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The Honorable David Neal, Chief Immigration Judge
Executive Office for Immigration Review
Office of the Chief Immigration Judge
5107 Leesburg Pike, Suite 2500
Falls Church, VA 22041

Re: Comments on the EOIR Practice Manual

Dear Judge Neal:

The American Immigration Lawyers Association, offer our comments on the EOIR Practice Manual, which went into effect on July 1, 2008.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. We appreciate the opportunity to comment on the EOIR Practice Manual and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that we believe will benefit the public and the government. AILA members regularly advise and represent U.S. citizens, lawful permanent residents, and foreign nationals in removal proceedings before EOIR, and advise and counsel their U.S. citizen and permanent resident family members, and their employers on issues present in proceedings before EOIR.

We appreciate the hard work that has gone into the Manual. We believe that the uniform rules will benefit all stakeholders in EOIR. We are also very pleased that EOIR views the Manual as a "living document," and that EOIR, has already implemented revisions in response to comments and concerns expressed by AILA and others. We hope that this continues to occur.

We also appreciate EOIR's responsiveness in delaying the effective date of the Manual to July 1, 2008, and issuing several OPPMs clarifying various points in the Manual. We are particularly pleased about your response to the many

comments you received about the “30 day rule” for filings. The change to a “15 day rule” and the amended rules for motions to accept late filings are great improvements. Again, thank you for listening to these comments and concerns.

We would also ask that you consider the following additional concerns and suggestions. These comments are a summary of comments received from AILA members throughout the United States.

I. Substitution of Counsel – Rule 2.3

A. Introduction

AILA is concerned about the treatment of substitution of counsel in the Manual and the impact it will have on law firms, individual attorneys, and the clients we represent. In general, the Manual requires a motion for substitution of attorneys, even when the substituted attorney is from the same law firm. This rule will result in more motion practice, which will not only increase the burden on the individual attorney and law firms, but on the Immigration Judges, court staff, and on DHS, as well.

For example, law firms and legal services organizations often assign attorneys to master calendar hearings based upon the availability of the attorney on that given day. Because some law firms and legal service organizations have so many master calendar hearings and interviews on a daily basis, it is not always possible for the original attorney to stay with a case for every master hearing. Under the new rules, it will be very difficult for law firms and legal service organizations to continue this practice.

We can see two potential problems under this new rule:

Problem # 1: If the law firm wants to change the attorney who handles the case, the attorney will have to prepare a formal motion for substitution of counsel and this motion must be granted for the new attorney to appear. See Section 2(f). This creates substantial additional work for the attorney/law firm.

Problem # 2: We understand that in the Manual that there is a procedure for an attorney to appear “on behalf of” another attorney. However, in order for this to work, the IJ must still grant permission at the outset. What if the IJ does not grant permission?

In other words, a rigid application of these rules may make it difficult for attorneys from the same firm to represent a particular client before the Court. It does not take into consideration the fact that many clients must appear at multiple master calendar hearings before an individual merits hearing is scheduled or the matter is otherwise resolved.

We also note that it appears that ICE attorneys are not subject to these same requirements regarding appearances. It is unfair to require private practitioners to conform to the requirements of this rule, requiring motions (sometimes multiple ones) every time another attorney, even one from the same firm, wishes to appear for a particular client, whereas ICE attorneys may substitute for one another without

filing any type of motion. Certainly, one possible reason for the existence of this new rule is to insure attorneys are prepared for hearings. However, many AILA members have experienced an ICE attorney, substituting for a colleague at a hearing stating that he/she is not prepared because “it’s not my case,” or “I just got the file this morning and I have not had time to review it,” and even “I don’t have the A-file.”

In addition, the Substitution of Counsel rule does not take into consideration that individuals in removal proceedings often hire law firms, not individual attorneys to represent them. As a result, they enter into retainer agreements with the firm, not with any particular individual attorney in the firm.

B. Specific Examples: Substitution of Counsel – Rules 2.3 (f) (i) and (ii)

The rules cited above, which would require an attorney leaving a law firm to remain responsible as the “attorney of record” for cases before the Immigration Courts until a motion for substitution or withdrawal is approved is excessively burdensome and impracticable, both for law firms and the individual attorney for the reasons set forth below. AILA believes that the law firm, rather than an individual attorney, should remain responsible until a motion for substitution or withdrawal is approved.

As an illustration of the potential difficulties involved, which also include ethical issues, please consider the following two hypothetical situations. In both cases, “Attorney A” has no ownership interest in the “Firm” or the case(s).

Situation 1: Attorney A provides two weeks notice to the Firm. During the final two weeks of employment, Attorney A is informed that his/her Immigration Court case file is being transferred to Attorney B. Attorney A and Attorney B discuss the case, and Attorney B says that he/she will file a motion to substitute counsel with the Court as soon as possible. Attorney A leaves the Firm and no longer has access to information about any of her former case files, including alien names, registration numbers, and hearing dates. Attorney B fails to file the motion to substitute counsel.

Situation 2: Attorney A’s employment is terminated. Attorney A is told to leave the premises, and immediately loses access to all case files. Attorney A does not have access to information including alien names, registration numbers, and hearing dates. The Firm fails to reassign case(s) and no motion(s) to substitute counsel is (are) filed.

Under the new Practice Manual rules, in both scenarios, Attorney A retains “responsibility” for the case and is expected to attend the next hearing. In neither case does Attorney A have access to the alien’s contact information, hearing date(s), and alien registration (A number). Thus, Attorney A cannot submit a motion to withdraw from representation because the Immigration Court will not accept a motion without an alien registration number (see Section 3.3(c)(vi)). Even if the Court would accept a motion without an A-number, Attorney A may not have or remember the alien’s name, so that any motion could be connected the proper Court file. Without that information, it is impossible to properly file a motion to withdraw from representation. Additionally, without an A- number or name, Attorney A would not

be able to check or review the Court docket or hearing schedule, thereby making her attendance at the alien's next hearing impossible.

We would like to provide additional comments regarding potential complications in the above scenarios:

- In Situation 1, Attorney A might be able to file a motion to withdraw from representation, before leaving the firm. However, that requires notice to and the consent of the alien client. This may not be obtainable in the two week window.
- In Situation 1, even if the motion to withdraw is filed, Attorney A remains the attorney of record until the motion is approved. If this takes longer than two weeks, and Attorney A has left the Firm, this could require her to perform legal work on a file that she no longer has access to, or has a right to work on. It would be unethical and possibly illegal for Attorney A to just take the file with her to the new firm, in case the Court does not grant the motion. (The Firm is not likely to agree to Attorney A taking the file with her).
- In Situation 2, Attorney A was terminated from her employment. She therefore never had the time or the chance to file a motion to withdraw. As a result, she is completely reliant on the Firm to timely and properly file a motion for substitution of counsel. It seems that Attorney A risks legal malpractice and or discipline from state bar authorities in such an instance, if the Firm does not file the motion.

Rather than forcing Attorney A to retain responsibility for cases pending before the Immigration Courts after leaving the Firm, we believe that it would be most practical and beneficial for all parties if the substitution of counsel rule would impose any such duties or burden on the law firm, not on a particular attorney. Because the law firm "owns" the case, the firm and its principals should bear the burden of ensuring adequate representation of its clients unless and until the file is released or Attorney A is granted access to the file. EOIR and/or an individual Immigration Court would thus have the option of disciplining the Firm for any failure in this obligation..

We also suggest that EOIR might consider creating a system by which individual attorneys can notify the Court when they change firms. EOIR already has a record of cases for which an individual attorney is responsible. This computerized system could allow for an attorney to relinquish her individual representative capacity over a case, in the event of a change of law firm only. In instances where a firm wishes to withdraw from representation of an individual Respondent, the standard substitution of counsel motion procedure as outlined in the Manual would make the most sense.

Finally, the motions required for substitution and/or change of attorneys will result in much more motion practice and, therefore, much more work for IJs and EOIR personnel.

II. Format Issues – Rule 3.3

A. Introduction

The provisions related to format all use the word “should” rather than “must,” and it is unclear whether these format provisions are suggestions or requirements. This is an important issue because the Manual states in Rule 3.1(d)(i) that the Court may reject a filing if it fails to comply with proper language, signature, and format requirements. Practitioners who see the word “should” might assume that it is a suggestion only and might not fully comply with the format requirements, later to find that their filing has been rejected. This could likewise be the case for an attorney who is doing his best to comply with the new format provisions and is unsuccessful. We are concerned that an attorney’s failure to follow a format requirement could lead not only to a Respondent’s removal, but also to an ineffective assistance of counsel claim against the attorney. We respectfully ask the EOIR clarify in the whether or not a filing must comply with the format provisions. We also ask that a reasonable period of time be allowed for practitioners to “phase in” some of these new, very specific and particularized rules when complying with the new procedures in the Manual.

B. Pagination – Rule 3.3(c)(F)(iii)

The requirement that all submissions, including exhibits, be paginated by consecutive (sequential) numbers will add significantly to the time needed for preparation and submission of documents. To handle this efficiently, practitioners would have to consider buying a numbering machine, or paginate by hand. Pagination is not a problem for motions or briefs, or documents with a few pages. However, practitioners often submit substantial background and personal documentation in support of an asylum or cancellation claim. Even if already paginated, in the past, many IJ’s would take the submissions apart and add them to an already existing exhibit or document. IJ’s also intersperse ICE exhibits with a Respondent’s exhibits. If this practice continues, it is hard to see that the new sequential pagination rule will make reference to a particular document—by either ICE, Respondent’s counsel, or the IJ—any easier.

Consecutive numbering of pages to multiple submissions may seem reasonable at first blush. However, the rule does not give any suggestions in the following scenarios:

- The submission of two applications for relief at once, e.g.: an application for asylum and an application for cancellation of removal: They might be filed simultaneously at a master calendar hearing. Which application is “first” (starts with page 1)? Does it matter?
- The submissions of separate applications for relief for several Respondents in proceedings together: Prior to the issuance of the Manual, some IJ’s would designate the principal Respondent’s application for relief as Exhibit 3 (for example), with the remaining Respondents’ applications marked as Exhibits 3A, 3B, etc. How will this be handled now? How should the applications’ pages be numbered for presentation to the Court?

AILA asks that EOIR reconsider the new rule regarding consecutive (sequential) pagination for submissions.

C. Tabs – Rule 3.3(c)(F)(iv)

The Manual requires the use of alphabetic tabs that should be affixed to the right side of the pages. AILA suggests that tabs placed on the bottom of the pages are more practical for all parties. We note that DHS files its documents on the left side of the “A” files. As a result, tabs placed on the right will be bent into the fold of the file. In addition, USCIS has recently stated that tabs included in submission of petitions and applications be placed at the bottom of the page. As a result, when USCIS refers an asylum application to EOIR, it will send the I-589 with bottom tabs.

More important than the placement of the tabs is the issue of what exactly needs to be tabbed, and why? The rule does not given any indication of what should be tabbed. At some point, the existence of myriad tabs creates more confusion, rather than helping the parties find a particular document or page. Also consider that some attorneys previously used side tabs to define where the certificate of service, exhibit list, exhibits, etc. started in large packets of materials, such as in a motion to reopen or pre-hearing statement. We ask that EOIR give more guidance on what should be tabbed.

D. Binding/Fasteners – Rule 3.3(c)(F)(viii)

This rule in the Manual discourages the use of ACCO type (presumably bracket) fasteners for submissions to the Court. It also encourages the use of removable binder clips.

ACCO fasteners are simply the best way to ensure that the entire submission reaches the file, in order. Furthermore, with the new sequential pagination rules, it will be all the more important to insure there are no loose papers or pages in any given submission. AILA is concerned that submissions will be lost and/or pages will be missing, if ACCO type fasteners are not allowed. We note that currently, EOIR uses some sort of bracket (metal fastener placed in the two holes punched in the file). We understand that court staff might have to remove the ACCO fastener before placing the submission the Court’s file. However, we believe this very slight inconvenience is outweighed by the assurance that filings will be complete. AILA asks that ACCO or bracket-type fasteners continue to be allowed.

III. Motion Practice

The Manual does not mention whether “omnibus” motions are possible. While that fact appears not to preclude such motions, it would be helpful for the Manual to state that such motions will be allowed. The Manual seems to suggest that there must be separate motion papers filed for each aspect of the case. For example, separate motions for change of venue/telephonic hearing/interpreter need to be filed. The time spent by court staff and an IJ reviewing separate motions would be greatly reduced if two or more requests, if they are somewhat related, can be filed together. For example, motions for telephonic hearing and for an interpreter logically go together. With regard to the Proposed Orders (see Appendix Q) that are now required for all motions, in the event of an “omnibus”-type motion, the Proposed Order could be prepared with separate check boxes for each request.

Filing separate motions for each request uses more paper. It also takes more time to prepare, with these costs passed onto the alien Respondent, the attorney, or the non-profit organization which is representing the Respondent.

IV. Improper Filings – Rule 3.1(d)(i)

Thank you for distributing the June 17, 2008, Memorandum from Chief Clerk Mark Pasierb regarding defective filings. We appreciate the level of detail included in the Memorandum. Nevertheless, we are concerned that based on this Memorandum, nearly all filings that do not comply with the Manual, even if the defect is relatively minor, will be rejected by the Immigration Court. AILA is concerned that non-material format errors, such as improper pagination, or a motion with its documents in an order different from that set forth in the Manual will be rejected. We believe that, at least during a interim period of time, that a rule of “reasonable compliance” would be more in order, especially given the level of detail and change to prior practice the new Manual appears to require. We believe that most AILA members’ have found in the past that clerks and court staff have been reasonable and did not reject filings for small, non-material errors.

The Manual, and the June 17 Memorandum seriously impact Immigration Court practice in the U.S. The requirement that the defect be corrected within the original deadline is not realistic, especially if the original filing is by mail and the Court returns the filing by mail. As a result, especially for practitioners in outlying areas, it will often not be possible to make the correction and return the filing in a timely fashion. We recognize that there is a remedy for an untimely filing—to file a motion under Section 3.1(d)(iii). The requirements for such a motion, however, include affidavits and declarations, and a demonstration that the filing is material. Additional motions mean additional work, not only for attorneys and respondents, but for IJs, who will be adjudicating these motions.

We acknowledge your issuance on June 20 of the Operating Policies and Procedures Memorandum 08-03 which concerns filings made under the Practice Manual. That Memorandum states that as a general principle, court staff should be flexible in applying its provisions. Nevertheless, we ask that EOIR set up a “grace period” of several months after the Manual goes into effect, to allow attorneys, the DHS, and Court personnel to become familiar with these new, often very specific format requirements. For example, if a filing has a non-material format error, such as tabs placed on the bottom instead of on the right side, the clerk should accept the filing and inform the attorney that the tabs should go on the right side rather than the bottom and that as of [a date to be determined], the Court will no longer accept such a defective filing because the “grace period” is over. This would be even more effective if the Court had a form for defective filings on which the clerk could just check off the error and hand it to the attorney or mail it, if the submission was made by mail.

A “grace period” may also help EOIR personnel. In many of the larger courts, attorneys and Respondents file their documents in person at the clerk’s window. If the intake clerks must now look over every submission in order to determine whether the submission is in the correct format, the already long lines at the intake windows will become unbearable for all concerned. A “grace period” would allow the intake clerks to accept the filing, unless it has an obvious material error, such as no proof of service, for example. Then either the intake clerks or the IJ’s legal assistant could look at the filing more carefully to see whether it conforms to the format requirements. The clerks could then send out a

form letter to the respondent or attorney, advising of the error and also advising that once the “grace period” is over that non-conforming filings will be rejected.

We also raise the issue of the submission of supporting documents, where the Respondent has applied for multiple applications for relief. Rules 5.2 and 5.4 of the Manual seem to require the submission of separate packets with separate cover sheets for each form of relief sought. It is also unclear whether separate packets for supporting evidence are needed for multiple requests for relief. Preparing separate packets is extremely time-consuming and a consummate waste of papers and time. For example, a LPR who originally entered as a refugee might apply for cancellation of removal as well as for asylum, withholding of removal, and relief under the Convention against Torture. To require that multiple affidavits be prepared for each form of relief, copies of 10+ years of tax returns (a discretionary issue for both cancellation of removal and asylum) be submitted for each, and that the same or similar country conditions documentation be submitted for each form of relief would require the Immigration Judge to read the same documents twice. It would be more effective to submit one packet of supporting documents with a detailed exhibit list noting the relevance of each document, to each form of relief.

Moreover, while rules 5.2 and 5.4 appear to require submission of separate packets for multiple applications for relief, Rule 3.3(c)(ii) prohibits the filing of multiple copies of supporting documents. AILA requests clarification regarding the interplay of these two rules and whether supporting documents should be filed in duplicate where filed in conjunction with multiple applications for relief or whether one set of supporting documents is sufficient when filing multiple applications for relief.

V. Telephonic Hearings – Rules 4.6 and 4.7

AILA is concerned that the Manual allows for telephonic hearings, but does not require an IJ to hold telephonic hearings in situations where Respondents are detained in locations far from their normal place of residence and/or the attorneys representing these Respondents are located far from the place of hearing. This has created great hardship for Respondents. As you know, ICE frequently transfers detained Respondents from ICE facility to ICE facility, and these transfers often take place from one end of the U.S. to another. Also, they often occur after attorneys file notices of appearance and have received a hearing notice for a particular Immigration Court.

We appreciate that many IJ’s recognize these difficulties and allow for telephonic representation. We also appreciate your recent issuance of Operation Policies and Procedures Memorandum 08-04, which discusses the discretionary factors IJ’s must take into account when considering a motion for telephonic representation.

However, the fact remains that some IJ’s will not allow telephonic representation. In Los Fresnos, Texas, for example, attorneys are allowed to represent clients telephonically at bond hearings, but not at master calendar hearings. An attorney appearing for the first time telephonically on a bond hearing has no way of knowing that the court does not allow telephonic representation at the later master calendar hearing. Given ICE’s current transfer policy and the difficulties faced by Respondents and the attorneys who represent them, all IJ’s should allow telephonic representation of detained Respondents at bond

proceedings and at master calendar hearings. This should be official EOIR policy and should be reflected in the Manual.

VI. Motions to Change Venue – Rule 5.10(c)

AILA is very pleased that EOIR has eliminated the Manual's (prior) requirement that a Respondent file a copy of his application for relief with any motion to change venue. We are also pleased to note that although a Respondent who is requesting a change of venue is required to plead to the allegations in the Notice to Appear, he is not also required to admit the allegations in order for a change of venue to be granted.

As discussed above, ICE currently has a policy of sending Respondents to detention facilities far from their normal homes and far from their attorneys. After such Respondents are released on bond, they must travel long distances to return to their homes. Even if a pro se Respondent files a motion to change venue almost immediately after release, because of the brief time between their release and their next Master Calendar hearing date, sometimes an IJ is not able to make a decision on their motion to change venue before that date. Under the provision in the Manual, the filing of a motion to change venue does not excuse the appearance of the Respondent. Without a ruling on the motion, the Respondent must appear at the previously-scheduled hearing. This often necessitates another long trip, usually by bus or car, at the individual's private expense. Very often the Respondent reaches the court only to discover that the change of venue request has been granted. If an attorney has filed a Notice of Appearance and/or the motion to change venue then she, too, must deal with this issue and if not allowed to appear telephonically, appear in person at an Immigration Court that could be far away.

A better practice in this type of situation, which is already followed in some courts, would be for the IJ to waive the respondent's presence at the master calendar hearing, and render a decision on the motion on/or before the Master Calendar hearing date. If the motion is granted, the respondent would next appear in the court to which venue had been changed. If the IJ does not grant the motion, the IJ would order the Respondent to appear at the original court at a master calendar hearing at least three weeks in the future. This would prevent unnecessary and expensive trips for the Respondent, and allow him time to obtain substitute counsel, if necessary.

CONCLUSION

Thank you for addressing these concerns about the Immigration Court Practice Manual. We look forward to hearing your response. We also look forward to the Manual's existence as a tool in professionalizing the representation of our clients before EOIR.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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