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WILL THE NOTICE OF ENTRY OF APPEARANCE REQUIREMENT BY AN ATTORNEY HINDER PRO BONO ASSISTANCE TO IMMIGRANTS?

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By
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On February 2, 2010, the Department of Homeland Security (DHS) published an interim rule, (available at http://tiny.cc/GvK9A), which adopts the Executive Office for Immigration Review (EOIR) rule at 8 Code of Federal Regulations (CFR) § 1003.102 that provides grounds to discipline practitioners for ethical violations. One specific provision, § 1003.102(t), which is the focus of this article, sanctions practitioners for failing to file a Notice of Entry of Appearance or sign pleadings, applications, motions or other filings if they have been engaged in practice and preparation.

The Department of Justice (DOJ) rules at 8 CFR § 1003.102, which were revised on January 20, 2009, significantly expanded the grounds under which a practitioner who practices before the EOIR can be disciplined. These rules can be found on the USCIS website at http://tiny.cc/j1rrs and will become part of the new DHS rule on March 4, 2010, and will extend to practitioners who practice before all of the components of DHS in immigration matters. This article raises preliminary questions about the impact of the specific section, 8 CFR § 1003.102(t), on pro bono clinics and services and illustrates that practitioners need further clarification from DHS to ensure that the rule does not undermine the provision of quality pro bono services.

Immigration practitioners are encouraged, even challenged, to take on pro bono representation and to participate in pro bono clinics. These clinics do a

yeoman's job in providing desperately needed assistance to indigent individuals who are unable to afford counsel and often require assistance on applications that are relatively straight forward and tend to require a simple, though thorough, review by an immigration attorney to spot important issues. In some clinics, non-attorney volunteers also assist in the filling up of applications that are supervised by volunteer lawyers. Typical examples of such applications are the N-400 for naturalization and more recently in the wake of the devastating earthquake in Haiti, the I-829 for Temporary Protected Status applicable to Haitian nationals. The need is significant and has prompted Second Circuit Judge Robert Katzmann and Second Circuit judicial nominee Denny Chin (currently a Federal District Court judge in the Southern District of New York) to bring together judges, private practitioners from large firms and solo offices, academics, clinicians, legal aid providers, and grievance committee members to study what could be done to promote good legal representation for low income immigrants. The reports of the study group are available here, http://tiny.cc/t95Wm.

The rule DHS will adopt on March 4, 2010 and which concerns us here, 8 CFR § 1003.102 (t), sanctions a practitioner who:

t) Fails to submit a signed and completed Notice of Entry of Appearance as Attorney or Representative in compliance with applicable rules and regulations when the practitioner:

(1) Has engaged in practice or preparation as those terms are defined in §§1001.1(i) and (k), and

(2) Has been deemed to have engaged in a pattern or practice of failing to submit such forms, in compliance with applicable rules and regulations. Notwithstanding the foregoing, in each case where the respondent is represented, every pleading, application, motion, or other filing shall be signed by the practitioner of record in his or her individual name...

The terms "practice" and "preparation" are defined in new sections 8 CFR § 1.1 (i) and (k), as follows:

The term practice means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS.

The term preparation, constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed DHS forms, by one whose remuneration, if any, is nominal and who does not hold himself or herself out as qualified in legal matters or in immigration and naturalization procedure.

As is quite evident, "practice" and especially "preparation" have been defined broadly to encompass pro bono assistance that an attorney may provide at a clinic where he or she may assist numerous individuals in understanding the requirements of and filling out particular applications. After these forms are completed, the applicant is responsible for submitting the application on his or her own to the appropriate filing address. Does this mean that a pro bono volunteer attorney needs to submit a notice of entry of appearance and sign his or her name on, for example, the I-829 or N-400 form? Given that these clinics often include a system whereby some volunteers check individuals in to determine whether they have the necessary documents with them, other volunteers may rove and answer questions raised by individuals as they complete the forms on their own, and another set of volunteers who do a final review of the application and documents, which of these volunteers would be required to sign as the preparer or put in the G-28?

Clearly, this rule was not intended to target pro bono lawyers who render assistance at a pro bono clinic for a deserving cause. The preamble to the proposed rule that sought to expand the grounds for disciplining practitioners in 8 CFR §1003.102, published in the Federal Register at page 44183 (http://tiny.cc/N3Jkt) states,

This provision is intended to address the growing problem of practitioners who seek to avoid the responsibilities of formal representation by routinely failing to submit the required notice of entry appearance forms. Furthermore, the difficulties in pursuing a practitioner for discipline for participating in the preparation of false or misleading documents are apparent when the practitioner fails to submit a completed notice of entry of appearance.

Nevertheless, without clarification, it appears that pro bono attorneys may need to submit a notice of appearance or to sign forms as preparers under 8 CFR § 1003.102(t).

While 8 CFR § 1003.102(t)(2) appears to make the failure to file a notice of entry of appearance a ground of discipline only applicable to one who is deemed to have "engaged in a pattern and practice of failing to submit such forms," the signing of the form by the practitioner in his or her name is a separate requirement in the next sentence of § 1003.102(t)(2). That sentence indicates that the attorney would be required to sign the forms only where "the respondent is represented . . . by the practitioner of record." However, considering that "the term representation . . . includes practice and preparation as defined in paragraphs (i) and (k)," 8 CFR § 1.1(m), what triggers the signature requirement is unclear. Overall, the rules do not provide clear guidance as to whether a pro bono attorney who is participating in a clinic to assist individuals who will submit forms pro se must sign as preparer.

The scope of acts that may fall under the rule must be clarified, given that the definition of "practice" includes not just a person appearing in a case, but also includes, through the added definition of "preparation" activities such as "the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers..." This definition is broad enough to include acts such as an attorney giving only brief advice through a consultation. Under those circumstances it is virtually impossible for such an attorney to submit a notice of entry of appearance if nothing is prepared or filed after the conclusion of such brief advice. On the other hand, if an attorney assists in the preparation of a motion, pleading or application, or reviews an application prepared pro se by the applicant, in addition to giving the brief advice, and even if the applicant will ultimately file pro se, it would trigger the requirement, at the very minimum, of the attorney signing his or her individual name on the application.

Although the regulations do not target pro bono attorneys, language in the preamble to the EOIR proposed rule indicates that pro bono attorneys are meant to be covered by the rule if their actions are found to fall within the definitions of "practice" and/or "preparation":

11. Section 1003.102(t)--Notice of Entry of Appearance

Comment . One commenter thought that the proposed provision was too broad because it subjects practitioners who provide pro bono services to discipline if they do not sign pleadings or submit a Form EOIR-27 or EOIR-28. The commenter suggested that disciplinary sanctions only be imposed when

filings demonstrate a lack of competence or preparation, or the practitioner has undertaken "full client services." Another commenter approved of this change, but suggested that pro se aliens be provided notice of this requirement in their own language and that immigration judges inform all who appear before the court of the requirement.

Response. The Department believes that all practitioners should submit Forms EOIR-27 and EOIR-28, and sign all filings made with EOIR, in cases where practitioners engage in "practice"' or "preparation" as those words are defined in 8 CFR 1001.1(i) and (k). It is appropriate to require practitioners who engage in "practice" or "preparation," whether it is for a fee or on a pro bono basis, to enter a notice of appearance and sign any filings submitted to EOIR. As stated in the supplemental information to the proposed rule, this provision is meant to advance the level of professional conduct in immigration matters and foster increased transparency in the client-practitioner relationship. Any practitioner who accepts responsibility for rendering immigration-related services to a client should be held accountable for his or her own actions, including the loss of the privilege of practice before EOIR, when such conduct fails to meet the minimum standards of professional conduct in 8 CFR 1003.102. It is difficult for EOIR to enforce those standards when practitioners fail to enter a notice of appearance or sign filings made with EOIR. However, in an effort to ensure clarity of this ground for discipline, a sentence will be added to this provision that makes it clear that a notice of appearance must be submitted and filings signed in all cases where practitioners engage in "practice" or "preparation." If a practitioner provides pro bono services that do not meet these definitions, then a notice of appearance is not necessary.

As for the suggestions made by the second commenter, the Department declines to codify in the regulations a rule that requires notice to pro se aliens or anyone appearing before an immigration judge of an attorney's obligation to enter a Notice of Appearance. The scope of this rule is to provide notice to attorneys of their responsibilities when engaging in practice and preparation before EOIR and to provide grounds for discipline when an attorney fails to carry through on his or her responsibilities.

73 Fed. Reg at 76914 (July 30, 2008). This fact makes clarification essential to the continued viability of pro bono clinics. In order to meet the challenges proclaimed by Judge Katzmann and the needs presented by human crises, such as the recent devastation caused by the earthquake in Haiti, pro bono

attorneys need to know how to proceed when they assist indigent immigrants in preparing applications.

Clearly, 8 CFR § 1003.102 (t) appears to be in conflict with ABA Opinion 07-446 (May 5, 2007), http://tiny.cc/18eBI, which holds, "A lawyer may provide legal assistance to litigants appearing before tribunals 'pro se' and help them prepare written submissions without disclosing or ensuring the disclosures of the nature or extent of such assistance." Although the opinion is not binding and assumes a context in which no law regulates undisclosed advice, it raises the important issues, not contemplated in the preamble or the rule itself, of the right of an individual to proceed pro se without disclosing a lawyer's involvement, the importance of "unbundling" legal services to allow assistance tailored to a specific need (and this is authorized under ABA Model Rule 1.2(c)), and the question of whether the fact of the assistance is material or the failure to disclose that assistance would constitute fraud in some way.

Although some may question the harm pro bono attorneys are concerned about in signing an application as a preparer, the signing requirement may dissuade volunteers from participating for fear of sanctions or potential litigation against them. Many clinics require individuals seeking assistance to sign a waiver or a limited scope of services agreement in order to protect the sponsoring organization and individuals volunteering from legal action. Most lawyers participating in pro bono clinics do not expect to be sanctioned as a result of reviewing a document or answering simple questions about a form that may be unclear to a non-lawyer. The new rule therefore jeopardizes the availability of pro bono services for the immigrant poor because it fails to clarify the scope of its reach.

The authors suggest that interested bar associations and organizations organizing pro bono clinics around a brief services model send in comments to the DHS rule on or before March 4, 2010 asking for modification of this requirement for pro bono volunteers providing pro se assistance to indigent immigrants.

(The views expressed in this article are solely of the authors and do not represent the views of any of the organizations they have any involvement with, presently or in the past.)

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