NEW YORK CITY BAR

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Rachel A. McCarthy
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U.S. Citizenship and Immigration Services
Department of Homeland Security
70 Kimball Avenue, Room 103
S. Burlington, VT 05403

Re: Comments on DHS Docket No. DHS-2009-0077, reopened for comment

Dear Ms. McCarthy:

I write as Chair of the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York to re-submit comments in response to the request for public comment by the Department of Homeland Security ("DHS"), on the interim rule ("Interim Rule" or "Interim Regulation") Professional Conduct for Practitioners: Rules, Procedures, Representation and Appearances, 75 Fed. Reg, No. 21, pages 5225-5230 (February 2, 2010), DHS Docket No. DHS-2009-0077, in light of the re-opening of the comment period in January. *See* 76 Fed. Reg. No. 20, page 5267 (Monday, January 31, 2011).

Since its founding in 1870, the New York City Bar Association ("NYCB") has grown to over 23,000 members. The New York City Bar Association works to promote the public good by advocating for political, legal, and social reform, and by promoting high ethical standards for the legal profession. The Association has a long-standing commitment to fair and humane immigration laws and policies as well as to advancing the cause of human rights in the U.S. and abroad. The Immigration and Nationality Law Committee, which I chair, meets on a monthly basis for discussion of current immigration topics; organizes and sponsors educational programs; and issues reports and recommendations. Most members of the committee regularly represent

non-citizens before the Immigration and Customs and Citizenship (ICE) and United States Citizenship and Immigration Service (USCIS) branches of the DHS, and the Executive Office for Immigration Review (EOIR). Our members are lawyers in private practice and lawyers at organizations that provide free legal services to the disadvantaged.

Many of our members also organize and/or participate in the provision of *pro bono* services through clinics and other events through the City Bar Justice Center ("CBJC") of the New York City Bar and the New York Chapter of the American Immigration Lawyers Association ("AILA-NY"), among other organizations. The most successful examples include the equal collaboration of CBJC and AILA-NY on the New York City Immigrant Advocacy Clinic ("NYCIAI"), which holds clinics throughout the New York City area on a monthly basis. At these clinics, walk-in clients present their immigration issues and attorneys advise them on their options, provide referrals, and sometimes take on cases for full representation. Most recently, NYCIAI has focused on the crisis in Haiti and organized clinics to assist the Haitian community with Temporary Protected Status by providing information and assisting individuals in preparing their applications. Please see the attached article on the City Bar's TPS clinic.

Our comments address the issues raised for *pro bono* service providers by DHS's adoption of 8 CFR 1003.102(t) and suggest a solution that promotes quality *pro bono* services and the purpose of the rule.

The rule DHS will adopt on March 4, 2010 and which concerns us here, 8 CFR § 1003.102 (t), sanctions a practitioner who:

> t) Fails to submit a signed and completed Notice of Entry of Appearance as Attorney or Representative in compliance with applicable rules and regulations 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; . . . .

(Emphasis added.) The terms "practice" and "preparation" are defined in new sections 8 CFR § 1.1 (i) and (k), as follows:

> The term *practice* means 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.
>
> The term *preparation*, constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the

> incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed DHS forms, by one whose remuneration, if any, is nominal and who does not hold himself or herself out as qualified in legal matters or in immigration and naturalization procedure.

The term "represented" is not defined (nor is "appearing") but "representation" is defined in new section 8 CFR § 1.1(m) as follows:

> The term representation before DHS includes practice and preparation as defined in paragraphs (i) and (k) of this section.

For attorneys committed to *pro bono* services, the new rule and definitions raise numerous concerns about the ability of attorneys to provide discrete, "unbundled" services without being obliged to assume undefined responsibility or face disciplinary action. The supplementary material to the EOIR final rule makes clear that the definitions are meant to apply to *pro bono* services, and the same would be true of the DHS rule.[1]

The key definitions cited above do not provide clear guidance to *pro bono* service providers as to when, if ever, an attorney participating in a *pro bono* clinic would be required to sign a form or to submit a G-28 in order to comply with the rule. Both "practice" and especially "preparation" have been defined broadly, and, their incorporation into the definition of "representation," broadens that term as well. As currently drafted, these definitions encompass *pro bono* assistance that an attorney may provide at a clinic where he or she may assist numerous individuals in understanding the requirements of and filling out particular applications. Answering questions and assisting an individual fill out the forms seems to constitute, at the very least, the "incidental preparation of papers," though that phrase is also unclear.

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

Examining the way in which *pro bono* clinics addressing particular needs -- such as TPS or Naturalization -- are structured illustrates the problems with applying these vague definitions. *Pro bono* clinics usually require individuals seeking assistance to sign a waiver or limited scope of services agreement that clearly define the services provided and direct the individual to retain an attorney if further assistance is required, and individuals are provided with resource lists informing them where they can get additional help. It is unclear that such agreements, although

[1] "It is appropriate to require practitioners who engage in "practice" or "preparation," whether it is for a fee or on a pro bono basis, to enter a notice of appearance and sign any filings submitted to EOIR." 73 Fed. Reg. 76919 (Dec. 18, 2008).

allowed under the Model Rules of Professional Conduct, specifically Rule 1.2(c)[2], and acknowledged in 8 C.F.R. 1003.102(q)[3], would be possible under the new definitions discussed here, which do not seem to provide for this type of flexibility.

This lack of flexibility appears to be in conflict with ABA Opinion 07-446 (May 5, 2007), which holds that "[a] lawyer may provide legal assistance to litigants appearing before tribunals '*pro se*' and help them prepare written submissions without disclosing or ensuring the disclosures of the nature or extent of such assistance." Although the opinion is not binding and assumes a context in which no law regulates undisclosed advice, it raises the important issues, not contemplated in the supplementary material to the EOIR rule (which is adopted by DHS through the new rule discussed here) or the rule itself, of the right of an individual to proceed *pro se* without disclosing a lawyer's involvement, the importance of "unbundling" legal services to allow assistance tailored to a specific need, and the question of whether the fact of the assistance is material or the failure to disclose that assistance would constitute fraud in some way.

Pro bono clinics often include a system whereby some volunteers check individuals in to determine whether they have the necessary documents with them, other volunteers may rove and answer questions raised by individuals as they complete the forms on their own, and another set of volunteers do a final review of the application and documents. Most volunteers are lawyers or paralegals supervised by lawyers. The new rule raises the question of which of these volunteers, if any, would be required to sign as the preparer or submit a G-28, especially where multiple individuals may have assisted with the preparation of a single application. The consequences of submitting a G-28 are considerable – this requirement vitiates any possibility of limited representation and requires on-going responsibility for the case, including responding to Requests for Evidence and other USCIS inquiries.

After forms are completed at a clinic, the applicant is usually given mailing instructions and is responsible for submitting the application on his or her own to the appropriate filing address. As noted above, it seems that a *pro bono* volunteer attorney needs to submit a notice of entry of appearance or sign his or her name on the form prepared. However, once the individual leaves the clinic, the attorney who signed the form has no control over the application. What prevents an attorney from being wrongly held liable where he or she has signed the form and, subsequently, the applicant makes changes to the application and submits it with significant flaws?

The signing requirement presents the significant potential harm of discouraging volunteers from participating for fear of sanctions or potential litigation. Most lawyers participating in *pro bono*

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

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

clinics do not expect to be sanctioned as a result of reviewing a document or answering simple questions about a form that may be unclear to a non-lawyer. The new rule therefore jeopardizes the availability of *pro bono* services for the immigrant poor because it fails to clarify the scope of its reach. In addition, the signature requirement creates a need for record keeping, including keeping copies of the forms prepared, imposing a burden on the attorneys and organizations involved in providing critically needed *pro bono* services to the public. This in turn creates tension among the sponsoring organizations – who takes on the responsibility of maintaining the records and for how long? How is client confidentiality addressed and protected under these circumstances?

These are just a few of the problems and riddles posed by the new rule and our central concern is that the new rule will undermine *pro bono* efforts mounted to answer the extraordinary needs in the immigrant community, especially in light of disasters like the earthquake in Haiti and the huge demand for information and services by individuals who would not be able to afford to pay an attorney. In order to meet the challenges and the needs of the immigrant poor community, especially in times of crisis, *pro bono* attorneys need to know how to proceed when they assist indigent immigrants in preparing applications.

Suggested Solution

In responding to comments to the original rule-making regarding the effect on *pro bono* attorneys, the EOIR recognized the need for clarity and added a sentence to "[make] it clear that a notice of appearance must be submitted and filing signed in all cases where practitioners engage in 'practice' or 'preparation.' If a practitioner provides pro bono services that do not meet these definitions, then a notice of appearance is not necessary." Of course, as discussed above, these definitions do not provide adequate clarity on the numerous issues the new rule raises for *pro bono* service providers. The EOIR's willingness to add clarity for *pro bono* attorneys, however, is instructive and should be acted upon here in crafting a complete solution.

We recommend that DHS craft an exception for limited *pro bono* legal services consistent with Rules 1.2(c) and 6.5 of the Model Rules of Professional Conduct ("Model Rules") and other similar codes, such as the New York Rules of Professional Conduct ("New York Rules").

Rule 1.2(c) of the Model Rules provides that:

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Similarly, Rule 1.2(c) of the New York Rules provides:

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent *and where necessary* notice is provided to the tribunal and/or opposing counsel.

(Emphasis added). Rule 6.5 of both the Model Rules and the New York Rules provide special rules for pro bono representation, specifically where lawyers provide short-term limited legal services under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization. New York Rule 6.5 defines "short-term limited legal services" as

> services providing legal advice or representation free of charge as part of a program [sponsored by a court, government agency, bar association or not-for-profit legal services organization] with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

Such arrangements are allowed so long as the lawyer secures the client's informed consent to the limited scope of the representation. As discussed above, *pro bono* clinics typically utilize limited scope of representation agreements and obtain the client's consent before providing services. We therefore suggest inserting the following after the final sentence of 8 CFR 1003.102(t):

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

We respectfully ask that you consider our suggestion. Thank you for your attention and consideration.

Sincerely yours,

Mark Von Sternberg
Chair, Immigration and Nationality Law Committee*

* Committee Member Myriam Jaidi assisted in the drafting of this letter.