AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Judge Hanen's Troubling Accusations of Unethical Conduct in *Texas v. United States of America*

To what extent can a lawyer be found to have violated his or her ethical duty of candor to the court when an immigration policy is subject to varying interpretations in a politically charged atmosphere?

On April 7, 2015, in *Texas v. United States of America*, Judge Hanen refused to lift his Order of Temporary Injunction blocking President Obama's Deferred Action for Parent Accountability (DAPA) and expanded Deferred Action for Childhood Arrival (DACA) programs. In a companion order, Judge Hanen chastised Department of Justice (DOJ or Government) lawyers for violating Rule 3.3 of the American Bar Association Model Rules of Professional Conduct and the corresponding Texas Disciplinary Rules of Professional Conduct. This ethical rule mandates that lawyers maintain a duty of candor to a court or tribunal. Lawyers cannot knowingly make false statements and also cannot knowingly submit false statements on behalf of their clients. A breach of Rule 3.3 is a serious ethical violation. Although the order was directed against government lawyers, this blog notes that private lawyers can also be accused of violating Rule 3.3 in a fractious courtroom.

The relevant portion of Rule 3.3 provides:

> *a) A lawyer shall not knowingly:*
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> *(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer*

In the companion order, Judge Hanen made this blistering statement against the DOJ lawyers whom he found had violated Rule 3.3:

> *Fabrications, misstatements, half-truths, artful omissions, and the failure to correct misstatements may be acceptable, albeit lamentable, in other aspects of life; but in the courtroom, when the attorney knows that both the Court and the other side are relying on complete frankness, such conduct is unacceptable*

Let's view Judge Hanen's accusations of serious unethical conduct against these lawyers in the context of the complex issues arising out of this case.

On February 16, 2015, Judge Hanen temporarily enjoined DAPA and the expanded DACA that was unveiled by DHS Secretary Jeh Johnson in a November 20, 2014 Memorandum "**Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents" (**Johnson Memo). The February 16, 2015 Order of Temporary Injunction (the "Preliminary Injunction") expressly did not enjoin the original DACA program that was announced on June 15, 2012 (DACA 2012). Qualified applicants have therefore continued to apply for DACA 2012 benefits. They were being granted two-year work authorizations under DACA 2012, but under the terms of the Johnson Memo, they were granted three-year work authorizations since November 24, 2014. Likewise, DACA 2012 applicants seeking renewal of benefits were being granted three-year work authorizations under the terms of the Johnson Memo since November 24, 2014.

The Johnson Memo would permit many more individuals who arrived as children aged less than 16 to benefit from

deferred action and obtain work authorization than DACA 2012.

> (1) The Johnson Memo ordered the USCIS to expand DACA 2012 by removing the age restriction. DACA 2012 had excluded those who had reached age 31.
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> (2) The Johnson Memo also ordered the USCIS to allow a later date of entry to the United States, from June 15, 2007 to January 1, 2010.

The "expansions (including any and all changes)" to DACA 2012 were all subject to the Preliminary Injunction. In conversations between Judge Hanen and the Government attorneys in court prior to the issuance of the Preliminary Injunction, the Government attorneys indicated that the Defendant USCIS had not taken any actions pursuant to the Johnson Memo, despite the fact that the USCIS had been issuing three year work authorizations (Employment Authorization Documents or EADs) since November 24, 2014.

The Government attorneys seemed confused in court about whether Judge Hanen had been asking about the three-year EADs since those EADs could only be issued to the DACA 2012 qualified applicants. The no age restriction/ later entry date deferred action could not be applied for until February 18, 2015 under the Johnson Memo, so it was safe to say that only DACA 2012 qualified persons could receive three-year EADs. It was also not possible to predict that Judge Hanen would subsequently apply the Preliminary Injunction to expansions to DACA 2012.

On March 3, 2015, after the issuance of the Preliminary Injunction, the Government attorneys filed an advisory stating:

Out of an abundance of caution, … Defendants wish to bring one issue to the Court's attention. Specifically, between November 24, 2014 and the issuance of the Court's Order, USCIS granted three-year periods of deferred action to approximately 100,000 individuals who had requested deferred action under the original 2012 DACA guidelines (and were otherwise determined to warrant such relief), including the issuance of three-year EADs for those 2012 DACA recipients who were eligible for renewal. These pre-injunction grants of three-year periods of deferred action to those already eligible for 2012 DACA were consistent with the terms of the November Guidance.

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Defendants nevertheless recognize that their identification of February 18, 2015, as the date by which USCIS planned to accept requests for deferred action under the new and expanded DACA eligibility guidelines, and their identification of March 4, 2015, as the earliest date by which USCIS would make final decisions on such expanded DACA requests, may have led to confusion about when USCIS had begun providing three-year terms of deferred action to individuals already eligible for deferred action under 2012 DACA.

Plaintiffs accused Defendants and the Government attorneys of misleading the Court that nothing was happening in relation to the Johnson Memo since November 20, 2014, in order to get a later date to file a brief before the Preliminary Injunction. ("Opposed Motion for Early Discovery" Doc. 183.) Judge Hanen agreed with the Plaintiffs that he felt misled and stated that he suspected that the representations made by the DOJ lawyers at the January 15, 2015 injunction hearing indicated "a distinct lack of candor."

While Judge Hanen has not applied any sanctions as yet, he granted Plaintiffs' motion for early discovery about the March 3 Advisory. Judge Hanen asked for all drafts and metadata relating to the March 3 Advisory, as well as a list of all individuals who knew and approved of the March 3 Advisory, including dates and times of when they were apprised of it. The scope of this instruction seems bent on finding out whether to determine appropriate sanctions for a Rule 3.3 violation. The early discovery order imposes an enormous burden on the Government attorneys, raises issues of invasion of attorney-client privilege, and has to be complied with no later than April 21, 2015.

Given the possible responses to the Judge's question of what was happening under the Johnson Memo, could the Government attorneys have "knowingly" made a false statement of fact or law to be penalized under Rule 3.3? Rule 3.3 requires actual knowledge of the false statement. ABA Rule 1.0(f) defines the terms "knowingly," "known" or "knows" as "actual knowledge of the fact in question." Rule 3.3 adds that a "person's knowledge may be inferred from

circumstances," but it is hard to find that the lawyers violated the rule through an inference from circumstances. In fact, the circumstances point the other way. Given the ambiguities surrounding what aspect of the Johnson Memo was going to be enjoined, it was hard for an attorney to ascertain whether the grant of three-year renewals to recipients of DACA 2012 were part of the preliminary injunction or not. There were a number of other executive actions that would potentially benefit DACA 2012 recipients, such as extending a Board of Immigration Appeals decision to those who travel under advance parole so that they do not trigger the 3 and 10 year bars. These were not even addressed in Plaintiffs' pleadings to stop DAPA and extended DACA under the Johnson Memo.

Moreover, Rule 3.3 also allows the lawyer to "correct a false statement of material fact or law previously made to the tribunal by the lawyer." The DOJ lawyers did so through the March 3 Advisory out of an abundance of caution, and took pains to explain that they did so "in light of any potential confusion from the intersection of the enjoined Johnson Memo, the 2012 DACA guidelines that remain in place, and Defendants' statements about when grants of DACA under the revised eligibility guidelines would begin taking place." Since the DACA 2012 recipients are not part of the Preliminary Injunction, the Government Defendants can theoretically fashion any new benefits for them consistent with its original deferred action policies. Indeed, if the three-year renewal extensions instead of the two-year renewals were issued through another guidance memorandum that was not the subject of this litigation, there would have been no such ostensible confusion.

Although Judge Hanen invoked Rule 3.3 against government lawyers, the same fate could befall private lawyers. Whether one agrees with Judge Hanen's Preliminary Injunction, the question we should be asking is whether a judge can invoke the candor to the tribunal rule to potentially sanction lawyers when the facts he is seeking are vague. When there are issues of differing interpretation, involving complex immigration and policy, it is problematic to use Rule 3.3 to accuse a lawyer of knowingly making false statements to a court or tribunal.

Judge Hanen could have written in his companion order that it appeared to him that Rule 3.3 was implicated by the Government lawyers' March 3 Advisory, ordered discovery and withheld setting forth a conclusion that the Government lawyers had violated Rule 3.3 pending a full hearing and airing of the issues. Indeed, this kind of matter is usually carried to the end of the case before findings as to lawyer conduct are resolved. Even in this case, Judge Hanen did not yet impose sanctions. But there is no doubt that the companion order would chill even the most confident lawyer, even if she believed that there was no false statement and only a misunderstanding.

Plaintiffs, Judge Hanen and Defendants could each have a reasonable view of the answer to the judge's question on whether anything was happening pursuant to the Johnson Memo on January 15, 2015 and for the next three weeks, without there being any knowing false statement. In our view, the Judge should have withheld judgment on a Rule 3.3 violation until the Government attorneys had made their proofs and both parties had had their say following the discovery that he ordered.

The companion order contains the kind of Rule 3.3 violation by inference that can confront private lawyers in any hotly contentious and politically charged case as this is. Does a lawyer who has residual questions about the scope of question from a judge have a duty to come forward and clarify any ambiguity? Should a court chill attempts at remedying a possible prior lack of candor? We think the better practice is for the lawyer not to sit on the uncertainty and bring the matter to the Court's attention, which happened here promptly though Judge Hanen disputes the reasonableness of the amount of time taken to remedy any confusion. The end of the judicial mission should be to secure a just result fairly on the merits, not to put lawyers in a catch 22 when they have uncertainty and come forward on their own to display it to the tribunal.

The Government has appealed the Preliminary Injunction to the U.S. Court of Appeals for the Fifth Circuit. In an April 14, 2015 letter to the Fifth Circuit court apprising it of Judge Hanen's April 7 Order on the Preliminary Injunction, the Government states that the district court's suggestion that the Government misled it is "incorrect and unwarranted." Even if the Fifth Circuit reverses, the accusations of unethical conduct stemming from the companion order may still linger, and it is important that we shine some light on it.