

RISK MANAGEMENT FOR THE IMMIGRATION PRACTITIONER

by John L. Pinnix*

INTRODUCTION

The way we were ... The way we are

Four years, and half a lifetime ago, this author wrote:

During the professional career of the majority of the members of AILA, the practice emphasis of many immigration attorneys has shifted from a general immigration practice, which often included a mix of family, refugee/asylum, trial and business cases, to principally—if not exclusively—business cases.

Several factors have contributed to this shift. A dynamic, technology driven, full employment economy has led employers to utilize the increased business visas and labor certification-exempt programs created by IMMACT90.¹

As with any area of law, immigration attorneys are attracted to their area of interest for a myriad of reasons. Undoubtedly, during the 1990s, some new practitioners, or their firms, perceived business immigration law as an under-served or emerging specialty niche. The practice emphasis of some of the more seasoned practitioners also shifted in the 1990s, both as a conscious reaction to the draconian restrictions in areas such as asylum and immigration defense and in anticipation of constriction in family law occasioned by the

imposition of the three- and ten-year bars, mandatory affidavits of support, and the sunset of INA §245(i). Their shift in emphasis was also in response to the siren song of a potentially remunerative area that might ameliorate the decline predicted for other areas of immigration practice. In a realization that the complexities of modern immigration law invites if not compels subspecialization, seasoned attorneys in growing firms also limited their immigration practices to a few areas—such as business.²

Fortunately, that snapshot did not inspire this author to attempt to peer into the future and offer any prophesy. Today, a perfect storm, consisting of a shallow economic recovery, post-9/11 national security concerns, and re-invigorated restrictionists, has transformed our practices; the world of many immigration attorneys has revolved almost 180 degrees. More and more lawyers are serving fewer and fewer business clients. Now, as old hands are rediscovering their family practice roots, attorneys are encountering unconscionable delays never intended by the legislators of yore who created our pitifully antiquated family quota system. The new practice frontiers are in areas such as border issues, national security, and, as of this writing, the now late and unlamented Special Registration program. Long in the wilderness, litigation is on the verge of becoming fashionable. PERM³ is coming on stage.

Every stage of a case has the potential to frustrate the most otherwise reasonable and virtuous client seeking nothing more than lawful status and family reunification. Even without the quota backlogs, governmental processing delays can destroy families. No less formidable and demanding is the human resources director, whose own job is on the line because no one anticipated there would be six-month lag in securing an advance parole for a key scientist, who has a desperate need to travel abroad—tomorrow.

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¹ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

² John L. Pinnix, "Risk Management for the Business Practitioner," 2 *Immigration & Nationality Law Handbook* 78 (2000–01 ed.).

³ Program Electronic Review Management.

In identifying basic rules for *Risk Aversion*, there are some constants—whether an attorney’s area of practice emphasis is business, family, or defense. The fact patterns giving rise to ethical dilemmas vary: the family practitioner may belatedly learn that a marriage is dubious; the attorney trying a removal case may learn that the testimony on which he was hinging his case is suspect; and the business immigration attorney learns that the employee has a criminal conviction undisclosed to the employer. Though mindful of Mark Twain’s warning against all generalities, including this one, there are nevertheless basic, fundamental precautions every immigration attorney can implement that will vastly reduce his or her exposure.

As in other practice areas, there are distinctions between questionable ethical conduct, malpractice, conflicts of interest, and issues of professionalism and confidentiality that face attorneys handling immigration issues.⁴ From obstruction of justice, to subordination of perjury, to harboring, immigration attorneys’ exposure has never been limited to civil liability or professional sanctions; but over the last decade, from IIRAIRA⁵ to the USA PATRIOT Act⁶ the bars have been raised. For instance, §213 of IIRAIRA removes any doubt that it is unlawful for any individual to knowingly and willfully fail to disclose, conceal or cover up the fact that he or she has, on behalf of any person and for a fee or other remuneration, prepared or assisted in preparing an application for immigration benefits that was falsely made.

While the distinctions between malpractice and other conduct are easily made by malpractice carriers and are of understandably keen interest to the

would-be claimant (who wants to be known as the “insured”) upon learning that the suit he or she is facing may be actionable, but is not at least for the purpose of the malpractice coverage, the actual distinction may be more academic to the attorney than the issues at hand. A negligence suit, bar grievance, criminal indictment, or loss of a single client can impact the attorney’s firm, other clients, and family for the remainder of his or her professional career.

The tactics for risk prevention suggested by this article go beyond modifying conduct that will allow an underwriter a better night’s sleep and address practices that may avoid an uncovered suit, professional grievance, or the wrath of a disgruntled client. They are not intended to be in any way exhaustive but are rather a professional reality check.

FIVE “EASY” PIECES

The real world practice of immigration law is fraught with situational ethical dilemmas.

Consider this: Either the petitioner or beneficiary may initiate contact with an attorney for assistance in securing a family-based “green card” for the beneficiary; it is rare indeed for a husband and wife to have independent representation at the outset of an immediate relative case. When there is a falling out among the relatives, the sponsoring uncle regrets signing an I-864 for the troubled teenage niece he has never met. Or, on the eve of the 90-day window to remove conditional status, the husband and wife whom you have represented for years separately call you and blurt out confidences that make your continued representation of either virtually impossible.

And in the business area in regard to who selects and meets with counsel, who signs the retainer agreement, or who pays the fees, an immigration attorney often *de facto* represents both the petitioning employer and the beneficiary employee. By extension, this representation often includes derivative beneficiaries.

Although the employer may initially think of the attorney as the worker’s representative, or the worker may think of the attorney solely as the company’s lawyer, the parties will soon be sharing confidences with the attorney necessary to process the application or petition. And the course of action the attorney charts will necessarily have legal implications for all of the parties.

As desirable as independent representation for each party may be (for both family and business based cases), it is usually not sought by the client,

⁴ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996); *See*, for instance, §213 of IIRAIRA, which pertains to the preparation of an application, and §214, which amends 18 USC §1546(a).

⁵ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

⁶ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; *see* “International Security, Civil Liberties, and Human Rights After 9/11—An Outline,” by Robert E. Juceam (with selected materials prepared by Dian R. Gray) in this volume.

not only for financial reasons, but also to facilitate processing.

Further consider the following, altogether possible, scenarios:

1. Fred Mertz, a Canadian entrepreneur, consults with you regarding a possible investment. Fred tells you, "Forget about filing anything for my wife Ethel. She has worked in the Boston office of Consolidated Aluminum Toothpicks for years and they think she is an American." The following day the Maple Leaf plunges and you do not hear from Fred again. Six weeks later, Consolidated Aluminum Toothpicks contacts you and asks you to represent the company. Your first task will be to supervise the audit of their 2,500 employees' I-9s.

2. José Melez entered the United States without inspection on July 4, 1997. He came to join Rosa, his childhood sweetheart; they married and now have four U.S. citizen children—the youngest, George, has a serious heart defect. Soon after he arrived, José's priest found him a "sponsor" and you timely file a labor certification that grandfathered José under §245(i). When the I-140/I-485 is ripe for adjudication, the service center transfers the file to your district office to schedule an interview. Although you occasionally speak by phone, you haven't actually seen José in a couple of years. Because José has been out of town, you arrange to meet the couple for final preparation outside the district office an hour before the scheduled interview. "This is the happiest day of my life," José exclaims. "I only wished my mother had lived to see it." You respond, that you are sorry, "I didn't know she had died." "Yes," says José, "I just got back from her funeral in Juaréz." "I was so afraid for him every moment he was away," Rosa added, "it's harder and harder to come in without papers." "Now what do we need to do to get ready for the interview?" they asked, together.

3. You have represented Bret Bolivar for years, beginning with his NACARA application. At long last, you accompany him to his naturalization interview. When he is given a date for the swearing-in ceremony, he says his brother, Bart, is coming in from a neighboring state for the happy occasion and the family wants you to represent Bart, since his "identical" NACARA case seems to be languishing. Bart makes an appointment to meet with you the day before Bret's ceremony. Your new legal assistant does an in-

take and reports that much of the case appears to be similar since Bret and Bart are identical twins. But she says Bart is awaiting his birth certificate, all he brought with him is a Matricula Consular and Mexican military card. He isn't sure how to get his birth certificate from the authorities in Monterrey.

4. Your oldest and most valued client is World Wide Widgets. Three months ago, an I-140/I-485 was filed at the California Service Center on behalf of Widget employee, Walter Worker. Last week, Walter's wife, Wanda, calls you at your home demanding to know when the adjustment will be completed "because Walter wants to leave the employment of World-Wide Widgets and accept a position with their competitor Norfolk and Western Widgets." Later the same evening, Walter calls you, apologizes for Wanda's "insolence," and begs you not to mention the call to World-Wide's human resources department; but "by the way, do you think the adjustment will occur before my divorce from Wanda becomes final?" The next day the director of human resources at World-Wide Widgets instructs you to *quietly* delay all immigration work pending a decision regarding a buy-out offer. A possible Canadian purchaser wants to move "corporate" to Winnipeg, manufacturing to Oaxaca, and reacting to the failure of Congress to meet the need for H-1Bs, high-tech functions will be fulfilled through virtual offices abroad. You are told, "We may need to re-file a couple of labor certifications for a few jobs that will be transferred to West Virginia; we should know where we stand within three to four months." That evening, Walter Worker, knowing nothing about the director's call, e-mails you to remind you that his daughter, Wylonia, turns 21 in eight months.

5. Walnut Cove Assisted Living, which you have never represented, has an approved I-140 for a professional nurse. The original beneficiary was in TN status and after determining he would never pass the CFGNS, he returned to Canada. Walnut Cove offers the position to Mary Worth who is visiting the United States. In completing the information required for the I-485, Mary becomes concerned about the question regarding arrests and convictions. In the late 1960s, early in her career, she thinks she was "charged" in Winnipeg for a (nonmarijuana) controlled substance violation. The record has been "expunged" and does not appear on any police checks. Mary

hopes that this will not be a problem because she is the sole support of her 93-year-old mother who is in a rest home and the salary offered is substantially more than she earns in Canada. Mary comes to you for advice and you indicate that serious issues are involved that will require some research. Minutes after your initial consultation with Mary, you receive a call from your old client, World-Wide Widgets, with “great news”: “We have just purchased all 50 Walnut Cove Assisted Living facilities.”

WARNING SIGNS

“Danger, Danger, Will Robinson!”

As they say, “it doesn’t take a rocket scientist ...” There are often early warning signs that foreshadow later melt-downs in business cases. Every attorney has legitimate reasons to sometimes give him or herself a pass for lack of 20/20 hindsight, but the seasoned practitioner can often avoid heartburn by taking the time to face and address troubling issues or facts as soon as they are identified. The following examples include the business immigration attorney’s equivalent to the family immigration attorney’s classic “bed-check” problems:

Your Contact is Limited to the Employee

At the least, this situation creates the potential that the parties are not reading from the same page of music; if problems arise later in the case, they may be harder to resolve. Is the employer willing to raise the offered wage if dictated by the wage survey? Is the employer willing and able to hold the job open until the start of the next fiscal year? Does the employer understand when a new or amended petition is required? And, in one critical area of the business immigration practice, limiting contact to the employee is entirely impermissible: labor certifications.

The Employer is Willing to “Sponsor” the Worker; “I’ll Sign Whatever You Prepare for Me”

In going down this road, the practitioner must distinguish between the appropriate role of counseling and assisting the employer in the preparation of a petition within the purview and intent of the applicable law that will facilitate an approval based on a legitimate job, and impermissibly assisting in the creation of an accommodation position or characterizing the position in a way that bears faint resemblance to the actual terms and conditions of employment.

The Beneficiary Awaiting Employment Authorization Can Never be Reached at Home During the Day

Scenarios such as your staff encountering the worker at the “future” job site prior to the approval of the petition suggest several issues and ethical dilemmas. Tempting though it may be, “Don’t Ask, Don’t Tell” does not discharge the attorney’s responsibility to the client nor may it satisfy the attorney’s duty to U.S. Citizenship and Immigration Services (USCIS). You must confront the issue and you can only do this by knowing the facts. Were false documents used to secure the employment? Did the employment begin before or after the filing of a change or extension of nonimmigrant status or before or after the filing of the ETA-750 or I-485? Can the matter be cured by exiting the United States and re-entering; of course, without resuming unauthorized employment? Will the I-485 be covered by §245(i) or (k)? Has the employee lied to you, and, if so, are you willing to continue the representation?

Opportunities to Expand Your Client Base or Profit Center

You receive the following e-mail:

Dear Sir: We are an international professional concern with offices in Rangoon, Nairobi, Milan, and Bratislava. We are looking for U.S. counsel to assist us in providing immigration assistance for up to 250 professionals during the upcoming year. Please provide your fee schedule for qualified referrals. Initially, we have several pre-screened computer programmers who need to come to the United States for final placement interviews. To qualify for B visas, they need a sponsor who is a U.S. citizen stating that they will be visiting him or her. Air tickets, hotel accommodation, food, and any other expenses will be solely on the workers’ account. Kindly contact us if you can help with these cases.

The author trusts that passing on this opportunity is a no brainer. But what about a U.S.-based solicitation promising you a very substantial fee for referring your client for some opportunity. Even if referral fees are permitted by your bar, is your due diligence to your client compromised or co-opted by the fee, especially if you do little, if any, legal work?

The Hired Gun Syndrome

Something about your couple doesn’t seem exactly right; but what the heck, they want to retain you right now. After all, you tell yourself, “everyone

is entitled to representation and integral to America's greatness is that we are a pluralistic society." Besides, you are loath to have some USCIS examiner expect your clients to conform to a 1950s Ozzie and Harriet stereotype. So, maybe there is a good reason this couple hasn't told their parents about their marriage ... maybe there is a good reason neither the husband or wife have a bank account ... maybe there is a good reason that some Ph.D candidate with a fundamentalist religious background married a 19-year-old U.S. citizen high school dropout with two felony drug convictions ... maybe there is a good reason that the 42-year-old wife's six and nine-year-olds haven't met their 26-year-old stepdad. But if there is a good reason, and there may well be one, you should satisfy yourself about the legitimacy of the relationship before even thinking about sending the file over the government's transom. Who are you to judge? It's only your license.

Servicing and Maintaining Clients: Know When to Hold Them, Know When to Fold Them

Never lose sight of the basics. This begins with an absolute duty to have and maintain the professional competence required to handle your client's case. Model Rule 1.1 requires that: "a lawyer shall provide competent representation for a client. Competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."⁷

Everyone has to begin somewhere and any licensed attorney can lawfully accept an immigration case. But immigration law is a complex area of practice, not a field for the dabbler. Over two decades ago John P. Boyd, a former INS District Director and then a Seattle attorney, told a West Coast symposium, "... the general practitioner, unfamiliar with immigration procedures, confronted with an immigration problem for the first time, may not realize the potential danger and far-reaching consequences inherent in what appears to be a simple matter. It is only after a practitioner has experienced firsthand a debacle affecting the lives of his clients that he fully realizes the necessity for a specialist."⁸ This is even more true today.

⁷ ABA/BNA Lawyers' Manual on Professional Conduct (ABA Manual); "ABA Model Rules of Professional Conduct" at Rule 1:1 (Feb., 21, 1996).

⁸ "Immigration and Nationality Law: The Client Who Seeks Permanent Residency Status," *Campbell Law Observer*, p. 5 (Dec. 26, 1980).

The Basics 101

In addition to the duty to possess the requisite professional competence, the other basics are: (1) you have the duty to diligently and timely pursue the case; (2) your client is entitled to your full and undivided loyalty; conflicts of interests are impermissible, and the client's confidences are sacrosanct; (3) the acts and omissions of your staff are inseparable from you; and (4) if you are scratching your head and formulating exceptions to the preceding tenets, you are outside of the basics and may already have a problem.

To minimally comply with the basic requirements of professionalism and ethics, you must comply with the following: maintain and use an up-to-date professional library; track deadlines through multiple tickler systems; routinely do conflict checks; have a written retainer agreement or engagement letter for every client; train your staff and oversee their work product at every stage of the case; maintain professional liability insurance; and oversee appropriate termination of representation including maintenance, or disposing, of the client's records pursuant to the governing bar rules.

An Ounce of Prevention

There are no "silver bullets," but a high percentage of problems can be avoided or minimized by the attorney who routinely follows basic procedures that should be second nature to an entry-level lawyer. Unfortunately, the harried professional may suppress his better, natural instincts or delegate without adequate supervision to the paraprofessional staff. The actual capital outlay for these procedures is usually minimal; and while their administration can at times be time consuming, this, too, is nominal in comparison with defending a suit or bar grievance.

According to Lawyers Mutual Liability Insurance Company, a North Carolina professional liability insurer, in order of frequency, the most common complaints about attorneys are:

- Did not return the client's telephone calls;
- Did not attend to the client's case;
- Did not explain the process to the client;
- Did not predict the outcome of the case correctly;
- Did not do what the client asked; and
- Had a conflict of interest.

Only a tiny fraction of Lawyers Mutual's policyholders are immigration attorneys but these complaints have clear resonance to the practitioner han-

dling immigration issues. Some of the complaints are remediable by discipline and common courtesy.

Each of the following complaints is addressed by the Model Rules:⁹

Returning Telephone Calls

Returning telephone calls often goes along with explaining the process. Both the attorney and the staff should promptly return telephone calls.¹⁰ The perception that the attorney has failed to explain the process is a related problem that can be met by maintaining lines of communication, *i.e.*, returning the client's calls. Of course, the attorney should clearly explain the case before accepting representation and throughout the process as mid-course corrections are required, or when governmental delays impact the original timetable of the client's case.¹¹

Today's client is inundated by provocative anecdotes in the media. There is almost endless material on the internet regarding virtually every subject, including immigration. Clients often do not understand that this material can be posted by anyone and much of it is speculation and otherwise lacks critical analysis. Even accurate information is dangerous if it is not correctly interpreted in the context of an individual's case. Absent clairvoyance, it is not always possible to know if even a well-educated and seemingly sophisticated client understands your explanation of processes that even most nonimmigration attorneys find hard to grasp. Invariably, the attorney will make judgment calls. Those who service clients on a flat-fee basis will, on occasion, be accused of streamlining the process so that the attorney is free to proceed to handle another matter; while those charging by the hour will be accused of "churning" the account to add to their billable hours.

There is no universal answer to address this area of professional risk; but clearly the better you and your staff know the individual client, the better position you are in to gauge his or her understanding of the process or at least the client's comfort level or informed consent *vis a vis* your course of action.

⁹ See article entitled, "Ethical Issues for Immigration Lawyers," in this volume.

¹⁰ "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Model Rule 1.4.

¹¹ "A lawyer shall explain the matter to the extent reasonably necessary to permit the client to make informed decisions," Model Rule 1.4.

Attending to the Case

According to the American Bar Association, failure to "attend to a case" is one of the most frequent reasons for complaints to lawyer discipline tribunals.¹²

Correctly Predicting the Outcome of the Case

The dynamics of immigration law have made the "prediction" of the outcome of a matter sometimes problematical even for the seasoned practitioner. Since 1986, there have been more than a half-dozen major immigration statutes enacted.¹³ In many instances, the implementing regulations have not been promulgated and the attorney has been fortunate if the agency provided any policy guidance, however informal. USCIS service centers are in meltdown, the appellate boards are years overdue in issuing decisions, the agencies are underfunded and the Department of Labor is suffering apparent permanent paralysis. Under these conditions, the attorney who attempts to predict the outcome of a case is on a fool's errand.

This is, of course, intolerable, given that the course of the client's life and fortune may often literally depend on the attorney's advice. Under these conditions, the attorney who guarantees results or makes predications regarding processing times without qualification and periodic professional re-

¹² ABA Manual, "Lawyer Client Relationship," at 31: 402 (Nov. 26, 1996). Model Rule 1.3 requires that "a lawyer shall act with reasonable diligence and promptness in representing a client." And the attorney has the ethical obligation of diligence to "carry through to conclusion all matters undertaken for a client." ABA Manual at 01:109.

¹³ These include: Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986); Immigration Marriage Fraud Amendments Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537; Immigration Act of 1990 (IMMACT90), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990); Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1953, 2024; 1994 U.S. Code Cong. & Admin. News p. 1801; Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") Pub. L. No. 104-132, 110 Stat. 279; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996); The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 30.

evaluation has abdicated his ethical and professional duty to the client.

Did Not Do What the Client Asked

Sometimes there may be no panacea to complaints that the attorney “did not do what I asked.” If the complaint is substantive rather than a matter of perception, the attorney may only be able to explain to the client why he or she cannot, or will not, do what the client asked. Perhaps it is unlawful, unethical, or just unwise. A legal sage once observed that “sometimes the best advice you can give your client is not to make a damn fool of himself.” Even if you can lawfully and ethically proceed, a course of action may in your professional estimation be tactically inappropriate. When the client insists on substituting his or her judgment for yours, you need to evaluate whether you want to terminate your relationship with that client. You need not only consult your own retainer agreement, but the applicable rules of professional conduct. In some jurisdictions, withdrawal has not been permitted without “good cause.”

Some rules now expressly allow withdrawal without cause or without client consent, subject to the authority of courts to require continued representation and provided the withdrawal can be accomplished without material prejudice to the client. In addition to “good cause” and the requirement that withdrawal can be accomplished without material prejudice to the client, Model Rule 1.16 lists situations under which an attorney may withdraw. These circumstances include: the client persists in actions the lawyer reasonably believes are criminal or fraudulent; the client has used the lawyer’s services to perpetrate fraud; the client insists on an objective that the lawyer considers repugnant or imprudent; or the representation has been rendered unreasonably difficult by the client.

The retainer agreement of the author’s firm requires the client to acknowledge that “it is essential that [the] Client advise [the] Attorneys of the true facts pertaining to this case, that the information provided on the Questionnaire submitted to [the] Attorneys is true and accurate to the best of [the] Client’s knowledge and that [the] Client promptly notify [the] Attorneys of any changes or corrections.” Breach of this provision permits immediate termination of representation by the firm, and the firm rarely fails to exercise this option.

Had a Conflict of Interest

Applicable Rules of Professional Conduct often address conflict situations arising in the context of litigation or scenarios uncommon to an immigration practice. But common sense and good practice policy dictate that representation should be declined at the outset if there is a conflict of interest; if a conflict is later identified, the client should be promptly notified and the issue of continued representation should be immediately resolved.

The New York City Bar Association recently found the following to be the *minimum* components of an effective conflicts of interest checking system:¹⁴

- All law firms, even solo practitioners, must maintain “records,” whether written or electronic.
- The records should be maintained in a way that allows them to be quickly and easily checked for conflicts.

To qualify as a “record”, the law firm must be able to systematically and accurately check for information when it is considering a new engagement.

- The records of prior engagements must be made at or near the time of the engagement.
- The records should be made within days, not weeks of the initial engagement, so that they may be checked before commencing a new engagement.
- The records should be updated periodically as additional parties or other relevant information is acquired that might create a conflict of interest.
- The records should be organized in a way that permits efficient access to the information contained therein.
- List clients and former clients alphabetically and list engagements undertaken for each client in chronological order under each name.
- Maintain a list of adverse parties cross-referenced to the client and matter in which the adverse parties were involved.

Certain information, at a minimum, should be maintained in the system:

- Client names
- Adverse party names
- Description of engagement

¹⁴ NYC Bar Ass’n Formal Op. 2003–03.

HELP IN TIME OF TROUBLE

The regulations only partially address discipline of attorneys and nonattorney representatives; they do not provide guidance on some of the most serious ethical issues, such as conflicts of interest. Generally, the ethics rules applicable to immigration attorneys are the rules of ethics for the state in which the lawyer is licensed to practice. In addition, most states have statutes regulating businesses and professions. State and federal laws regarding fraud apply to all lawyers, irrespective of their area of practice.”

The attorney encounters a legal or ethical issue that cannot be resolved after diligent research (and, if applicable, after consultation with other firm members). A filing deadline is at hand, or sometimes more intimidating, the Vice President for Human Resources absolutely needs to know an answer before the start of the next business day in Bonn. Where do you turn?

The Bar

Many state bars have counselors who will advise attorneys on ethical issues. Because these bar counselors may not be familiar with immigration issues, the querying attorney will have to carefully explain the areas of concern. A less than full understanding of the problem could hopelessly skew the opinion, thereby rendering it worthless.

Note: Before utilizing this resource, the attorney should be familiar with the parameters of the service and be sure that the query will not have any unintended collateral consequence.

Attorneys will normally seek an opinion from the bar in their home state. Attorneys needing assistance in other jurisdictions can start with the state’s court or bar Web page. A description profiling the services provided by each state bar is contained in the *Martindale-Hubbell Law Directory*; a directory of state bar associations is published in the American Bar Association’s annual “Leadership Directory”; and referrals also may be obtained through the National Organization of Bar Counsel, Inc., 515 Fifth Street, N.W., Building A, Room 127, Washington, D.C. 20001; (202) 638-1501; fax: (202) 638-0862; or online: www.nobc.org.

The American Bar Association’s “ETHICSearch” permits attorneys to call, write, fax, or e-mail descriptions of situations posing ethical problems. They will receive citations to the authorities including: applicable ABA ethics rules, ethics opinions issued by the ABA as well as state and local bar

opinions, and other relevant research materials; *e.g.*, case law, law review articles, and treatise materials. Most inquiries are handled on a same-day basis.

Most ETHICSearch searches are free of charge. If additional research is requested, there is an hourly charge of \$30 for members of the Center for Professional Responsibility, \$45 for other ABA members, and \$60 for nonmembers. The minimum charge is \$15. Expedited services as well as fax and mailing services also can be arranged. Call (800) 285-2221, fax ethics questions to (312) 988-5491, or send an e-mail to ethicsearch@staff.abanet.org. You can write to ETHICSearch at ABA Center for Professional Responsibility, 321 North Clark Street, Chicago, IL 60610.

Professional Liability Insurers

Many professional liability insurers have proactive risk management programs to assist their policy holders. Just as with bar counselors, the policy holder may have to carefully explain the areas of concern if the company does not specialize in the immigration coverage area. Even if the carrier cannot resolve the problem at hand, prompt consultation with the company may be necessary under the terms of the policy.

Practice Pointer: The author encourages every attorney to maintain adequate professional liability coverage and encourages the attorney to periodically review the terms of the policy keeping in mind any changed circumstances and understanding that not every potentially actionable occurrence is covered.

The Government

AILA’s formal liaison and other initiatives directed toward the State Department, Department of Labor, the EOIR, USICE, USCBP, USCIS, and the Social Security Administration at every level are extraordinarily valuable tools in ascertaining and influencing immigration policy for our clients. This aside, to paraphrase the venerable punch line, “the government is here to help you,” is all too often true in the real world, at the “retail level.” With sincere respect to the thousands of dedicated public servants and leaving issues of motive and intent aside, the agencies charged with the administration of U.S. immigration laws are neither competent nor equipped to give advice on which you can rely.

Whatever advice is available is necessarily myopic: consuls do not know or understand the regulations the USCIS service centers follow; whatever understanding a state workforce agency (SWA) has

of nonimmigrant programs is limited to the areas it is charged to administer. USCIS “consumer” publications and Web site are replete with errors and USCIS hotlines constantly give erroneous advice, some of which if followed could actually render the recipient inadmissible or removable. If you get an answer you like, how can you ensure that USCIS will later honor it; if you receive an answer you do not like, do you follow it? If you do not follow it, after you have notice of the government’s position, you may have incurred additional exposure.

If our immigration laws were in any way user-friendly and if the advice of the government could be readily obtained or confidentially relied on, the business community, with its eye on the bottom line, would not be utilizing the services of immigration attorneys.

The American Immigration Lawyers Association

By virtue of their membership, AILA attorneys have access to the AILA Mentor Program. This is an invaluable resource for evaluating and coping with ethical issues.

The AILA mentor is a practicing immigration attorney with at least five years of experience in the area of practice. There are mentors for the specific area designated as “Ethics and Professional Responsibility,” as well as for virtually every area of immigration practice.

The mentor does not charge any fee for a brief consultation, not to exceed 15 minutes. The attorney seeking consultation must ask the AILA mentor for assistance directly. Use of this system by legal assistants and secretaries is not permitted; the calling attorney should research the issue before calling the mentor. Current mentors and the guidelines for the program may be found on the AILA InfoNet site.

Practice Pointer: Invaluable though a volunteer mentor can be, some issues will necessitate formal association of outside counsel. When this occurs, the practitioner will need to decide from the outset whether the outside counsel is representing the original client or the attorney.

The World Wide Web

Check out www.legalethics.com; assume that your client is looking at it, too.

CONCLUSION

Always do right.

This will gratify some people,

And astonish the rest.—Mark Twain

Representing foreign nationals has always posed potential ethical challenges to the attorney. These have included cultural, educational, and linguistic barriers, as well as a misunderstanding of the role lawyers play in the immigration process and the American legal system. Sometimes just as challenging is the U.S. petitioner who expects legal counsel to be creative and resourceful and may not care about or understand the constraints the law places on an immigration practitioner.

It is the immigration attorney’s calling and responsibility to reconcile these differences and balance the interest of each client. An immigration practice requires identifying and drawing on a commonality of professionalism and ethical precepts, the same precepts that ideally are part of the professional fiber of every person practicing our profession. These precepts should be nurtured, cultivated, and preserved. Now more than ever, immigration attorneys have the unique responsibility not only to further the interest of their clients but to educate the public as to the contributions of all immigrants to our nation, and to lead the fight to protect the fundamental due process rights guaranteed by our Constitution.

It is said that Carroll W. Weathers, who practiced real estate law in Raleigh, North Carolina, for 17 years before serving as the Dean of the Wake Forest University School of Law for another 20 years, wished for his students that “to the end, their lives may be lived in the service of others, and they may find the satisfaction that comes from a noble purpose, high ideals and exemplary living.”¹⁵ Dean Weathers, blind and retired, continued to teach legal ethics at Wake Forest until his death at age 82. It is doubtful that Carroll Weathers ever handled an immigration matter, but he fervently believed in legal ethics and that an attorney “occupies a preferred station of leadership, possesses exceptional influence, and it not only is his privilege but his duty to use his influence and position on behalf of a better social order, and live as a worthy example to others.” Such should be the highest aspiration of an immigration attorney.

¹⁵ “What Would Dean Weathers Do?” *North Carolina Lawyer*, September/October 1999.