

My name is Jonathan Appelbaum and my comments are focused on the Judges proposal to bar individuals from participating in proceedings. This docket came to my attention while searching the Federal Register for a different issue. I have no expertise with the Copyright Board but have participated in rulemakings and conferences for other Federal Agencies (FERC, FCC DOE). I am commenting because the Judges are proposing a rule that is not aligned with the stated reasons for the proposal.

#### 1. The Proposal

The summary of the proposed rule correctly states its intention is to "authorize the Judges to bar, either temporarily or permanently, certain individuals and entities from participating in proceedings before the Judges". The supplementary information expresses the importance of truth in testimony. This is an important concept for any Federal Agency or hearing body. This section describes testimony of a Mr. Galaz. It refers to a Memorandum and Opinion that the Board issued to disperse certain funds that also impeached the evidence submitted by him or his agency. The Board decided to pursue this rulemaking to establish a Standard of Conduct and characteristics to initiate a Board review to bar participation based on a violation of Standards of Conduct.

#### 2. The Proposed Standard 350.9(a)

Proposed 350.9(a) establishes a standard that "All persons appearing in proceedings before the Copyright Royalty Board are expected to act with integrity and in an ethical manner." I agree with this.

#### 3. There Are Examples From Other Agencies Regulations to Suspend

Other Federal agencies in their rules of practice contain regulations addressing the suspension of participant based on unethical conduct. Two examples are provided here.

FERC rules of practice and procedure Subpart U is titled "Appearance and Practice Before the Commission" and FERC rule 2102 (Section 385.2102) states:

(a) After a hearing the Commission may disqualify and deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to a person who is found:

- (1) Not to possess the requisite qualifications to represent others, or
- (2) To have engaged in unethical or improper professional conduct, or
- (3) Otherwise to be not qualified.

(b) Contumacious conduct in a hearing before the Commission or a presiding officer will be grounds for exclusion of any person from such hearing and for summary suspension for the duration of the hearing by the Commission or the presiding officer.

FCC 47 Part 1.24 " Censure, suspension, or disbarment of attorneys " is similar to FERC but limited to attorneys.

A cursory review of other Federal agencies and their rules all show a similar approach. Limiting participation in a proceeding based on professional conduct and relative qualification.

#### 4. The Proposed Regulation is Broad and Arbitrary

As a proposed regulation for suspending for barring appearance before the board, The Proposal is broad and borders on establishing arbitrary criteria.

350.9(b)(1) states that a suspension or disbarment in any State will allow the Board to initiate action. This is remarkably broad since 350.2 states "The appearance of an attorney on behalf of any party constitutes a representation that the attorney is a member of the bar, in one or more states, in good standing". So on the Board will initiate a review of an attorney if suspension occurs in one State even though the attorney is still in good standing in another State which meets 350.2 requirement. There is no violation of the proposed Standard of Conduct to initiate this review. First, the attorney meets 350.2 by having good standing in one State, and second the reason for disbarment occurred for a proceeding not involving the Board. If the attorney is qualified to represent the Party then the Party has accepted the attorney's status. Obviously, an attorney not licensed to practice in any State would be disqualified before the Board for not meeting 350.2.

350.9(b)(1) includes "or any person who has been convicted of a felony or a misdemeanor involving moral turpitude" which is unrelated to whether a person will perform to the proposed Standard. Due to the introduction in section b this would impeach a witness based on character unrelated to the proceeding. Denying relevant testimony prior to submission usually does not occur, and is unrelated to activity before the Board.

350.9 (b)(1) combines witness impeachment with attorney disqualification. It may be the Board's intent to only apply (b)(1) to attorneys, but it appears when combined with the introduction of section b, that a suspended attorney can be reviewed to be barred even if appearing as a witness. Impeaching the evidentiary testimony of a witness based on a conviction usually occurs after consideration of the evidence and its value not prior. The regulation for evidence in 351.10 appears to do this.

The Board in (b)(2) establishes a condition of extra judicial sentencing for unrelated criminal convictions. Once a felon has served their sentence it is not for the Board to establish bars to the person's future employment. There is no valid reason to bar an entity that employs a felon to assist in the preparation of evidence or distribution of claim. The felon is not participating in the proceeding, and the evidence or testimony is being submitted by a competent attorney. If the felon is only involved in the distribution of a claim after the Board issues a decision, where is the connection to conduct before the Board during the proceeding

350.9(b)(5) is very broad since it includes any violation of Board rule or regulation without reference to whether the violation was an ethical lapse or lapse in integrity.

#### 5. The Proposal Establishes a Chilling Effect

The Proposal may not establish an immediate bar to participation based on the criteria in the regulation, but it creates a chilling effect for such an individual identified in the regulation from participating in the procedure based on the possibility of undergoing a suspension review.

One purpose of creating these regulations is to place persons and companies on notice for when a review for suspension may occur. An agency should be as specific as possible when creating the criteria for identifying who gets review. It is recognized that Federal agency actions should encourage participation by those who feel an interest or are qualified to participate in an Agency proceeding and should not discourage such participation.

#### 6. Conclusion

I agree the intent to publish rules for suspension is a proper undertaking of the Board, but I firmly believe this proposal should be withdrawn or rewritten and properly characterized has rules for suspension before a Board proceeding. The regulations should be narrow and tailored to ethical and professional misconduct. Witnesses should not be barred unless they are argumentative or disrespectful. The use of released felons should not bar an entity's participation. The Board should follow the examples from other Agencies.

Thank You for your time.  
Jonathan Appelbaum