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US IMMIGRATION & NATIONALITY LAW

HOW CALIFORNIA'S AB 1159 WILL HURT IMMIGRATION LAWYERS AND THEIR CLIENTS: A NEW YORK IMMIGRATION LAWYER'S PERSPECTIVE

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The California State Legislature is about to pass a bill to protect its residents from immigration fraud. The bill, which if passed will take effect on January 1, 2014, is also supported by the State Bar of California. While a bill to protect people against immigration fraud is always laudable, California's Immigration Reform Act, AB 1159, will not meet this objective. Indeed, many of its provisions are so onerous, and interfere so radically with the attorney-client relationship, that it will likely drive away good and ethical attorneys from representing clients in California leaving it to unscrupulous unauthorized and unregulated practitioners to prey upon them.

I write as a New York attorney since AB 1159 may also impact out of state attorneys like me if we choose to represent people in California in immigration matters. As a New York attorney, I will also point out how New York's Rules of Professional Conduct already govern my ability to provide ethical services to clients and may also be in direct conflict with the requirements under AB 1159. Although the American Immigration Lawyers Association has justifiably opposed the bill on policy grounds, I focus on some of the specific provisions that target immigration attorneys in order to show how we have been singled out among other lawyers, and how impossible it will be for us to effectively assist immigrants. Many immigration attorneys have chosen this area of practice because it is most noble and gratifying to make a meaningful difference in the lives of people rather than for the money. It is therefore disappointing to see that this bill extends a pre-existing law that has regulated immigration consultants, and unfairly presupposes that immigration attorneys must be more regulated than other attorneys even though all attorneys are

already bound by their state bar rules of ethical conduct. In addition, immigration attorneys can also be sanctioned under the disciplinary rules promulgated by the Department of Homeland Security and Executive Office for Immigration Review at 8 CFR 1003.102.

AB 1159 contemplates that if the Border, Security, Economic Opportunity, and Immigration Modernization Act, S. 744 (BSEOIMA) becomes law, an attorney who provides "immigration reform act services" will have to register with the State Bar of California and file a bond of $100,000. This bond shall be payable to the State of California, and shall be for the benefit of "any person damaged by any fraud, misstatement, misrepresentation, unlawful act or omission, or failure to provide the immigration reform act services of the attorney or the agents, representatives, or employees of the attorney, while acting within the scope of their employment or agency." One can only wonder what standards will be set for someone to prove damages, and whether it will be comparable to the malpractice standard in a court of law. Given the underlying complexity in any new immigration law, along with the evolving standards and interpretations, it is hoped that immigration attorneys will not be held needlessly liable for an alleged "failure" to provide services when the denial was due to other extraneous reasons.

AB 1159 impacts California attorneys who will provide immigration reform act services as well as out of state lawyers who are authorized under 8 CFR 1.2 and 8 CFR 1001.1(f) to represent persons before the Department of Homeland Security or the Executive Office for Immigration Review, but only if this out of state attorney is providing immigration reform act services in an office or business in California. While it is clear that AB 1159 will apply to a non-California attorney who works in a law office or is in house counsel in a corporation in California; if interpreted broadly, it could also include an out of state attorney who represents a client at an interview in a USCIS office or Immigration Court in California. It should clearly not be interpreted to apply to an out of state attorney who files an application with a centralized USCIS office in California, such as the California Service Center, while practicing in an office outside California.

Since most immigration attorneys are solo or part of small firms, the $100,000 bond requirement will immediately preclude attorneys from providing competent and diligent services, which they are mandated to do under their professional responsibility obligations. If BSEOIMA becomes law, there will

likely be a shortage of competent attorneys who will be required to represent the millions of applicants who may become eligible for Registered Provisional Immigrant status. The $100,000 bond requirement will further exacerbate the shortage. Employees of organizations that are qualified to provide free legal services or of non-profit tax exempt organizations will be exempt from the $100,000 and the other provisions of AB 1511, but many of the legitimate non-profits providing legal services work with private attorneys to provide pro bono services, and this is particularly true upon the implementation of a new immigration benefit, as was the case with the Deferred Action for Childhood Arrivals (DACA) program, where non-profits leveraged off thousands of pro bono lawyers to effectively represent young applicants throughout the country. Such pro bono efforts, which will need to be scaled up upon the passage of BSEOIMA, will not be possible in California under AB 1159. Then, on top of the $100,000 bond, section 6247 authorizes the California State Bar to collect additional fees from attorneys for the reasonable costs of administering and enforcing the statute.

Another provision of AB 1159, section 6246, is particularly problematic as it makes it unlawful for an attorney to accept payment for any immigration reform act services before the enactment of BSEOIMA. While one can understand the concern behind this provision about preventing an unscrupulous attorney to speculatively charge fees for a filing, which does not yet exist, it is clearly part of competent representation for an attorney to advise a client in advance regarding changes in law. For instance, a client may wish to know whether he or she is hypothetically eligible for RPI status with criminal convictions, and the diligent attorney may recommend that a disqualifying felony conviction under the new law be expunged, if at all that is possible. Again, interpreting section 6246 broadly, an attorney may be penalized for legitimately charging a fee for providing such strategic advice. Similarly, a corporate client may wish to know how BSEOIMA may affect its ability to file new H-1B petitions on behalf of its existing employees and new employees. Providing advice in contemplation of a change in law would enable such a company to restructure its personnel prior to the law taking effect so that it is not deemed an H-1B dependent employer under BSEOIMA, as well as file labor certifications on behalf of employees so that they become “intending immigrants,” and are thus not part of the dependency calculation.

It is worth noting that the Connecticut Bar Association’s Professional Ethics

Committee addressed a similar question in 2012 when an attorney requested guidance on whether it was ethically appropriate to be retained and perform work for a client in anticipation of the enactment of the federal regulations pertaining to the I-601A Provisional Waiver. Referencing Connecticut Rules of Professional Conduct 1.4 and 1.0 pertaining to client communication and informed consent, this opinion concluded that it was, so long as clients are fully informed of the costs, risks and potential benefits of preparing the case without a guarantee that the law will be enacted. *See Informal Opinion 2012-04, Work Performed in Anticipation of New Federal Regulation. Connecticut Bar Association Professional Ethics Committee, May 9, 2012*. In contrast, section 6246 prohibits any kind of service that can be provided in advance of a law becoming effective, even if otherwise ethical and which would clearly benefit the client.

In the interests of brevity required in a blog, I will not pick on each and every onerous provision of AB 1159, but must finally note that the bill would require attorneys providing immigration reform act services in California to put all funds received form a client in an attorney trust account, and only withdraw these funds when the services have been completed. Most immigration attorneys charge flat fees and such flat fees if not unreasonable generally benefit the client as they provide certainty at the outset of the representation. An immigration practitioner's typical retainer agreement defines the various steps required in an immigration case, and the fee pertaining to each step. The initial payment from the client thus is not an advance; rather it is paid for starting work towards the case such as research, strategy, inputting information, and gathering of evidence in preparation of an application. The next payment is made prior to filing the application and the next could be for preparation and appearance at an interview or hearing, and so on. According to NYC Bar Opinion 1991-3:

> *A "flat fee" is a stated amount for the representation contemplated, to be paid regardless of the actual hours that are ultimately required. The agreement might provide for an additional fee if the representation extends to an additional phase (e.g., the case goes to trial or there is an appeal). The flat fee reflects a sharing of risks between lawyer and client and generally provides the client with the security or comfort of a known cost for a particular service.*

In New York, a lawyer can deposit such a flat fee, or other variations of non-hourly fees such as an advance retainer, in the lawyer's own account. In fact, according to N.Y. State Bar Op. 816 (2007), if the parties agree to treat advance

fees as the lawyer's own, then a lawyer is required to deposit such fees in the business account and not in the attorney trust account as the latter would "constitute impermissible commingling." Even if such a flat fee is deposited in the lawyer's own account, it is seldom considered non-refundable. If the client terminates the lawyer's services or vice versa prior to the completion of the agreed representation, the lawyer is still required to refund the unearned portion of the fee even if it was deposited in the lawyer's own account. Whether a fee is considered an advance towards unearned legal fees, and thus required to be deposited in a trust account, or a fee immediately earned by the lawyer, is subject to much ambiguity and varying interpretations in different states. Texas, for example, according to Robert Alcorn may require flat fees to be put in a trust account unless they are non-refundable, although it is not clear whether the Texas ethics opinions cited in the forthcoming article involved unearned fees or fees charged for commencing work on defined steps as in an immigration case. See A Perfect Storm – CIR and IOLTA by Robert Alcorn, Bender's Immigration Bulletin, August 15, 2013. Clearly, treating a fee as an advance towards future fees (even when it is not and agreed as such by attorney and client), and thus requiring strict accounting of deposits and withdrawals from the trust account (along with significant additional expenses), will likely force lawyers to engage in hourly billings so as to ensure accounting accuracy, which in turn will result in less predictability and comfort for the client.

It is hard to understand why the State Bar of California is behind such a bill aimed at immigration lawyers. In New York, for example, bar associations such the New York City Bar look to the immigration bar in working jointly together to assist immigrants and to also fill unmet needs through pro bono projects. In addition to immigration lawyers being regulated by their own state bar rules and special immigration rules, they will also be subject to criminal sanctions under BSEOIMA for knowingly filing fraudulent applications. Thus, the new provisions in AB 1159 are totally unnecessary. Instead of supporting such a pernicious and ill-conceived law targeting immigration lawyers, the California State Bar can better focus its efforts in launching programs that facilitate mentoring, education, and pro bono collaborations among immigration lawyers, which will result in the more effective delivery of legal services to millions of people who will truly need them if immigration reform becomes a reality.

Update – Improved Markup of AB 1159

Since the blog was posted, AILA InfoNet posted an amended version of the bill, which substantially improves some of the provisions. For instance, pro bono attorneys will no longer be subject to the provisions of the bill. The immigration reform related services provision is limited to preparing applications for undocumented immigrants who will be able to apply under legalization provisions of BSEOIMA or future versions of this law. A certified legal specialist in California who maintains a professional liability policy of $100,000 per occurrence and a general aggregate limit of $350,000 is also exempt. Most important, a non-exempt attorney may maintain a professional liability policy in an amount of not less than $100,000 per occurrence and a general aggregate limit of $350,000 or a bond of $100,000. Hence, a bond of $100,000 is not required if the attorney has the requisite professional liability insurance. It appears that AILA's advocacy efforts have born fruit, but the bill still needs to be further improved before the immigration bar can support it. Notwithstanding these modest improvements, AILA leader Annaluisa Padilla, who is spearheading this effort in California, asks these pertinent questions: "Is further state regulation of immigration attorneys specifically acceptable to us? In the sense that in addition to to already existing requirements, is further regulation needed in this particular area of the law? Will these regulations actually prevent fraud on immigrants? If so, are not immigrants likely to be defrauded in other areas of the law?"