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John Blum, Acting General Counsel
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

Re: Comments on the Proposed Rule by the Executive Office for Immigration Review: Professional Conduct for Practitioners – Rules and Procedures, and Representation and Appearances RIN NO. 1125-AA59, EOIR Docket No. 160P

Dear Mr. Blum:

The American Immigration Lawyers Association (AILA) submits the following in response to the request for public comment by the Executive Office for Immigration Review (EOIR), on the proposed rule (“Proposed Rule” or “Proposed Regulation”) Professional Conduct for Practitioners – Rules and Procedures, and Representation and Appearances 73 Fed. Reg., No.147, pages 44178-44189 (July 30, 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. AILA members regularly advise and represent U.S. citizens, lawful permanent residents, and foreign nationals in removal proceedings before EOIR. AILA members also advise and counsel U.S. citizen and permanent resident family members and employers on issues present in proceedings before EOIR. We appreciate the opportunity to comment on the Proposed 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 Agency’s concern with endeavoring to ensure that all individuals represented before the EOIR receive competent and knowledgeable representation. AILA, too, is strongly concerned about the adequacy of representation given to those in proceedings before EOIR. More particularly, we support the proposed rules to the extent that they 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.

Although the Proposed Rule's expanded standards for discipline of professional conduct are generally in conformity with the Model Rules of Professional Responsibility of the American Bar Association ("ABA Model Rules"), they lack the guidance and specificity that certain Comments to the ABA Model rules ("Comments") establish, which would provide context for lawyers better to conform their professional conduct to the proposed standards and notice of conduct which EOIR regards as a basis for discipline. As discussed below, we believe that certain Comments should be reflected in your final rule.

AILA is also concerned that the rules should apply and be enforced equally with respect to professional conduct by government attorneys, as well as counsel for the non-citizen.

Moreover, AILA is concerned with procedural aspects of implementing the proposed rules, including those addressing disciplinary procedures for the expanded disciplinary power of EOIR. AILA suggests that EOIR adopt procedures similar to state bar association disciplinary structures and that the final rule expressly require the standard of "clear and convincing" to initiate disciplinary proceedings.

Finally, AILA believes the attorney discipline rules should not be made final unless the Rules of Professional Responsibility for Immigration Judges, 72 Fed. Reg. 35510 (June 28, 2007) are made final contemporaneously.

I. The Standards of Misconduct are an Important Tool in Redressing Non-citizen's Ineffective Assistance of Counsel Claims

The supplementary information to the proposed standards, the large number of ineffective assistance of counsel claims, and questions of lawyer competence in recent judicial decisions ascribe the need for professional responsibility standards. As such, the proposed standards will be an important tool in redressing ineffective assistance of counsel claims and should also act in tandem with non-citizen's requests for re-opening a case based on an ineffective assistance of counsel claim. The same judicial decisions have raised serious issues as to the conduct of Immigration Judges and as we suggest below, should promptly lead to a final rule of standards for immigration judges, which were proposed but not acted on more than a year ago. 72 Fed. Reg. 35510 (June 28, 2007).

II. The Scope of the Standards of Misconduct are Vague

The proposed standards borrow from the ABA Model Rules' wording without incorporating or adopting the ABA Model Rules themselves or their extensive commentary following each rule. The Comments give notice and context to the substance and intended applicability of each rule. Without illustrating proposed standards by factors the certain Comments contain, they are often vague, are subject to abusive interpretation, and do not adequately or fairly limit the conduct subject to discipline before, rather than constructive guidance from, the agency. We, thus, suggest additional material for the final regulations drawn from certain Comments to the ABA Model Rules as set forth below.

The proposed standard on Diligence, new section 8 C.F.R §1003.102(q), provides a good example where the proposed standard does incorporate aspects of the Comments to the ABA Model Rule. It provides the necessary explanation and interpretation of the standard's scope and meaning. ABA Model

Rule 1.3 provides: “A lawyer shall act with reasonable diligence and promptness in representing a client.” The Comments illustrate where diligence is required and how the agency proposes to assess it.

Following are AILA’s concerns with the individual proposed standards, as well as suggestions for providing content for their scope and interpretation.

Definition of Attorney: New Section 1003.102(f)

This section should also define “accredited representative.” Moreover, just as an attorney has a “bar card,” we urge EOIR to issue an accredited representative card in order to ensure that only attorneys and accredited representatives are appearing in immigration court. No longer would judges be forced to accept the assertions of accredited representatives that they are, in fact, accredited. Such a card would allow the court to have a basis to confirm the accredited status and protect immigrants from unscrupulous imposters.

Previous Final Order Finding Ineffective Assistance of Counsel: New 8 C.F.R. § 1003.102(k)

AILA appreciates the acknowledgement that EOIR will take into consideration previous findings of ineffective assistance of counsel by a federal court. This factor of consideration under new 8 C.F.R. § 1003.102(k) recognizes that ineffective assistance of counsel can occur outside the parameters of the immigration courtroom and even occur subsequent to final decision by the BIA.

AILA suggests that the proposed standard be revised and include a requirement that the previous finding of ineffective assistance of counsel must be contained in a final order. AILA recommends the following replacement language for proposed standard 8 C.F.R. § 1003.102(k):

Engages in conduct that constitutes ineffective assistance of counsel, as previously determined in a *final order* by the Board, an immigration judge’s *final order* in an immigration proceeding whose time for appeal has lapsed, or a *final order* issued by a Federal Court judge or panel, and a disciplinary complaint is filed within one year of the finding;

Assist in Performance of Unauthorized Practice of Law: New 8 C.F.R. § 1003.102(m)

This standard should be revised to include a *knowingly* mens rea requirement. AILA suggests the following revision: “*Knowingly* assists any person, other than a petitioner as defined in § 1003.101(b), in the performance of activity that constitutes the unauthorized practice of law.”

Conduct Prejudicial to the Administration of Justice: New 8 C.F.R. § 1003.102 (n)

A standard incorporating “conduct prejudicial to the administration of justice” or “undermining the integrity of the administrative processes” has the potential for ensnaring respondents in proceedings for technical, immaterial, and excusable misconduct and is so broad as to swallow all of the other standards.

AILA recommends the addition of the supplementary information from the Federal Register notice and certain Comments to the ABA Model Rules into the text of the standard. Additionally, AILA recommends the addition of a *knowingly* and *intended to be* mens rea requirement for this standard. AILA suggests the following revision: “*Knowingly* engages in conduct that is *intended to be* prejudicial to the administration of justice or *intended to* undermine the integrity of the adjudicative process.”

The proposed rule acknowledges that this standard is borrowed from ABA Model Rule 8.4(d). The supplementary information to the proposed rule explains that the parameters of the rule are best described in a D.C. Court of Appeals case:

[T]he conduct, which includes any action or inaction, depending on the circumstances, must be considered improper. Improper conduct occurs, for instance when the practitioner “violates a specific statute, court rule or procedure, or other disciplinary rule,” but impropriety may also be found when, considering all the circumstances, the practitioner “should know that he or she would reasonably be expected to act in such a way as to avert any serious interference with the administration of justice.”

Second, in order to fall under the domain of the “administration of justice,” the conduct must bear directly upon the judicial process ... with respect to an identifiable case or tribunal. Third, the practitioner’s conduct must taint the judicial process in more than a *de minimis* way.

73 Fed. Reg 44178, 44181 (Wednesday July 30, 2008) (*citing In Re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996)). The proposed rule should incorporate these three principles.

Additionally, Comment 3 to ABA Model Rule 8.4 should be incorporated:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice base upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d)...

Also, the principles of Comment 4 to Model 8.4 should be incorporated:

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning the validity of a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Competence: New CFR Section 1003.102 (o)

AILA commends the Department's addition of Competence as a new ground for disciplinary sanction. All representatives appearing before the EOIR should have the requisite "legal knowledge, skill thoroughness, and preparation reasonably necessary for representation."

Fair notice to the representative of what competence issues are of disciplinary nature would be enhanced if the proposed rule incorporated a recognition of factors to be considered under the standard for misconduct set forth in Comments 1, 3, and 5 of ABA Model Rule 1.1.

Comment 1 to ABA Model Rule 1.1 states that whether a lawyer employs the requisite knowledge and skill in a particular matter should involve consideration of:

- Relative complexity and specialized nature of the matter
- Lawyer's general experience
- Lawyer's training and experience in the field in question
- The preparation and study the lawyer is able to give the matter, and
- Whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

Moreover, Comment 3 to ABA Model Rule 1.1 recognizes that special training and prior experience are not always necessary where a lawyer is initially unfamiliar with an area of law and that recently admitted lawyers may be as competent as seasoned practitioners. Important legal skills, such as the analysis of precedent, evaluation of evidence and legal drafting are required in all legal counseling. Further, attorneys should be encouraged to be available where emergency representation in an area is needed, such as areas of catastrophe like Hurricane Katrina or in massive enforcement raids on large employers in rural areas, but where they do not have sufficient expertise to undertake a matter if referral or association with an experienced lawyer is not practical.

Finally, Comment 5 to ABA Model Rule 1.1 illustrates the requirements for thoroughness and preparation. The following factors should be recognized in the text of the proposed standard for misconduct:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence...

The supplementary information to the competence standard recognizes the high stakes that are involved in a majority of cases that come before the EOIR in determining whether aliens are allowed to remain in the United States, determining whether an individual will be returned to a country where the alien will suffer persecution or death, or determining if an individual is a citizen of the United States. The proposed addition of material from the Comments provides interpretive clarity.

Scope of Representation: New Section 1003.102(p)

AILA has initial concerns that this standard attempts to regulate activity that has traditionally been within the authority of state bar associations. Generally, the scope of representation is defined by the written retainer, representation agreement, or engagement letter entered into between attorney and client. Such agreements have traditionally been under the exclusive jurisdiction of state bar associations' rules for professional conduct and are interpreted under state contract law. To the extent that the proposed rule infringes on the authority of state bar associations to regulate the practice of law as it applies to retainer agreements, AILA objects to this proposed standard. However, AILA understands the role that retainer agreements play in the representation of non-citizens before the EOIR. AILA further understands the Agency's concerns regarding withdrawal of attorney representatives from cases. AILA also agrees that EOIR and immigration judges have a role in determining whether a representative may withdraw from a case; however, this last concern can be addressed without infringing on the right of private contracts in engagement consistent with state law.

The proposed standard on scope of representation lays out a stringent standard that could be read to require attorneys to represent individuals, even where there is a conflict of interest between the attorney and the client or where a conflict of interest would require withdrawal under state law. This standard must be written and interpreted in a manner that provides attorneys the flexibility to comply with the conflict of interest standards imposed on attorneys from their respective states. ABA Model Rule 1.16 provides that attorneys must request withdrawal where "(1) the representation will result in violation of the rules of professional conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged." AILA suggests that this proposed standard adopt the provisions of ABA Model Rule 1.16 in this regard.

Additionally, AILA strongly recommends that the proposed standard add a list of factors that EOIR and Immigration Judges must consider prior to making a decision regarding withdrawal. As to withdrawal, EOIR's standard should require Immigration Judges to consider the following factors when deciding whether to allow an attorney to withdraw from a case:

[A] lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw, unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

ABA Model Rule 1.16(b). Additionally, judges determining whether to allow an attorney to withdraw should take into consideration if withdrawal can be done in a manner that would not prejudice the individual's case.

Finally, this standard must be flexible enough to take into consideration the multiple contexts in which immigration attorneys, especially pro-bono attorneys and non-profit organizations, represent clients. Many states authorize and many times attorneys assist non-citizens for a very limited matter (i.e. represent them for a bond hearing or before the immigration judge for a master calendar hearing) but do not agree to represent the individual for the entirety of proceedings before the agency. The EOIR rules should expressly permit limited appearances given the large number of aliens who appear *pro se* as their only alternative to such limited representation. Moreover, attorneys are faced with clients who refuse to pay the fee associated with a fee agreement. In such situations, attorneys should not be held to an unreasonable standard which would require them to provide services without payment of the agreed fee or inconsistent with state conflict of interest laws.

Diligence: New Section 1003.102(q)

As described above, AILA appreciates the proposed Diligence standard's incorporation of Comments to the ABA Model Rule. AILA suggests that the Diligence standard be revised to include a good cause exception. Failure to act with reasonable diligence or failure to file something in a timely manner should be a grounds of discipline, only absent good cause. For example, an unforeseeable emergency may impede an attorney from filing in a timely manner. Moreover, the current rules should be revised to permit *nunc pro tunc* filings for good cause shown since in a "true emergency" relief can only be sought after the event causing delay.

Communication: New Section 1003.102(r)

AILA generally accepts the Communication standard as drafted in the proposed rule. As with the Diligence standard, the Communication standard is a good example of where certain Comments promote more certainty in the ground for discipline and foster notice to the representative.

AILA suggests that the standard reflect that failure to communicate will only be found where the representative fails to communicate through current contact information provided by the client. Additionally, AILA is concerned that the standard's requirement that attorneys communicate in a language that the client understands may unduly burden attorneys. If the client ceases to provide or pay for an interpreter, a lawyer is not and should not be obligated for the failure of an accessible interpreter

where an interpreter is needed. The rule as worded also negatively affects the availability of pro-bono assistance.

Notice of Entry of Appearance: New Section 1003.102(t)

AILA understands the reasons behind implementation of proposed Section 1003.102(t). AILA agrees that the Federal Rules of Civil Procedure Rule 11 mandates that all filings before a court be signed by the responsible attorney. This requirement ensures that attorneys are held responsible for the factual and legal allegations and legal arguments. However, the requirement also is too broad for the many jurisdictions that permit non-profit and pro-bono attorneys to assist *pro se* aliens. Requiring all pleadings and filings submitted before EOIR to be signed and accompanied by an EOIR -27 or 28 would allow discipline for attorneys who provide pro-bono or non-profit legal services for low income individuals in such circumstances.

AILA recommends that the Notice of Entry of Appearance Standard be revised to sanction the repeated filing of briefs and pleadings that are not signed and accompanied by EOIR-28 and 27 only where such filings demonstrate a lack of preparation, lack of competence, and the representative has undertaken full client services to the non-citizen.

Repeated Filings: New Section 1003.102(u)

The proposed standard regarding repeatedly filing motions and briefs reflecting little or no preparation and relying on boilerplate language is a welcome addition to the standards for professional conduct before the EOIR. However, AILA is concerned that the standard fails to acknowledge that sometimes boilerplate language is appropriate to the brief and is commonly used by both non-citizen parties, as well as government attorneys. Where cases present common issues of law, analysis, and argument, briefing language used in prior cases may be appropriate and efficient. It does not inherently reflect incompetence and lack of preparation in context. As worded, this would punish the repeated use of briefing material regardless of the materials' relevance to the case at hand. AILA suggests revising the standard to sanction only such filings that reflect slavish incorporation of incorrect or irrelevant material not appropriate to the case at hand.

III. The Standards for Misconduct and Discipline Should be Applied to All Attorneys That Appear Before the EOIR

Ensuring that removal proceedings are conducted in a professional manner, as contemplated by the proposed standards for misconduct, requires that the standards be applied to all representatives appearing before the EOIR: Non-citizens' attorneys, accredited representatives, and attorneys representing the government. The level of diligence, communication, and competence must be maintained for all in order for the new scheme to succeed. To the extent that the proposed rule defines who is authorized to appear before the agency as an attorney EOIR's standards of misconduct should be applied to government attorneys.¹

¹ Similarly, Federal District Court rules allow the court to discipline federal government attorneys appearing in the case. The authority of EOIR to determine which attorneys may appear before them is independent of any authority to discipline government attorneys through the DOJ Office of Professional Responsibility.

The supplementary information to the proposed rule indicates that one goal for implementing the new standards of professional responsibility is to heighten the professional conduct of attorneys appearing before the EOIR. Additionally, the supplementary information explains that the proposed standards are in response to a recent review of EOIR proceedings by the Attorney General. The Attorney General's review determined that "immigration judges should have the tools necessary to control their courtrooms and protect the adjudicatory system from fraud and abuse." 73 Fed. Reg 44178, 44179 (July 30, 2008). Moreover, "the proposed rule seeks to preserve the fairness and integrity of immigration proceedings, and increase the level of protection afforded to aliens in those proceedings." *Id.* AILA agrees wholeheartedly with EOIR's goals for implementing these new standards. AILA suggests, however, that these goals can only be achieved if the proposed standards of misconduct and procedures for disciplinary proceedings are applied equally across the board to non-citizen attorneys, government attorneys, and accredited representatives. In an adversarial system like removal proceedings and BIA appellate proceedings, fairness and integrity of the system requires that standards for professional conduct be applied to all parties appearing before the tribunal.

IV. The Disciplinary Hearing Procedures Should be Overhauled to Reflect the Disciplinary Structure of State Bar Associations

The proposed rule attempts to overhaul the disciplinary standards and responsibilities of EOIR in policing discipline. While the proposed rule greatly broadens the grounds for discipline and envisions EOIR's disciplinary power as never contemplated before, the rule fails to review and adjust the current procedures for disciplinary proceedings themselves. We believe that the proposed rule's modifications to the existing disciplinary procedures under new 8 C.F.R. sections 1003.103-1003.106 need to be meaningfully reviewed.

Up to now, the disciplinary regime used by EOIR mainly disciplined individuals who were subject to final discipline in their home states, or other court decision, or who were finally convicted of serious crimes. Under the proposed rule, EOIR would be authorized to impose sanctions on individuals based on an expanded group of individual grounds of misconduct. Such a change in the disciplinary scheme and the hiring of additional EOIR staff anticipates a shift away from primarily reciprocal discipline to a system of prosecuting, adjudicating, and enforcing an independent disciplinary scheme. Due to the nature of expansion of grounds for misconduct, AILA has great concern that the existing disciplinary hearing structure is not adequate.

There is a serious perception of an inherent conflict of interest of having Immigration Judge's adjudicate disciplinary hearings of lawyers that appear before EOIR. Additionally, Immigration Judges who would preside do not necessarily have training or background in bar discipline proceedings, expertise in the subject matter, private practice experience, or time to be away from a constantly heavy caseload of immigration cases to adjudicate. Thus, AILA suggests EOIR revise the disciplinary scheme to reflect procedures commonly in use in state regimens. For example, most states appoint private practice attorneys and members of the public, carefully screened and trained, to a disciplinary panel. Disciplinary proceedings are first investigated by staff, then heard by an appointed retired judicial officer or experienced lawyer, and reviewed as to the outcome by the ethics panel.

Following are AILA's concerns about specific sections of the proposed rule revising the disciplinary hearing procedures:

First, under proposed 8 C.F.R. § 1003.105, a notice of intent to discipline should not be issued absent a preliminary finding that the proceeding could be sustained on clear and convincing evidence.

Secondly, proposed 8 C.F.R. § 1003.103(a) and (b) provide for immediate and summary disciplinary proceedings where an attorney is disbarred from their state or convicted (or pleads guilty) to a serious crime. These sections should be revised to require that immediate and summary disciplinary proceedings are only initiated upon filing with the Office of General Counsel a copy of a final order of suspension, conviction, or order from a state.

Finally, AILA suggests that the rule be revised to provide that reciprocal discipline will run concurrently with that imposed by an individual's state bar association. AILA is concerned that under proposed 8 C.F.R. § 1003.103, the rule would suspend an attorney from practicing before the EOIR if he or she is suspended or disbarred in his or her home state for a different period of time without any basis or finding as to why such a result is appropriate. The proposed rule, also does not have a provision for vacating the immediate suspension in cases where the attorney is successful in vacating or having suspended the underlying state suspension, which is the basis for EOIR's reciprocal discipline.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION