AMERICAN IMMIGRATION LAWYERS ASSOCIATION

James McHenry
Director
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1902
Falls Church, VA 22041

15 February 2019

Dear Director McHenry:

The American Immigration Lawyers Association writes to express our grave concern with the continued imbalance in the treatment of counsel appearing before the components of the Executive Office for Immigration Review perpetuated by your December 18, 2018 memo entitled "Internal Reporting of Suspected Ineffective Assistance of Counsel and Professional Misconduct."

As a voluntary bar association of more than 15,000 immigration attorneys, the American Immigration Lawyers Association (AILA) considers it an integral part of our purpose to stand as a guardian against unethical behavior, ineffective assistance, and unprofessional conduct. We provide our member lawyers with hundreds of hours of continuing legal education, mentoring, ethics resources and guidance, as well as substantive legal resources, so they are prepared in their roles as both client advocates and officers of the court.

We share your belief that legal professionals should maintain the highest ethical standards, but efficient court procedures cannot exist if only one side of the courtroom is being held accountable, and no meaningful process is in place for complaints against any detrimental conduct of Department of Homeland Security (DHS) trial attorneys. AILA has objected to the Department of Justice confining its authority to discipline attorneys to private practitioners since the rules for professional conduct that are antecedent to the current rules were published in 1998 (63 FR 2091, January 20, 1998). In comments submitted on March 19, 1998, AILA wrote:

> In addition, we are concerned about the lack of parity with respect to treatment of misconduct by private practitioners and by government attorneys. While the regulations set forth an elaborate disciplinary scheme with very specific standards of conduct for private practitioners, the issue of misconduct by government attorneys is relegated to one sentence each at 8 CFR Sections 3.58 and 292.3(h). It is certainly inappropriate and inequitable to presume that a flat advisory that complaints about government attorneys should be directed to the Office of Professional Responsibility.
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> We certainly believe that the great majority of government attorneys are competent and act in a fair and professional manner; yet it is also true that there are occasions when government attorneys have 'engaged in contumelious or otherwise obnoxious conduct.' Further, some government attorneys have on occasion engaged in frivolous behavior, as defined at 8 CFR Section 3.52(j)(1). If such specificity is warranted with respect to private practitioners, it is certainly also warranted with respect to government attorneys.

AILA stands by those comments today. Reliance by the EOIR on standards of conduct administered by the Office of Professional Responsibility – which fail to describe conduct unbecoming of a lawyer in the representation of parties and the administration of justice in any kind of relevant detail, as the foundation for standards of practice for attorneys representing the government – places the private bar, and the parties they represent, on an uneven playing field, and tips the balance improperly, undermining the fair and even administration of justice.

Unless there is another equivalent memo about the discipline of DHS trial attorneys that hasn't been made public, this seems to be an example of bias within the court system.

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Further, the process by which an immigration judge may file a complaint against a practitioner ignores the possibility of retaliation. Presently, a lawyer may file a complaint against an immigration judge, yet the resulting disciplinary process remains unclear, secretive, informal, and consists solely of an internal agency review free from public scrutiny. Without transparency in the immigration judge complaint process, there is a risk that lawyers may now find themselves facing retaliatory complaints.

As we have previously commented when these rules were initially promulgated and then revised in 2008, the vague nature of many of the grounds of discipline listed makes it difficult for lawyers to know the court-imposed bounds, and makes it easy for individual judges to use that vagueness to their advantage in the court. Because immigration judges now face unprecedented pressure to complete more cases annually under quotas established by the Department of Justice, we are deeply concerned that these court-centered rules might be used to intimidate ethical lawyers who are zealously representing their clients.

One such vague ground prohibits a lawyer from engaging in frivolous behavior to cause unnecessary delay, including making a legal argument or filing motions if the lawyer's actions have an improper purpose. When read with then-Attorney General Sessions' memo *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* on continuances, does that mean a request for a continuance is a frivolous act and therefore unethical behavior? It is a valid concern, as much of this memo may be read as a threat to lawfully zealous lawyers and stifle their ability to be client advocates as well as court officers.

It is wholly inappropriate to issue this one-sided memo in light of the structural imbalance created by disciplining private attorneys while remaining silent about the abuses of DHS trial attorneys and the tepid and opaque OPR process. Nevertheless, should any AILA member come under inappropriate retaliation or attack, he or she will have the support of this organization to respond to prevent any coercion or injustice, while responsibly acting in our dual roles as advocates and officers.

The preamble to the grounds of discipline for practitioners (8 CFR 1003.102) clearly states that they should not be read to diminish the practitioner's duty to zealously represent clients. We will continue to interpret them in this light.

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