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Rachel McCarthy
Disciplinary Counsel,
Office of the Chief Counsel
U.S. Citizenship and Immigration Services
Department of Homeland Security
70 Kimball Ave., Room 103
Burlington, VT 05403

Re: Comments on the Interim Rule: Professional Conduct for Practitioners: Rules, Procedures, Representation, and Appearances, DHS Docket No. DHS-2009-0077

Dear Ms. McCarthy:

The American Immigration Lawyers Association (AILA) submits the following in response to the request for public comment from the Department of Homeland Security on the interim rule “Professional Conduct for Practitioners: Rules, Procedures, Representation, and Appearances,” 75 Fed. Reg., No. 21, pages 5225-5230 (February 2, 2010).

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. AILA members regularly advise and represent U.S. citizens, lawful permanent residents, and foreign nationals in proceedings with DHS. We appreciate the opportunity to comment on the Interim Rule 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 commends the Department’s concern with endeavoring to ensure that all individuals represented before DHS receive competent and knowledgeable representation. AILA, too, is strongly concerned about

the adequacy of representation afforded those in proceedings before DHS. More particularly, we support the proposed rule to the extent that it will foster fairness and integrity in immigration proceedings, increase the level of protection afforded to non-citizens in those proceedings, and provide due process for those against whom sanctions may be sought. We, however, are strongly concerned about the new professional conduct rules for practice before DHS under 8 CFR sections 1.1 and 292.

Individuals appearing before DHS have both a statutory and a regulatory right to representation by counsel.¹ The new provisions under DHS's rules for appearance of counsel and disciplinary proceedings threaten to chill an individual's right to seek zealous representation by counsel, inappropriately authorizes non-attorney DHS adjudicators to initiate disciplinary complaints, will force immigration attorneys to sacrifice ethical decisions for fear of non-compliance with the agency's disciplinary scheme, and will ultimately undermine the statutory right to be represented by counsel in immigration proceedings.

Moreover, the rule inappropriately interferes with an individual's attorney-client privilege, and the definition of practice and preparation will hinder non-profit organizations and *pro bono* attorneys from assisting non-citizens in free legal clinics. Finally, the rule empowers notary publics to engage in the unlawful practice of law with impunity.

AILA provides the following comments for revision to the rule.

Introduction

The underlying foundation of the DHS disciplinary rule is that DHS adopted EOIR's disciplinary scheme under 8 CFR section 1003.102, including EOIR's grounds of discipline. The Supplementary Information to the rule indicates that DHS reviewed the EOIR rule and accompanying public comments.

AILA commented on the EOIR rule, and was concerned that the scope of the disciplinary standards of misconduct were vague. Additionally, our comment expressed concern about the procedures for adjudicating disciplinary complaints. To the extent that the EOIR disciplinary scheme is applied in the DHS context, AILA renews its objections to the EOIR rule. AILA offers additional comments on this rule's incongruent application to disciplinary complaints filed for alleged attorney misconduct in DHS proceedings.

¹ Individuals have a "right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs." 5 USC § 555(b); *see also* 8 CFR § 103.2(a)(7)(i). Additionally, 8 CFR section 292.5(b), explicitly provides that in any examination any "person involved" in the interview has a right to be represented by an attorney or representative.

I. Adoption of EOIR Disciplinary Rules is Inappropriate in the DHS Adjudication Context

The agency's decision to adopt the disciplinary scheme for EOIR representation² is misguided. The wholesale adoption of the EOIR disciplinary scheme fails to acknowledge the stark differences between representing individuals before DHS officials and representing individuals in an administrative court setting of EOIR. Disciplinary procedures that may be appropriate in EOIR proceedings are not appropriate for DHS adjudications. It is one thing to allow an EOIR Immigration Judge to initiate a disciplinary complaint against an officer of the court who is appearing as counsel. However, the Interim Rule allows non-attorney DHS adjudicators, responsible for deciding the case before them, to initiate a disciplinary complaint against an individual attorney. The agency's adoption of EOIR's disciplinary scheme fails to acknowledge these differences between EOIR and DHS proceedings.

Most DHS adjudicators are not attorneys. Unlike EOIR judges, DHS adjudicators are not trained in attorney ethics and, thus, do not have the grasp of legal issues and legal ethics to adequately identify misconduct for which disciplinary proceedings could be initiated. Moreover, simply providing training for non-attorneys in legal ethics is not adequate. Attorneys are professionals held to a high ethical standard, not only ingrained by legal ethics training in law school and a bar exam specifically covering professional responsibility, but further supported by the fact that their sole ability to practice law is dependent on their constant adherence and to ethical standards. Individuals not subject to such ethical standards and not subject to disbarment are in no position to adequately judge the standards of conduct of a profession to which they do not belong. Therefore, non-attorney DHS adjudicators are in no position to determine whether an attorney's legal decisions and conduct warrant a disciplinary complaint. The rule's allocation of disciplinary authority to initiate a complaint to DHS adjudicators is wholly inappropriate.

Moreover, the rule fails to define which DHS employees are considered "adjudicating officials," authorized to initiate disciplinary complaints. Without further clarification, it is unclear if individual adjudicators of individual cases are authorized to initiate a complaint against an attorney who appears before them, or if "adjudicating official" has an alternate meaning under the rule. AILA strongly urges a refined definition of "adjudicating official" that excludes individual adjudicators, responsible for deciding the case before them, from initiating a disciplinary complaint against an attorney that is appearing before them in a case. To empower adjudicators to initiate disciplinary complaints against attorneys appearing directly before them creates an inherent conflict of interest.

Given our stated concerns regarding the conflict of interest and barriers to justice, AILA recommends that the revised definition of "adjudicating official" reflect that an "adjudicating official" for purposes of this rule be limited to a supervisory level official within USCIS or DHS who does not have primary responsibility for adjudicating individual cases, and who is not the principal adjudicator for the case in which challenged

² 75 Fed. Reg. at 5228.

conduct is at issue. Limiting the power to initiate a disciplinary complaint to supervisors will ensure that the balance of power in an adjudication proceeding is preserved.

a. The DHS Rule's Disciplinary Scheme Will Chill the Zealous Representation of Clients

Empowering DHS adjudicators with the authority to initiate disciplinary proceedings arms adjudicators with a sword and will greatly burden an individual's ability to obtain zealous representation from an attorney. Revised section 292.3(b) states that "[n]othing in this regulation should be read to denigrate the practitioner's duty to represent zealously his or her client." However, the entire rule eviscerates an attorney's ability to provide zealous representation of the client in adjudications and proceedings before DHS. The rule creates a disciplinary scheme that has the potential to force a party to a proceeding to choose sides in any adjudication proceeding conflict. On one side is the adjudicator, who has the authority to initiate disciplinary proceedings against a party's attorney. The same adjudicating officer also has the discretion to approve or deny the party's application or petition. The party is placed in an untenable position: he or she must choose between the lawyer and the adjudicator, who wields enormous power - a position that is solely the making of this rule.

Conversely, an attorney may make the decision to not object to an adjudicator's conduct or line of questioning during an interview, in an attempt to placate an adjudicator so as not to incur the adjudicator's wrath and risk a complaint. This potential abdication of the attorney's role is a direct consequence of empowering adjudicators to initiate disciplinary proceedings. Such circumstances will effectively force attorneys to abandon their roles as zealous advocates for their clients in fear of retribution by an adjudicator.

b. The Adopted EOIR Disciplinary Scheme in the Context of DHS Adjudications Fails to Provide Adequate Due Process Protections

The proposed rule allowing conduct during an interview to form the basis of a disciplinary complaint fails to provide adequate due process protections to attorneys. Unlike EOIR proceedings, DHS proceedings are conducted without an official record or transcript and frequently without witnesses. In an EOIR proceeding, an attorney-respondent in a disciplinary proceeding has the due process protection of an EOIR record and the availability of witnesses to rebut alleged actions of attorney misconduct. In contrast, DHS proceedings, by their very nature, are interviews conducted by adjudicating officers with non-citizen applicants, petitioners, or beneficiaries, and the individual's attorney. DHS proceedings do not provide a record of proceedings, and lack any credible witnesses except for those with a vested interest in the outcome of the case.

The rule would allow a DHS adjudicator to initiate a disciplinary complaint against a practitioner based solely on the report of the adjudicator, without any record to corroborate the claims, and without any uninterested parties to witnesses to the alleged misconduct. AILA suggests that until DHS adjudications are conducted in a manner that would provide a record of proceedings, basing a disciplinary complaint on a DHS adjudicator's report of events is inappropriate and violation of due process.

II. The Proposed Rule's Automatic Waiver of the Attorney-Client Privilege Inappropriately Interferes with an Individual's Ability to Seek Legal Counsel

The rule's automatic waiver of attorney-client privilege upon filing of a disciplinary complain under Section 292.3(d)(2) violates most state ethics rules and improperly interferes with an individual's right to attorney client privilege. New section 292.3 (d)(2) states, in part:

Upon receipt of a disciplinary complaint or on its own initiative, the DHS disciplinary counsel will initiate a preliminary inquiry. *If a complaint is filed by a client or former client, the complainant thereby waives the attorney-client privilege and any other applicable privilege, to the extent necessary to conduct a preliminary inquiry and any subsequent proceeding based thereon.*

Waiver of the attorney-client privilege is not valid without informed consent. Moreover, the rule's automatic waiver of the privilege further exposes the complainant to potential civil or criminal proceedings by DHS based on information it may learn in the course of investigating the complaint. AILA strongly urges DHS to strike this portion of the rule, which inappropriately interferes with the attorney-client privilege.

This provision is highly unusual. No other state bar disciplinary authority requires complainants to waive the attorney-client privilege upon filing of a disciplinary complaint. Additionally, any waiver of the attorney-client privilege in a disciplinary proceeding must follow well-established law. The waiver of attorney-client privilege must be obtained by informed consent -- not automatically as the current rule provides -- and the waiver must be limited to a waiver of the privilege in the context of a preliminary disciplinary inquiry and any subsequent *disciplinary* proceedings based thereon. Under the current rule, the automatic waiver of attorney-client privilege lacks informed consent³, and is therefore unlawful. Also, the rule's language regarding the waiver's applicability to "any subsequent proceeding" is vague and in need of limitation to any subsequent disciplinary proceedings.

DHS adjudicators are not lawyers, so therefore, are not competent or authorized to advise a person on the waiver of rights. Under the rule's disciplinary scheme, the only lawyer involved in the initial process of filing and reviewing a complaint is the DHS Disciplinary Counsel. It would be up to the disciplinary counsel to provide information to the potential complainant prior to the complaint being filed. This puts the Disciplinary Counsel in both the role of prosecutor of the lawyer and legal advisor to the lawyer's

³ The client's decision to waive the attorney-client privilege can only occur after informed consent. Informed consent requires an understanding of the risks and benefits attendant upon disclosure. Any lawyer seeking the person to waive their privilege must take steps to inform the client of these risks prior to the waiver being valid. See ABA Ethics Opinion 01-421 (2001).

client who may be filing the complaint.⁴ Without this informed consent, the waiver is not valid and the complaint cannot move forward.

Moreover, one of the risks that must be disclosed to the client is the risk that DHS will use the information gained in the course of the investigation to modify past immigration benefit proceedings or institute new proceedings contrary to the best interests of the client. It seems hard to believe that a client would move forward with a complaint after being informed of this possibility. Rather than waive this privilege and risk a harsh penalty, these clients would more likely seek the assistance of state bar disciplinary authorities, which do not mandate the same requirement.

III. The Terms “Practice” and “Preparation” as Defined in New 8 CFR § 1.1 (i) and (k) and 8 CFR § 1003.102(t) Will Negatively Impact the Level of *Pro Bono* Service Provided by Attorneys to Noncitizens

The new rule and definitions of “practice” and “preparation” raise numerous concerns about the ability of attorneys to provide “unbundled” services to *pro bono* clients without being obliged to assume undefined responsibility or face disciplinary action.

The new definitions do not provide clear guidance to *pro bono* service providers as to when, if ever, an attorney participating in a *pro bono* clinic (such as Haitian TPS or naturalization/citizenship clinics) would be required to sign a form or to submit a G-28 in order to comply with the rule. As currently drafted, these definitions 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. Answering questions and assisting an individual fill out the forms seems to constitute, at the very least, the “incidental preparation of papers,” according to the plain language of the rule as it is currently written.

Furthermore, the signing requirement may be triggered independently of the definitions. The last sentence of 8 CFR § 1003.102(t) requires a practitioner to sign a form where “the respondent is represented . . . by the practitioner of record,” as indicated, pursuant to 8 CFR section 1.1 paragraphs (m), (i) and (k). Taking these definitions together, the brief service provided at a clinic could amount to the “giving of advice” and “incidental preparation of papers” and thus trigger the signature requirement, even if the applicant will ultimately file *pro se*.

Pro bono clinics usually require individuals seeking assistance to sign a waiver or limited scope of services agreement that clearly defines the services provided and directs the individual to retain an attorney if further assistance is required. Often, individuals are provided with resource lists informing them where they can get additional help. It is unclear that such agreements, although allowed under the Model Rules of Professional

⁴ Generally, conflicts of interest may be waived, however, under this set of circumstances, AILA cannot contemplate a theory where this conflict would be waivable.

Conduct, specifically Rule 1.2(c)⁵ and acknowledged in 8 C.F.R. 1003.102(q)⁶, would be binding under the new definitions discussed here.

Pro bono clinics often utilize systems in which numerous volunteers working in concert help an immigrant complete a single application. The new rule raises the question of which of these volunteers, if any, would be required to sign as the preparer or submit a G-28, especially where multiple individuals may have assisted with the preparation of a single application. Furthermore, attendees often leave such clinics and take their applications with them with the intention of submitting them at a later date. However, once the individual leaves the clinic, the attorney who signed the form has no control over the application. What prevents an attorney from being wrongly held liable where he or she has signed the form and subsequently the applicant makes changes to the application and submits it with significant flaws? The consequences of submitting a G-28 are considerable – this requirement vitiates any possibility of limited representation, and requires on-going responsibility for the case, including responding to Requests for Evidence and other USCIS inquiries.

The signing requirement will most likely discourage volunteers from participating for fear of sanctions or potential litigation, exacerbating the critical need for *pro bono* services to the public.

AILA endorses the recommendation set forth by the Bar Association of the City of New York in its comment on these regulations. We encourage DHS to craft an exception for limited *pro bono* legal services consistent with Rules 1.2(c) and 6.5 of the Model Rules of Professional Conduct (“Model Rules”) and other similar state codes. DHS could insert the language suggested by the City Bar, adding the following after the final sentence of 8 CFR § 1003.102(t):

This section shall not apply to a lawyer providing short-term limited legal advice, defined as legal advice or representation free of charge as part of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization with no expectation on behalf of the client that the assistance will continue beyond what is necessary to complete an initial consultation. In this circumstance, the lawyer must secure the client’s informed consent to the limited scope of the representation.

⁵ Rule 1.2(c) provides as follows: “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”

⁶ 8 C.F.R. section 1003.102(q)(3) provides in relevant part: “A practitioner should carry through to conclusion all matters undertaken for a client, *consistent with the scope of representation as previously determined by the client and practitioner*, unless the client terminates the relationship or the practitioner obtains permission to withdraw in compliance with applicable rules and regulations.” (Emphasis added.)

IV. Clarification of “Immigration Service Providers” Definition is Needed to Prevent The Unlawful Practice of Law

AILA recommends the deletion of 8 CFR § 1.1(k), or a revision that specifically proscribes practice and preparation of immigration forms by a notary public. The revision should additionally provide that any notary public or other individual that engages in the unlawful practice or preparation of immigration forms without authorization from DHS will be referred to state authorities for unlawful practice of law prosecution. The clarification contained in 8 CFR § 1.1(k) is not helpful and will lead to more harm to immigrants by those unauthorized to practice immigration law. Subpart (k) states:

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.
(Emphasis added.)

Although this section purports to clarify who may practice immigration law, it actually will lead to more harm. The rule validates the work of notaries public. No application, form, or petition requires a notary to verify and notarize a name or signature, yet this subpart seems to specifically allow notaries to provide legal advice and assistance because of the language of this rule.

The problem of unauthorized practice of law has long been prevalent among notary publics in the United States. A notary in the United States is someone who verifies the identity of a person who is signing some type of legal document. The involvement of a notary in the selection and completion of forms is treated in many states as the unauthorized practice of law. Most immigrants are not aware that an individual who is solely a notary in the U.S. is not authorized to practice law. In Mexico, as in many other Latin American countries, a notary is first a lawyer, who later applies for the notary license after passing specialized tests. In the United States, a notary has no educational requirement. Unsuspecting immigrants are too often led to believe that notaries public can knowledgeably help them complete immigration forms, only to later learn this has cost them their ability to live and naturalize in this country.

States do not have sufficient resources to police those notary publics who are engaged in the unauthorized practice of law and many notary publics unlawfully practice immigration law with impunity, oftentimes to the detriment of the applicant. The inclusion of the wording in the regulation may serve as a means for notary publics to rely on the federal regulation as authorization to practice.

Additionally, the regulation continues to ignore the fact that even the selection of a form involves a decision requiring the review of eligibility and advisability of filing. Some states have enacted legislation regarding their notary publics restricting them from filling out immigration forms, as it has been determined at both the state and federal levels to be near impossible to complete immigration forms without engaging in at least some form of the practice of law.⁷ Despite these findings and contrary to public policy, many USCIS information officers will hand a packet of forms to an individual with the suggestion to go to any notary public – the practice should stop. The rule should disavow the practice of recommending noncitizens seek the services of notaries public and individuals engaged in the unlawful practice of law.

AILA recommends revision of 8 CFR section 1.1(k) to make the definition comport with both the state and federal the public policies by removing this language: “[b]ut 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.”

Modifying the rule’s language under subsection (k) will not reduce representation for noncitizens. The regulations already provide for low cost services by churches for their parishioners, friends may help friends without fee, law students and law school graduates may represent people without direct remuneration and accredited representatives may represent people for a nominal fee.

V. Adjudicators and Clients Do Not Need the Protections of This New System, as They Can File Complaints With Any State Bar Disciplinary Authority Where The Lawyer Is Barred.

This new disciplinary scheme creates new and difficult problems that are not attendant in state disciplinary systems. The avenue of complaint is not necessary and only raises grave issues. As we have pointed out, clients will not benefit from the system due to numerous issues, including the automatic waiver of the attorney-client privilege. The only potential pool of complainants who will use the system are adjudicators, whom we have pointed out are more likely to use this new rule as a sword for their own use rather than for the protection of the adjudication system.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

⁷ *UPLC v. Cortez*, 692 S.W. 2d 162 (TX 1985); *Legal Opinion*, Reese, General Counsel, CO 292.2 (May 20, 1992) (selection of forms is giving legal advice); *Memo*, Virtue, Acting Gen. Counsel (Aug. 6, 1993); *Letter*, Reese, General Counsel, CO 292.2 (May 20, 1993).