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US IMMIGRATION & NATIONALITY LAW

IS AN IMMIGRATION AGENCY A TRIBUNAL UNDER NEW YORK'S ETHICAL RULES?

Posted on November 25, 2009 by Cyrus Mehta

In preparing for the ethics panel for the AILA 2009 New York Chapter Immigration Symposium on December 1, 2009, I came across an interesting connundrum with my co-panelists. Are the offices within the Department of Homeland Security, such as United States Citizenship and Immigration Services (USCIS), or other governmental agencies that deal with immigration matters, such as the Department of Labor or Department of State considered tribunals?

A lawyer has a duty of candor before a tribunal. New Rule 3.3 of the New York Rules of Professional Condcut prohibits a lawyer from making a false statement to a tribunal or to knowingly assist a client in making a false statement on an application that if submitted to a tribunal. This rule is similar to the same ABA Model Rule, which has been adopted by most states.

Rule 3.3 also requires that a lawyer who comes to learn of the false statement after submission take reasonable remedial measures, including if necessary, disclosure to the tribunal. The proper course is to first remonstrate with a client confidentially, and seek the client's cooperation with respect to the withdrawal or correction of the false statement. Most clients will hopefully understand that taking such a measure is also in their best interests, and that a lawyer is likely to take steps that is least damaging to the client. For instance,if an asylum claim otherwise includes truthful elements, the withdrawal of the damaging evidence may be presented at the same time as part of a packet of evidence that is otherwise truthful and supportive of the client's claim. If the client is uncooperative and withdrawal from the representation cannot remedy the false statement, the lawyer, under Rule 3.3(b), must make disclosure to the tribunal as is reasonably necessary to remedy the situation, even if such disclosure if protected under the attorney client rule of confidentiality.

The term “tribunal” is broadly defined in Rule 1.0(w) to encompass not just a court but even an “administrative agency or other body acting in an adjudicative capacity.” But the definition of “tribunal," and its reference in Rule 3.3 with respect to an administrative agency still connotes a court-like adversarial proceeding involving two parties. At issue is whether the USCIS, along with the Department of Labor and Department of State, would be considered “tribunals” under this definition. The definition of tribunal goes on to state: “A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting the party’s interests in a particular matter.” There is no question that a proceeding before an Immigration Judge or the Board of Immigration Appeals would be before a “tribunal,” but there is ambiguity as to whether it would extend to the above governmental agencies too as it is unclear whether there is a neutral official who will render a legal judgment "after the presentation of evidence or legal argument by a party or parties" when one files an application with the USCIS or with a U.S. Consulate.

As a practical matter, though, whether an immigration-related agency is a tribunal or not should not matter. If an attorney knowingly assists a client in filing a false application, such conduct may trigger criminal liability regardless of whether the application was made to a tribunal or not. An attorney is also required to be truthful to third persons, governmental or otherwise, under Rule 4.1. Moreover, Rule 1.6(b)(3), while not mandating it, allows a lawyer to withdraw a written or oral opinion or representation relied upon by a third person (even if not with a tribunal), where the lawyer belatedly learns of its falsity. Finally, a similar duty of candor applies to immigration agencies under parallel ethical rules in 8 C.F.R. §1003.102(c) and 8 C.F.R. 292.3(b), governing the conduct of private immigration attorneys, although the requirement is to “take appropriate remedial measures” without a specific requirement to disclose to the tribunal.

Regardless of the ambiguity in the definition of tribunal, it behooves a lawyer to ensure at the outset of the representation, and prior to filing an immigraiton application, that there is no false, misleading or inaccurate statement. For example, it always makes sense to meet with both the spouses, and run some typical questions by them, to ascertain that the marriage is bona fide prior to taking on the case and filing the applications.