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ETHICAL CONSIDERATIONS RELATED TO
AFFIRMATIVELY FILING AN APPLICATION FOR ASYLUM
FOR THE PURPOSE OF APPLYING FOR CANCELLATION OF
REMOVAL AND ADJUSTMENT OF STATUS FOR A
NONPERMANENT RESIDENT

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ETHICAL CONSIDERATIONS RELATED TO AFFIRMATIVELY FILING AN APPLICATION FOR ASYLUM FOR THE PURPOSE OF APPLYING FOR CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS FOR A NONPERMANENT RESIDENT.¹

I. BACKGROUND

This advisory seeks to assist attorneys in navigating the significant ethical questions posed by the practice of submitting an affirmative asylum application with the end goal of being placed in removal proceedings so that an application for cancellation of removal for nonpermanent residents (Form EOIR-42B) may be submitted.

Attorneys seeking to avoid violating the Code of Federal Regulation (C.F.R.)'s grounds for disciplinary sanctions, as well as the applicable rules of professional conduct, should be familiar with the ethical considerations that attach to this practice; this is particularly so given that several attorneys have been subject to professional discipline for related conduct. To this end, a checklist is provided at the conclusion of this advisory consisting of questions that attorneys should ask of themselves before engaging in this practice.

FROM SUSPENSION OF DEPORTATION TO CANCELLATION OF REMOVAL

In 1996, Congress severely curtailed immigration options through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). One of the many changes in the law was the transformation of suspension of deportation into cancellation of removal for nonpermanent residents (non-LPR cancellation of removal). An application for either form of relief could only be filed before an immigration judge during the course of deportation proceedings (now called removal proceedings) and, if granted, would enable the recipient to obtain lawful permanent residence.

The premise behind suspension of deportation was that some long-term residents of the United States should not be removed if they have compelling equities. Under this old rule, a foreign national could qualify for suspension of deportation by showing seven years of continuous physical presence in the U.S. and hardship to self or a qualifying relative if deported.

While Congress left this general concept in the Immigration and Nationality Act (INA) in the form of cancellation of removal, it intentionally made the rules much stricter, thereby greatly reducing the number of applicants who would qualify.² To win cancellation of removal, an individual must have lived in the United States for ten years and also demonstrate exceptional and extremely unusual hardship to a qualifying relative.

The requirements for cancellation of removal and adjustment of status for certain nonpermanent residents are set forth at INA § 240A(b):

1. In general, the Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

¹ Authors: AILA members Matthew Blaisdell, Victoria Neilson, Michele Carney, and Meghan Moore on behalf of the AILA Ethics Committee.

² For a very informative article about non-LPR cancellation, see Margaret Taylor, "What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal," 30 J.L. & Pol. 527, 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631638.

(C) has not been convicted of an offense under section 1182(a)(2), 1127(a)(2), or 1127(a)(3) of this title, subject to paragraph (5); and
(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2012).

The standard is, by design, very difficult to meet. The applicant must be in removal proceedings, be able to prove long-term residence in the United States of at least 10 years, have a qualifying relative, and then meet a hardship standard that is intentionally very high. The Board of Immigration Appeals has made it clear that “exceptional and extremely unusual hardship” is “substantially beyond that which would ordinarily be expected to result from the alien’s deportation.”³

Further, the number of applications that may be granted in a fiscal year is capped at 4,000 nationwide; once that cap is reached, a decision on pending applications must be reserved until numbers become available in subsequent years, creating a significant backlog of approvable cases.

AFFIRMATIVELY SEEKING CANCELLATION OF REMOVAL

When suspension of deportation was available, an attorney could prepare an application and ask Legacy INS to issue an Order to Show Cause (the charging document in immigration proceedings, now called a Notice to Appear, or “NTA”) to place the foreign national into deportation proceedings—thus allowing the individual to apply for suspension. Often, if presented with a compelling and competently prepared application accompanying the request, the trial attorneys would use their discretion to initiate proceedings.

The context today is very different. Immigration courts currently face severe backlogs with merits hearings often calendared two or three years after the initial hearing, and often much longer if additional hearings are required. Furthermore, current enforcement priorities focus on recent entrants and individuals who evidence other aggravating factors in their immigration and criminal history. Thus, it is virtually impossible to convince DHS to issue a NTA for the purpose of permitting an application for cancellation.

As a result, attorneys representing clients who are statutorily eligible for cancellation are left with the dilemma of how and whether to have their clients placed into removal proceedings. If an attorney has a client who is already in removal proceedings and is statutorily eligible for non-LPR cancellation, there is no ethical dilemma in pursuing cancellation. However, with limited routes to get into removal proceedings, and restricted options to qualify for other relief, attorneys have begun affirmatively filing applications for asylum solely for the purpose of having their clients placed in removal proceedings; this is possible because applications not granted at the asylum office are required by federal regulation at 8 C.F.R. §208.14(c)(1) to be referred to the immigration court for removal proceedings if the immigrant is inadmissible or removable.

The requirements for asylum bear no resemblance to those for cancellation of removal. Asylum requires a demonstration that the applicant is unwilling or unable to avail herself of the protection of her home country due to a well-founded fear of persecution on account of one of five protected grounds. She must also establish that she has both a subjective and objective fear of return. The subjective component requires that she demonstrate a genuine fear of persecution; the objective component is whether a reasonable person in her circumstances would fear persecution, and must be supported by credible, direct, and specific evidence. Additionally, the application must be filed within one year of entering the U.S., absent a showing of changed or extraordinary circumstances that caused the application to be filed beyond the deadline.

Some attorneys have been known to advertise the ability to procure work permits for immigrants who have been in the U.S. for ten years. The premise is that once an asylum application is pending for 150 days, an applicant may file for an Employment Authorization Document (EAD) or, once the case is referred to immigration court, the attorney will file an application for

³ *In Re: Monreal-Aguinaga*, 23 I. & N. Dec. 56, 59 (BIA 2001).

cancellation of removal along with an application for employment authorization, and then pursue administrative closure so that the immigrant can work while the case remains closed. (Though, it should be noted, this strategy may also apply in cases where asylum is the only application pursued.)

The practice has become widespread. Some asylum offices now face backlogs of two to three years between the time when the asylum application has been filed and the time of the interview. Thus, it has been reported that these types of cases, once colloquially referred to as a “10 year green card,” are now being referred to as the “eight year green card” because if an immigrant has eight years of physical presence before filing the I-589, and another two years pass before issuance of the NTA, then the immigrant will have acquired 10 years of physical presence for the purposes of non-LPR cancellation. Often, the immigrant fails to appear for the asylum interview, and the asylum application is typically withdrawn and not pursued in the immigration court.

Additionally, many advocates have reported consulting with immigrants who have unknowingly filed such applications. They are unaware of their content, the relief sought, the representations made therein, or of the potential consequences that such filings may entail; many believe that they have simply applied for a “10-year green card” or work permit.

Against this background, attorneys, community-based organizations, law enforcement agencies, disciplinary authorities, and the courts have struggled with the ethical and practical considerations surrounding this practice. The asylum office may refer cases directly to the EOIR for discipline, as well as to the DHS Disciplinary Counsel and or the Fraud Detection and National Security (FDNS) office within USCIS, in which case an investigation may be generated that could ultimately result in a disciplinary referral and/or enforcement action. Additionally, disciplinary referrals may be made by the Immigration Judges, ICE Offices of the Chief Counsel (OCC), or by other attorneys who have been made aware of unethical attorney behavior.

The purpose of this advisory is to provide attorneys with a brief overview of a few of the ethical concerns they must consider when deciding whether to file an affirmative application for asylum when the primary objective is to pursue an application for cancellation of removal. Where applicable, citations are made both to the ABA Model Rules of Professional Conduct and the grounds for disciplinary sanctions found at 8 C.F.R. §1003.102.

II. ETHICAL CONSIDERATIONS

A. FILING A FRIVOLOUS APPLICATION

A primary concern for practitioners in filing asylum applications for the purpose of having removal proceedings initiated against their clients is that the application could be considered frivolous. There are two distinct (though overlapping) definitions of “frivolous” with which attorneys must comply.

Asylum-specific (CFR) “frivolous”

To combat fabricated asylum claims in the 1990s, Congress imposed a new rule that anyone filing a “frivolous” asylum application would be banned from all forms of immigration relief. The Code of Federal Regulations defines “frivolous” not as a case that doesn’t succeed, but specifically as a case which is “fabricated.”

For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act only if a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. For purposes of this section, an asylum application is frivolous if any of its material elements is deliberately fabricated. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. For purposes of this section, a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal. 8 C.F.R. § 1208.20

If an applicant knowingly fabricates material elements of the claim, she will be barred from any and all future immigration benefits. Congress deliberately made the consequences of filing a fabricated asylum claim among the most severe under the INA.

Frivolous applications. - If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this Act, effective as of the date of a final determination on such application. INA § 208(d)(6).

Below are two examples which highlight the meaning of the asylum-specific frivolous definition.

Hypothetical 1. Yen-Chen is from China. She has a good case for cancellation of removal because she has been in the United States for 15 years and has a U.S. citizen son with severe medical problems. Her attorney advises her to say that she has recently converted to Christianity and file for asylum on this basis. In fact, Yen-Chen is an atheist.

Hypothetical 2. Gretchen is from Germany. She does not like the Syrian refugees coming into Germany and thinks they may cause violence. Gretchen would like to apply for asylum because she is afraid to return to Germany. Gretchen has been in the United States for fourteen years and has two U.S. citizen children, both of whom are exceptional math scholars.

The first example is a classic instance in which, if an immigration judge or the BIA makes the sufficient findings, Yen-Chen could be considered to have filed a frivolous asylum application as defined at 8 C.F.R. § 1208.20. Under the unethical advice of her attorney, she willfully created material facts in an effort to set forth a strong asylum claim.

By way of contrast, Gretchen has not violated the asylum-specific frivolous rule. She has not fabricated a material fact. So long as she is truthfully afraid of the Syrian refugees, there is no fabrication in her claim. However, the fact that she has a subjective fear does not mean that an attorney can or should file Gretchen's claim. There is a second, broader definition of "frivolous" which attorneys must also consider which includes filings that are lacking in merit, perhaps including one in which the applicant does not have an argument to overcome having missed the one-year filing deadline.

"Frivolous" under the model rules and C.F.R.

ABA Model Rule (MR) 3.1 Meritorious Claims and Contentions states:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

This is echoed at 8 C.F.R. §1003.102, which states that "a practitioner who falls within one of the following categories shall be subject to disciplinary sanctions in the public interest if he or she"

(j) Engages in frivolous behavior in a proceeding before an Immigration Court, the Board, or any other administrative appellate body under title II of the Immigration and Nationality Act, provided:

(1) A practitioner engages in frivolous behavior when he or she knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to harass or to cause unnecessary delay. Actions that, if taken improperly, may be subject to disciplinary sanctions include, but are not limited to, the making of an argument on any factual or legal question, the submission of an application for discretionary relief, the filing of a motion, or the filing of an appeal. The signature of a practitioner on any filing, application, motion, appeal, brief, or other

document constitutes certification by the signer that the signer has read the filing, application, motion, appeal, brief, or other document and that, to the best of the signer's knowledge, information, and belief, formed after inquiry reasonable under the circumstances, the document is well-grounded in fact and is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, and is not interposed for any improper purpose.

Here the term “frivolous” comes to us again, and imposes a more significant burden on the attorney to investigate the merits of the claim than merely requiring that the claim not be fabricated; filing a claim without a basis in law and fact (both subjective and objectively reasonable) could invite sanctions under both the Model Rules and C.F.R.

Note also that, if the applicant fails to attend her interview, it may be inferred that she has chosen not to pursue the application, as it cannot be approved without her appearance at the scheduled interview.

Below are two examples of when an attorney may file an affirmative asylum claim with the end goal of getting her client into removal proceedings to seek additional relief and in which MR 3.1 and 8 C.F.R. §1003.102 might not be violated:

Hypothetical 3. Veronica is afraid to return to El Salvador, but does not have a claim for asylum on a traditionally recognized protected ground. She is genuinely afraid to return to gang violence and she fears her young daughters may be harmed. Veronica is a single mother of five U.S. citizen children. Three of her children have unusual and severe birth defects and require constant medical appointments and hospitalization. Her children range in age from 16-20. Veronica has been in the United States for 20 years, with no criminal convictions.

Hypothetical 4. Adrian is afraid to return to Mexico because of the violence in his hometown in the state of Guerrero. He knows several young men from his town who have joined the cartels and has fear of returning based on what he has heard about the state of affairs there. Adrian has lived in the United States for nine years and has an undocumented wife and three young U.S. citizen children. One of the children was born with a heart defect, but surgery corrected the issue. It is unknown if the child will have issues from the heart defect in the future, but the child is required to see a cardiologist for several years. Adrian owns a landscaping business, but is desperate for a work permit. He has no criminal convictions. His attorney is confident that, by the time the Notice to Appear is issued, Adrian will have the 10 years of physical presence required to pursue a COR claim and that, based on his experience, DHS will agree to a motion to administratively close after Adrian has filed an application for a work permit based on either the asylum application or the COR application. The attorney is also hopeful, that, during the period while a 589 is pending, there could be comprehensive immigration reform or some discretionary relief (e.g, DAPA) for which Adrian may qualify.

In the two scenarios above, Comment 2 of MR 3.1 provides guidance. This comment states:

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

In Hypothetical 3, filing an asylum claim may not be seen as frivolous if the lawyer can make a good faith argument in support of the claim. It is well known and even recognized by the Department of State⁴ that general and gang-related violence in El Salvador are pervasive. Notwithstanding the client's real fear of returning to El Salvador, the lawyer still may not be able to fit

⁴ <https://travel.state.gov/content/passports/en/alertswarnings/el-salvador-travel-warning.html>.

the client under a recognized protected ground—i.e. a particular social group (PSG) for a winning asylum case. However, case law within the area of PSGs is in a state of flux and it could be possible that Veronica might have a winning case by the time she makes it to her individual hearing in court in several years. She does have a one-year bar to her asylum claim, but could make a colorable argument regarding changed or extraordinary circumstances excusing the late filing. She could also still pursue the application by way of applying for withholding of removal if the case is referred to the immigration court.

Once in immigration court, she may pursue non-LPR cancellation while still pursuing the withholding claim. She also has children who are moving towards aging out as qualifying relatives for COR. Since she is a single mother, once the kids age out, she may be faced with severely disabled adult children and no recourse in immigration court to pursue cancellation. Therefore, filing an asylum application in this case is not only not frivolous but may also be prudent, as she may have a genuine asylum claim and also a strong claim for non-LPR cancellation of removal.

Hypothetical 4 is a bit hazier due to the fact that Adrian does not yet have the 10 years of physical presence required for non-LPR cancellation. Additionally, he would need to meet the exception to the one-year filing deadline. Filing an application under these circumstances would not be frivolous as long as there is a good faith argument under the existing case law or a good faith argument to expand existing case law, regardless of the fact that the attorney does not expect the argument to succeed. The test for non-frivolous under MR 3.1 would be whether the client expressed a genuine fear based on the facts, communicated via a detailed statement that includes a nexus to a protected ground of asylum; additionally, a colorable argument must be made for filing for the asylum application now rather than within one year of entering the U.S. If these elements are met, regardless of the fact that the secondary goal is a cancellation case, the filing would not be frivolous under MR 3.1.

Be aware, however, that there is a fine line surrounding what could be considered by some Immigration Judges to be frivolous. MR 3.1, Comment 1 states:

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

In regards to the litigation strategy of placing the client in removal proceedings in the hopes of obtaining a favorable exercise of discretion from DHS while avoiding the possibility of a removal order, a more detailed discussion of informed consent is included below under MR 1.4 (Communication).

Returning to Hypothetical 1, above, a claim for a German woman whose subjective fear of refugees would not be seen by a tribunal as objectively reasonable, supported by country conditions materials, or potentially as pushing the law in a new direction, would clearly violate MR 3.1 & 8 C.F.R. § 1003.102.

Hypothetical 5. Maria is from Mexico. She has crossed the border back and forth for years. Her mother recently died and she would no longer have a place to live in Mexico if she were to return there. The attorney tells Maria that gang violence is increasing in Mexico and asks if she is afraid of gangs but Maria says there are no gangs in the part of Mexico from which she comes. She does not want to return because she will not find work and no longer has family there. She wants to file for asylum to obtain work authorization.

An attorney who files for asylum for Maria would also likely violate MR 3.1 and 8 C.F.R. § 1003.102. Even if country conditions materials might support a gang-based claim for some parts of Mexico, unless Maria is actually afraid to return, an asylum claim would be frivolous. The fact that Maria has made multiple return trips to Mexico with no problems or fears would further undermine any claim that she has a subjective fear of return.

B. OTHER ETHICS IMPLICATIONS

Candor to the Tribunal

Other ethics rules of which attorneys must be cognizant in this situation pertain to Candor to the Tribunal. MR 3.3 (Candor to the Tribunal) states, in part:

(a) A lawyer shall not knowingly: (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; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. (emphasis added)

Another equally important rule at play here is 8 CFR § 1003.102, which states that a practitioner shall be subject to disciplinary sanctions if he or she:

(c) Knowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence. If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures.

If a lawyer has offered material evidence that she later discovers to be false, there is a duty to take reasonable remedial measures to correct the false evidence, while at the same time, always maintaining client confidentiality per MR 1.6. If the client refuses to withdraw the false evidence, then the attorney must withdraw from the case and may have to disclose the false evidence to the tribunal.

Note that some jurisdictions have modified versions of MR 3.3's disclosure requirement. In several states and Washington D.C. confidentiality must be held inviolate, and several other states provide for different obligations and restrictions related to the disclosure obligation than those generally discussed above. Therefore, attorneys must consult the rules of the applicable jurisdiction when considering their obligations under MR 3.3.

It should also be noted that there is debate as to whether the asylum office should be considered a tribunal⁵ for the purposes of MR 3.3.⁶ If an asylum office is not a tribunal, attorneys' representations should be guided instead by MR 1.4

⁵ MR1.0(m) defines "tribunal" as a body, including an administrative agency, acting in an adjudicative capacity, such that a neutral official, after the presentation of evidence or legal argument, will render a binding legal judgment directly affected a party's interest in the matter.

⁶ For example, New York State Bar Association Opinion 1101 states that USCIS service centers are not tribunals, and that the inquiry rested on whether the decision issued by the body affected individual parties who had the opportunity to present evidence and to cross-examine other providers of evidence, and whether the decision was made by a brief of fact, rather than a person in a policy-making role. However, there is disagreement as to whether this indicates that New York State does not consider any DHS agency to constitute a tribunal. It should be noted that USCIS and the Department of Labor have the authority to challenge or otherwise verify evidence, that MR 1.0(m) does not refer to "cross-examination", and that the agency itself may act as an adversary. Additionally, several states, including New York, allow attorneys to withdraw an opinion or representation, in exception to MR 1.6, that is inaccurate or in furtherance of the

(Communication). This is particularly relevant in instances where an attorney's duty under MR 1.6 is triggered, as MR 3.3 states instances in which it 'trumps' MR Rule 1.6 states instances in which it 'trumps' MR 4.1. A highly detailed discussion regarding what constitutes a tribunal may be found in the chapter addressing MR 3.3 within the AILA Ethics Compendium. For purposes of brevity, the Authors note that the answer to this question is state-specific, and attorneys should look to the ethics opinions of the appropriate state bar.

However, lawyers should treat both the asylum office and the immigration court as tribunals for purposes of these rules, particularly given that MR 3.3 is certainly triggered once the I-589 is referred to EOIR and an NTA is issued. Regardless, 8 CFR § 1003.103(c) (covering false statements) anyway requires remedial measures with respect to any application filed with USCIS. An attorney cannot knowingly submit any information on Form I-589, and later Form EOIR 42B, or in any and all documentation submitted in support of such applications, that were fabricated or otherwise not true in fact. Upon discovery of such, the attorney must take the appropriate remedial measures, including disclosure. Furthermore, as discussed below, the knowing presentation of false evidence to any government entity will expose the attorney to criminal liability per 18 U.S.C. § 1001 (knowing false statements) and § 1546 (fraud and misuse of visas and other immigration documents).

Competence and Diligence

Both MR 1.1 (Competence) and MR 1.3 (Diligence) apply to the situation where an attorney is strategically filing an asylum application in order to get his client into removal proceedings.

MR 1.1 states that "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MR 1.3 states that "a lawyer shall act with reasonable diligence and promptness in representing a client." Their EOIR corollaries can be found at 8 C.F.R. §§ 1003.102(o) and (q).

Under these rules, the lawyer is required to prepare the I-589 application in a manner that is both competent and diligent. If the lawyer is preparing the I-589 asylum form, it is critical that the lawyer understand the legal requirements for asylum, withholding of removal and protection under the Convention against Torture (CAT). The lawyer should understand the protected grounds and nexus required for asylum, and the standards for both withholding of removal and CAT.

It is important for the lawyer to also understand how to competently complete the I-589 form in a way that completely answers all questions. For example, under Part B, question 1 (the question that asks which protected ground the claim falls under), it is essential for the lawyer to truly understand those protected grounds, including the relevant case law. A failure to answer this question in a manner that states a colorable claim may evidence a lack of competence and/or diligence.

MR 1.1 and MR 1.3 would not be satisfied if the lawyer does not understand the I-589 form or legal requirements. Simply completing the form, and leaving large blanks, with the goal of getting the client into removal proceedings, raises a number of significant ethical concerns discussed throughout this article.

Likewise, assuming that the completed I-589 meets both its procedural and legal requirements, and the client is eventually referred to Immigration Court, it is critical that the attorney understand the legal requirements of non-LPR cancellation. A competent lawyer would thoroughly evaluate the strength of the potential claim for cancellation of removal before beginning the process that would result in the initiation of removal proceedings. Proving "exceptional and extremely unusual" hardship can be challenging and it is important for the lawyer to be current on case law in that jurisdiction as well as the idiosyncrasies of the various Immigration Judges who may oversee the proceedings.

commission of a crime—and as noted below, several federal criminal statutes may be implicated by the practices described in this advisory. Further, the authors note that the regulations discussing candor at 8 CFR § 1003.102(c) do not distinguish between immigration courts and asylum offices.

There are also other factors that the lawyer must understand about non-LPR cancellation, which include length of physical presence, qualifying relatives who age out, good moral character, the stop time rule, and criminal issues. In addition, asylum offices are currently taking several years to schedule appointments for affirmative asylum applications, and if the case is referred to Immigration Court, then there may be another long delay. The qualifying relative for cancellation may age-out, leaving the client in removal proceedings with only a weak asylum claim as relief. All this must be fully disclosed to and understood by the client before filing an asylum application.

Communication

MR 1.4(a)(2) states that a lawyer shall “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” and MR 1.4(b) states “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” “Informed consent” is defined at MR 1.0(e) as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

MR 1.4 is arguably violated when attorneys represent to clients the potential benefits involved (work permit, green card) without fully explaining any and all of the following: the legal strategy involved in pursuing the benefits sought; that the benefits will be sought via an application for asylum and/or cancellation of removal; the elements required for such claims; the likelihood of success for each claim; the risks involved in such applications (namely, the institution of removal proceedings and the possibility that an order of removal will be issued); the consequences of submitting a frivolous application; and that the client must review, understand, and vouch for the information contained in the applications. Failing to communicate this information and to explain the material risks inherent in this proposed course of conduct likely constitute a violation of this rule.

Given the geographic and judicial diversity in immigration courts throughout the United States, there is a high degree of “roulette” involved in the strategy to place a client into proceedings. Judges exercise considerable discretion in finding whether the “exceptional and extremely unusual hardship” standard has been met. Thus, while an attorney may inform a client that, based on the attorney’s opinion or a theoretical “average case,” the client presents a strong application, the attorney has no way of knowing which judge will adjudicate the application, and should therefore advise the client that a case which one judge may view as strong may be viewed quite differently by another judge. This element of chance should be explained as well.

Fees

MR 1.5(b) states that “The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.”

MR 1.5(c) sets out the restrictions related to contingency fees, a common practice among clients of some nationalities or cultures, particularly in the field of asylum and cancellation of removal. Attorneys going down this road should carefully read section MR 1.5(c) to ensure that their written agreements are in conformity with the rule. Also consider that engaging in activity outside the scope of the representation and using legal fees paid to seek immigration benefits that were not authorized by the client raises ethical considerations under this rule. For example, representing to the client that an application will be submitted for a work permit or green card based on hardship, while using the fees collected from the client to instead apply for asylum where the client has not made an informed decision to authorize such application, may constitute such a violation.

Non-attorney Partnerships

Some applications filed with the asylum office that are later referred to the immigration court are initiated by or in partnership with non-attorney businesses who may have established a relationship with attorneys. Attorneys should be aware of MR 5.4(a), which clearly prohibits fee sharing with non-lawyers, subject to very narrow exceptions beyond the scope of this advisory. At a minimum, an attorney must maintain professional independence and ensure that both the scope of the representation and the fees charged for such are made clear to clients in written agreements, and that the legal evaluation of the claim and her strategy for the case are in no way influenced by such non-lawyer third parties.

Fraud and other Unlawful Conduct

A note should also be made regarding the potential for incurring federal criminal liability in preparing and filing affirmative asylum applications for the purpose of receiving a NTA. Often, the debate tends to center around whether an asylum application is “frivolous” as defined by 8 C.F.R. § 1208.20. However, attorneys must be aware that the filing of an application that is frivolous as defined by MR 3.1--without any reasonable basis in law or fact -- may invite much bigger problems.

MR 1.0(d) describes as fraudulent “conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” According to 18 USC §1546 (fraud and misuse of visas, permits, and other documents):

“[w]hoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact . . . Shall be fined under this title or imprisoned . . .” (emphasis added).

Once the attorney has signed Form I-589 as preparer, she certifies that: (1) the application is being submitted at the request of the applicant; (2) the responses are based on the information provided by the applicant; (3) the completed application was reviewed with the applicant by the preparer in a language the applicant understands; (4) the applicant signed the form in front of the preparer; and that (5) the preparer acknowledges the criminal and civil liability a preparer is subject to should he or she prepare an asylum application with false information. These attestations are made under the penalty of perjury, triggering §1546 should the signer possess knowledge that the application contains false statements with respect to material facts or fail to contain any reasonable basis in law or fact. See also 8 C.F.R. §§1003.102(t) and (j)(1).

Moreover, 18 U.S.C. §1341 criminalizes using the mail for the purpose of furthering and executing such a scheme to defraud. Thus, once the offending application goes out in the mail, additional civil and criminal liability under §1341 may be incurred. Additionally, both mail and visa fraud are predicate acts under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961. A civil suit under RICO can open an attorney up to significant financial liability, as the statute permits plaintiffs to seek treble damages and injunctive/declaratory relief.

Yet another consideration for attorneys should be liability under 18 USC §1001, which includes potential charges for aiding and abetting in the case that someone:

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry. 18 USC §1001

We lastly note the prohibitions in MR 8.4(c) regarding engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and MR 1.2(d) against counseling a client to engage, or to assist a client, in conduct that the lawyer knows is criminal or fraudulent. Note [2] to this Model Rule states that:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude". That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or *serious interference with the administration of justice* are in that category. *A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.* (Emphasis added).

Likewise, 8 C.F.R. § 1003.102(n) permits sanctions against an attorney that:

Engages in conduct that is prejudicial to the administration of justice or undermines the integrity of the adjudicative process. Conduct that will generally be subject to sanctions under this ground includes any action or inaction that seriously impairs or interferes with the adjudicative process when the practitioner should have reasonably known to avoid such conduct.

Backlogs for the asylum offices and immigration courts have significantly increased in part as a result of the practices described in this advisory. The routinization of filing boilerplate or borderline frivolous claims [those perhaps triggering rule MR 3.1 but not INA § 208(d)(6)] on a large scale may open an attorney up to liability on a charge that she has abused the processes in place for the adjudication of applications for asylum and cancellation of removal, and, therefore, has engaged in conduct prejudicial to the administration of justice.

MR 8.4 is taken seriously by disciplinary bodies. Attorneys who have incorporated into their businesses, on a large scale, the practice of filing affirmative asylum applications for purposes of receiving a NTA should be aware of the risk of a charge under this rule.

III. POTENTIAL DISCIPLINE

As noted above, potential violations of the relevant rules may be referred to EOIR or DHS for investigation and enforcement. It is important for attorneys to understand that their behavior before both the asylum office and the immigration court may serve as the basis for sanctions before the EOIR. DHS Disciplinary Counsel may initiate disciplinary proceedings based on misconduct before the asylum office. Once the matter has been referred to immigration court EOIR Disciplinary Counsel also has jurisdiction to initiate disciplinary proceedings. When discipline is issued by EOIR it applies to practice before both DHS and EOIR.

In analyzing the costs and benefits attendant to pursuit of the strategies discussed in this advisory, attorneys should also consider the possibility that the attainment of employment authorization for their clients is not guaranteed. An Immigration Judge may simply terminate proceedings without accepting an application for cancellation of removal. Moreover, ICE may move to terminate proceedings (if, for example, it is determined that the alien is not a priority for removal). In such an instance, the client will have been placed into removal proceedings without having attained the anticipated benefit, and referrals to EOIR's Disciplinary Counsel have been filed in such cases by either successor counsel, ICE, or the Immigration Judge.

Potential discipline may range from confidential discipline to suspension or disbarment. Generally, confidential discipline is more likely to result where there is a single instance of misconduct, although disciplinary counsel may seek disbarment where the attorney engages in a pattern or practice of misconduct.

IV. EXAMPLES OF DISCIPLINE

At this time, there are no published advisory opinions or disciplinary decisions related to this practice. However, several attorneys have been disbarred by EOIR for engaging in this type of practice. In the case of Michelangelo Rosario (Disciplinary Case D2013-1112), the attorney was charged with: telling potential clients that they would be required to go before an immigration judge to obtain an employment authorization document and lawful permanent resident status; filing applications without an explanation as to why the applications were not time-barred and similarly lacking evidence, details, or facts in support of the asylum claim; and instructing the clients to skip the asylum interviews in pursuit of a strategy that entailed filing an application for non-LPR cancellation once in immigration court and pursuing administrative closure. When questioned by the Immigration Judge, the clients stated that they did not know why they were in removal proceeding, that they were told not to appear for their asylum interviews, and that they were not made aware of the consequences for failing to appear at their interviews.

The Immigration Court notified the EOIR Office of the General Counsel (OGC), which initiated a preliminary inquiry. After notifying the attorney and receiving his response, he was later found to have violated 8 C.F.R §§ 1003.102(j) (frivolous), 1003.102(n) (engaging in conduct prejudicial to the administration of justice), and 1003.102(o) (lacking competence). OGC stated that the asylum applications appeared to be without merit and could be deemed frivolous by an Immigration Judge. OGC further alleged that the attorney advised his clients to avoid their asylum interviews, resulting in their being placed into removal proceedings and being subject to their ultimate removal from the U.S. to a country to which they allegedly feared returning, thus engaging in an “inaction that seriously interferes with the adjudicative process” which the practitioner should have reasonably known to avoid. Moreover, the practice placed immigrants on the radar of the government who were “not previously known to the government and were not in imminent jeopardy of being removed from the U.S.”

Despite the OGC’s warning, the attorney continued to engage in the same conduct about which he had been warned, resulting in a Notice of Intent to Discipline (NID), jointly filed by both EOIR and DHS Disciplinary Counsel, seeking disbarment. The NID cited to the American Bar Association’s Standards for Imposing Lawyer Sanctions (ABA Standards) which, when applied to the attorney’s conduct, resulted in findings that he had violated the Standards relating to lack of competence (4.5), lack of candor (4.6), failure to maintain personal integrity (5.1), false statements, fraud, and misrepresentation (6.1), and abuse of the legal process (6.1).

In the case of Richard Mendez (D2015-0066), the attorney had likewise advised clients to file asylum applications to obtain employment authorization documents and lawful permanent resident (LPR) status without having to leave the U.S.⁷ The attorney then affirmatively filed the asylum applications with USCIS, without details, before instructing his clients to skip their asylum interviews. When referred to immigration court and before an Immigration Judge, the attorney withdrew the asylum applications and filed applications for non-LPR cancellation were filed. In referring to this (and other) conduct in a NID, EOIR and DHS Disciplinary Counsel reached the decision to disbar the attorney, applying the ABA Standards relating to lack of competence (4.5), lack of candor (4.6), failure to maintain personal integrity (5.1), false statements, fraud, and misrepresentation 6.1), and abuse of the legal process (6.2).

V. CONCLUSION

The purpose of this advisory is not to discourage attorneys from filing affirmative applications for asylum where the applicant may have a stronger claim for cancellation of removal than for asylum. Rather, it intends to provide an ethical guide for attorneys as they analyze the possibilities and strategies for their clients and potentially move down this pathway.

Attorneys charged with committing ethics violations cannot retreat to the defense of “zealous advocacy” or the exploitation of a “loophole” in the law. Disciplinary authorities evaluate conduct on the basis of whether it violates specific sections of the

⁷ It should be noted that Mr. Rosario had engaged in other conduct for which he was charged with violating various grounds of discipline.

applicable Rules of Professional Conduct and regulations. Attorneys must address each individual allegation related to their conduct and demonstrate that they did not violate any of the rules detailed above.

Thus, before filing a weak application for asylum with the sole purpose of having a client referred to immigration court so that a COR application can be submitted, attorneys should consider the following to ensure they are complying with applicable ethics rules.

- Is the client able to produce a detailed statement regarding her fear of persecution that has an arguable nexus to a protected ground of asylum?
- If the client will not be able to meet the 1-year filing deadline, is there a colorable argument for a changed or extraordinary circumstance that caused the delay?
- Does the client understand that: if the asylum application is denied, she will be placed into removal proceedings with the risk that she will be subject to an order of removal; the consequences of filing a frivolous asylum application; and the legal requirements for cancellation of removal, including the fact that it is a highly discretionary form of relief and can only be applied for in the context of removal proceedings?
- Has the scope of representation, including the legal strategy and the attendant fees, been made clear in the retainer agreement?
- If the case was referred to you from a non-attorney business, has it been made clear that you will not share client fees for the referral, and that your professional judgement related to all aspects of your representation may be in no way influenced by the wishes or direction of the business?
- Is it apparent that any material elements of the asylum claim were false or fabricated? Do you suspect that any of the documents have been improperly forged or altered? If so, are you willing to take the appropriate remedial measures and explain the requirement to your client?
- Is the application correctly completed, making a colorable claim for asylum in both law and fact? Have you signed as preparer?
- Did you evaluate whether your client has the evidentiary proof needed to put forth an application for cancellation of removal, including issues such as the effect of contacts with the criminal justice system, good moral character, the “stop-time rule,” aging-out of the qualifying relative, and other special issues related to cancellation?
- Do you intend to fully pursue the application for asylum, including appearing at the interview and pursuing the application until it is fully adjudicated by the asylum officer?

If your answer to any of the above is “no,” then you may be subjecting yourself to liability for violations of your state’s Rules of Professional Conduct (depending on the extent to which they have been adopted by the states in which you are registered and the states in which your representation occurs), the CFR, and possibly federal criminal statutes.