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Sunday Aigbe
Chief, Regulatory Products Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529-2020
Submitted via: www.regulations.gov

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

Dear Chief Aigbe:

The American Immigration Lawyers Association (AILA) submits the following supplementary comments in response to the reopened request for public comment from the Department of Homeland Security (DHS) on the interim rule "Professional Conduct for Practitioners: Rules, Procedures, Representation, and Appearances," 75 Fed. Reg., No. 21, pages 5225–30 (Feb. 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 before 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.

The following comments are designed to supplement the comments AILA submitted on March 4, 2010, in response to the initial publication of the interim rule.

I. Introduction

We applaud DHS for reopening the public comment period for the interim rule "Professional Conduct for Practitioners: Rules, Procedures, Representation, and Appearances." We believe that the adoption of the

Executive Office for Immigration Review's (EOIR) disciplinary scheme is flawed in that it fails to acknowledge the stark differences between representing individuals in removal proceedings before EOIR, and representing individuals in a benefits adjudication setting before DHS. We also believe that the rule inappropriately interferes with the attorney-client relationship, fails to provide adequate due process protections to attorneys, fails to address the unauthorized practice of law, and is ultimately, unnecessary.

Moreover, the promulgation of the interim rule without first referring it for review by the Office of Management and Budget (OMB) violates Executive Order 12866.[1] Under the Executive Order, the OMB's Office of Information and Regulatory Affairs is to review "significant regulatory actions" prior to their publication in the Federal Register. A "significant regulatory action" is any regulatory action that is likely to result in a rule that may: (1) have a significant impact on the economy; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; or (4) raise novel legal or policy issues. As described in detail below, we submit that the interim regulation raises numerous legal and policy issues that have a direct impact on the ability of attorneys to engage in their profession, and the ability of the indigent immigrant community to obtain competent representation and assistance in filing for immigration benefits. Therefore, the interim rule is a significant regulatory action, and should have been referred for OMB review prior to the notice and comment period.

Furthermore, under Executive Order 13563,[2] President Obama reiterated that regulations must be "accessible, consistent, written in plain language, and easy to understand," and directed agencies to undertake a retrospective analysis of existing rules that "may be outmoded, ineffective, insufficient or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[3] Since early 2010, when it was first published in the Federal Register, the interim rule has been the subject of intense debate, and has generated inconsistent interpretations and confusion by and amongst the private bar and the government agency charged with its enforcement. At the conclusion of this comment, we offer a number of recommendations, which we hope that the agency will take into consideration in light of the purpose and spirit of Executive Order 13563.

II. The Scope of 8 CFR §1003.102(t) and the Definitions of "Practice" and "Preparation" Are Not Clear and Are Subject to Differing Interpretations

Under new 8 CFR §292.3(b), disciplinary sanctions may be imposed against a practitioner who falls within one or more of the categories enumerated in the EOIR disciplinary scheme under 8 CFR §1003.102.[4] The interim rule adopts the grounds of discipline in 8 CFR §1003.102 in their entirety and attempts to apply those grounds to practitioners before DHS.

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[1] Exec. Order 12866 (Oct. 4, 1993).
[2] Exec. Order 13563 at Sec. 1 (Jan. 18, 2011).
[3] *Id*. at Sec. 6.
[4] 75 Fed. Reg. at 5228.

Under 8 CFR §1003.102(t), a practitioner may be subject to disciplinary sanctions by DHS if he or she fails to submit a signed and completed Notice of Entry of Appearance as Attorney or Representative (Form G-28) when the practitioner:

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

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

The term "practice" is defined as "the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS."[5] The term "preparation" is defined as "the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers...."[6]

A. The Types of Activities That Constitute "Practice" or "Preparation" Are Unclear

While it appears that an attorney is required to file a G-28 whenever he or she has engaged in "practice" or "preparation," many unanswered questions remain. Since the interim rule was published on February 2, 2010, the definition of "preparation," read together with 8 CFR §1003.102(t), has been the subject of much confusion regarding its multiple interpretations. One question has been raised and vigorously debated: What activities constitute "preparation" thus triggering the G-28 requirement? It appears from a plain reading of the rule, that a practitioner must do more than analyze facts and provide advice. However, USCIS has recently taken the position that "practice, as well as preparation, includes situations where the attorney studies the facts of a case, renders an opinion as to potential eligibility for benefits, coupled with providing legal advice to an applicant."[7] Moreover, the definition of "auxiliary activities," which, if undertaken with a factual analysis will require a G-28, is equally unclear. "Incidental preparation" of papers seems to constitute an auxiliary activity, but beyond that, practitioners are given no guidance as to what activities trigger the G-28 requirement.

[5] 8 CFR §1.1(i); 8 CFR §1001.1(i).
[6] 8 CFR §1.1(k); 8 CFR §1001.1(k).
[7] Minutes from the USCIS Field Operations Directorate – American Immigration Lawyers Association (AILA) Liaison Meeting (Jan. 7, 2010), *published on* AILA InfoNet at Doc. No. 11021031 (*posted* 2/10/11).

B. The "Deeming" Provision Is Unclear

> In order to be subject to discipline under 8 CFR §1003.102(t), in addition to failing to file a G-28 when engaged in "practice" or "preparation," the practitioner must also be "deemed" to have engaged in a pattern or practice of failing to file G-28s in compliance with applicable rules and regulations. The rule does not provide any information as to how a practitioner is so "deemed," who does the "deeming," or how a practitioner is informed that they have been "deemed."

The lack of clarity as to the scope of 8 CFR §1003.102(t), and the definition of "preparation," has raised a number of fundamental questions that impact the attorney-client relationship and the ability engage in limited representation agreements, which, if left unanswered, will have far-reaching impact on private immigration practitioners and the pro bono community.

III. The Rule Infringes on the Attorney's and Client's Ability to Contract and Unbundle Services and Will Have a Significant Impact on the Pro Bono Community and Private Practitioners

Under Rule 1.2(c) of the American Bar Association Model Rules of Professional Conduct (hereinafter "Model Rules"), "a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Though the scope of "auxiliary activities" in the definition of "preparation" is not clear, what appears to be clear is that the "incidental preparation of papers," coupled with a factual and legal analysis and the giving of advice, triggers the G-28 requirement. Interpreted as such, the rule presents a clear infringement on the attorney's and client's ability to contract. Lawyers often use limited representation agreements to meet a client's needs and budget. Many clients only want initial assistance, and do not feel the need for ongoing representation throughout the processing of their application or petition. Limited representation agreements are also utilized at pro bono clinics and workshops. USCIS cannot impose a term of representation beyond the scope freely determined by the lawyer and his or her client. At the same time, we acknowledge that a lawyer is precluded from limiting representation to such an extent that he or she cannot provide competent representation as required by 8 CFR §1003.102(o) and Model Rule 1.1.[8]

Limited representation is acknowledged in 8 CFR §1003.102(q)(3), which provides, "[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…." The concept of limited representation is further acknowledged in 8 CFR §1003.102(p) which states, "[a] practitioner may take such

[8] *See* N.Y. City Bar Ethics Op. 2001-3 (2001) (lawyer may limit scope of representation to avoid conflict with current or former client, provided client whose representation is limited consents after full disclosure and limitation does not so restrict representation as to render it inadequate), available at *http://www.abcny.org/Ethics/eth2001.html*.

action on behalf of the client as is impliedly authorized to carry out the representation." Thus, 8 CFR §1003.103(t) ought to be read in conjunction with these other provisions acknowledging limited representation.

A. Impact on Pro Bono Services and Programs

In our comment dated March 1, 2010, we addressed the impact of 8 CFR §1003.102(t) on pro bono workshops, where it is typical for attorneys to provide unbundled services to a high volume of individuals. In the pro bono context, it is possible for AILA and other bar associations to quickly organize and train hundreds of lawyers to assist individuals seeking immigration benefits. These clinics facilitate the goals of USCIS, especially with deadline-driven benefits such as temporary protected status (TPS), to mobilize applicants, and to ensure that they are properly advised of eligibility and the need to file accurate and truthful applications. Similar workshops include "Citizenship Day" clinics, and workshops to assist victims of unauthorized practitioners who have been prosecuted and shut down. Pro bono workshops and clinics will also play a pivotal role in providing assistance to millions of foreign nationals if and when Congress passes a law that would provide a path to lawful status for the undocumented population. By virtue of receiving sound legal advice, pro bono participants are less susceptible to scams and fraudulent schemes by unauthorized practitioners.

It is common practice to have each pro bono client read and sign a limited representation agreement that clearly defines the services to be provided at the clinic and directs the individual to retain an attorney if further assistance is required. The scope of services is usually limited to the giving of advice and guidance, reviewing forms, and assisting in the completion of forms. According to the plain language of the rule, answering questions and assisting an individual in completing forms appears to constitute, at the very least, "preparation." However, when asked about the G-28 requirement in the context of pro bono community-based workshops, USCIS recently took the position that any conduct by a lawyer that includes assisting a person with an immigration benefit—even giving advice on how to fill out a form—triggers the G-28 requirement.[9]

Given these conflicting interpretations and the potentially serious impact enforcement of the rule could have upon the pro bono community, we thank USCIS for announcing on February 18, 2011, that until further notice, it would not initiate disciplinary proceedings against practitioners who fail to file a G-28 in relation to pro bono services provided at group assistance events.[10] However, given the problems it poses, as discussed further below, we urge DHS to

[9] "Practice, as well as preparation, includes situations where the attorney studies the facts of the case, renders an opinion as to potential eligibility for benefits, coupled with providing legal advice to an applicant. *See* 8 CFR 1.1(k)." Minutes from the USCIS Field Operations Directorate – American Immigration Lawyers Association (AILA) Liaison Meeting (Jan. 7, 2010), *published on* AILA InfoNet at Doc. No. 11021031 (*posted* 2/10/11).

[10] *See* Statement of Intent Regarding Filing Requirement for Attorneys and Accredited Representatives Participating in Group Assistance Events, available at *www.uscis.gov*.

withdraw 8 CFR §1003.102(t) altogether. Alternatively, we ask that USCIS make the February 18 announcement permanent.

Requiring an attorney to submit a G-28 with respect to every individual who is assisted at a pro bono clinic will effectively destroy this pro bono model, and will discourage lawyers from mobilizing in times of crisis or when tens of thousands, or even millions, seek to file complete and meritorious applications in a limited time frame. A participant in a pro bono workshop may not even be ready to file an application if he or she must confirm information required on the form, or secure a supporting document that is not readily available. If a lawyer was compelled to provide the person with a signed G-28, and then relinquish control over the application, the lawyer would have no idea if the applicant changed his or her answers on the application, or submitted a document that was incorrect. The lawyer could later be deemed liable for malpractice, despite the client having made an informed decision to seek only limited advice from the lawyer at the workshop. While the attorney could retain control over the application and accept the applicant as a full pro bono client, the attorney would then be required to dedicate more hours to pro bono service than he or she had originally intended, which would discourage the attorney from participating in future workshops.

It has been suggested, in the context of limited representation in a pro bono clinic, that attorneys may submit a G-28 with an application, while simultaneously requesting withdrawal. First, it should be noted that the submission of a G-28 is by itself contrary to the concept of limited representation. Moreover, given the large volume of applications that are initiated in a pro bono clinic setting, it would be a huge administrative burden on DHS to properly document attorneys' "appearances" and then immediately acknowledge withdrawal. In addition, the withdrawal request could easily be missed and the attorney would then be required to proceed, even though the representation arrangement was expressly limited. It should also be noted that once a G-28 has been filed, original notices, including receipt notices, requests for evidence, interview notices, and approval notices are sent to the attorney of record. If the attorney and client have agreed on a limited representation arrangement consisting only of advice and advance preparation, but the attorney has submitted a G-28 as required by the rule, the risk that these documents will be misdirected, and that the applicant will not receive a critical notice of interview or request for information, is greatly magnified.

The concept of limited representation with the informed consent of the client has proven to be an effective model in providing much needed assistance to the poor and indigent immigrant community. Given the high demand for such services, and DHS's interest in ensuring individuals are provided with quality and correct legal advice, we urge DHS to take action to protect the future of pro bono service.

B. Impact on Private Practitioners and the Ability to Consult

At its extreme, 8 CFR §1003.102(t) requires any lawyer who consults with a potential client, but does not make an appearance, to file a G-28. A G-28 is traditionally filed in conjunction with an application or petition, or after the application or petition has been filed and is pending. Therefore, the rule could penalize a lawyer even when it is logistically challenging, or even impossible to file a G-28.

For example, a lawyer consults with a potential client regarding her eligibility for naturalization. No representation agreement is signed and the client leaves the office without making any decisions as to how or if she will proceed. Several weeks later, she submits an N-400 application for naturalization *pro se*. Similarly, an individual seeks advice from a lawyer in the form of a broad consultation about potential immigration options. Based on the lawyer's advice, the person decides to forego filing an immediate application with the lawyer's assistance, and ends the consultation without having signed a representation agreement. One year later, he later files an application *pro se*.

Individuals may seek the advice and counsel of an immigration attorney for a number of reasons without formally engaging the attorney in a full representation agreement. A person may have already filed an application or petition *pro se* and may seek the advice of an attorney on the next steps. Or, a person may have filed an application with the assistance of another attorney, and consult with a new attorney for a second opinion. It is also not uncommon for a person who cannot afford the full services of an immigration lawyer to consult with an attorney about eligibility and procedures, with the intention of immediately filing for the benefit *pro se* at the conclusion of the consultation.

Does 8 CFR §1003.102(t) require the filing of a G-28 in one or more of these scenarios following the consultation? According to recent statements by USCIS, the answer may be "yes." Though discussed in the context of a pro bono clinic, USCIS recently stated that "practice, as well as preparation, includes situations where the attorney studies the facts of a case, renders an opinion as to potential eligibility for benefits, coupled with providing legal advice to an applicant."[11]

The consequences of submitting a G-28 are considerable. According to 8 CFR §292.4(a), upon filing a G-28, "[t]he appearance will be recognized by the specific immigration component of DHS in which it was filed until the conclusion of the matter for which it was entered." This means that once filed, the attorney would assume ongoing responsibility for the case, including responding to requests for evidence and other USCIS inquiries, until the matter is completed. Moreover, once a G-28 has been filed, all notices of action on a case are sent to the attorney of record. If the attorney and client do not have an ongoing

[11] Minutes from the USCIS Field Operations Directorate – American Immigration Lawyers Association (AILA) Liaison Meeting (Jan. 7, 2010), *published on* AILA InfoNet at Doc. No. 11021031 (*posted* 2/10/11).

relationship, the *pro se* applicant may not receive adequate notice when action is taken on his or her case. While §292.4(a) further provides that "substitution may be permitted upon written withdrawal," would the attorney be required to file a request for withdrawal concurrently with the G-28 in order to not be held accountable for the case moving forward? Or is the attorney only permitted to withdraw when new counsel is substituted?

None of the individuals described above have authorized the lawyer to make an appearance on their behalf, and it would seem absurd, under these circumstances, to compel the lawyer to file a G-28. If interpreted and applied this broadly, the rule would infringe upon the attorney's ability to provide brief advice enshrined in Model Rule 1.2(c). Moreover, it would be highly problematic to require the attorney to submit a G-28 in connection with an inchoate form. Doing so would require the attorney to disclose the person's name, address, and the identity of the form/benefit discussed. It would be unwise, and perhaps statutorily and constitutionally problematic to create a rule that forces the attorney to disclose privileged information, perhaps years in advance of any action being taken, or even when no action is ever taken.[12] The rule should only apply to an attorney who been engaged to appear, beyond giving advice at a consultation, with complete consent from the client.

Significantly, DHS does not preclude an applicant from filing a benefit application *pro se*. It should be noted that when an applicant seeks advice from a lawyer, either paid or unpaid, the applicant benefits from such advice before proceeding *pro se*. But with the chilling effect of 8 CFR §1003.102(t) on limited representation, *pro se* applicants would cease receiving the benefit of quality legal advice. Indeed, such applicants would not only be more vulnerable to the unauthorized practitioner, they would also be more likely to file flawed applications, resulting in the waste of DHS resources if additional processing was required, or the applicant was never eligible for the benefit sought.

Given the significant impact that 8 CFR §1003.102(t) potentially has on private immigration practitioners, we ask that this provision be withdrawn. Alternatively, we ask that the temporary moratorium on disciplinary proceedings against

[12] Where a person has a right to counsel, the concomitant right to communications being privileged and confidential ensues. INA §292 provides for a right to counsel in removal or appeal proceedings at no expense to the government. While the INA is silent regarding the right to counsel in a non-removal context, 8 CFR §103.2(a)(3) provides that an applicant or petitioner may be represented by an attorney. However, there is clear statutory basis for the right to representation under the Administrative Procedure Act: "A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding." 5 USC §555(b).

practitioners who fail to file a G-28 in relation to pro bono services provided at group assistance events, be expanded to apply to practitioners outside the pro bono setting, whose representation is so limited that it would be impossible or impracticable to submit a G-28. We further request that the suspension be made permanent.

IV. The DHS Rule's Disciplinary Scheme Improperly Interferes with the Attorney-Client Relationship

A. The Rule Will Chill the Zealous Representation of Clients

Under 8 CFR §292.3(a), "[a]n adjudicating official ... may impose disciplinary sanctions against any practitioner if it finds it to be in the public interest to do so." Empowering DHS adjudicators with the authority to initiate disciplinary proceedings will hinder the attorney's ability to zealously represent his or her clients. Although revised 8 CFR §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," the rule creates a disciplinary scheme that has the potential to force a party to choose sides if a conflict arises. The party is placed in the untenable position of choosing between the lawyer and the adjudicator, who not only has the discretion to approve or deny the benefit sought, but who also has the authority to initiate disciplinary proceedings against the party's attorney. Conversely, an attorney may decide to not object to an adjudicator's abusive conduct or improper line of questioning in an attempt to avoid the risk of complaint. Empowering adjudicators to initiate disciplinary proceedings will effectively force attorneys to abandon their roles as zealous advocates in fear of retribution by an adjudicator.

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

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.*

AILA strongly urges DHS to strike this portion of the rule. The automatic waiver of the attorney-client privilege upon filing a disciplinary complaint under 8 CFR §292.3(d)(2) violates most state ethics rules. In fact, no other state bar disciplinary authority requires complainants to waive the attorney-client privilege upon filing a disciplinary complaint. Furthermore, the attorney-client privilege may only be

waived with informed consent.[13] Therefore, the rule's automatic waiver of the privilege is unlawful.

DHS adjudicators are not lawyers and are not qualified or authorized to advise a party on the waiver of rights. Under the rule, the only lawyer involved in the initial filing and review of a complaint is the DHS disciplinary counsel. It would be up to this person to provide information to a potential complainant prior to the complaint being filed. This puts the disciplinary counsel in the dual role of prosecutor of the lawyer and legal advisor to the lawyer's client.[14] Without informed consent, the waiver is not valid and the complaint cannot move forward.

Moreover, the automatic waiver provision exposes the complainant to potential civil or criminal proceedings based on information DHS learns in the course of its investigation. Once advised of this possibility, it is hard to believe that a client would move forward with a complaint. Rather than waive the attorney-client privilege and risk a harsh penalty, the client is more likely seek the assistance of state bar disciplinary authorities, which do not mandate the same requirement.

C. The Provisions Pertaining to Attorney Withdrawal upon Conclusion of the Attorney-Client Relationship Are Inadequate

1. *The EOIR Disciplinary Ground at 8 CFR §1003.102(q)(3) Does Not Readily Apply in the DHS Context*

The adoption of the EOIR rule on withdrawal of representation is inappropriate in the context of DHS proceedings. Under 8 CFR §1003.102(q)(3), an attorney is required to:

> 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). This provision, however, was meant to govern representation before EOIR, and does not translate when applied in the DHS context. In order to withdraw before the immigration court, the attorney must file a motion to withdraw which must include:

1. The reason(s) for withdrawal, in conformance with applicable state bar or other ethical rules;
2. The last known address of the alien;

[13] 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. A lawyer must take steps to inform the client of these risks in order for the waiver to be valid. *See* ABA Ethics Opinion 01-421 (2001).
[14] Although conflicts of interest may be waived, we cannot contemplate a theory where the conflict described would be waivable.

3. A statement that the attorney has notified the alien of the request to withdraw as counsel or, if the alien could not be notified, an explanation of the efforts made to notify the alien of the request;
4. Evidence of the alien's consent to withdraw or a statement of why evidence of such consent is unobtainable; and
5. Evidence that the attorney notified or attempted to notify the alien, with a recitation of specific efforts made, of (a) pending deadlines; (b) the date, time, and place of the next scheduled hearing; (c) the necessity of meeting deadlines and appearing at scheduled hearings; and (d) the consequences of failing to meet deadlines or appear at scheduled hearings.[15]

Furthermore, in the EOIR setting, the attorney of record is required to continue representation until the immigration court grants the motion to withdraw or permits another attorney to substitute as counsel.[16] We expect that DHS did not envision a process in which it designates adjudicators to decide motions to withdraw under guidelines similar to those set forth by EOIR. We therefore, recommend that DHS remove the requirement that the practitioner "obtain permission" to withdraw from the agency.

2. *The DHS Provision on "Appearances" Does Not Clearly Provide for Attorney Withdrawal without Substitution of Counsel*

Under 8 CFR §292.4, once a G-28 has been filed:

> [t]he appearance will be recognized by the specific immigration component of DHS in which it was filed until the conclusion of the matter for which it was entered.... *Substitution* may be permitted upon the written withdrawal of the attorney or accredited representative or upon the filing of a new form by a new attorney or representative.

(Emphasis added). Therefore, it appears that where a matter has not been concluded, DHS may not recognize the withdrawal of an attorney at the conclusion of the attorney-client relationship, without the substitution of new counsel. Consider the example of an attorney who is retained to file an I-140 petition for immigrant worker on behalf of an individual who is self-petitioning as an alien of extraordinary ability. The scope of the attorney-client agreement includes the preparation and filing of the petition, and any required response to a request for evidence (RFE) or notice of intent to deny (NOID). The attorney prepares and files the I-140 petition and supporting documents on behalf of the client. Three months later, an RFE is issued. While attempting to gather and evaluate evidence to respond to the RFE, the relationship between the attorney and client deteriorates and they are unable to agree on a strategy for responding to the RFE. The self-petitioner elects to proceed *pro se*. The attorney submits a letter withdrawing his representation. Will USCIS recognize the withdrawal without

[15] *Immigration Court Practice Manual* Ch. 2.3(i)(ii). *See also, Matter of Rosales*, 19 I&N Dec. 655 (BIA 1988).
[16] *Id*.

substitution of new counsel? The answer to this question is uncertain under the plain language of the rule. We ask that DHS amend this provision to clearly provide for attorney withdrawal, without requiring substitution of counsel.

V. The Disciplinary Scheme Fails to Provide Adequate Due Process Protections

Most DHS adjudicators are not attorneys and are not trained in attorney ethics. Unlike immigration judges, DHS adjudicators are not trained to identify misconduct for which disciplinary proceedings could be initiated. Moreover, simply providing legal ethics training for non-attorneys is inadequate. Attorneys are held to a high ethical standard, that is ingrained by legal ethics training in law school, a bar examination on professional responsibility, and is supported by the fact that the ability to practice is dependent on constant adherence to the rules of ethics. Therefore, non-attorney adjudicators are in no position to determine whether an attorney's decisions and conduct warrant a disciplinary complaint, and the rule's allocation of authority to initiate a complaint to adjudicators is wholly inappropriate.

The rule also fails to articulate which DHS employees are "adjudicating officials," authorized to initiate complaints. AILA strongly urges incorporating a definition of "adjudicating official" that excludes individual adjudicators from initiating a disciplinary complaint against an attorney that is appearing before them in a case. "Adjudicating officials" should be limited to supervisory officials who do not have primary responsibility for individual cases. Limiting the power to initiate complaints to supervisors will ensure that the balance of power in the proceeding is preserved.

Moreover, an attorney-respondent in an EOIR disciplinary proceeding has the due process protection of a record, and the availability of witnesses to rebut allegations of misconduct. By contrast, DHS proceedings do not provide a record of proceedings, and lack credible witnesses except for those with a vested interest in the outcome of the case. Until DHS adjudications are conducted in a manner that provide a record of proceedings, basing a disciplinary complaint on a DHS adjudicator's report of events is inappropriate and a violation of due process.

VI. Further Protections Are Needed to Prevent the Unauthorized Practice of Law

Sanctions may be imposed upon any "practitioner," which includes any "attorney," as defined under 8 CFR §1.1(f), who does not represent the federal government, or any "representative," as defined by 8 CFR §1.1(j).[17] Indeed, the rules neglect to sanction non-lawyers who prey upon the vulnerabilities of the immigrant population.

The problem of unauthorized practice of law by notary publics has long been prevalent in the United States. A U.S. notary is someone who simply verifies the identity of a person signing a legal document, and the involvement of a notary in the selection and

[17] 8 CFR §292.3(b).

completion of forms is treated in many states as the unauthorized practice of law.[18] Most foreign nationals are not aware that a U.S. notary is not authorized to practice law. In Mexico, and many other Latin American countries, a notary is also a lawyer. Unsuspecting immigrants are too often led to believe that a notary can knowledgeably help them complete immigration forms, only to later learn that the notary has cost them their ability to live lawfully in this country.

Moreover, 8 CFR §1.1(k) specifically excludes the activities of a notary public from the definition of "preparation." That provision states:

> The term preparation ... *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 will actually lead to more harm in that it appears to permit notaries to provide legal advice and assistance, and may serve as a means for notaries to claim authorization to practice. Therefore, AILA recommends that DHS revise 8 CFR §1.1(k) to make the definition comport with state and federal public policies, by removing the italicized language noted above. AILA further recommends that 8 CFR §1.1(k) be revised to proscribe practice and preparation of immigration forms by a notary public, and to provide that any notary public or other individual that engages in the unlawful practice or preparation of immigration forms without DHS authorization, will be referred to state authorities for prosecution.

If DHS has the power to issue and enforce professional conduct rules, and sanction attorneys and accredited representatives for failure to follow those rules, it follows that DHS must similarly have the power and authority to regulate the activities of notaries and other individuals, including disbarred or suspended attorneys, who abuse the system. Many individuals who fall victim to the unauthorized practice of law are led to believe that they have valid claims only to find themselves on the fast-track to removal, often after providing the notary thousands of dollars in fees. Therefore, DHS should implement oversight rules and procedures that are equally focused on preventing unlicensed attorneys and notaries from engaging in the unauthorized practice of law. In doing so, DHS will serve and protect the public from those who seek to victimize the people who need protection and help from DHS the most.

VII. The New Disciplinary System Is Unnecessary

The new disciplinary scheme creates problems that are not attendant in state disciplinary systems. Aliens will not benefit from the system as a result of numerous issues, including

[18] *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).

the automatic waiver of the attorney-client privilege. The only real pool of complainants who will use the system are adjudicators, who may be tempted to use the rule as a sword, rather than for the protection of the immigrant population and the adjudication system. Adjudicators and clients can file complaints with any state bar disciplinary authority where the lawyer is licensed in order to seek redress against an attorney who has engaged in offending conduct. In addition to state bar disciplinary rules, there are other provisions under the INA that can effectively sanction unscrupulous lawyers.[19]

VIII. Recommendations

In light of the significant legal and policy issues raised and discussed above, we ask DHS to remand this rule for OMB review as a "significant regulatory action." Alternatively, we ask DHS to consider the following recommendations as part of its retrospective review of existing regulations, as mandated by Executive Order 13563.

With respect to 8 CFR §1003.102(t):

1. **Withdraw 8 CFR §1003.102(t).** In our prior comment, we endorsed the recommendation set forth by the New York City Bar Association in its comment dated March 1, 2010. Given the recent statements by USCIS that purport to extend the disciplinary ground to attorneys who merely analyze the law and facts and provide advice, and recognizing the adverse impact that 8 CFR §1003.102(t) can have on both the pro bono community and private practitioners, we ask that this provision be rescinded.

2. **Add language to the final regulation limiting the scope of 8 CFR §1002.103(t).** As an alternative to rescission, we propose the following additional limiting language:

   > 8 CFR §1003.102(t) shall not apply in the case of a practitioner who provides short-term limited legal advice, with no expectation on the part of the client that assistance will extend to representation or an appearance before DHS. The lawyer must secure the client's informed consent to the limited scope of representation.

3. **Issue guidance permanently exempting attorneys participating in group processing workshops from sanctions under 8 CFR §1003.102(t) for failing to file a G-28, and expand the guidance to cover attorneys who engage in short-term limited legal advice, where there is no expectation on the part of the client, that assistance will extend to representation before DHS.** We thank USCIS for announcing a temporary hold on disciplinary proceedings for attorneys participating

[19] *See e.g.*, INA §274C(e), which provides that preparers who "knowingly and willfully" fail to disclose "the fact that they have, on behalf of any person and for a fee or other remuneration, prepared or assisted in preparing an application which was falsely made…" may be sentenced to a fine under Title 18 of the U.S. Code, and/or five years in prison, and will be prohibited from preparing any other immigration application of any kind, whether for a fee or not.

in pro bono clinics.[20] If §1003.102(t) is not rescinded, and the limiting language set forth above is not included in the final rule, we ask that this policy be made permanent, and be extended to cover private practitioners who provide limited legal advice in the form of a consultation.

4. **Provide better guidance on the type of activities that will trigger the G-28 requirement.** Expand on the definitions of "practice" and "preparation" to make it clear what activities will trigger the G-28 requirement. Include a definition of "auxiliary activities."

5. **Provide guidance on the "deeming" provision in 8 CFR §1003.102(t)(2).** Provide information on how an attorney is "deemed" to have engaged in a pattern or practice of failing to file G-28s. Include information on who makes this determination, and how an attorney will be notified if he or she has or may be so "deemed."

6. **Add a check box to applications commonly prepared in a pro bono clinic, "This application was prepared at a group processing workshop."** This option could be added to the Application for Naturalization (Form N-400), Application for Temporary Protected Status (Form I-821), and any future applications that might be created to legalize the status of the undocumented population. Attorneys could sign as "preparer" and check the "group processing workshop" box to provide notice to DHS of their limited representation of the applicant.

7. **Add a space on existing forms to list all individuals who have assisted the applicant/petitioner in completing the form, including individuals who have provided advice on completing the form and eligibility for the benefit.** This would be similar to that which is currently included on the I-589, Application for Asylum, but expanded beyond mere "preparers."

With respect to other issues raised by the interim rule:

1. **Strike the portion of 8 CFR §292.3(d)(2) requiring waiver of the attorney-client privilege.** Specifically, eliminate the language from that provision that states, "*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.*"

2. **Provide guidance on attorney withdrawal.** Clarify the process for attorney withdrawal under 8 CFR §292.4 to permit withdrawal when there is no substitution of counsel. Eliminate the requirement in the grounds of discipline under 8 CFR §1003.102(q)(3) that the practitioner "obtain permission" to withdraw from the agency.

[20] *See* Statement of Intent Regarding Filing Requirement for Attorneys and Accredited Representatives Participating in Group Assistance Events, available at *www.uscis.gov*.

3. **Add a definition of "adjudicating official."** The definition should limit "adjudicating officials" to supervisory officials who do not have primary responsibility for individual cases to ensure that the balance of power in the proceeding is preserved.

4. **Revise 8 CFR §1.1(k) by removing language exempting notaries from the definition of "preparation."** Furthermore, AILA recommends that 8 CFR §1.1(k) be revised to proscribe preparation of immigration forms by a notary public, and to provide that any notary or other individual engaged in the unlawful practice or preparation of immigration forms will be referred to state authorities for prosecution.

5. **Convene a working group to further study the professional conduct rules.** We recommend that DHS convene a working group, in cooperation with stakeholders, to consider alternative means for DHS to achieve its goals with regard to professional conduct for practitioners, and coordinate with USCIS's current efforts to address the unauthorized practice of law.

We appreciate the opportunity to provide additional comments on the interim rule, and look forward to a continuing dialogue with DHS on issues concerning this important matter.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION