PRO BONO TRAINING

May 2013

AUDIO/VIDEO RECORDING

Transcribed for the

Merit Systems Protection Board

Transcript 1 of 1

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MS. CAZABON: Hi, everyone. I think we're going
to go ahead and get started.

I'm Rebecca Cazabon. I'm the pro bono managing
attorney here at Foley. I know everyone here in the room;
and have just met in person Judge Boulden and Judge
Craig -- I'm sorry, Judge Berg. So thank you all for
coming today.

I wanted to thank in particular Judge Boulden
helping us put this all together. And the training we're
about to have is to introduce everyone to the Merit
Systems Protection Board Appeals and a new pro bono
project that we are piloting here at Foley.

We're really excited to get this going. And I
wanted to let folks know that in terms of the case intake
and the screening, I will be doing that for the firm. So
that you don't need to worry about taking calls from folks
who are interested in pro bono representation. I will be
handling that, doing the eligibility -- financial
eligibility screening and also the issue, conflict and
other conflict screening, along with Jonathan Keselenko
who will be helping with that process, as well.

So today's training is about an hour and a half
and hopefully everyone has materials which are on the
tables.
In addition, I wanted to let folks know that we are recording the training, and the microphones are on, so just keep that in mind. If people could put their phones on vibrate or shut them off that would be great. And if you have a question I think -- I'm not sure if the judges would prefer us to ask during the presentation, or if it would be preferred to wait at the end, but we can let you both know -- let us know what you prefer.

We will also have this recording available to folks afterwards. And I know a few of you -- a few associates weren't able to attend today so you'll be able to view it later.

I think that's about it, so Jonathan wants to come up and say a few words.

MR. KESELENKO: Thanks. Good morning, Your Honors down in Philadelphia.

My name is Jonathan Keselenko; I'm a partner here at Foley, and we're very excited about this program and the potential both to help the individuals who we would be representing, and also the opportunity for associates to be involved in this and get some good experience, involved with regard to the representation.

I don't have much to add to what Rebecca said. Again, we're delighted to have this program hopefully get underway as quickly as possible after the training session
ends.

If any of you here in the room have questions about this internal to Foley, ask Rebecca or I after the training. If you have questions about the training itself, I don't know if the judges would like us to hold questions or what not, but I suspect it will be somewhat an interactive process, and let's get going. Thanks.

JUDGE BOULDEN: Thank you.

Good morning everybody, we're really glad that you're here today. I'm Bill Boulden, the Chief Administrative Judge for the Northeastern Regional Office. And with me is Judge Craig Berg, who's one of our great judges here in Philadelphia, and also one of our trained mediators, and I'll be talking a little bit more about our settlement program, but we do try to settle as many cases as we can, so Judge Berg is one of those special mediators that we have.

We really appreciate Rebecca's efforts on this project. And it began really with -- I think it's Phillip Swain, one of your partners, was speaking with Deborah Miron who's our Chief Judge for the MSPB and our Director of Regional Operations. And they were sitting with one of the judges from the Court of Appeals for the Federal Circuit at a Federal Bar Association meeting, and they began discussing how important it is for the MSPB to have
pro bono counsel for some of our appellants.

So I had some e-mail exchanges with Mr. Swain, and then Rebecca and I talked and had some e-mail exchanges and she's done a lot of work on this. And I think a nice connection is that Claire Laporte, who I understand is your pro bono partner, knows Deborah Miron and also Jim Eisenmann, who's now our Executive Director, who all have been involved together on committees with the Federal Bar Association, so it's -- as I said it's a nice connection there.

We'll definitely try to do this in an hour and a half; there's a lot of material on the slides and we won't go into detail on everything that's on the slides but they're certainly for your information. And there's other ways that you can get other information that I'll talk about.

We would be happy to take questions any time if there's something that's really burning that you don't want to forget about. We'll be happy to have you ask the question while we're speaking.

So I'm going to go first and talk about the basic -- the history of the Board a little bit and what the Board is and the kinds of cases that we hear. And then after that, Judge Berg is going to talk in some more detail about adverse actions, which are -- have been, I
guess historically, sort of, our bread and butter. "Adverse actions," meaning basically a charge of misconduct of some kind and then an action such as termination following the misconduct.

So that's our plan. I'll try to do my portion in about a half an hour, and I think Craig also will do that, and then if we don't have questions in the meantime, if there's questions at the end we'll be happy to address those.

The MSPB -- there's a great deal of information on our website, so just as an initial thing I would tell you that you can go on the website, which as you can imagine is just mpsb.gov, and there's lengthy discussions about the Board's process, the kinds of cases that we hear. There's actually a video presentation of a mock hearing so that you can see what a hearing is like.

And there are also what we call "Information Sheets" which have been written by judges throughout the country. And they address specific areas of the law, so that if you were presented with a particular kind of case, you could just go on the website and look at this information sheet and it would give you a two-page synopsis of what that area of the law is about.

So if you -- I remember from law school, I'm looking at the slide that says "Appeals System Required by
Law." I remember in law school the Loudermill case, which is cited here for you as standing for the proposition of "some kind of hearing", if you recall that from your law school days.

This is the case that the Board often cites and it essentially held that a tenured public employee had a due process right. In other words, a property right interest in their employment, which could not be denied without "some kind of hearing", as the Supreme Court said and so this is, sort of, the bedrock case for the Board's jurisprudence.

Over time the statutes at 5 USC, in two of our biggest areas the basic things that you would think about is due process, notice, a right to respond, a written decision, et cetera are actually in the statute itself.

In other areas it's really a question of the Supreme Court and other case law that Judge Berg will be talking to you about, but as we talk about the Board, it's always a good idea to keep in mind this old Loudermill case.

So I wanted to tell you a little bit about the Merit Systems Protection Board itself. The Board is made up of three presidential appointees who are in Washington, no two -- no more than two of whom may be from the same political party; so it's truly a non-partisan organization.
in that sense.

Generally the chair, right now Susan Grundmann, generally the chair would be the same party as the President, but not necessarily, and the other two board members may or may not, but as I said at least one is going to be from another political party.

Most of the cases are heard first out in the regions by Administrative Judges such as ourselves, and we hold full trials, except for the absence of a jury; but other than that it's really a full trial that you might see in any other setting. Most of the offices have courtrooms. Occasionally we might have a hearing in a conference room if there's no courtroom available.

There's about -- there are eight regions or field offices at the Board, and there's about 67 judges by last count throughout the country, and the Administrative Judges issue what are called "initial decisions" after the hearing. But the initial decisions, unlike some agencies, the initial decisions actually become final unless one side or the other files some sort of appeal from our decision, so many of the Administrative Judges decisions actually become the decision of the Board.

Either side can file an appeal to the Board members, who essentially, sort of -- you can think of as the Appellate body of the MSPB, and usually that's a
record review. Sometimes the Board has held hearings. This Board in particular has held a few hearings recently. And/or it's not necessary to appeal to the Board. Many parties do. But there's also an appeal to the Federal Courts following a final board decision, as I said, which might be the AJ's decision, or if there was an appeal to the Board, it would be the Board's decision.

Our reviewing court is almost always the Court of Appeals for the Federal Circuit, and I'll talk about the exceptions in a few minutes, but the nice thing about that for me, and I think for practitioners, is we really have a very unified body of law in most cases. So that it's not necessary to go around to different district courts or different circuit courts of appeal to try to figure out what the law is in that particular circuit, but instead the Federal Circuit speaks, you know, for the entire process.

The Board also is reported in a West reporter service, the "Merit Systems Protection Reporter" service, so probably not in your -- in Foley Hoag's library, but certainly in major libraries and obviously available online, as well. So I think that -- it makes it easy in terms of figuring out what the law is.

I've shown you on the next slide just a quick view of the regions in the country, and you'll see that
Boston is in the Northeastern region, obviously, and the Northeastern region has seven judges, plus myself. And we also have a field office in Manhattan with five -- four judges and a Chief Judge for that field office.

We used to have an office in Boston years ago but the case -- caseload had really dwindled to some degree in Boston and it was decided that that office would be abolished. So in terms of the cases that you might have, you would most certainly being hearing -- having the case heard by one of the judges here in the Philadelphia office. We might travel up there in person or we might do a hearing by video. In some very simple cases we might even -- a retirement case, for example, it might be by telephone.

So the next slide, I wanted to just give you a little sense of where the Board fits in the legal framework and the Board is actually a creature of statutes, as most federal administrative agencies are. So you see that it's set out in 5 USC section 1201 and we have very extensive regulations in the Code of Federal Regulations under part 1201 that talk about our jurisdiction. Talk about our process in great detail. Talk about the appeal process. So it's really -- if you have an MSPB case you really need to get into the CFRs at Part 1201.
Just to let you know, the Board just had a very large overhaul of our regulations, and until the next set of Federal Regulations are issues next year, you need to look at the Federal Register version of the Board's regulations to make sure that you have the latest version for the rest of this year. And again, that can be found on the Board's website without any problem. You can just link right to the next regs.

So the Board's jurisdiction, as most federal agencies are, being a creature of statute, we're a limited jurisdiction organization. We only can hear cases that are -- that we're designated to hear by statute or some law or rule. So that means that there's a number of hurdles that appellants have to meet in order to be able to have their case heard before us, and I'll talk about this a little bit further, but they have to be in the right kind of agency.

They have to be -- have the right kind of status as an employee. It has to be an action over which we can hear. And it has to be filed timely. So you'll see that there are a number of potential jurisdictional or timeliness problems that would be presented to us with appeals. And we try to alert the parties immediately upon getting the appeal if we think there's some sort of an issue that we might not have jurisdiction or the appeal's
not timely, and I'll talk about that a little bit more.

Just to let you know where the Board -- you'll see the Board's seal goes back to 1883, and that's because that's when the Pendleton Act was enacted. And you might recall that President Garfield was assassinated by what the history books call it -- was a "disappointed office seeker." And because of that, Teddy Roosevelt decided that we needed a statutory basis for a career federal service, not one based on patronage, and one that was based on merit. So that's where the "merit system" comes from, going back to 1883.

Now, we were actually created as an entity in the Civil Service Reform Act in 1978. I think this was the Carter administration. The Civil Service Commission had been around for a long time, but the Civil Service Commission brought charges and basically was reviewing itself in discipline actions, and it was deemed that that was really a conflict. So through President Carter and Congress, the Civil Service Commission was cut up into a number of sub-agencies and I've listed them there for you, because you may -- you may come in contact with these. You may know some of them now. But if not, you'll come into contact with these in terms of Board cases. So obviously there's the Merit Systems Protection Board.

The old Civil Service Commission really now is
OPM, the Office of Personnel Management, which we get involved with in retirement appeals. So I'll talk about that a little bit more. But those are where our retirement appeals come from.

There's the FLRA, which you may know about that deals with union issues with federal employees.

And there's the Office of Special Counsel, OSC. And this is an agency that is setup to investigate and prosecute violations of Whistleblowing reprisal. And there's a connection with the MSPB that I'll talk about in a few minutes. But that's an organization that you'll also run into.

And also don't forget about the EEOC, which deals with discrimination. And there's a federal component to the EEOC, and there's a crossover with us because discrimination may be brought up as an affirmative defense in MSPB cases.

In other words, if we have a removal action that we have jurisdiction over, the employee often will raise discrimination. So they'll say even if the Agency can prove that I was AWOL, for example, the reason the Agency brought this against me is because, you know, I'm over 40, or you know, I'm in some other protected category. Or perhaps disability discrimination was involved. So that's called a mixed case because there's a mix of
discrimination and an action that we have jurisdiction over and it gets complicated but all of these agencies you may run into as you're dealing with Board cases.

So this next section that I want to talk about is, sort of, my pitch for why it's so important for counsel to be involved in our cases. But you should be aware that there's actually no requirement for counsel, and the Board has no authority to appoint counsel. So it's not a criminal jurisdiction, obviously, so there's no right to counsel and we can't go out and find counsel for appellants.

They obviously can have counsel if they want. And some appellants are represented by non-attorney counsel. Some are represented by union representatives, for example. Or in retirement cases they may even be represented by a friend or a spouse. Or they'll be proceeding pro se.

So the -- to me the issue with that is the Board's law and this area has, since 1978, has become increasingly complex and I'll talk about that in a few minutes. But it has become complex. It's difficult, I think, for non-attorneys to navigate the process and keep up with the latest case law.

There's one area where counsel is required, although again the Board can't appoint this counsel, but
you'll see the French case that's cited there on the slide, and this is a disability retirement case where the appellant missed the filing deadline and claimed that they missed the filing deadline because they were mentally incompetent. And the Federal Circuit rightfully obviously said, well, we can't have mentally incompetent people having to prove their own mental incompetence. Obviously, that just seems impossible and unfair. So in that one limited area appellants must have counsel and we try to find counsel for them, but if we can't, then we just have to dismiss the case without prejudice until they can locate counsel or our efforts are successful.

So I talked about the complexity a little bit and I just wanted to highlight that for you, because last term kind of amazingly enough two MSPB cases ended up at the Supreme Court. So -- and this had to do with the rights to appeal beyond the Board's decision. So you'll see that obviously this is something way beyond the can of the average pro se appellant to figure out.

But the first case, this -- and this involved mixed cases, this is why I wanted you to understand mixed cases, the Board dismissed a mixed case as untimely filed. And the exception for our usual jurisprudence of going to the Federal Circuit Court of Appeals is that if there was discrimination alleged in a mixed case the appellant can
choose to pursue the discrimination or must pursue the discrimination if they won in court in the district court of pertinent jurisdiction. The Federal Circuit Court of Appeals does not deal with the discrimination aspect of these cases.

So the Board dismissed the case as untimely. And the Eighth Circuit said, well, this -- the Board didn't get into the discrimination issue, so therefore the proper place for this appeal is the Court of Appeals for the Federal Circuit. And the Supreme Court disagreed and said even if the Board didn't address the merits of the discrimination claim, if discrimination was alleged it belongs in the district court like any other mixed case would belong.

In the other case, the Elgin case, it's actually in the First Circuit and Mr. Elgin actually started his appeal in our office here in Philadelphia. But he was terminated when OPM discovered that he had not registered for the draft, as required, to be a federal employee and one of our judges had the case and decided that we couldn't delve into OPM's discretion. OPM can waive that requirement of registering for the draft under some limited circumstances and they didn't waive it in that case. So our judge dismissed the case saying that we couldn't delve into that.
And then Mr. Elgin joined a group of appellants or petitioners in the First Circuit who alleged that the draft—the registering for the draft was unconstitutional because only men were required to register. And this then went to the First Circuit Court of Appeals and they -- the First Circuit said no, this can only go to the Court of Appeals for the Federal Circuit; we can't look at this because this was an MSPB matter.

So once again, this went all the way to the Supreme Court. And the Supreme Court, in this instance, decided that yes, the Court of Appeals for the Federal Circuit is the only venue for this sort of case, despite the unconstitutionality claim, and that obviously the -- as a Court of Appeals, the Federal Circuit has the power to rule a statute unconstitutional, as any other federal circuit court of appeals would. So that case was sent back to the -- remanded to go to the Court of Appeals for the Federal Circuit.

So you can see from those two cases how complex this process is, requiring two Supreme Court decision just last term, and there are others through the years that have gone to the Supreme Court regarding the Board.

Not only are the cases complex and obviously the cases are important personally to the appellants and important to the agencies and important to the taxpayers,
et cetera, but there's also some -- sometimes some national impact in what the Board does. And I just wanted to highlight, for example, the Defense Of Marriage Act cases.

Two of the appellants that were part of the challenge to the constitutionality of DOMA in the First Circuit, Mr. Harra and Mr. Koski actually were both appellants also in this office before they joined that case of the First Circuit. So obviously the Board does not declare statutes unconstitutional and DOMA does seem, on its face, to bar spousal annuity benefits, for example, or other federal benefits for same sex married couples. But obviously these cases are now all pending what the Supreme Court does.

One of the important issues for Mr. Harra was a question of timely notification to OPM of his post-retirement marriage. And there's a timeliness requirement for that, and of course the question is if you have a post-retirement marriage recognized by Massachusetts but not recognized by the federal government is there a requirement to notify OPM of the marriage when the marriage is not deemed to exist for federal purposes under DOMA? So those issues and others I think will be presented shortly when the Supreme Court issues its decision.
And again, I think in Mr. Harra's case, if I'm not mistaken, the First Circuit kicked him out of the, or removed him from the, First Circuit case involving the constitutionality of the Defense Of Marriage Act, holding that since he had gone to the MSPB in this office, his right of appeal for that entire case was with the Federal Circuit Court of Appeals, including the constitutionality issue, so he has a case, I think, pending there on hold also.

But again, just to highlight some -- the significance of some of these cases for you, you may have also been hearing about the furlough issues with the sequester, and so for those who really haven't heard of the MSPB, all of a sudden we're in the national news again because furloughed employees can appeal to the MSPB.

Actually, Rebecca and I talked about this and we thought it probably wasn't something we wanted to hit Foley Hoag with for this project, since it's kind of a unique blip, bump in the road for us in terms of these cases. And we're not exactly sure how they're all going to trickle through the system. But I don't -- I don't think their plan is to have you hear those cases, but just to let you know this is the kind of thing that sometimes gets national attention for us.

Flipping over to the next page, I just wanted to
highlight for you the notice that is going to go out to pro se's who are from the Boston area when we get an appeal. So you'll see Rebecca's there as the point of contact and she'll be the gatekeeper for these cases.

What we are -- what we're going to do is include this notice in every appeal that comes to us from the Boston area where someone has not designated that they have counsel when they file their appeal with us. And we looked at the statistics over the last two years and it looked like roughly 16 or so appellants from the Boston area every year filed pro se with us. So we're not anticipating a huge number of cases, but certainly still very important for us.

And I guess I should note -- I meant to let you know that the Board is trying to expand this pro bono program nationwide in a number of different areas through law schools and law firms and it's very near and dear to our chair's heart, as well as Deborah Miron's. And so we're really pleased to have Foley Hoag be part of that national effort.

So let me just tell you a little bit about the kinds of cases that you could expect to see in -- with appellants that come before us. And as I was saying before, the person needs to be the right employee, the right agency, the right kind of action, and be timely.
So, sort of, the first two bullets there, the adverse actions and the performance cases, those are really what the MSPB was created for back in 1978.

The Civil Service Commission used to be able to hear any kind of adverse action; a reprimand, a bad performance appraisal, et cetera, something that might -- you might think of as fairly minor. And the Board was created to hear just the big -- the big misconduct or performance actions, so that meant someone who was fired or demoted or suspended for 15 days or longer, and not those other relatively minor kinds of actions. And also to hear performance cases where someone could be fired or demoted because of poor performance. So those are your first two bullets there.

Those kinds of actions start with the Agency. The Agency gives the employee notice, for example that, you know, "We're charging you with having struck your supervisor." The employee gets an opportunity to reply in writing and/or in person. Then they get what we call the decision letter. So there's a proposal notice, the reply, a decision letter, and then after the decision letter is issued they have to tell the employee "You can appeal to the MSPB." At that point we get the case.

Now, the other -- the next two bullets are -- these are avenues of appeal that were added later to our
jurisprudence after the Civil Service Reform Act, and they're really requests for correction action. They're not initiated by the Agency. In other words, there's no notice and an opportunity to reply. Instead, the employee believes that there's been some sort of adverse personnel action or a benefit of employment that they've been denied and they're alleging that it's because they were a whistleblower or because they're a veteran or because, you know, they're currently in the reserves, and they bring that to us. So it's a different -- as you see, the posture of that case is different. It's not -- it's not initiated by the Agency, it's initiated by the employee. So that's what we mean.

The "IRA" is an Individual Right of Action. The "VEOA" is a Veteran's Employment Opportunity Act case, and that's an action brought in which the employee alleges that their veteran's preference rights have been violated. And "USERRA" is a mouthful that's the Uniformed Services Employment and Reemployment Rights Act, and that's the veteran's discrimination act; you probably should think about it that way..

Now, the important thing with those kinds of cases are particularly with the whistleblowers and the veterans preference cases there is an exhaustion requirement before the employee can come to us. There's
not an exhaustion requirement with USERRA cases. But in
the case of whistleblowers they have to go to the Office
of Special Counsel, this is the OSC that I was mentioning
to you before. They must try to get OSC to grant them
relief and if OSC does not grant them relief then they're
given a "Right to Sue" letter, if you will, to come to the
Board.

And the same in the VEOA context; the employees
must go to the Department of Labor and again request that
they investigate and grant them relief. If the Department
of Labor does not grant them relief then again they can
come to the Board.

And then then the third category of cases that
we hear are retirement cases and those cases require the
employee to have what we call a reconsideration letter
from the Office of Personnel Management. And those cases
can involve a request to retire on disability. There
might be a request to simply be allowed to retire. There
are disputes about who is entitled to annuity benefits.
Sometimes there's a family dispute because of who the
employee designated when they first came into the -- to
employment and they never changed it. So they might have
an old girlfriend or boyfriend, for example, and now the
family -- you know, the wife 30 years later obviously
wants to be the beneficiary. And there are overpayment
claims that we get from OPM or from people that usually it's because they were granted disability and they got a huge payment from Social Security Disability and they owe a lot of money back to the federal government.

In any event, all of those retirement sorts of cases, the way that process works is the employee will have an initial decision from OPM that's adverse to them. They request reconsideration. And OPM issues what we call a reconsideration decision, and it's that letter that they must have before they can come to the Board.

This is a category that we probably -- there's a good likelihood that in many of those cases that the appellant, especially if it's a spouse, for example, may well meet your category for income. Many people in those cases find themselves in really difficult financial straits.

So let me -- I'm just looking at the time here.

JUDGE BERG: It's 20 of.

JUDGE BOULDEN: Okay. All right, so I'm -- I can probably --

I'll finish up quickly then --

JUDGE BERG: Yeah.

JUDGE BOULDEN: -- because I don't want Craig not to have a chance.

But I would just recommend if you get cases,
you've got to delve into what their specific employment status is. The key document, you may have seen these or you may not have, but there's an -- there's a form called -- in the government there's always a form; it's an SF-50 or an SF-52, Standard Form. And this is the document that has all of the pertinent information about, you know, someone's -- what the legal basis for their appointment was, what retirement system they're in, what their agency is, whether they have veterans preference or not. There's a lot of important information there. That's a good key to use when you're trying to figure out exactly what the person's status is.

So let me talk about the process very quickly from what you would see. When the appeal is filed with us, we respond within two to three business days, which is quick, I think, with an Acknowledgement Order. And the Acknowledgment Order goes back to the employee or the appellant and to the Agency. And if we've identified a timeliness or jurisdiction issue, we'll highlight it in the Acknowledgement Order, what the law is, why we think there's an issue and it puts both sides on notice and gives them a chance to respond quickly about that. So you should look for that.

We often -- we usually have some sort of status conference with the parties. There's full discovery under
the Board's rules, which can be very quick, and you should take a look at those deadlines very carefully. We have a pre-hearing conference, which is usually by telephone and that's a very key stage in the process because any defenses or issues or witnesses that are not identified by the pre-hearing conference will almost always not be allowed to be raised later, so that's a very important part of the process. As I said we have hearings if the appellant requested a hearing. A hearing's not required and it's the appellant's right to have a hearing or not.

The initial decision is issued -- our very strong goal is to issue the initial decision by the Judge within 120 days after the appeal was filed. So you can see that that's a very quick turnaround time. That includes discovery, the entire hearing, the Administrative Judge writing a very detailed decision, so it's a very fast process.

There are -- there is a suspension program, if the parties think they need more time, so a case can be suspended. Sometimes cases are dismissed without prejudice if there's a good reason to do that. So there are some "escape hatches," if you will, from the 120 days, but we issue at the regional level the great majority of cases within 120 days.

So I guess the other thing I wanted to mention
is that the Federal Rules of Evidence are -- and the rules
with regard to discovery are instructive for us, they're
not required, so hearsay is technical admissible, although
its weight has to be carefully considered. So you will
not necessarily have the very, very strict rules that you
might have in Federal District Court for the Rules of
Evidence, but nevertheless, you know, we still all look to
those rules; the 404(b) exceptions, the hearsay, et
cetera, all those things. So I mean, you should expect --
you should expect something that looks like a very serious
hearing process if you get to the hearing stage.

The only other thing I wanted to mention, I
guess before I let Judge Berg start is we do encourage the
parties, although it's adversarial, we encourage voluntary
discovery and we encourage cooperation with regard to
motions. So it is possible to file a motion to compel
discovery but you'll see when the Agency responds to the
Acknowledgement Order that they will give you what they
consider to be the key documents in the case. So they
will turn over right away, within 20 days of the appeal,
you'll see the proposal notice, you'll see the appellant's
reply, you see the decision letter, you'll see the basic
evidence that they used; so those things come to you very
quickly.

In a retirement case OPM will turnover its --
the basis of its action very quickly. So you'll have all
those things.

Then we encourage voluntary discovery. We can
issue subpoenas for depositions, for court appearance if
necessary. We encourage the parties to work it out. We
don't -- you don't need to file your discovery with us;
it's a voluntary process until one party or the other
disputes what the other side did, and then obviously you
can file a motion to compel and we'll get involved.

With motion practice there -- you know, there's
often motions for maybe a delay of some kind. A motion to
compel, as I said. Maybe a motion to suspend. We ask the
parties to try to, again, at least talk to each other and
say, "Look, I'm going to file -- the appellant is very
ill," or "their spouse is very ill. We need -- we're
going to need some extra time. We're going to file a
motion to suspend." We ask both parties to just touch
base with the other side first and tell us whether the
other side objects. If the other side doesn't object then
it's probably a much easier matter for us to rule on. But
it's very helpful for us if in the motion we're told that
you've contacted the other side and the other side does or
does not object.

The -- I just wanted to mention quickly the
suspension or the settlement program. We do encourage
settlement. About roughly 50 percent I would say of the cases nationwide settle that we -- that we have jurisdiction over. You know, they're headed toward the hearing process.

You can -- the adjudicating judge can discuss settlement with you. The parties sometimes waive ex parte communicates with the judge to encourage discussions. You can seek a judge other than the adjudicating judge to talk about settlement. Or you can go through the Mediation Appeals Program, the MAP Program, which Judge Berg is one of the mediators for, and this really takes the case completely off of the adjudication docket and you'll have an in-person mediation. I think the goal probably within 30 to 60 days and many cases settle through that program. And it's been really, really an excellent settlement program.

So don't be surprised if early on the judge gets the parties together and says, "Where is this case settlement wise?" And you know, maybe in the first status conference the judge may be already talking about settlement.

I've included in the slides some of the, sort of, common things that the parties settle for so that might give you some ideas of what's possible. Sometimes the appellant simply wants a "clean record" as we call it, so they don't have a record of having been fired.
Sometimes it involves a lot of money if the Agency wants the appellant to withdraw their discrimination claims, for example, so we see sometimes a lot of money in these cases. Sometimes there's a "Last Chance Settlement Agreement" where the employee comes back to work with the idea that if they get in trouble again that they can be terminated without going back to the Board. So there's a number of -- and there's other creative avenues that can be pursued.

And just speaking of money quickly, the Board -- if an appellant is the prevailing party, both in our regular jurisprudence and under the Whistleblower Protection Act and in the veterans area, damages are available, including many times full back pay with interest, restoration of all benefits. And if a discrimination or whistleblowing reprisal has been found, there may be a follow-on proceeding for damages. So these can involve -- there can be some real financial consequences to these cases.

So that's really all -- I know that's quick and I hope I didn't go through it too quickly, but there's a lot of other information on the slides and as I said on the Board's website. And again, we're really -- we're hoping, I think, Rebecca can clarify this but I think we're hoping to put the notice for Boston appellants in
acknowledgement orders within a couple of weeks here. So hopefully we'll start getting some appellants shortly. So thank you very much again for doing this and for giving your time today.

JUDGE BERG: Okay, before I start I just want to make -- because we can't really see what's on there, does -- is this other slide show up yet or do I need to give you a minute --

MS. CAZABON: (Inaudible) working on it so --

JUDGE BERG: Okay.

MS. CAZABON: Yeah, we're almost there. You should go ahead; we'll get it up soon.

JUDGE BERG: Okay. Yeah, I'll just start and then hopefully you'll be right behind me.

I also -- I want to reiterate what Judge Boulden said, we really do appreciate you engaging in this project. It's very helpful to us to have the appellants represented. You know, our job is to make a good record and to hopefully, you know, get the evidence we need to make the right decision, and it's very helpful for us to have, you know, good attorneys like you all are involved. And obviously even more importantly it's, you know, it's great for the appellants; they really, you know, benefit from -- will benefit from your help.

Just to start, the first slide -- substantive
slide, just should say "Adverse Actions." And I looked this up; in 2012 48 percent of the case that we received nationwide were adverse actions. I think that's probably down a little bit from what it used to be because we now have -- there's some other statutes that have created appeal rights for us, but it's still really by far the one area that, you know, in which we get the most appeals. So it's likely that a significant number of cases that you would get would be adverse actions I would assume.

And when we say "adverse actions" we're talking about, as the slide says, removal, and I think Bill said, reduction in grade, reduction in pay, furlough of 30 days or less, and suspensions of more than 14 days. So I think, you know, obviously you'll see when you get the case, you know, when someone comes to you that, you know, one of these, if it's an adverse action, has to be in place.

Reduction in grade and reduction in pay, you'll see sometimes people will say they got demoted. What we're really looking at for jurisdictional purposes is was there, you know, was their grade reduced or was their pay reduced. Usually it would be both. There are cases that are exceptions where an agency tries to give someone, let's say, saved pay, which means their pay doesn't go down but there's a grade reduction. That's still
appealable and vice-versa. But that's really what we're looking at to make sure it's within our jurisdiction.

Or a reassignment at the same grade and pay.

While it might be something that an employee does not want would not be appealable to us, you know, absent some exceptions, which, you know, which are probably beyond what we want to talk about.

So that's -- those are the types of cases that would come in for adverse actions.

I mean, furloughs, again as Bill said, we really don't see those. You're not going to be involved in the sequester furloughs. Furloughs of more than 30 days are within our jurisdiction under a reduction in force. And I would also say the likelihood that you're going to see something like that is slim and none.

The next slide, "Burden of Proof," in adverse actions the Agency has the burden to prove the charge, and the burden is by preponderance of the evidence. And so I have it quoted here, "The degree of relevant evidence a reasonable person considering the record as a whole would accept as sufficient to find a contested fact is more likely to be true than untrue." And I think for short -- for your purposes, you know, for shorthand, the way a lot of us look at this is really "more likely than not".

You know, it's obviously, you know, you know
that there are other -- in other areas of the law there
are other standards, other burdens. You know, obviously
criminal, beyond a reasonable doubt. We -- and in other
areas of the law. We have some cases that are clear and
convincing evidence is the burden; that's an Individual
Right of Action appeal. That's a higher burden.

You know, this burden, again, we really -- the
way I look at it is really if it's a tie, if I really
can't determine that it's more likely than not then the
appellant would win. So that's -- that's really what
you're looking at and you want, you know, from your
purposes, you know, you're going to be trying to prevent
the Agency, obviously, from meeting that burden.

The next slide, "Types of Charges," and I -- and
I'm going to go through some of these a little bit quickly
because we probably don't have time to go through all of
it, and I should have said at the beginning this is
really, I think we created this also as a reference for
all of you so you can go back and look at it later if need
be.

The other purpose really also, you know, when I
created this was thinking issue spotting things that
might, you know, would kind of, get in your head so that
when you get a case you would see that, you know, here are
some issues that I have to be aware of.
So types of charges that we see, number one, the "Descriptive and specific charge," that's really, you know, a charge which has a label, and that's probably, you know, the most common we would see. And the example would be maybe theft or you know, we see conduct unbecoming a federal employee, things like that, so that would be a charge with a label.

We get cases also somewhat frequently with what we would call "Generic charge," and that would really be a charge like improper conduct, inappropriate conduct, unacceptable conduct. Something like that would be very generic and you know, we would really be looking at what the specifics are underneath that, so that the label doesn't really tell us a lot.

A "Narrative charge," something I think that's pretty rare these days, it's a charge where there's really no label and the Agency would really just put in their notice, they would just, sort of, launch into "Here's what you did wrong" and just explain it in narrative fashion.

The parts of a charge, again, as I said, the label -- the Agency would -- chooses the label and that's what they're stuck with. That's what they have to prove.

When we say "specifications" what we're talking about is the description underneath the label. So you know, for example if it's -- if it's theft, if the
charge -- if the label is theft, under it you would have specifications. There could be more than one instance where the Agency believes the employee has stolen something and they would usually list them one after another, and I would say, you know, "On June 22nd you," you know, "you were spotted with copper tubing," or whatever it is. It would specify what the charge is.

"Legal elements," when we talk about that also we, you know, we all go back to law school. You know what the -- what we're talking about when we say "elements."

For example, the theft example, the Agency would have to prove that there was an appropriation or deprivation of property of another with intent to permanently deprive. It's going to be, for our purposes it's going to be government property for the most part. It's rare that we see anything other than that. But that's the legal elements. And again, if that's the charge the Agency chose to bring, that is -- they're going to have to prove those elements. Even if they prove part of it, but not all, that's not enough and the charge would fail.

The next page, something that Bill touched upon briefly and I think is something very important to be aware of when you get these cases is the due process issues.

So first, as Bill said under the statutes at 5
USC 7513, what the employee's entitled to, notice and opportunity to be heard, 30 days advanced written notice, a reasonable time to answer orally and in writing, and it actually specifies there has to -- the minimum time is seven days. The employee has a right to representation and the Agency would need to write -- give -- provide a written decision that explains the reasons for taking the action.

And these are all things that are absolute requirements. If the Agency fails in any of these, you know, there's a very good chance, you know, absent some obscure argument to the contrary that the action will simply be reversed. So these are really things you want to look at and make sure, you know, that the Agency met its requirement to provide this type of due process.

The next page, also "Due Process," I put these two cases at the top of the page, these are also going to be very important. If there are any potential due process issues in cases that you would be handling.

Stone and Ward, these are Federal Circuit cases. Essentially what they said is that the -- we call it the "Deciding Official" is the person who signs the decision letter, whose making the decision, the final decision for the Agency, may not consider new and material information without providing it to the appellant and giving the
appellant a chance to respond. So that's definitely something that as of late comes up very frequently. The Ward case came out in 2011 and added to the Stone case from about 12 years before. Originally, the way we looked at it and we thought the court was really saying that this only pertained to the charges and if there was an error with respect to the penalty determination we looked at that more as a harmful procedural error analysis. The Court has made it clear in Ward that it's a due process situation. So as I said, it applies to evidence on the merits and the aggravating factors considered in the penalty determination. So the Agency just, in short, in each case -- in each adverse action is going to be required not only to, you know, assess the charge but the deciding official also has to go through a list of factors that pertain to the penalty and evaluate them. And then the Agency would be required to come in and support the penalty determination, as well.

So in essence, this due process issue is -- the Agency can -- that deciding official really should be deciding these issues, sort of, in a vacuum. I mean, the appellant will come in and either do an oral or written response, or both, and after that the deciding official is really not supposed to go back and, you know, talk to
anyone or get additional evidence. If they do -- they can
do it, but if they do it they would need to then
supplement the proposal notice and provide additional
notice of what conversation they had or what additional
evidence they looked at to the appellant and give the
appellant a chance to respond.

And I think a lot of agencies are really just
becoming aware of this. And this comes up very
frequently. Sometimes it comes up in the middle of a
hearing and we -- you know, we become aware that a
deciding official, you know, did a whole investigation
after the fact, and in many cases that's going to be
enough for us to just reverse the action. So something
important to look at.

So I put in some common charging issues.
Without going into great detail, but this is something
you -- you know, when you're look -- when you have a case
and you're looking at the charges, something that does
crop up, "splitting of a charge." So that's probably not
something that's going to come up frequently.

But, for example, in this Burroughs case that we
put in as an example, the charge was directing
unauthorized use of government materials, manpower and
equipment for other than official purposes. Not really a
wise charge for an agency to bring because they have to
prove every aspect of that.

And in that case they proved all of it except, the Administrative Judge found that the actions were actually for an official purpose. So they may have been, you know, improper but they were used -- it was, I think, some equipment and manpower and materials that were used for an actual project, but the judge sustained the charge anyway, saying that, you know, enough of it -- essentially split the charge and said enough of it was proven and separated it out. The Court said we cannot do that so it's now clear, the -- you know, the charge, as I said before, the Agency brings a charge, they've got to prove every aspect of it. Every element.

"Merger," an agency can take -- frequently there will be one serious incident that the -- that will concern an agency. They will investigate it and decide that there -- they can bring multiple charges. For example, you know, criminal conduct sometimes would lead to, you know, an appellant being -- an employee being incarcerated. The Agency looks into it and decides, "We have to do something. We have to charge them with this criminal conduct in some way." They can also charge AWOL if the employee doesn't, you know, is absent and doesn't have leave that's granted.

So that is okay. However, sometimes the Agency
will really try hard to pile on charges and we will merge charges if they're based on the same conduct and proof of one charge automatically constitutes proof of the other charge. So that's merger.

"Multiple specifications," this is important to just keep in mind. If there is a single charge and multiple specifications, proof of one specification will mean that the charge is sustained. So sometimes agencies will, for -- using the AWOL example, they'll bring an AWOL charge and there will be 20 days, for example, and if they only prove 10 days the charge is still sustained. Doesn't mean that we don't look at the fact that some of the specifications were not proven and that factor that in at times with respect to the penalty. But you know, the charge itself is sustained.

"Lesser included offenses," really not something that comes up too often, but just to be aware we are not able to eliminate elements of a charge brought by an agency. If it's -- again, same concept, if a charge is brought that's the charge the agency has to prove.

The next slide, "Criminal Offenses," this actually is something that comes up fairly frequently. A federal employee is charged with a criminal act. If the Agency chooses to also charge -- if the Agency has a concern with that and also chooses to take administrative
action and charge the employee with the criminal offense, they have to prove the elements of that offense. So it's really something I think most federal agencies are trying to get away from. If they're smart now they can just bring an improper conduct charge and just explain what happened and, you know, they wouldn't be required to prove all those elements.

But in addition, keeping in mind when there's a criminal -- when there's an issue with criminal charges against someone who might be a client of yours, you have to look and see what the charge is. The Agency has to make a decision, are they going to charge -- you know, if it's something where they feel we really can't have this person in the workplace, we have to bring a charge, they have to decide are they going to charge the person with the underlying conduct or are they going to indefinitely suspend the person, which is -- there's a provision for that. And then wait it out. And then really try and terminate the person based on conviction. So these are just issues that crop up if there's involvement -- you know, criminal charges that are involved here.

If they -- you know, there's downsides for the Agency to waiting for a conviction because then they never know, it could be reversed on appeal and then their charge, which is based on, you know, the fact that the
court initially convicted the person, is also automatically going to be reversed. So these are just some of the issues to keep in mind when there's a criminal matter involved.

The next slide, just loaded words. Words that you should be aware of when you're looking at a charge and figuring out what exactly the Agency meant. There's words that we look at -- the Board looks at that imply intentional misconduct.

When we see in a charge "knowingly," "willfully," "threatened" is, sort of, a separate word that's part of a separate type of charge, which I'll get to briefly if we have time. But you know, there are a number of types of charges that you or the agencies use these words and then automatically, you know, you would be aware that the Agency has to prove intent.

When we're trying to figure out, and when you're trying to figure out, what the charge -- you know, what the Agency's required to prove when it brings a specific charge, if it's confusing, which does happen, and everybody's trying to figure out and parse the charge, the Board will look at the -- has said it will look at the structure and language of the proposal notice. So we really consider that to be the main charging document. I mean, we will also, if that's not clear, there will be
other things that we would look at, as well, but that's
the principle document. So that's what you would want to
look at in figuring it out if you have an issue there.

Then I just really put in some charges that I
think are common that you might see. So, first, you know,
these are charges that we see frequently that agencies
bring that require proof of intent. And as it says here
at the top, "Intent's a state of mind generally proven by
circumstantial evidence." You know, as we know it's rare
that you're going to get the case where the person
expresses an intent -- the intention in some overt way, so
it's really the surrounding circumstances that the Agency
needs to present to establish that the intent was present.

So I gave some examples here. I think we're --
we wanted to leave you some time to ask questions, I won't
go through all of them.

"Theft" is something I mentioned before.

"Threat," something to keep in mind. If you see
a charge that includes the word "threat" it's very likely
the Board is going to look at -- you know, the Agency may
try and get out of having to prove a threat, but you'll
want to look at it and see if you can hold them to that
standard. And if they -- if so, there's a test that the
Federal Circuit has told us to follow, reasonable person
test, and I have listed here the things that, you know, we
would look at, the listener's reactions, apprehension of harm, speaker's intent, circumstances, and whether the threat was conditional. And these cases can get very fact specific, obviously, but there are circumstances.

You might have a client who makes, you know, a very -- says something that, you know, is really seemingly terrible on the surface and, you know, it turns out it was said, you know, in gest or it was said in a psychiatrist's office or something like that. So these are the factors you really want to look at.

"Insubordination" is something we see frequently. Just the thing to keep in mind is this is -- the Agency does have to prove intent, willful and intentional, as opposed to a failure to follow instructions, which is another charge we see frequently where the Agency does not have to prove intent.

"Falsification" also an intent charge that the Agency, if they use the word "false" in any way -- I mean, I put one case here, this George case, which was my case, and was very confusing the way the charge was set out. But the Board believed that the Agency -- because the Agency used some form of the word "false" that the -- that intent was required to be proven.

And the other thing to keep in mind with an intent charge, falsification charge, they don't have to
prove actual intent. They can prove reckless disregard for the truth. So it's not, you know, as we all learned in law school, the different, you know, levels of proof, that there's -- it's not a negligence -- negligence would not be enough; it would have to be reckless disregard. Or actual intent for any of these charges.

The next page, charges with elements that don't require intent, these are just again, these are examples of -- so that you'll recognize things if you're representing someone in an adverse action case.

"Misuse of government property" you know, really explains there what it is. That's something that we do see frequently and it's something, you know, an agency finds out an employee is, you know, has a side business and is using their computer. You know, they do a search on the computer and find out there's all sorts of, you know, stationery and you know, thousands of e-mails conducting a side business. They might -- one of the charges they might bring is misuse of government property. And you know, misuse of the telephones.

Government charge card, we see that frequently. People have a government charge card, it's supposed to be used for travel, and instead are out charging things left and right, which is definitely a no-no. But these charges -- this does not require specific intent to prove.
"AWOL," another one you should be well aware of, that's a charge that we see very frequently. The Agency has to prove that the employee was supposed to be at the duty station, that he or she wasn't there, and that the absence was either not authorized or the employee requested leave and the denial of the request was proper.

And then I have the -- I didn't spell this out entirely but it says, "If based upon a denial of LWOP," that refers to leave without pay, "the Board will determine whether the denial was reasonable." So sometimes employees run out of leave, they you know, either can't be at work or want to take leave. You know, sometimes they just don't show up, but other times they ask for leave without pay. And we would look -- there's some discretion but we would also look just to make sure that the denial of leave without pay is reasonable.

The FMLA issues that I've put here, the Agency has the burden.

If you go to the next slide, "Failure to follow leave requesting procedures." This explains the FMLA a little better, which stands for Family Medical Leave Act. Some of you may have heard of it or have some familiarity with it. So this charge, the "failure to follow leave requesting procedures" is really a charge agencies bring because they're concerned that an AWOL charge will be
overturned on appeal.

If the employee brings in medical evidence, the Board -- I think the Board has gone back and forth on this, but I know that, you know, there have been times where the Board will accept medical evidence that shows that sick leave, let's say for example, or even leave without pay, should have been granted, and you know, we can, you know, accept that even at the appeal stage.

So you know, supervisors feel obviously that's, and agencies feel that's not fair, so they will frequently bring this charge, "failure to follow leave requesting procedures," and so they just have to show that they had a procedure, the employee knew the procedure and failed to follow it.

And this is also where these Family Medical Leave Act issues come in. With any charge that's attendance related the -- if there's a Family Medical Leave Act issue, the Agency has the burden on that. So that's important to note. It's not an affirmative defense. If the employee at some point requested Family Medical Leave Act and, you know, was denied that's something the Agency would have to show, that that was a proper denial. Or you know, other circumstances that arise under the FMLA, a couple of which I have put in here.
So just something to be aware of if you end up with an employee whose had illnesses or family problems and is terminated or there's some other action taken against.

"Failure to follow instructions," as I said before, that's a non-intent charge. Similar to insubordination but easier for the Agency to prove. And they do have to prove that there were proper instructions given so that does come up at times. You know, there are some exceptions and it's -- you know, obviously a supervisor can't ask an underling to do something that's unsafe. Or you know, there's a few other exceptions but something you want to look at, whether it was a proper instruction given.

The next slide, just a couple more charges that -- a few more charges that I thought you should just be aware of their existence; "Lack of Candor," agencies use this when they -- essentially when they really can't prove falsification. They're concerned that they won't be able to prove intent.

In my experience where this would come up would be that the Agency's concerned with something, they're conduct -- something an employee's done, they're conducting an investigation, you know, they have somebody that is questioning the employee at length and the
employee's answering the questions and they can't really prove that they -- that they lied in any of the answers, but you know, the employee left something out that was very important, maybe that wasn't responsive exactly to a question, but that clearly should have been something that was volunteered by the employee.

So it's kind of a tough charge to even put your hand on what the elements are as -- our reviewing court in this Ludlum case I cited, has said that the elements depend on the context and the conduct. So it's really generally better to disclose. Agencies do use it where -- where they could have used falsification, where it is something where they're really claiming that it was -- it was a false response but they're just not convinced they can prove intent.

"Unauthorized use of government vehicle," that's brought this way, just "unauthorized use," there's no need to prove intent. But there's a mandatory 30-day suspension under the statute that I listed here if it was willful or done with reckless disregard. So that's important to note if you get -- see a charge like that, you have to see did the Agency charge it under the statute, in which case they do have to prove that it was willful. If they didn't, there is no intent and there's no requirement that it -- that the suspension or whatever
adverse action they take be 30 days at minimum.

The others, I won't really go into, "Sexual harassment," I think is something we don't see too often these days, but just there for your edification.

I guess the one that we probably do see a little bit more, I don't think we see really the quid pro quo type of sexual harassment almost ever, at this point, at least.

We do see more of the hostile working environment type of sexual harassment, so I put that as the last sentence there, that the conduct -- "The Agency has to prove the conduct was offensive based on the victim's sex, unwelcome and sufficiently severe or pervasive to interfere with the victim's job performance or create an abusive work environment." So that's probably what we would see most of the time.

We -- the one thing to note about sexual harassment is a lot of agencies have their own rules on -- you know, that prohibit sexual harassment. And when they bring a charge like this, it's important to look at whether they're charging the employee with breaking the internal rules or sexual harassment under Title VII. And the Board has said that if it's really -- if their internal rules basically track Title VII, they're going to, you know, go with the Title VII standard of proof.
So it's just something to look at. It does come up in these cases, as what is -- you know, what is the burden because sometimes the agencies don't even realize it, what they're actually -- you know, what their burden would be and, you know, what the basis for the charge is.

And finally, "Approved leave," just something to be aware of. There is this one exception, generally a federal agency cannot take action against an employee after they've approved leave. There is this one exception in the Cook case here, I won't -- you know, it's there for you to look at. It's very narrow but it does come up. I've had a number of these cases where it really was someone who's, you know, out of the work place for a long time and the Agency just feels it needs to replace this person. They've approved their leave for whatever reason for a lengthy period but really just want to take an action. So that's there in case you ever see that.

And I think that's about all I have for adverse actions.

JUDGE BOULDEN: Right.

JUDGE BERG: I didn't get into really the penalty part, so that's something we, sort of, left out. You know, but it's something -- there is a case called Douglas v. Veterans Administration, that is you want to look at what the factors are that an agency needs to
consider when determining what the reasonable penalty is, you should look at that case. I think it's 5 MSPR 3 --

JUDGE BOULDEN: It's in the 5, right.

JUDGE BERG: -- 380 or something like that. But you'll see it if you handle a case like this and the penalty's an issue, you'll definitely see a reference to that case.

And I think that's all I have.

JUDGE BOULDEN: Okay.

JUDGE BERG: So we have hopefully a little time for questions, right?

JUDGE BOULDEN: Yeah.

MS. CAZABON: Great. Thank you so much. I again, I want to thank Judge Boulden and Judge Berg for doing this training for us today and putting together these terrific materials.

Just to let folks know in addition to the PowerPoint slides, we've also provided you with an appeal form, which I recommend everyone read.

And in addition, you know, we're going to support you here internally. We'll have plenty of partner supervision, and hopefully if there's enough interest and we have enough cases we'll be able to have some small group discussions and periodic meetings to talk about the issues and the cases.
And as Judge Boulden mentioned, I hope that in the next probably -- by mid-May or at least late May we'll start taking these cases.

So I wanted to see if people here had any questions? Brian?

BRIAN: Is there a regular Bar Association or regular lawyers who do these types of cases that -- I'm just envisioning taking one of these cases and not knowing what a brief is supposed to look like necessarily or exactly what type of stage I'm in in a certain case and what's going to happen next. Are there regular practitioners or Bar Association that we might be able to consult once in a while if we get stuck in one of these cases?

JUDGE BOULDEN: There are certainly some major players that we see in D.C. in particular and in Boston, actually. There's the Lafferty Law Firm we see often. But I don't know if there's actually an MSPB Bar, per se. I think there's a federal employment bar, Passman & Kaplan in Washington, D.C., for example, is involved in that.

Peter Broida, I don't know if you know his name, actually writes a compendium of, sort of, the history of Board cases over time.

I don't know, Craig, do you know of any?

JUDGE BERG: I don't -- yeah, other than that I
mean, I know obviously there's a federal employment bar, but I don't think there's anything more organized than that, really.

JUDGE BOULDEN: Yeah.

MS. CAZABON: All right, looks like we have another question.

UNIDENTIFIED SPEAKER: Hi. I just had a quick question. Do the usual rules of privilege and disclosure and things like that apply? It seems like they would.

JUDGE BOULDEN: Yes.

UNIDENTIFIED SPEAKER: To any client.

JUDGE BOULDEN: Um-hmm.

MS. CAZABON: Anything else?

(No response.)

MS. CAZABON: Okay, looks like all questions have been answered. So thanks again, Judge Boulden and Judge Berg. We look forward to taking on these cases. And you know, we really appreciate the time you put into doing this presentation.

JUDGE BOULDEN: Yeah. Could I just mention one thing? I forgot to tell everybody, the Board has a very sophisticated electronic filing process and you'll see it's referred to there on the paper form, but most -- many attorneys today are filing electronically the appeal itself. And also if you register as a e-Filer there --
all of your pleadings can be done electronically and you'll be served electronically by the other side if they do it, too. So it's a pretty sophisticated system I think you'll find.

MS. CAZABON: Great. Well, thanks again.

JUDGE BOULDEN: Okay, thank you.

JUDGE BERG: Thank you.

(Whereupon, the above audio was concluded.)
CERTIFICATION

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