immunity under the CAA.

Furthermore, the issuance of subsection (3) would exceed the Executive Director's authority under section 303 of the CAA because subsection (3) is a substantive, not procedural, rule.

Finally, although the proposed amendments do not suggest a change to section 8.01(2), that section is misstated in the proposed amendments. The final rules should accurately state that section.

Section 9.01 - Filing, Service and Size Limitations of Motions, Briefs, Responses and Other Documents

The last sentence of subsection (a) should be deleted. As written, the rule authorizes an officer, hearing officer or board to require a party, for example, to submit a document in Word

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[1] Each of these cases involved a duty of confidence rule identical or similar to Rule 1.6 of the Rules of Professional Conduct for the District of Columbia Bar.

format. Those parties that do not have Word could not comply with such a requirement without significant inconvenience and/or cost. Furthermore, the rule authorizes an officer, hearing officer or board to impose such requirements on one party but not the other parties, which would be inequitable. A more acceptable alternative to this proposed change in the rule would be to adopt the electronic filing requirements of the district courts.

Finally, the term "officer" appears to be a typographical error.

Section 9.05 - Informal Resolutions and Settlements

The proposed addition of subsection (d) constitutes a substantive, not a procedural change. Accordingly, as discussed above, promulgating such a rule exceeds the authority granted to the Office by section 303 of the CAA.

Furthermore, the proposed addition of subsection (d) grants the Executive Director and the hearing officer authority beyond that granted to them by the CAA. The CAA does not contemplate or authorize a hearing officer to hear breach of contract claims. Moreover, nothing in the CAA requires the parties to a settlement agreement to stipulate the method for a dispute resolution in the settlement agreement. For these reasons, issuance of the proposed addition of subsection (d) would exceed the authority the CAA grants to the Executive Director and the hearing officer.

Section 9.07 - Payment of Decisions, Awards or Settlements Under Section 415(a) of the Act

As written, section 9.07 would authorize payment of funds prior to the final resolution of a case. Accordingly, the proposed rule should read, in its entirety, as follows: "The payment of funds pursuant to Section 415(a) of the Act, the decision, award, or settlement shall be submitted to the Executive Director to be processed by the Office for requisition from the account of the Office in the Department of the Treasury, and payment, upon exhaustion of all appeals."

Sincerely,

Jean Manning

JM/kj