CLINIC

PRACTICE POINTER:

Limited Assistance to Noncitizens With USCIS Applications

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Introduction

Limiting the scope of, or "unbundling," legal services is authorized and even encouraged under the American Bar Association's (ABA's) Model Rules of Professional Conduct and corresponding ethics opinions and guidance. When practicing before United States Citizenship and Immigration Services (USCIS), however, immigration practitioners face logistical difficulty in limiting their engagements to a discrete portion of a case. Practitioners before USCIS must navigate a murky patchwork of regulations, policy guidance, and codes of professional responsibility when engaging in limited-scope representation. Consequently, practitioners face confusion and uncertainty about ethical and regulatory obligations when providing limited assistance, for example, at group workshops or in completing petitions and applications. While the Department of Justice (DOJ) recently promulgated new regulations making limited assistance in immigration court more accessible, USCIS has not followed suit and has failed to offer practical mechanisms that would allow practitioners to enter limited assistance rather than a full appearance. This practice pointer explains the rules complicating limited-scope practice before USCIS and offers ethical guidance to practitioners.

This practice pointer will first explain the legal concepts that govern when a practitioner-client relationship is established and how to limit the scope of the relationship. Then, it will walk through federal regulations that affect limiting scope in immigration practice. And finally, it will walk through practical implications for completing USCIS applications in a limited-representation arrangement.

The ethics guidance offered in this practice pointer is based on the ABA Model Rules of Professional Conduct. State codes of professional responsibility often mirror the Model Rules, but sometimes will differ. Practitioners are encouraged to consult their state rules and to confer with local ethics authorities regarding any state-specific questions to ensure compliance with their state bar's ethics rules. This practice pointer uses the term "practitioner-client" relationship instead of "attorney-client relationship" to be inclusive of DOJ accredited representatives. While accredited representatives are not bound by state bar rules of professional conduct, CLINIC encourages their adherence to the rules applicable in their state as a matter of best practice. The federal regulations (including grounds for discipline) cited in this practice pointer apply to all immigration practitioners, including accredited representatives.

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Limited Assistance According to Legal and Ethics Authorities

A primary consideration when engaging in limited assistance is understanding whether a practitioner-client relationship forms and ensuring that the client understands and consents to the limited nature of the services the practitioner agrees to provide.

The creation of a practitioner-client relationship is governed by agency and contract law. The relationship is formed, generally, when a potential client seeks to enter into a representation agreement with the practitioner and the practitioner manifests their assent to the representation.[1]

The general premise is that the creation of a practitioner-client relationship requires mutual agreement. Nevertheless, courts will conclude that such a relationship exists in the absence of an express agreement when the practitioner's actions created a reasonable perception on the part of the client that the relationship existed or when the client reasonably relied on the assistance of the practitioner.[2]

Failure to explicitly "unbundle" services or to clearly define the end of the intended relationship, therefore, creates a risk that a client relies upon the practitioner for representation beyond what the practitioner intended. Though the practitioner's intention may be to limit the interaction to the preparation of a form at a group workshop, for example, the noncitizen may reasonably be under the mistaken understanding that the volunteer practitioner is "their lawyer." If that is true, they may reasonably expect the practitioner's assistance with future correspondence, appearances at interviews, or responding to requests for evidence or notices of intent to deny, unless the practitioner explicitly limits the scope of representation.

The Model Rules allow practitioners to limit the scope of representation so that the practitioner is not obligated to represent the client in any matters beyond the discreet agreed-upon service. Specifically, Rule 1.2(c) says practitioners "may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Therefore, theoretically, a practitioner could reasonably agree to represent a client in filing a USCIS application and decline representation in future interviews, as long as the client gives informed consent.

It has become increasingly common for practitioners to assist individuals in filling out USCIS applications, especially during group workshop setting, and then label this assistance "pro se assistance." Often, the practitioners take the position that no practitioner-client relationship was created. Pro se assistance, however, is a form of representation. The term "pro se assistance" emerged to describe a particular form of limited-scope representation where a lawyer gives assistance to a litigant without agreeing to represent them in court. This type of assistance commonly takes the form of the lawyer providing representation limited to procedural and legal advice, counsel on strategy, and assistance with "ghostwriting" court submissions, but declining to represent the litigant in their civil or criminal court proceedings. This was coined "pro se assistance" because the client remains unrepresented (pro se) in court — not because they were never provided any representation.

Similarly, in practice before USCIS, the term "pro se assistance" generally refers to practitioners' helping to complete USCIS applications, attaching relevant evidentiary materials, and submitting application packages to USCIS. Importantly, just like preparing a filing for a civil litigant, assistance to noncitizens who will remain unrepresented

1 The Restatement (Third) of the Law Governing Lawyers §14 (2000).

2 The Restatement (Third) of the Law Governing Lawyers §14 cmt e (2000).

following a practitioner's limited "pro se assistance" is representation that creates a practitioner-client relationship. Therefore, practitioners must clearly and explicitly limit the scope of the representation to form completion to avoid future liability. Practitioners must also understand that after creating a practitioner-client relationship, they must perform the assistance diligently and completely, maintain confidentiality, and abide by all other applicable rules of professional conduct.[3] Additionally, once the limited representation concludes, practitioners continue to owe duties of loyalty and confidentiality to the former client.[4]

Note

In practice, if your ethics rules allow, advance waivers of conflicts of interest may be prudent. While practitioners owe duties to clients they represented with "pro se assistance," the relationship is generally discrete and finite.

Note

As a reminder, rules of professional conduct are only directly binding upon attorneys admitted to the bar. Accredited representatives, however, should follow local rules to guide their ethical practice. Federal regulations that bind all immigration practitioners are often silent on ethics rules or don't provide significant guidance. While it would be a rare scenario, if the regulations conflict with local rules of professional conduct, accredited representatives should follow the regulations that directly apply to them.

Occasionally, but rarely, practitioners may act as mere "scribes" when assisting noncitizens with completing USCIS applications. In such cases, where a practitioner refrains from offering any legal advice and only records verbatim the noncitizen's answers to questions on the form, the practitioner-client relationship does not form. Even though, however, scribe assistance would not generally create a practitioner-client relationship, USCIS regulations are extremely broad and make it difficult for practitioners to assist in a "scribe" capacity.

Limited-Scope USCIS Practice According to the Regulations

Immigration practitioners must also comply with federal regulations when providing limited assistance to noncitizens. The regulatory threshold for when a practitioner's interactions with a noncitizen rise to "**representation**" before the Department of Homeland Security (DHS) are incredibly wide sweeping. Under the regulations, most interactions between practitioners and noncitizens that include assistance with USCIS applications amount to **representation**. Familiarity with regulatory definitions found at 8 CFR § 1.2 facilitates the analysis of how practitioners may properly provide limited assistance to noncitizens who will otherwise remain unrepresented.

Note

Note that the rules establishing certain duties to current and former clients are somewhat relaxed by Model Rule 6.5: Nonprofit & Court-Annexed Limited Legal Services Programs. Rule 6.5 provides that a lawyer providing short-term limited legal services "under the auspices of a program sponsored by a nonprofit organization or court" is subject to the conflict of interest rules only if the lawyer knows of the conflict of interest. Attorney practitioners should consult their local ethics rules to see if there are similar allowances.

Note

Terms defined in the regulations are color coded here for the reader's ease of understanding. The definitions are intertwined and can be confusing.

The regulations provide that "**representation**" before DHS "includes **practice** and **preparation**." **Practice** before DHS 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."

3 *See generally* Model Rules of Prof. Conduct (Am. Bar Ass'n 2024).

4 *See* Model Rules of Prof. Conduct R. 1.9 (Am. Bar Ass'n 2024).

To "**appear**" before DHS is not defined explicitly in the regulations. Instead, the meaning is loosely embedded within the definition of **practice**, which states that **appearing** on a case may be in person or "through the preparation or filing of any brief or other document, paper, application, or petition on behalf of a person or client before or with DHS." 8 CFR § 1.2. This means that "appearance" is not limited to in-person advocacy at interviews, but also encompasses filing of forms and applications with USCIS.

Representation before DHS also includes "**preparation**." **Preparation** "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."[5]

Because representation is defined so broadly under the regulations, even minimal assistance to noncitizens with form preparation commonly amounts to representation. Anytime a practitioner prepares a USCIS filing by combining legal analysis (study of facts and law of a case) with giving advice and filling in forms (an "auxiliary activity"), they are providing representation.

A practitioner may, at times, "prepare" (i.e., fill out) a USCIS form in the colloquial sense of the word without engaging in preparation in the regulatory sense. In reality, though, it is exceedingly rare for a practitioner to fill in USCIS forms without screening for eligibility (i.e., studying the facts and applicable law) and providing advice, and therefore preparing the form. Whenever assistance combines the study of facts and law with giving advice and form preparation, the practitioner is providing representation. In a 1992 opinion, the Immigration and Naturalization Service General Counsel explained that merely advising people on whether they should file an immigration application and indicating which forms they should file constitutes legal advice.[6] Additionally, the definition of "preparation" limits the ability of practitioners to act as scribes, excepting only "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."

Note

Even if there may be a scenario where "scribe" work (filling out blank spaces on forms) would not generally create a practitioner-client relationship and would not be considered "representation" under the regulations, CLINIC urges against practitioners attempting to assist noncitizens without providing analysis or legal advice. It is difficult for practitioners to withhold helpful knowledge and noncitizens may reasonably expect practitioners to offer helpful legal advice.

When Practitioners Must Enter an Appearance

The regulations state that an appearance "must be filed on the appropriate form as prescribed by DHS by the attorney or accredited representative **appearing in** each case."[7] Furthermore, practitioners may be subject to discipline for

5 8 CFR § 1.2.

6 Opinion of the General Counsel, Immigration and Naturalization Service (INS), Genco opinion 93-25, CO 292.2 April 20, 1993, AILA InfoNet Doc. No. 93042090.

7 8 CFR § 292.4.

repeatedly failing to file notices of entry of appearance[8]. As explained above, "**appearance**" isn't separately defined in the regulations, but the definition of "practice" gives practitioners some examples of what it means to appear on a case before DHS. Notably, "to **appear**" not only describes practitioners who are authorized to be present at interviews or to receive ongoing communications from USCIS. In addition, the definition of practice provides that an appearance may be "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."[9] Read together with the rule authorizing discipline for failure to enter an appearance, practitioners should take note that they seem to be required to enter a notice of entry of appearance anytime they "**prepare**" a brief, document, paper, or petition for submission to DHS.

The USCIS policy manual adds: "If the person who helped interpret or prepare the benefit request is an attorney or accredited representative, he or she must determine if the level of involvement and rules of professional responsibility require him or her to submit a signed and completed Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) with the benefit request."[10] Since the Professional Conduct for Practitioners regulations, which apply to all immigration practitioners, provide grounds for discipline when practitioners repeatedly fail to enter appearances, any level of involvement that constitutes preparation requires an entry of appearance. Remember that "appearing" in a case includes "the preparation and filing… of any application." To summarize, any practitioner who assists a client with a USCIS matter by combining analysis (the study of law and facts) with giving legal advice and completing USCIS forms (the "incidental preparation of papers," an auxiliary activity) is engaging in preparation and should enter an appearance. The Policy Manual also references a practitioner who "helped interpret," however, which is a "level of involvement" that does not constitute preparation or practice before DHS and therefore does not require an entry of appearance.

Considering the lack of a practical mechanism to limit representation to only the preparation and submission of a USCIS form, the rules and policy guidance seem wide-sweeping, and require practitioners to enter an appearance, notwithstanding that they do not intend to provide ongoing representation beyond the submission of that form. In fact, EOIR and USCIS have adopted such an interpretation in the past.

The disciplinary ground for repeated failure to enter appearances, coupled with the broad definition of "representation," was the subject of *NWIRP v. Sessions* litigation and settlement.[11] In that case, DOJ served cease-and-desist letters upon removal defense practitioners who did not enter appearances but provided assistance in completing and submitting forms and motions to the immigration court. The DOJ's argument was that the practitioners' limited assistance in preparing motions and applications for submission to the court required an appearance because the preparation assistance amounted to representation, which

Note

Now that the DOJ has updated the regulations defining practice, preparation, and representation, practitioners may enter a limited appearance on forms EOIR-60 and EOIR 61. This way, they can provide limited representation without entering a full appearance (Forms EOIR-27 and EOIR-28) without violating the regulation that punishes practitioners who provide representation on matters while repeatedly failing to enter appearances. USCIS regulations have not been updated to allow for appearances on limited document assistance.

8 8 C.F.R. § 292.3(a), 8 CFR § 1003.102(t).

9 8 CFR § 1.2.

10 1 U.S. Citizen and Immigration Serv., Policy Manual B.5, "Interpreters and Preparers" (2024), https://www.uscis.gov/policy-manual/volume-1-part-b-chapter-5.

11 *Nw. Immigrant Rts. Project v. Sessions*, No. 2:17-CV-00716, 2017 WL 11428868 (W.D. Wash. May 17, 2017).

requires an appearance under the regulations. The cease-and-desist letter stated that the practitioners were subject to potential discipline because they "clearly represented" noncitizens "by engaging in 'preparation' and 'practice' of their motions to reopen."[12] Fortunately, the plaintiff organization settled with DOJ and, under the settlement, DOJ promulgated new rules allowing limited assistance for "document preparation" without entering a full appearance before EOIR and the BIA. 8 CFR §§ 1003.17(b) (immigration court), 1003.38(g)(2) (BIA). Unfortunately, however, a parallel provision in the regulations still does not exist for assistance with filing documents before USCIS.

USCIS's promulgation of the disciplinary rules punishing the repeated failure to enter appearances in 2010[13] created a chilling effect on practitioners providing limited-scope assistance to noncitizens. In response, USCIS issued a statement declaring that while "historically, DHS has required that practitioners file a Notice of Entry of Appearance as Attorney or Accredited Representative when they engage in practice in immigration matters before DHS, either in person or through the preparation or filing of any brief, application, petition, or other document," the agency supports pro bono limited scope efforts. It announced that it did not intend to initiate discipline against practitioners providing pro bono limited-scope services at community events without entering a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative.[14]

At the time that USCIS issued the above statement, the agency had re-opened the 2010 interim final rule for additional public comments to consider the issue.[15] However, despite the comment period ending in March of 2011, USCIS never finalized the rule. This means that the interim final rule remains policy and that USCIS never officially addressed this issue by rule. That said, USCIS's statement of intent not to impose discipline in these circumstances, despite it appearing as "archived content" on the USCIS website, continues to be referenced as to whether an attorney or accredited representative must file a G-28 at group assistance events.[16]

Notwithstanding USCIS's 2011 statement, some preparer sections for USCIS benefits requests indicate that a practitioner preparer must submit a G-28. For example, the Form I-131, Application for Travel Document, preparer section notes: "If you are an attorney or representative, you must submit a completed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, along with this application." The form instructions do not provide any additional clarification. Given USCIS's stated intention to allow practitioners to prepare USCIS forms at pro bono community events without fear of discipline, and because of the potential incongruence with the regulations, practitioners can determine their level of comfort with the idea of not entering an appearance even if the form they are preparing indicates they "must."

12 Decl. of Jennifer Barnes, Document 49-10, Nw. Immigrant Rts. Project v. Sessions, No. 2:17-CV-00716, 2017 WL 11428868 (W.D. Wash. May 17, 2017).

13 Professional Conduct for Practitioners: Rules, Procedures, Representation, and Appearances, 75 FR 5225-01.

14 "The Department of Homeland Security (DHS) supports the efforts of immigration practitioners who volunteer to assist aliens at community events. U.S. Citizenship and Immigration Services (USCIS) announced that, until further notice, DHS does not intend to initiate disciplinary proceedings against practitioners (attorneys and accredited representatives) based solely on the failure to submit a Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) in relation to pro bono services provided at group assistance events." USCIS Statement of Intent Regarding Filing Requirement for Attorneys and Accredited Representatives Participating in Group Assistance Events, available at https://www.uscis.gov/archive-alerts/statement-of-intent-regarding-filing-requirement-for-attorneys-and-accredited-representatives. (last updated February 18, 2011).

15 Professional Conduct for Practitioners: Rules, Procedures, Representation, and Appearances; Reopening the Public Comment Period, 76 FR 5267-01.

16 USCIS Consideration of Deferred Action for Childhood Arrivals (DACA) Frequently Asked Questions, Q and A: 82, available at https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#miscellaneous Reviewed (last updated April 1, 2024).

Unfortunately, USCIS has not indicated any reassurance against possible discipline for limited scope preparation work outside of the pro bono community event context. Practitioners who charge fees for limited assistance or who engage in limited assistance on an individual basis may be at a greater risk of discipline for "repeatedly failing" to enter an appearance. In stakeholder engagements, USCIS representatives have expressed the position that the agency does not intend to control the scope of the practitioner-client relationship, but must merely know what the extent of the relationship is. One way to communicate a limited scope representation that concludes with the preparation and submission of the application, and that does not extend to all future correspondence, would be to so state on the G-28. The form requires that the practitioner "list the form numbers or *specific matter* in which the appearance is entered." While a practitioner could then alert USCIS to the limited scope in this way, it would be exceedingly unlikely that USCIS would recognize an appearance only for a "specific matter." Therefore, practitioners should be prepared to continue to receive correspondence and communication from USCIS beyond the stated scope of the relationship.

Preparer Sections on USCIS Forms

USCIS form instructions and preparer sections sometimes state that "anyone who *helped* you *complete*" the form "MUST sign and date" in the preparer section.[17] Other times, USCIS preparer sections state "if someone assisted you in completing" the application, you should indicate that you used a preparer.[18] These instructions indicate that USCIS's preparer section is meant to declare assistance by more than just those whose actions fall under the regulatory definition of "**preparation**." The phrases "helping to complete" or "assisting in completing" the form are potentially broader than the regulatory definition of preparation and indicate colloquial use of the term "prepare."

Regardless of whether assistance amounts to "**preparation**" under the definition in the regulations, practitioners should complete the preparer section anytime they assist a noncitizen in completing a USCIS form. Furthermore, most interactions with noncitizens amount to **preparation** even if USCIS was using only the regulatory definition of preparation.

Through updates to selected benefits requests in recent years, USCIS has begun to ask practitioner form preparers to indicate whether representation "extends beyond" or "does not extend beyond" the preparation of an application or petition.[19] When the language began to appear in form updates, practitioners were not clear about USCIS's objective for collecting this information. This was especially true in light of the agency's broad regulations on what constitutes "representation." USCIS has still not issued policy guidance or clear instructions as to how this information is used and what it means for representation to "extend beyond" preparation.

Practically speaking, if the intention is to limit scope to preparation and submission of one application only (at a group processing event, for example), the intention would not ordinarily be for representation to extend beyond that service. Therefore, the practitioner should check "does not extend."

Checking "does not extend," however, does not mean that USCIS will acknowledge the limited scope if

17 *See* Form I-129 Instructions, at 9, available at https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf.

18 *See* Form I-360 Instructions, at 13, available at https://www.uscis.gov/sites/default/files/document/forms/i-360instr.pdf.

19 *See* Form I-485, at 18, available at https://www.uscis.gov/sites/default/files/document/forms/i-485.pdf.

the benefits request also includes a G-28. USCIS recognizes the G-28 "until the conclusion of the matter for which it is entered, unless otherwise notified," regardless of the answer to the "extends beyond" question. There is currently no practical way to fill out the G-28 to limit the scope to match the "extends beyond" question of the preparer section. Though checking "does not extend" is not an explicitly permitted alternative to entering an appearance, practitioners whose assistance is limited to preparation and submission of a form commonly do not file a G-28, though the interaction may technically amount to "representation." Given the potential for discipline and USCIS's lack of clarification about the preparer provisions, practitioners must decide their level of comfort with attempting to limit scope solely through their answers on the preparer section.

Conclusion

While limited-scope representation is allowable and even encouraged by the ABA, the regulatory framework governing immigration practice makes it practically difficult for practitioners to deliver limited-scope services. Practitioners should be aware of when interactions with noncitizens create a practitioner-client relationship under the common law and according to DHS. Without regulatory reform similar to changes promulgated by the DOJ in recent years, practitioners before USCIS should remain aware of and consider exposure for potential discipline for failure to enter appearances. They should remember to follow ethics rules related to limited-scope representation and best practices to document their limited scope agreements through case management documents.