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WERE THE DOJ LAWYERS REALLY UNETHICAL IN TEXAS V. USA?

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Judge Hanen's order dated May 19, 2016 reprimanding thousands of Department of Justice lawyers for unethical conduct is astounding because it does not even appear that their conduct was unethical.

Much has already been written about Judge Hanen's strange order. Professor Orin Kerr questions whether the judge can even impose ethics classes on hundreds of DOJ lawyers who are not remotely connected to the case. Professor Shobha Sivaprasad Wadhia is justifiably concerned that the order, in addition to reprimanding DOJ attorneys, also threatens to 'out' the names of more than hundred thousand recipients of the Deferred Action for Childhood Arrival (DACA) program who were granted 3 year extensions instead of 2 year extensions. Professor Stephen Legomsky does not even think the DOJ lawyers did anything wrong.

I completely agree. Let's look at Rule 3.3 of the American Bar Association Model rules of Professional Conduct and the corresponding Texas Disciplinary Rules of Professional conduct, which Judge Hanen used, along with a fair sprinkling of dialogs from popular films, for finding that the DOJ lawyers were not truthful to the court. One of the cardinal ethical cannons is that a lawyer has a duty of candor to a tribunal. ABA Model Rule 3.3 provides in relevant part:

> a) A lawyer shall not knowingly:
>
> 1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

The relevant potions of the Texas version of Rule 3.3 are similar:

a) A lawyer shall not knowingly:

1) Make a false statement of material fact or law to a tribunal

2) Fail to disclose a fact to as tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

.....

5) offer or use evidence that the lawyer knows to be false.

In order for a lawyer to violate Rule 3.3, he or she must have knowingly made a false statement to the tribunal. Was there such a knowing violation of Rule 3.3 here?

On June 15, 2012, the Obama administration announced DACA that allowed young people who came to the United States prior to the age of 16 and had lived continuously since June 15, 2007, and were not in a lawful status, to be granted deferred action. On November 20, 2014, DHS Secretary Jeh Johnson issued a memo expanding DACA by changing the eligibility criteria to cover those who had come to the United States prior to January 1, 2010 instead of June 15, 2007 and by removing the maximum age limit of 31 ("Johnson Memo"). The Johnson Memo also lengthened the deferred action time from two to three years. The Johnson Memo further granted deferred action to parents of US citizens or resident children, known as the Deferred Action for Parent Accountability (DAPA), if they had arrived into the United States on or before January 1, 2010.

A group of states challenged the Johnson Memo in *Texas v. USA* by filing in a court in Brownsville, TX, where Judge Hanen sat who had already expressed strong views against the Obama administration on immigration. Judge Hanen granted a preliminary injunction on February 16, 2015 blocking DAPA and expanded DACA. Much has already been written to rebut the conclusions in this flawed decision, and the further flaw in the Fifth Circuit's affirmation of Judge Hanen's preliminary injunction. The preliminary injunction order did not expressly block the original DACA 2012 program. Qualified applicants thus continued to apply for DACA 2012 benefits. Under the terms of the Johnson Memo, qualified applicants under DACA 2012 started receiving grants of deferred action for 3 years instead of 2 years as of November 24, 2014.

Prior to the preliminary injunction of February 16, 2015, in conversations

between Judge Hanen and DOJ attorneys, the DOJ attorneys indicated to the court that USCIS had not taken any actions pursuant to the Johnson Memo. Although actions had been taken since November 24, 2014 to grant three year deferred action periods rather than two years, those stemmed from the DACA 2012 program. They were also well publicized. The expanded DACA, which brought forward the entry date from June 15, 2007 to January 1, 2010, was to take effect on February 18, 2015. Thus, when DOJ attorneys denied that the government had not taken any actions regarding expanded DACA, it was well conceivable that issuing three year deferred action periods instead of two years were actions stemming from the DACA 2012 program and had nothing to do with the expanded DACA program, which had not gone into effect.

After the preliminary injunction was issued, which applied to "expansions (including any and all changes)" to DACA 2012, the DOJ filed an Advisory indicating that out of an abundance of caution it was informing the court that it had granted three year periods of deferred action under the original DACA 2012 guidelines in the event of any misunderstanding.

Given this lack of clarity, as well as the fact that DACA 2012 was never the subject of the lawsuit, could the DOJ attorneys have knowingly made a false statement to be sanctioned under Rule 3.3? This Ethics Committee of the American Immigration Lawyers Association first questioned whether this was so in 2015, but it has become even more important to assert whether there was a Rule 3.3 violation Judge Hanen's order.ABA Rule 1.0(f) defines the terms "knowingly," "known" or "knows" as "actual knowledge of the fact in question." Rule 1.0(f) goes on to state that a "person's knowledge may be inferred from circumstances." When the DOJ attorneys were giving an assurance to the court about no action being taken, it could have well been understood to be in relation to recipients who would have become eligible under the expanded DACA, which had not gone into effect., Even the expansion of the deferred action term from two years to three years, if referred to by Judge Hanen, could have meant to relate to those recipients who would become eligible under the expanded DACA and not relating to the granting of a three year term to qualified recipients under the DACA 2012 program, which had nothing to do with the proposed preliminary injunction. It should be noted that since DACA 2012 was not part of the preliminary injunction, the administration could have fashioned any new benefits for them, and could have theoretically issued a separate guidance memorandum articulating three year renewals rather than

two years, separate from the guidance in the Johnson Memo.

Rule 3.3 also allows a lawyer to correct false statements that may have previously been made to the tribunal, which the DOJ did through the Advisory seeking clarification. Unfortunately, Judge Hanen did not view this as clarification but as a further admission that the government lawyers had deceived the court. It is hard to imagine that DOJ lawyers would have knowingly and intentionally deceived the court when three year work permits were being publically announced and given out to those eligible under DACA 2012, and it was a well publicized fact. There was nothing to hide, and it is inappropriate for a judge to use Rule 3.3 to club not one lawyer but thousands when it was not so clear that knowing false statements had been made to the court.

Although government lawyers oppose private immigration lawyers, and often take unreasonable positions against our clients we defend, Judge Hanen's reprimand should not be cause for celebration as such a fate could well befall a private lawyer. When there are issues of differing interpretation, involving complex immigration law and policy in hotly contested litigation, it is extremely problematic to use Rule 3.3 to accuse a lawyer for knowingly making false statements to a court or tribunal. While it is one thing for a lawyer to lose a case, it is quite another for a judge to also sanction a lawyer for ethical violations when there was no clear dividing line between an immigration program such as DACA 2012 that was not being enjoined and an expanded version of it that was being enjoined. This is especially so and rather precipitous when the case is still pending at the Supreme Court in United States v. Texas and the issues are yet to be resolved. And when a lawyer seeks to clarify the ambiguity, as required under Rule 3.3, a judge should not use that as a basis to accuse the lawyer for deliberate deception. Handing out sanctions for ethical violations in such a ham handed manner not only unfairly undermine a lawyer's reputation, but create a chilling effect, and in this case demonstrates Judge Hanen's bias and hostility towards only one of the parties in Texas v. USA.

On June 3, 2016, the government filed a mandamus action against the lower district court for exceeding its scope, with an accompanying request for a stay, essentially asserting that its lawyers did not intentionally intend to deceive the court, and any perception by Judge Hanen that there was a Rule 3.3 violation was due to miscommunications regarding the scope of the preliminary injunction. The government further complains that there was no hearing prior to the issuance of these unusual sanctions. This is a new front in the

government's battle against a district court judge that has blocked President Obama's deferred action program, and has also imposed an unusual reprimand for alleged ethical violations. In this instance, it is hoped that the government wins the day on both fronts. A dual victory will allow deserving undocumented immigrants to remain in the United States and it will also nullify the bizarre ethics sanctions of a hostile judge, thus sending a message that ethics rules should not be arbitrarily used to club well intentioned lawyers in hotly contested litigation.

(The views in this blog are the personal views of the author, and do not necessarily reflect the views of any organization that he is part of)