Kicking and Screaming: Advice in Dealing with Difficult Cases and Clients

Immigration matters are often fraught with ethical dilemmas. This is especially true for challenging cases and clients. Having a well-crafted, written philosophy of lawyering and a checklist with the steps to follow are essential in order to analyze an ethics issue. What follows is a suggested checklist along with some scenarios illustrating some challenges a lawyer might face, including the multi-jurisdictional challenges that might be seen by a lawyer who practices both U.S. and Canadian immigration law.

General Considerations

Steps to Handle a Challenging Ethics Matter for U.S. Immigration Matters:

1. The federal rules at 8 CFR 1003.102 always apply with respect to practice in immigration court and before the Department of Homeland Security, even when the lawyer or client is abroad.
2. Remember that state or federal criminal laws also might restrict your conduct. For more on this, see *Up Against a Wall: Post-Election Challenges for Immigration Lawyers* by Cyrus D. Mehta and Alan Goldfarb (AILA Doc. No. 17011200).
3. The practice of immigration law is unusual in that it is not uncommon for a lawyer licensed in one jurisdiction to have an office in another. This is contemplated in the American Bar Association's Model Rule 5.5(d)(2).
4. State rules likely also apply. First, see the Rules 8.5 of states that have a connection with the matter as well as your state(s) of licensure to determine which states rules apply. You might be subject to the jurisdiction of many different states, but you should generally only be subject to one state's rules for a particular matter. See *The Law of Outlaws: Rules and Jurisdiction When Establishing an Out-of-State Practice Under Rule 5.5(d)(2)* by Kenneth Craig Dobson (AILA Doc. No. 15051403) for the details.
5. New York State's Rule 8.5 provides that a lawyer admitted to practice in NYS "is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct."
6. If possible, interpret the federal rules and the applicable state rules harmoniously. If there is no way to do so, then the federal rules likely preempt state rules to the extent that they cannot be reconciled.
7. If reading the rules is not enough, consult *AILA Ethics Compendium* (AILA Doc. No. 13100890) for the answer or look for other articles or guidance from AILA, state bar opinions, etc. Keep in mind that some opinions are binding while others might not necessarily even be considered persuasive (*e.g.*, the difference between a formal and informal opinion in Georgia.)
8. If you find that the rules give you discretion, rely upon your personal philosophy of lawyering to guide you. See Kenneth Craig Dobson's article *Yes, No, or Maybe: The Importance of Developing a Philosophy of Lawyering in an Era of Immigration Upheaval* (AILA Doc. No. 17092930). It is important to have a personal philosophy of lawyering

written (and updated yearly) so that you have something to rely upon when you face these difficult decisions.

9. If you cannot reach a conclusion, either in the interpretation of the applicable laws and rules or in how to use your discretion, call an ethics hotline or an ethics lawyer. Keep in mind that the advice you receive is only going to be as good as the ethicist's understanding of the facts and substantive law of your matter, and might not result in a correct answer.
10. For a more detailed checklist that differs somewhat from this one, see *Dissecting an Ethics Dilemma: A Practical Checklist for Immigration Lawyers* by Reid Trautz (AILA Doc. No. 06121172). And heed Mr. Trautz's advice on delay: "Resolve the issue with the client, tribunal, or whomever. Don't let it sit. Unlike a fine wine, an ethics problem does not get better with age! Get in front of the issue." While you should do your best to get it right, ethics authorities who disagree with your course of action might be more forgiving if you are able to show that you have followed a careful process in good faith than if you delay too long in resolving the matter.
11. The laws or rules of foreign countries might also be applicable to your ethics matter. For example, a U.S.-licensed lawyer who is authorized by the Canadian government to handle U.S. immigration matters though she is physically present in Canada might also have to consider Canadian rules.

Additional Considerations for Canadian Lawyers

1. Refer to the Rules of Professional Conduct as need be. In the first instance one should refer to the applicable jurisdiction. The Ontario Rules of Professional Conduct can be found at https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct;
2. The Federation of Law Societies of Canada has an approved Model Code of Professional Contact. It has been implemented by a number of law societies and is under review by others. The expectation is that over time any significant differences in rules of conduct throughout Canada will be eliminated. The Model Code cross references the corresponding provisions of the provincial codes. It can be found at https://flsc.ca/national-initiatives/model-code-of-professional-conduct/;
3. The Law Society of Ontario has a practice management hotline. If you are struggling with an issue they may be able to refer you to a rule you may not have otherwise thought of or give you their perspective. You should document your effort to seek clarity from them.

Prefatory note: unless otherwise stated, you are an attorney licensed in the State of New York and the Province of Ontario, with an office in Toronto, in all scenarios.

Scenario 1

An old friend from university whom you have not seen for years is now the director of human resources for Acme Inc., a midsize corporation with offices and operations throughout North America. She approaches you to assist the company with obtaining

work permits for some employees who reside in the U.S.A. and need to work in Canada, and some employees who reside in Canada and need to work in the U.S.A.

You begin to prepare all of the required forms and documentation. In gathering information from Wiley Coyote, an American citizen who intends to work in Canada, he discloses to you an incident in which someone had dropped a safe on his head and he grabbed that safe dropper by the neck. He recalls that he pleaded guilty to some offence and is hopeful that the incident won't complicate his entry into Canada. He adds that in any event this is a very personal matter and he does not want this information shared with Acme.

You check your file and you see the retainer agreement was signed on behalf of Acme and they are paying the bills for all work and fees.

Meanwhile, you get a call from the HR director who says she wants to speak about something personal outside of the files you're working on. She says she is recently divorced, she heard through the grapevine that you're single, and she would like to get together socially. She explains that she always liked you and she'd like to get to know you better personally though this will be separate from the professional relationship.

Questions

What do you do about Wiley's disclosure regarding his guilty plea? About the HR Director's interest in getting together socially?

Scenario 2

You have been retained by Darcy Fitzwilliam, who wishes to arrange for his bride, Elizabeth Bennet, and her three children (all under age 14) to immigrate to the U.S.A. Darcy and Elizabeth have both signed a Retainer Agreement for the work to be completed.

Darcy is a citizen of both Canada and the U.S.A. Darcy explains that he intends to live with Elizabeth and her children at a home on Martha's Vineyard but that he wants to "keep options open" given what he describes as "the fluid situation" in the U.S.A. Meanwhile, he wants you to proceed with the marriage and family cases and help Elizabeth obtain employment authorization so she can work in the U.S.A.

Due to the impending expiration of U.S. tourist stay for Elizabeth and her children, the deadline to submit the paperwork is in five days. Darcy signed his forms and paid you the $5,615 for filing fees before departing in a hurry for business matters in Canada, with the expectation that your firm will make out checks payable to the adjudicating government agency. He will be in Canada for two weeks, then plans to return to the U.S.A. and await adjudication of the marriage and family cases with Elizabeth.

You arrange for a meeting with Elizabeth, who explains she will be leaving with her children the next day to visit her sister, Jane, in Montana and will not be available to review forms, etc., so she wants everything done and ready to sign when she visits you.

She comes to your U.S. office in Manhattan. Prior to her appointment, you reviewed the file and noticed that there is an unpaid balance of $7,500 legal fees that are outstanding for some six months notwithstanding the periodic follow-ups of your accounts receivable clerk.

You mention this to Elizabeth, who says you should speak to Darcy about it but then adds, "Don't tell him I told you, but he confided to me that he has no intention of paying that bill because he is having cash flow problems and, as he put it, 'I've paid that immigration lawyer quite enough.' I'm only telling this to you because you seem like a nice guy."

Questions

What do you do about the forms prepared for Elizabeth and her children? About the payment made to you by Darcy for filing fees? About the unpaid balance due for legal fees?

Scenario 3

You are in your satellite office in Buffalo when you are approached by Lemuel Gulliver, who introduces you to a couple who have arrived from the country of Lilliput, where there is much political and social strife. Evidently, a long-dormant issue has come to life: the majority of those in Lilliput firmly believe that when one cracks a hard-boiled egg, it should first be cracked on the big end, whereas others in the minority are adamant that it is the small end that should be cracked first. This difference of opinion has led to violent altercations between the two groups.

The Lilliputians at your office do not speak English, and you do not speak Lilliputian (nor does anyone in your office), so you rely on Mr. Gulliver to interpret. He explains that the clients in your office are in the minority regarding egg-cracking beliefs, and how this affects them in their home country. Believing the information imparted by Mr. Gulliver establishes a claim for asylum, you prepare a retainer agreement and the necessary asylum paperwork, which the clients sign as applicants and Mr. Gulliver signs as translator. Since there is a language barrier between you and your clients, they authorize Mr. Gulliver to use his discretion in giving instructions on their behalf.

There is a hearing scheduled, and your disclosure is due at the immigration court tomorrow. You are reviewing the Lilliputian clients' documents and notice that some of the information on their completed and signed forms is not consistent with some supporting documentation from the clients that you intend to submit. You call Mr. Gulliver to ask about this and he says it was an inadvertent oversight and it's no big deal;

he says to simply withhold the documents and not submit them, so that the immigration judge "will not get confused and conclude that the Lilliputians are not credible." He says that the Lilliputians are out of town and can't be reached, but he knows they would agree with this approach and also reminds you that the clients authorized him to provide instructions on their behalf.

Questions

What do you do about communicating your concerns to the Lilliputians? About meeting the filing deadline established by the court? About your communications with Mr. Gulliver?

Scenario 4

You are retained by Tony Soprano to assist him and some business associates (all are Canadian citizens) to apply for admission to the U.S.A. at the Peace Bridge/Buffalo port of entry. He explains that he and his associates have had some brushes with the law in the past but after reviewing the information and documentation they provide, you believe they are not inadmissible to the U.SA.

You write a letter, stating your opinion that no ground of inadmissibility applies to Tony and his associates, for them to present if necessary at the border. Tony says that he wants you to appear with them at the border in case any unanticipated issues arise and you agree.

You all arrive at the border and are sent to secondary inspection. Tony introduces you as their counsel, though the port of entry officer does not seem interested in speaking with you.

While the officer is questioning one of Tony's associates, you overhear two of the others, Paulie and Christopher, talk about their past difficulties with the law. You hear Christopher say that there are some offences he was convicted of years ago while in Europe. He is confident that U.S. authorities would not have access to this information, because it was from long ago and the sister of another colleague who works in the records division for the European country in question assured him that the records would not be readily available. Christopher says to Paulie that he did not disclose his European offences because "none of them is a big deal," they didn't involve the U.S.A. and he did not want things to get unnecessarily complicated.

While you are mulling over this new bit of information, another associate named Silvio comes up to you and says he overheard the officer asking one of the other colleagues "have you ever committed a criminal offence?" Silvio says if he's asked he will admit to having smoked marijuana before it became legal in Canada, and that he continues to smoke marijuana because "millions of people did it and still do. I'm also in a rock band

so they'll presume I did, and I might as well be up front about it. It's legal now in Canada so it's no big deal."

Questions

What do you do about Christopher's disclosure to Paulie? About Silvio's declaration to you regarding his past and current marijuana use?

Scenario 1 - Analysis

We note initially that there are no conflict rules in the court-centered DHS/EOIR rules of professional conduct.

If this were to have occurred with a U.S. immigration matter with the lawyer's main office in New York, the work being performed in New York, and the clients located in New York:

A. On the first issue, Wiley's disclosure regarding his guilty plea, check to see who you represent. Does the retainer agreement say? In this matter, the lawyer would typically be representing both employer and employee. Even if there is joint representation, this does not mean that the lawyer can share confidential information between the parties. If the lawyer intends to represent only the company, he must comply with NYRPC 4.3.
B. NYRPC 1.7, Comment 30 says that "the prevailing rule is that, as between commonly represented clients, the privilege does not attach. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised." Same as the ABA Model Rule.
C. NYRPC 1.7, Comment 31: "At the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other." The ABA Model Rule uses similar wording.
D. By agreement, client could use information previously obtained after a revocation. This could be part of an advance conflict waiver, but the authority to share confidential information of the former client is not automatic. Advance agreement must specify what happens upon revocation of consent. NYSBA Opinion 903.
E. Sample language from D.C. Ethics Opinion 317: "You have the right to repudiate this waiver should you later decide that it is no longer in your interest. Should the conflict addressed by the waiver be in existence or contemplated at that time, however, and should we or the other client(s) involved have acted in reliance on the waiver, we will have the right—and possibly the duty, under the applicable rules of professional conduct—to withdraw from representing you and (if permitted by such rules) to continue representing the other involved client(s) even though the other representation may be adverse to you."

F. On the second issue, involving the invitation to get to know the HR director better, it is possible that both New York and Canada's rules would apply since immigration to both the U.S.A. and Canada are involved.
G. The simplest and easiest solution to the HR director's proposal is to politely decline. NYRPC 1.8(j) does not expressly prohibit sexual relations with a client, except in domestic relations cases, but the ABA Model Rule 1.8(j) does: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."
H. Furthermore, NYRPC Rule 1.7(a) prevents a lawyer from representing a client when "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."

For an attorney licensed in the State of New York and the Province of Ontario, with an office in Toronto, applicable provisions in the Ontario Rules of Professional Conduct are at:

Chapter 1.1

Chapter 3.4-5

Chapter 3.4-1 Commentary 4

See also https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/steps-for-dealing-with-the-joint-retainer-rules.

Scenario 2 - Analysis

If this U.S. immigration matter were to have occurred with a lawyer whose main office is in Canada, the work is being performed at the lawyer's New York office, and the clients are located in New York:

A. To be on the safe side, the lawyer should follow the applicable federal rules found at 8 CFR 1003.102, the NY rules, and any applicable Canadian rules that may apply due to his licensure and physical presence in that jurisdiction. According to NYRPC 8.5, "[i]f the lawyer is licensed to practice in [New York] and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct." In this case, Canadian rules might apply considering that is where the lawyer's principal office is located. The predominant effect might be in New York, though it is unclear given the international nature of the matter. Any applicable Canadian choice of law provisions must also be considered in the analysis.

B. The impending expiration of U.S. tourist stay for Elizabeth and her children is an important deadline for several reasons, though the lawyer would generally be able to file the case after the expiration of the tourist status. The lawyer should try to make a timely filing so that the clients at least remain in the U.S.A. under color of law. Failure to do so could cause the client to be put into removal proceedings, with the result that USCIS would lose jurisdiction for the adjustment case.
C. According to NYRPC 1.16, the lawyer may withdraw if "the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees." (emphasis added). See NYSBA Opinion 598 for more detail on this. Note that part (c) is written in the disjunctive. Sometimes lawyers read (c)(1) as a requirement in every case, but that is only one of 13 reasons for which a lawyer has the option of withdrawing. But note that 1.16(e) requires that the lawyer "to the extent reasonably practicable…avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing for time for employment of other counsel…". In this case, there is too little time left before the deadline to withdraw. While presenting on another CLE panel, one of the authors heard NY disciplinary counsel for the First Department use a general standard of 30 days as reasonable notice for a client to seek other counsel in most matters. As required by Rule 1.16(e), be sure to give the client all "papers and property" and refund any unearned fees in addition to complying with "applicable laws and rules." Failure to do so might adversely affect the client's ability to seek representation elsewhere.
D. The lawyer should closely monitor clients who are not paying legal fees and address these issues well in advance of any deadlines.
E. Remember that under New York rules, lawyers need not use a trust account for unearned legal fees or expenses paid in advance, though an agreement can be made with the client to do so. (See NYSBA Opinions 570 and 816 and *A Practical Guide to Attorney Trust Accounts and Recordkeeping from the New York Lawyers' Fund for Client Protection*, at http://www.nylawfund.org/esc.html [January 2015] [last accessed September 5, 2019].) Even if the lawyer does not use a trust account, he should still allocate any fees paid in accordance with the agreement with his client, *e.g.*, using money specifically earmarked for filing fees as agreed. Such a process would be complicated and unnecessary. To avoid problems, the engagement agreement might say "The client understands and agrees that any payments made to the firm will become firm property immediately upon receipt where they will be deposited into a firm operating account used for the general operation of the firm. In accordance with New York rules, payments for unearned fees and expenses will not be deposited into a trust account and may be applied toward legal fees, cases expenses or both."
F. Remember that you cannot simply use the New York rules because you find them more favorable or reasonable. You should first perform a careful choice of law analysis because failure to use a trust account for unearned fees under the rules of other jurisdictions can be a serious offense and might even be considered conversion.

Applicable provisions in the Ontario Rules of Professional Conduct are at Chapter 3.7-3.

Scenario 3 - Analysis

A. The interpreter should remain in his role as just that, the interpreter.
B. The interpreter might not be qualified. He might summarize or add his own advice. The lawyer should clearly recommend to the clients that they use an interpreter who is completely fluent in the appropriate languages and is skilled at interpreting and translating. Mistakes, even innocent mistakes with the most honest clients, can lead to confusion and corrections that have to be made at a later date, causing a loss of credibility and risking a favorable outcome for the case.
C. Was the interpreter officially appointed as the clients' agent, memorialized in a written and signed document? Even if he were, this is the kind of thing that should be discussed directly with the client. See Rule 1.4. Additionally, there is a risk that this interpreter is engaging in the unauthorized practice of law, which could lead to a violation of NYRPC 5.5(b): "A lawyer shall not aid a nonlawyer in the unauthorized practice of law."
D. Does the lawyer have a relationship with the interpreter? Be careful about recommending or affiliating with third parties. There could be ethical and professional obligations to perform due diligence. A lawyer might also have malpractice liability for a negligent referral. Though certified translators/interpreters are not required, it would be safer to use them.
E. Since this is before an immigration court, a "tribunal" under the NY Rules, NYRPC 3.3 would apply. Under this standard, the lawyer cannot offer evidence he "knows to be false."
F. The federal rules are more strict that the NY rules, allowing for discipline if a lawyer "[k]nowingly or with reckless disregard makes a false statement of material fact of 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." 8 CFR 1003.102(c)
G. Adding evidence in good faith, though it contradicts other evidence, increases the risk of having to make a correction pursuant to the state and federal rules. Under both sets of rules, there is a duty to take "remedial measures" if the lawyer discovers inaccurate information was offered, even though it was offered in good faith. See NYRPC 3.3(c) and 8 CFR 1003.102. Having to make these corrections at a later date could plant the seed of doubt in a judge's mind, causing the case to ultimately be denied.
H. Of course, lawyers should always try to perform work well in advance of deadlines. However, court or other agency deadlines, sometimes coupled with a lack of client cooperation, sometimes make these situations impossible to avoid. If the clients are uncooperative, the lawyer must make a decision about how much risk she is willing to take if the case ultimately goes off course due to a lack of client cooperation. At a minimum, the lawyer should document the file, which should include direction correspondence (email, for example) whenever possible. The lawyer should carefully consider a motion to withdraw the moment she feels that the case is too difficult or risky due to the lack of client cooperation. As mentioned earlier, it's critical to make

this kind of assessment as early in the case—and as far in advance of any deadlines—as possible.

Applicable provisions in the Ontario Rules of Professional Conduct are at:

Chapter 5.1-2
Chapter 5.1-4
Chapter 3.7

Scenario 4 - Analysis

A. For the criminal convictions in Europe, the answer is simple with respect to future conduct. The lawyer must convince his clients that telling the truth is the only option. See NYRPC 4.1 and 8 CFR 1003.102(c).
B. Under NYSBA Opinion 1011, CBP agents are likely not tribunals so there would be no duty to correct under state rules, but for prior misstatements the duty to take reasonable corrective measures remains under 8 CFR 1003.102(c), especially if the lawyer discovered the falsity of the statement before the matter was decided.
C. If a decision had already been made on Christopher's particular case and he is just waiting for his associates to join him, then the analysis is more complex. Neither the New York rules nor the federal rules at 8 CFR 1003.102(c) address when the duty ends. The ABA Model Rules state that the duty to correct ends "at the conclusion of the proceeding." ABA Model Rule 3.3(c). If lawyers in states that have adopted the "conclusion of the proceeding" language can reasonably read the federal and state rules together to conclude that their duty to correct would end "at the conclusion of the proceeding," then a lawyer practicing under NY rules might come to the same conclusion under the federal rules.
D. Whatever conclusion she reaches, the lawyer must use her philosophy of lawyering to guide her in deciding how long the duty to correct lasts, given the silence of the New York and federal rules at 8 CFR. For more detailed analysis, see NYCBA Opinion 2013-2 and Cyrus Mehta's blog post entitled *How Long is a Lawyer Obligated to Correct False Evidence That Was Submitted On Behalf of the Client? at* http://blog.cyrusmehta.com/2013/06/how-long-is-lawyer-obligated-to-correct.html (last accessed September 5, 2019).
E. For Silvio, this is a matter of philosophy of lawyering. See *Yes, No, or Maybe: The Importance of Developing a Philosophy of Lawyering in an Era of Immigration Upheaval* (AILA Doc. No. 17092930).

Applicable provisions in the Ontario Rules of Professional Conduct are at:

Chapter 5.1-2
Chapter 5.1-4

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AMERICAN IMMIGRATION LAWYERS ASSOCIATION

THE LAW OF OUTLAWS:

RULES AND JURISDICTION WHEN ESTABLISHING AN OUT-OF-STATE PRACTICE UNDER RULE 5.5(D)(2)

By Kenneth Craig Dobson

Establishing an out-of-state practice in a jurisdiction where a lawyer is not admitted to practice is per se uncommon in the legal world—some might even say "outlaw"—before considering a federal area like immigration where multiple states and jurisdictions are at play regardless of the location of one's office.[1] ABA Model Rule 5.5(d)(2) specifically addresses this unusual issue, and it has been adopted in some form in many states[2]. The current version of ABA Model Rule 5.5(d)(2) states the following:

> (d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that…(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.[3]

With any specific ethical requirement, one must determine which state has jurisdiction over the lawyer and which state's ethics rules apply. The applicable jurisdiction and rules may seem obvious, but making this determination is deceptively complex and significant—particularly so with respect to Rule 5.5(d)(2). A common assumption is that one who is licensed in only one state is subject to jurisdiction of the disciplinary authorities and must follow the ethics rules only of that state; however, ethics authorities in the jurisdiction where an out-of-state lawyer practices will likely look to their own rules when determining whether an office may be established there. But the analysis certainly doesn't end here. What follows is detailed analysis of how an out-of-state lawyer establishing an office in a state in which she is not licensed under Rule 5.5(d)(2) can determine jurisdiction for her practice as well as which rules to apply. It is not intended to provide precise answers to any particular situation, but rather to elucidate the level of analysis that must go into any such determination. It will also provide practical advice on how to proceed with the lack of clarity under the current system.

The author will also refer back to this brief hypothetical throughout this article: An out-of-state lawyer moves to a state that has adopted the current version of the model rules (The author will call this fictional U.S. state Yorkshire.) and establishes a federal immigration practice. She is licensed only in the state of New York. She represents clients on federal immigration matters throughout the United States. She strictly limits her practice[4] to that which is authorized[5] by federal law and regulations.

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[1] Though this article will focus on the rules that apply when an out-of-state immigration lawyer establishes an office, all immigration lawyers should be aware of these issues for three reasons: First, virtually all immigration lawyers engage in multijurisdictional practice to some degree and may be subject to the rules and jurisdiction of states other than where their offices are located. Second, all lawyers need to know the rules so that they can recognize when lawyers are engaging in unethical conduct or even the unauthorized practice of law (UPL). And third, the immigration bar should be aware of the rules so that they do not unfairly harass lawyers practicing lawfully, hurting noble efforts to combat true UPL.

[2] For more on this, see State Implementation of ABA MJP Policies (October 7, 2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf.

[3] MODEL RULES OF PROF'L CONDUCT R. 5.5 (2013). With respect to the ABA Model Rules, the author is referring to the rules as currently adopted by the ABA at the time of writing.

[4] Practicing in a state in which one is not licensed should only be considered by a lawyer willing to carefully research the applicable law, regulations, and state ethics rules and opinions. There is perhaps no area of legal ethics where so much is assumed while so little is known. Accordingly, a lawyer considering this practice must make sure that she is aware of the rules while at the same time considering the possibility that even state authorities may not fully understand or accept federal preemption.

Federal Preemption and the Co-evolution of Rules 5.5 and 8.5[6]

The lawyer's practice in our hypothetical is strictly limited to that which is permitted under federal authority unless the specific conduct is authorized under some other provision of Rule 5.5[7]. Rule 5.5(d)(2) is essentially a state's acknowledgement of federal preemption as set forth in Sperry v. Florida, 373 U.S. 379 (1963). The court makes it clear that a lawyer (or even a nonlawyer) may practice law anywhere in the United States when federally authorized to do so. While the Court acknowledged that this authority is limited, it clearly did not intend for it to be so dissected as to prevent the practitioner from carrying out his or her authorized duties. In the Sperry case, there were no regulations defining the scope of practice for a Patent agent. But Footnote 47 states that "a practitioner authorized to prepare patent applications must, of course, render opinions as to the patentability of the inventions brought to him, and that it is entirely reasonable for a practitioner to hold himself out as qualified to perform his specialized work, so long as he does not misrepresent the scope of his license."[8] With regard to USCIS, both practice and preparation are defined in the regulations at 8 CFR 1.2. Whether or not such detail is outlined for practice before a particular agency or court, the bottom line is that lawyers are permitted to practice throughout the United States according to the their federal authorizations—no more, no less.

The lawyer in our hypothetical is authorized by federal law, not limited to work that involves knowledge of federal law only. For example, she may opine on Yorkshire laws in a brief submitted to the immigration court in that state.[9] However, preemption—and the specific section of Rule 5.5 acknowledging it, 5.5(d)(2)—would not even authorize something as simple as advising a client on how to get a Yorkshire driver's license after receiving her green card if that were to fall within the definition of practicing law in that state. Further, the lawyer in our hypothetical is not free to opine on any law simply because it is federal. This is just one example of the complexity of the rule and how it can lead to misunderstanding. This complexity can also be exploited by lawyers wishing to drive out competition, the apparent motivation in the seminal case itself, Sperry v. Florida.[10]

Model Rule 5.5(d)(2) provides clarity and a safe harbor[11] for an out-of-state lawyer who practices law in that state when federally authorized to do so. Comment 15 further clarifies that a lawyer may even establish an office in the state. Ironically, in what is almost a quid pro quo for acknowledging federal authority that already exists, Rule 8.5 allows a state to exercise jurisdiction over an out-of-state lawyer and may even require the lawyer to follow its rules. This article focuses on those corresponding aspects of Rule 8.5 and how they affect a lawyer practicing under Rule 5.5(d)(2).

Jurisdiction

There is no scenario in which a lawyer in the United States practicing federal immigration law is beyond the jurisdiction of state bar authorities.[12] Far from being beyond regulation, lawyers who practice in states where they are not licensed are often subject to the

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[5] With respect to practice before USCIS, 8 CFR 292.1 authorizes any U.S. attorney to practice immigration law. A U.S. attorney is defined as "any person who is eligible to practice law in, and is a member in good standing of the bar of, the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, and is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law." Also, the Adjudicators Field Manual states at Section 12.1 that "[a]n attorney need not be admitted to practice in the state in which his or her office is located or where the applicant or petitioner resides…" There are specific provisions setting forth qualifications to practice before other government agencies, but it should suffice to say that 5 USCS § 500(b) sets the maximum qualifications required by all but one federal agency at bar membership in at least one state.

[6] This brief discussion on Rule 5.5(d)(2) is not intended to be a comprehensive analysis. Rather, it is intended to pique the reader's interest in the nuances of this multijurisdictional immigration practice and, more importantly for this article, to demonstrate how Rules 5.5 and 8.5 are connected and have evolved together.

[7] A careful review the applicable version of Rule 5.5 may reveal that a lawyer may practice beyond that which is federally authorized, a subject beyond the scope of this paper.

[8] Sperry v. Florida, 373 U.S. 379 (1963).

[9] See Philadelphia Bar Association Opinion 2005-14: "The Committee notes that oftentimes state law issues, for example domestic relations law, will have an impact on representation in an immigration matter. The inquirer is required by Rule 1.1 (Competence), if dealing with any of these questions to have sufficient knowledge of such law in order to provide competent advice. However, the inquirers involvement in such areas must be limited to advice and discussion on such matters as they impact the clients [sic] immigration matter and nothing further. Should the client request that the inquirer become more involved, to do so would place the inquirer in violation of Rule 5.5."

[10] See also Rittenhouse v. Delta Home Improvement (in Re Desilets), 291 F.3d 925 at 930 (6th Cir. Mich. 2002), stating that the "motivating force behind the controversy in Sperry," driving out competition, was the same as in Rittenhouse.

[11] As the Sperry v. Florida ruling made it obvious that a lawyer may practice anywhere in the United States when authorized by federal law to do so, the ABA considered omitting Rule 5.5(d)(2) altogether, but lawyers facing realities under the status quo needed more: "Because it is axiomatic that a lawyer may perform work when authorized by federal law to do so, the Ethics 2000 Commission initially proposed relegating a provision to this effect to a Comment to Model Rule 5.5. However, the MJP Commission has been told that it is important to lawyers who perform such work that this provision be codified, because at times they have been threatened with sanction for violating state UPL laws." American Bar Association Interim Report of the Commission on Multijurisdictional Practice, 28-29 (November 2001).

[12] But see Charles H. Kuck & Olesia Gorenshteyn, Immigration Law: Unauthorized Practice of Immigration Law In The Context of Supreme Court's Decision in Sperry v. Florida, 35 Wm. Mitchell L. Rev. 340 (2008). The article states that "[a]n attorney whose practice is not regulated becomes no better than a notario. Rules are set

authority of multiple jurisdictions and sometimes must follow the rules of different states on different cases. In order to demonstrate how this works, a comparison of Rule 8.5 of at least two different states—the licensing state and the state where the office is located—is required. It is sometimes necessary to evaluate the rules of other states as well. In this case, we will use the New York rules in addition to the ABA Model rules for demonstrative purposes.

The common assumption is that the out-of-state lawyer must follow the rules only of the state (or states) in which she is licensed. The argument is that since a lawyer's licensing state always retains jurisdiction over her and no other states can take away a license they have not issued, she is obviously only required to follow the licensing state's rules. However, care must be taken to separate the issues of choice of law and jurisdiction. Model Rule 8.5 addresses both, requiring a more complex analysis to determine which rules apply and also stating that a lawyer may fall under the jurisdiction of multiple states:

> (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
>
> (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.[13]

The rules of Yorkshire, where her office is located, state that "a lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction."[14] Therefore, the lawyer in our hypothetical will clearly be subject to the jurisdiction of the state of Yorkshire.

The Yorkshire rules also allow for the possibility that she may be subject to the laws of another state: "A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct."[15] We must look to the rules in her licensing state of New York to determine whether she will also be subject to their jurisdiction, and New York Rule 8.5 makes it clear that she will:

> (a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.
>
> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

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for the legal profession not just to set minimum standards of conduct, but to protect the clients, who become the victims of unauthorized practitioners." Id at 358. This author respectfully disagrees with his esteemed colleagues because this conclusion fails to take into account that out-of-state lawyers are always subject to the jurisdiction and rules of at least one state. It never mentions that many states had formally acknowledged that out-of-state lawyers could establish federal practices within their borders as of its writing in 2008. There is no mention of the then-current ABA Model Rules 5.5 and 8.5. The article cites to the lower court's case (Rittenhouse v. Delta Home Improvement, Inc., 255 B.R. 294 (W.D. Mich. 2000)), which was overturned on appeal in 2002. (Rittenhouse v. Delta Home Improvement (in Re Desilets), 291 F.3d 925 (6th Cir. Mich. 2002). Additionally, it fails to mention that, with the exception of practicing before the U.S. Patent and Trademark office, lawyers licensed in at least one state are expressly permitted by federal law, not just regulations specific to certain agencies, to represent clients before federal agencies: "An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts." 5 USCS § 500(b).

[13] MODEL RULES OF PROF'L CONDUCT R. 8.5 (2013).

[14] Id.

[15] Id.

(2) For any other conduct: (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.[16]

New York Rule 8.5 states that a "lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs."[17] The New York rule, somewhat antiquated, does not even recognize the disciplinary authority of any other jurisdiction unless the lawyer is actually licensed there: "A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct."[18] The implication is that a New York lawyer admitted in no other jurisdictions would be subject to New York's jurisdiction alone. However, the New York rule does not expressly state that a lawyer admitted only in New York would not be subject disciplinary authority in other jurisdictions, and there is no express conflict between the rules. There is also a New York State Bar Association opinion on point:

A New York lawyer who is permitted by the law of a foreign jurisdiction to engage in conduct in a foreign jurisdiction that would constitute the practice of law if undertaken in New York, even though the lawyer is not formally admitted to practice law, is "licensed to practice" in that jurisdiction. If the lawyer principally practices in that jurisdiction and the particular conduct does not have its predominant effect in New York, the rules of the foreign jurisdiction govern the conduct.[19]

While this opinion is on choice of law, it acknowledges that lawyers practicing as authorized under foreign law (and presumably under Model Rule 5.5(d)(2) in a different state) are "licensed to practice" for purposes of New York Rule 8.5. This further clarifies that the rules of Yorkshire apply, and the fictional state's rules clearly indicate that the lawyer would be subject to its jurisdiction. Therefore, from New York's perspective, the lawyer will likely be subject to the jurisdiction of both New York and Yorkshire.

From the perspective of the state of Yorkshire, the lawyer is clearly subject to the jurisdiction of both New York and Yorkshire, and it is possible she is subject to a host of other jurisdictions. Model Rule 8.5(a) states that a "lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction."[20] This lawyer provides legal services to clients who live in all 50 states. If, for example, she assists clients in Alabama with respect to a family-based adjustment of status, she might be subject to the jurisdiction of ethics authorities there. On the one hand, the actual work is being done at her office in Yorkshire. On the other hand, the clients who receive legal services live in Alabama and may never set foot in the state of Yorkshire, and the predominant effect of the lawyer's conduct may be in Alabama. It is possible that she may be deemed to practice in Alabama in such a scenario and therefore subject to Alabama's jurisdiction. There is little guidance on this point at present. However, certain states such as South Carolina, have adopted rules asserting jurisdiction over out-of-state lawyers who advertise there.[21]

Lawyers with nationwide federal immigration practices will certainly be subject to the ethics authorities in states in which they are licensed, probably subject to the jurisdiction of ethics authorities where their offices are located, and might even be subject to the jurisdiction of ethics authorities in any and all states where they represent clients (e.g. in immigration court), where their clients reside, or where they advertise. As a practical matter, the states most likely to exercise jurisdiction over the attorney would be the licensing states, those where offices are located, and those from which the lawyer accepts clients. The question is often raised as to how a state that has not formally licensed a lawyer may discipline her. Rather than formal disbarment, at least one state has "debarred" an out-of-state lawyer, preventing her from seeking admission to the bar of that state in the future and prohibiting advertising, solicitation, etc. in the future until certain conditions are met.[22] In addition, if a state where the lawyer is not admitted administers some form of discipline, it will report the matter to the lawyer's home state which can take further action.

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[16] N.Y. RULES OF PROF'L CONDUCT 8.5 (2010).

[17] Id.

[18] Id.

[19] NYSBA Opinion 815.

[20] MODEL RULES OF PROF'L CONDUCT R. 8.5 (2013).

[21] Advertising and Solicitation by Unlicensed Lawyers, SCACR 418. Note that this is just one example of an additional set of rules outside the state's Rules of Professional Conduct governing lawyers' conduct. When researching rules and jurisdiction, your analysis should not end with the applicable Rules of Professional Conduct.

[22] SC Supreme Court Appellate Case No. 2014-001077 (2014).

Choice of Law in Transactional Practice

If ethics authorities were to proceed against the lawyer in our example, it is important to know which rules would apply. While jurisdiction may vest in a number of different states, lawyers should ideally only be subject to one state's ethics rules for the same conduct.[23] Though only one state's rules should apply for the same conduct, it is not always clear which state's rules apply. Because Rule 8.5 is not uniform in every state, the very rules that determine which rules apply sometimes conflict. According to Model Rule 8.5, "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct."[24]

If the lawyer were to practice only within the borders of the fictional state of Yorkshire representing clients who reside in that state in transactional immigration matters, then the rules of the state of Yorkshire would apply. This is contradicted by New York's 8.5(b)(2)(i) which says that, other than in court proceedings, lawyers licensed only in New York will be subject only to New York's rules. Model Rule 8.5 states that the rules of the jurisdiction where the lawyer's conduct occurred shall apply unless the predominant effect is in another state. Though the rules conflict, the New York State Bar Association has opined that the law of the foreign jurisdiction applies when the lawyer principally practices there, unless the predominant effect is in New York:

> A New York lawyer who is permitted by the law of a foreign jurisdiction to engage in conduct in a foreign jurisdiction that would constitute the practice of law if undertaken in New York, even though the lawyer is not formally admitted to practice law, is "licensed to practice" in that jurisdiction. If the lawyer principally practices in that jurisdiction and the particular conduct does not have its predominant effect in New York, the rules of the foreign jurisdiction govern the conduct. [25]

The opinion appears to refer to foreign jurisdictions, meaning foreign countries, but it is this author's opinion that the same policy would apply for New York lawyers practicing in other states as well. And it should be noted that a lawyer practicing out-of-state will still be expected to follow New York rules when the predominant effect is in New York. In most cases, this would mean following New York rules when immigration clients on non-court matters reside in New York. Furthermore, there are certain New York rules that its lawyers must follow no matter where they are in the world, such as those involving "honesty, trustworthiness or fitness as a lawyer."[26]

If the lawyer in our example never leaves the state of Yorkshire while representing clients outside the state (for example, in Georgia), then her conduct would likely be deemed only to occur in the state of Yorkshire. However, ethics authorities may consider the predominant effect of her representation to be in Georgia. Assuming Georgia has also adopted Model Rule 8.5, the Georgia rules may apply. This is true despite the fact that she has no office in Georgia, is not licensed there, and did not set foot in Georgia while representing the Georgia client.

What is more, determining the predominant effect may prove elusive. Fortunately, the New York State Bar Association (NYSBA) recently issued an opinion listing factors to determine predominant effect. They list four factors, which are apparently nonexclusive: "(a) where the clients reside, and where they work; (b) where any payments will be deposited; (c) where any contract will be performed; and (d) where any new or expanded business will operate."[27] Reading this opinion and the New York Rules of Professional Conduct alone, one might come to the conclusion that New York lawyers could only be subject to the rules of states where the New York lawyer is formally licensed. However, reading the ABA Model Rules (applicable in the fictional state of Yorkshire) in conjunction with NYSBA Opinion 815, it is clear that one can be deemed "licensed" for purposes of determining which state's rules apply.

Our hypothetical lawyer may not only be subject to the jurisdiction of all 50 states with a nationwide practice, but also she might need to know the ethics rules in all 50 states! As a practical matter, I am not aware of any lawyers who maintain familiarity with the ethics rules in all 50 states so that they can change their conduct according to where their clients are located. Such practice would likely have a paralyzing effect on lawyers who can legally practice throughout the United States under federal preemption. Comment 14 in the Preamble to the Model Rules states that the "Rules of Professional Conduct are rules of reason."[28] Under this basic premise, it is this author's opinion that the drafters never intended to impose such an unreasonable burden on those who engage in nationwide federal practice. The Model Rules acknowledge federally authorized practice, providing safe harbors for practitioners who once relied

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[23] Comment 6 of ABA Rule 8.5 states that: "[i]f two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules."

[24] MODEL RULES OF PROF'L CONDUCT R. 8.5 (2013).

[25] NYSBA Opinion 815.

[26] NYSBA Opinion 815.

[27] NYSBA Opinion 1027.

[28] ABA Model Rules Preamble, Comment 14.

only upon court rulings such as Sperry v. Florida[29], but they are a work in progress and need to evolve further to accommodate this reality.

Possible Approaches to the Choice-of-law Problem

There is no simple solution to this complex issue, but the two part approach outlined here provides protection for lawyers as the rules lag behind the realities of modern immigration practice. Almost all immigration lawyers have some form of multijurisdictional practice, though they might not be aware of the extent of it. For this reason, it is wise to follow what I will call the "conservative consensus" with respect to ethics decisions. Following the conservative consensus would mean taking actions that are in conformity will all states' ethics rules, thereby avoiding running afoul of the rules of any state in particular. For example, nonrefundable retainers are allowed in some jurisdictions, but are expressly prohibited in others.[30] Whether or not they are allowed, they are becoming increasingly frowned upon throughout the United States.[31] The conservative consensus would require that nonrefundable retainers be avoided so that a lawyer following this rule would not break the rules of any state. A possible problem with this is that one state's rules may require a certain action while another's may specifically prohibit it, making it impossible to act in a manner that would be permissible under any states rules. Another problem with this approach is that it is hard enough to follow the rules in just a few states (including ethics opinions, etc.), much less the rules of all 50 states. Though this approach may seem altogether outlandish, it is quite clear that many multistate firms apply this approach with regard to their websites, for example, with a long list of disclaimers, etc. required by various jurisdictions. If one hits the pause button on the DVR during national law firm TV advertisements (and one's TV is large enough), it is possible to read the lengthy fine print attempting to comply with the rules of multiple jurisdictions at once. At a minimum, lawyers with national practices should seek to find this conservative consensus whenever possible to minimize risk. Avoiding clearly controversial actions like nonrefundable legal fees is advisable. A possible long range solution would be for the creation of a written "conservative consensus," similar to the Restatement of the Law Governing Lawyers, but different in that it would rewrite the rules in such a way as to allow a lawyer to conform with all rules nationwide, with special notations where it is impossible to conform with all rules at once.

The second part of the solution is to stipulate which rules will apply in the engagement letter. Comment 5 to Rule 8.5 of the Model Rules provides this as a possible solution in certain circumstances:

> When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.[32]

Simply following the rules of the only state in which one is licensed or where one's office sits may not meet the standard of reasonable belief of where the predominant effect is. However, Comment 5 allows for a lawyer to stipulate in writing the rules that shall apply to the representation to clarify the lawyer's reasonable belief under paragraph (b)(2) of Rule 8.5.

It is likely that New York would maintain that its rules apply when immigration matters are handled for clients in New York[33], regardless of where the New York lawyer does the work. It should be noted that New York's predominant effect clause only allows for the application of rules in states where the effect is clearly in another state. It does not contain the reasonableness standard[34]. Since many other states, including our fictional state of Yorkshire, have adopted the Model Rule's "reasonable belief" standard, it may be advisable for the lawyer in our hypothetical to apply the New York rules when it is arguable that New York's rules apply. And clearly, it

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[29] Sperry v. Florida, 373 U.S. 379 (1963).

[30] Nonrefundable fees are expressly prohibited under New York rules. See N.Y. RULES OF PROF'L CONDUCT 1.5(d)(4) (2010). Apparently, one may continue to classify a fee as nonrefundable under the South Carolina rules. See S.C. RULES OF PROF'L CONDUCT 1.5 (current version as of the date of publication of this article).

[31] While South Carolina rules do not prohibit nonrefundable fees, fees classified as such are nonetheless refundable when reasonableness requires it. See S.C. RULES OF PROF'L CONDUCT 1.16, Comment 9. In 2012 the Supreme Court of South Carolina added very specific requirements for advanced fees, including nonrefundable retainers, deposited directly into ones operating account. See SC Supreme Court Appellate Case No. 2011-198067 (2012) and S.C. RULES OF PROF'L CONDUCT 1.5(f). This is both an example of the growing disfavor of nonrefundable fees and the need to know which rules apply when rules are unusually specific with their requirements.

[32] MODEL RULES OF PROF'L CONDUCT R. 8.5 (2013).

[33] See NYSBA Opinion 815.

[34] See NYSBA Opinion 1027.

would be inadvisable for a lawyer to try to stipulate that the rules of a state that has no nexus to the representation (whether it be the client, lawyer, adjudicative body, etc.) apply simply because he perceives those rules to be permissive.

For the hypothetical in this article, the lawyer might include the following language in her engagement letters: "The parties (lawyer and client) agree that the Yorkshire Rules of Professional Conduct shall apply to this case."[35] Given the less forgiving language in the New York rule, the lawyer should probably err on the side of stipulating that the New York rules should apply to the representation. It should be noted that lawyers apparently cannot stipulate which rules apply when it involves representation before a tribunal under the ABA Model Rules or a court under the New York rules.

Representing Clients Before Tribunals

The above analysis only covers the scenario in which the lawyer represents clients on transactional matters from within the borders of the fictional state of Yorkshire as authorized by Rule 5.5(d)(2). The Model Rule says that "for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits [apply], unless the rules of the tribunal provide otherwise."[36] The definition of tribunal is technical and requires careful reading of the applicable rule(s). The Model Rules define a tribunal as:

> a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.[37]

An immigration court is clearly a tribunal under the definition in the Model Rules. This means that under the Model Rules a lawyer licensed in one state, with an office in another, must follow the ethics rules of a third state if the immigration court she is appearing in is located there. This means that our New York lawyer must follow the Massachusetts Rules of Professional Conduct[38] when she represents clients in immigration court there. The New York rules, using the word "court" instead of "tribunal," might ordinarily provide otherwise, but Yorkshire rules would generally apply as this is where the lawyer has her sole office and likely deemed "licensed" there for any authorized practice for choice of law purposes.[39] And if the case were to be appealed to the Board of Immigration Appeals in Falls Church, VA, then she would be subject to Virginia's rules.[40] If the case were then appealed to a federal circuit court, it is likely that that court would specify which rules apply.[41] While all this might seem counterintuitive at first, it does make sense that lawyers on each side of a case have to follow the same rules.

It is the author's opinion that immigration service centers or field offices are not tribunals.[42] This is because the officers are not neutral, among other reasons.[43] Rather, they act as both judge and prosecutor in any given case. This should come as a relief to immigration lawyers who file cases with USCIS throughout the United States. To continue with our example of the New York lawyer

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[35] While immigration lawyers who have offices only in states in which they are licensed might only occasionally use such agreements when the predominant effect is unclear, out-of-state lawyers with offices under Model Rule 5.5(d)(2) might use them on a regular basis to increase the likelihood that the rules they have chosen to follow would be applied by ethics authorities. On the other hand, even in-state lawyers with clients nationwide (or even worldwide) might consider whether it would be wise to use such an agreement routinely.

[36] MODEL RULES OF PROF'L CONDUCT R. 8.5 (2013).

[37] MODEL RULES OF PROF'L CONDUCT R. 1.0 (2013).

[38] Assuming Massachusetts follows Model Rule 8.5. Rules 8.5 of the various jurisdictions involved must be consulted and compared in order to determine which rules apply.

[39] See NYSBA Opinion 815.

[40] Assuming Virginia follows Model Rule 8.5. See also comment 17.

[41] For example, Southern District of Georgia Local Rule 83.5(d) states that the "standards of professional conduct of attorneys appearing in a case or proceeding, or representing a party in interest in such a case or proceeding, are governed by the Georgia Bar Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct. When a conflict arises, the Georgia Bar Rules of Professional Conduct shall control. A violation of any of these rules in connection with any matter pending before this Court may subject the attorney to appropriate disciplinary action." This is a rare example where the ABA Model Rules actually do apply; however, they must give way to Georgia rules where there is a conflict.

[42] It should, however, be noted that there is disagreement on the issue. Beyond the clarity provided by the plain meaning of the definition of tribunal in the ABA Model Rules, the NYSBA makes a strong argument in Opinion 1011 that service centers and field offices are not tribunals. However, the opinion cites several court opinions that have reached contrary conclusions. The opinion points out that, in each case cited, either the lawyer did not dispute the issue or the court provided no explanation as to why it reached its conclusion. Even Hazard & Hodes state, "without citing authority, 'Rule 3.3(d) applies to such matters as applications before the Patent Office and other ex parte presentations')." NYSBA Opinion 1011 (quoting Hazard & Hodes, The Law of Lawyering § 29.3, at 29-7 (2007 Supp.)).

[43] See NYSBA Opinion 1011. The opinion addresses practice before immigration agencies specifically and concludes that "visa and work permit proceedings" do not constitute tribunals.

practicing in Yorkshire, the Yorkshire rules would generally apply if she is representing Yorkshire clients on a case filed at a USCIS service center. If she were to represent a client who lives outside the state of Yorkshire, then the predominant effect analysis would be required.

Long Term Solution

Sometimes knowing which rules apply is about as clear as mud. But this does not absolve lawyers from making reasonable efforts to identify which rules apply and following them. The complexity and lack of clarity revealed in this article of which rules apply in federal immigration practice demonstrates the need for a long term solution to this problem. For this reason, this author suggests the following answer: Government agencies such as USCIS and EOIR should state that any immigration practice before those agencies should be governed by the current version of the ABA Model Rules. Immigration practice is already governed by some basic rules[44]. But these rules alone are not complete and this author is not aware of any states having considered them to be so comprehensive as to occupy the field of ethics rules governing practitioners. Federal regulations should be changed to clearly state that they are intended to "occupy the field" and preempt state ethics rules. State authorities would still retain jurisdiction[45], but they would be required to consistently use the Model Rules as the law to be applied for federal immigration cases. Rather than each agency having to rewrite its own set of rules, this would provide a full set of rules and clarity to lawyers. With all the complexity faced by lawyers brave enough to practice in this esoteric field, at least having clarity on the rules to be followed would provide welcome relief.

But for now, lawyers must review all the various choice of law rules to determine which state's rules apply. And whenever possible, the parties should stipulate which state's rules will apply in the engagement letter. One otherwise risks being an "outlaw" with potentially hazardous consequences.

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This ethics article is written by Kenneth Craig Dobson as part of the 2014-15 AILA National Ethics Committee and published by the AILA Practice & Professionalism Center.

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[44] See 8 CFR 292.3 and 8 CFR 1003.101 – 1003.109.

[45] See 5 USCS 500(d).

AMERICAN
IMMIGRATION
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Yes, No, or Maybe: The Importance of Developing a Philosophy of Lawyering in an Era of Immigration Upheaval

By K. Craig Dobson

A few years ago, a friend asked me to represent her on a DUI charge. I had never handled a criminal case, and I really didn't know where to begin. I asked some experienced colleagues for help, and they emphatically recommended a book by Bubba Head, one of the best DUI attorneys in the state of Georgia and possibly the United States. I bought the book and read it, and then asked follow-up questions of my colleagues. I asked one lawyer about the procedure that he used to test the equipment at the police station that measures blood alcohol content. The colleague laughed and said that nobody really did everything that Bubba recommended in his book. In what seemed to be his way of justifying the fact that he had never tested the electrical systems, etc. at the police station, he said that this would likely just make some people mad, namely the judge and the prosecutor, and ultimately hurt not only this client, but also my reputation and thus future clients. And further, local lawyers could not charge the fees that Bubba was rumored to have charged so it was not economical to put in this level of time and effort. Though the book was universally recommended by colleagues, they apparently did not intend for me to follow Bubba's advice *that* closely.

This raises a number of issues that are also applicable in the immigration context, particularly in immigration court. In this era of immigration upheaval, lawyers need to know how far they *can* go and how far they *should* go in representing their

clients. In this writing, I will argue that the answer lies not only in the applicable ethics rules and laws, but also resides within each individual lawyer.

The ethics rules require that we diligently and competently represent our clients, relegating the "zealousness" language to the comments and the preamble.[1] (The preamble to the federal rules does, however, state that nothing in those rules is intended to relieve the lawyer of her duty to zealously represent her client.[2]) Without the express requirement of zealousness, perhaps the first question we should ask is whether an immigration lawyer *should* represent her client with zeal. Professor Elizabeth Keyes, in her salient article, *Zealous Advocacy: Pushing the Borders in Immigration Litigation*,[3] answers the question with a resounding "yes" when it comes to clients in immigration court proceedings. She argues that the odds are stacked against the immigrant, and zealous representation is one of the few things we can do to make sure that justice is done. But other lawyers may disagree with this "client-centered" approach, espousing a different "philosophy of lawyering," or more specifically, "philosophy of practice."[4] Professor Nathan Crystal, in his groundbreaking work, *Developing a Philosophy of Lawyering*,[5] delineates several different philosophies of practice that a lawyer may adopt. Professor Keyes' philosophy of practice would clearly fall within the category of what I believe Professor Crystal would call "client-centered."[6] While it is doubtful that most lawyers practice in a "client-centered" way[7], I firmly believe that that is the aim for most of us in the profession. I would also guess that most lawyers feel that this is in fact the *only* way there is to practice—as a "client-centered," "hired gun." With this as the only acceptable goal, lawyers can become overwrought with guilt and dissatisfaction for falling short. But in fact, the ethics rules give us a lot of latitude. By developing a philosophy of lawyering, lawyers can—within the scope of applicable laws and ethics rules—define for themselves a way of practicing law that is consistent with their long-term vision for their lives and their values. This will lead to increased contentment among lawyers within the profession, with the ensuing benefits passed along to clients. And clients will benefit as well by receiving clear articulations of lawyers' philosophy of practice so that they can make informed decisions about which lawyer to hire. In fact, Professor Crystal argues that such disclosure should be required.[8] The goal of this writing is to briefly introduce lawyers to the concept of a philosophy of practice, to illustrate by way of example how various philosophies might play out in immigration practice, and to demonstrate the benefit to both lawyers and clients of such an organized approach to discretionary decisions within the practice of law.

Professor Crystal delineates philosophy of practice into four main categories: a self-interested philosophy of lawyering, a morality-based philosophy of lawyering, a philosophy of lawyering centered around institutional values, and a philosophy of lawyering that is client-centered.[9] The range of various philosophies of practice is broad and the subject of a great deal of legal scholarship.[10] Additionally, one's philosophy of practice need not fit neatly into one of the categories, but may instead be

1 See generally ABA Model Rules of Professional Conduct. The word "zealous" does not appear in the text of the rules.

2 "Nothing in this regulation should be read to denigrate the practitioner's duty to represent zealously his or her client within the bounds of the law." 8 CFR 1003.102.

3 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3. Available at: http://scholarship.shu.edu/shlr/vol45/iss2/3.

4 The concept of "philosophy of lawyering" is broad and encompasses a lawyer's work/life balance, involvement in the development of the profession, and the practice of law itself. See generally Nathan M. Crystal, *Using the Concept of a "Philosophy of Lawyering" in Teaching Professional Responsibility* (2007) 51 St. Louis U.L.J. 1235 (2007). This article focuses on the latter, what Professor Crystal calls "philosophy of practice," defining it as "that part of a lawyer's overall 'philosophy of lawyering' that focuses on a lawyer's philosophy in making discretionary decisions in the practice dimension." *Id* at 1241.

5 Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75 (2000).

6 Nathan M. Crystal, Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility (2007) 51 St. Louis U.L.J. 1235 at 1245.

7 Professor Crystal notes that "[s]ome empirical studies (although limited in number and scope) of the behavior of criminal defense lawyers, lawyers in small communities, lawyers in nonlitigation activities, and lawyers in large law firms cast doubt on the claim that neutral partisanship accurately describes the conduct of most lawyers. Indeed, some of these studies suggest that the problem with the way lawyers conceive of their role is the opposite of neutral partisanship; lawyers are not sufficiently zealous in representing their clients because they are concerned about protecting their reputations, preserving relationships with other lawyers, judges, or officials, or advancing their own interests." Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 88 (2000).

8 Professor Crystal states that "[c]lients…are entitled to more than word of mouth or the luck of the draw. Clients are entitled to receive from their lawyers a clear expression of the lawyer's philosophy of representation." Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 94 (2000).

9 Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1245 (Chart 3).

10 See Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1251.

a complex combination of various aspects of each.[11] This brief hypothetical will help illustrate how a philosophy of practice may influence a lawyer's decisions in real life.

Hypothetical

In order to show contrast among various philosophies of practice, including the client-centered approach advocated by Professor Keyes, I will use a question she addresses in her article: "Have you EVER committed a crime or offense for which you have not been arrested?".[12] Assume that, while completing Form I-918 for a client who is in removal proceedings, he reveals to a lawyer that he has committed several crimes. He admits to stealing a watch on his 18th birthday and he tells the lawyer that he frequently jaywalks. He further states that his lawyer must, of course, keep these facts a secret. The I-918 petition for U status is the only defense the client has in removal proceedings. With this brief example, I will begin by analyzing how a self-interested philosophy of practice might look in the immigration context.

A Self-Interested Philosophy of Lawyering

After careful consideration, lawyers might decide that they will generally exercise any discretion they may have in favor of themselves.[13] To avoid potential ethical entanglements, the lawyer follows a self-interested approach to discretionary decision-making. He tells the client that he cannot proceed without disclosing these offenses on the I-918. He further tells the client that he must conduct research to determine whether stealing the watch was in fact a crime involving moral turpitude and whether it is subject to the petty offense exception under INA § 212(a)(2)(A)(ii)(II). The self-interested lawyer charges a high, but reasonable, hourly rate and tells that client that this will cause the legal fee to increase substantially. If the petty offense exception applies, then the client will then have to disclose the shoplifting offense on his I-918 and the lawyer will draft a brief to USCIS explaining how the petty offense exception applies, again adding to the already substantial legal fee. The self-interested lawyer might then explain that other lawyers disagree with the duty to disclose prior offenses and that the client is free to seek the opinions of other lawyers.[14]

While such an approach may seem absurd and extremely prejudicial to the client at first, a closer look may reveal that this actually benefits the client in the long run. If the petty offense exception does apply, then the client could disclose the shoplifting (and perhaps include some general statement that says he jaywalks on a regular basis and cannot recall every offense). If the petty offense exception does not apply, then a waiver could be filed. Perhaps there is a small chance that someone witnessed him shoplifting or that he bragged to his friends about doing so. If the client is successful with his petition, he would never again have to worry about his failure to disclose. If one of these people contacted USCIS to report the shoplifting or perhaps turned the client in to local authorities, this would not give rise to his losing his status and once again facing proceedings.[15]

11 See Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1245.

12 See Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2, Article 3 at 532 quoting I-918, Petition for U Nonimmigrant Status, at 3, U.S. Citizenship and Immigration Services, available at http://www.uscis.gov/i-918 (last visited Feb. 28, 2015).

13 See Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1244, 1245.

14 ABA Model Rule 1.3 requires the lawyer to act with "reasonable diligence and promptness," and Comment 1 says the "lawyer must…act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." But the comment further states that a "lawyer is not bound, however, to press for every advantage that might be realized for a client."

15 The disclosure per se may lead to criminal charges being initiated. As this is a serious consequence under criminal law, it may be wise to insist that the client consult with criminal defense counsel if this is beyond the scope of the lawyer's engagement.

If the client insisted on not revealing the shoplifting on his application, the immigration lawyer might seek leave to withdraw from the case, citing a breakdown in the lawyer/client relationship. In the event that the judge were to deny the motion, the lawyer would have no choice but to continue with the representation pursuant to ABA Model Rule 1.16 and applicable federal rules. As the I-918 is filed with USCIS, it might be possible for the lawyer to limit the scope of his representation and insist that the client hire separate counsel for the U petition, but this would nonetheless require substantial cooperation of the client.

The self-interested lawyer would be unlikely to propose checking the "no" box on Form I-918 as this may increase the risk of violating ABA Rule 4.1 or 3.3.[16] Furthermore, an "overzealous" prosecutor might even seek criminal charges against a lawyer pursuing this option, making this an even more unlikely choice for the lawyer who has adopted this philosophy of practice.[17]

A Morality-Based Philosophy of Lawyering

Under a morality-based philosophy of lawyering, "lawyers are morally accountable for the actions that they take on behalf of their clients and must be prepared to defend the morality of what they do."[18] Under this philosophy, lawyers cannot claim that they are merely a "hired gun" and that they are not morally responsible for their actions so long as they comply with laws and ethics rules. Of course, one problem with a morality-based philosophy of lawyering is that moral values are subjective.[19] This problem also makes it more difficult to demonstrate how this rule might apply. Honesty would be a moral value that presumably all lawyers would consider important, but their interpretation of the technical aspects of the I-918 question under discussion may vary. In our example involving the I-918, one lawyer may interpret their duty of honesty, based upon religious or moral values, to require him to either withdraw from the case or convince the client to proceed checking the "yes" box. Another might value honesty as much as the first, but interpret this differently within the context of his overall obligation to serve his client and the technical interpretation of the question. Assume that his client is from Honduras. The lawyer might consider his obligation to interpret any gray area in favor of his client, given the risk that his client might otherwise face returning to Honduras—a small country where he would face grave danger—in the future. The lawyer may be concerned that his client stole an expensive watch and committed a crime that is not covered under the petty offense exception, is punishable by at least a year in jail, and therefore is subject to a waiver for which there is no guarantee of approval. The lawyer might consider the Judeo-Christian value of welcoming the stranger to compel him to interpret the gray area in favor of helping his client remain here and avoid the suffering he would face in Honduras. As justification for his action, he might interpret the question on the I-918 as overly broad, unfair, and decide that honesty does not require checking the "yes" box. (A detailed discussion to follow under the "client-centered" section.)

16 The lack of clarity as to whether Rule 3.3 or 4.1 applies in this situation provides another good example for analysis of philosophy of practice. Beyond the clarity provided by the plain meaning of the definition of tribunal in the ABA Model Rules, the NYSBA makes a strong argument in Opinion 1011 that service centers and field offices are not tribunals. However, the opinion cites several court opinions that have reached contrary conclusions. The opinion points out that, in each case cited, either the lawyer did not dispute the issue or the court provided no explanation as to why it reached its conclusion. Even Hazard & Hodes state, "without citing authority, 'Rule 3.3(d) applies to such matters as applications before the Patent Office and other ex parte presentations')." NYSBA Opinion 1011 (quoting Hazard & Hodes, *The Law of Lawyering* § 29.3, at 29-7 (2007 Supp.). It is likely that the client-centered lawyer would consider Rule 4.1 to apply when there is a lack of clarity as to whether a previous statement need be corrected. The self-interested lawyer would be more likely to err on the side of considering service centers "tribunals" for purposes of Rule 3.3.

17 Cyrus Mehta, *Crime Without Punishment: Have You Ever Committed A Crime For Which You Have Not Been Arrested?*, at http://blog.cyrusmehta.com/CyrusMehta/wp-content/uploads/wp-post-to-pdf-enhanced-cache/2/crime-without-punishment-have-you-ever-committed-a-crime-for-which-you-have-not-been-arrested.pdf.

18 Nathan M. Crystal, *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1235 at 1242.

19 Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 90 (2000).

An Institutional Values-Based Philosophy of Lawyering

Those concerned about the subjective nature of a "philosophy of morality" might instead choose a "philosophy of institutional value." There are many complex theories espoused by ethics scholars, and a detailed analysis of each is beyond the scope of this writing.[20] For illustrative purposes, I will use Professor Crystal's more general definition of a "philosophy of institutional values" as "approaches based on social or professional values or norms rather than principles of morality."[21] In this case, a lawyer might argue that, after long and deliberate consideration, the law has been drafted to take crimes involving moral turpitude seriously. Federal regulations give form instructions great weight, and this would presumably extend to answering every question on the forms.[22] Though regulations are not passed by elected officials, they are promulgated after notice to and comment by the public. He might then decide that it makes sense that the lawyer's own moral views are subjugated to those of the state.[23] He might decide that the question should be answered in the affirmative in our example because the shoplifting offense is clearly the kind of thing the drafters were looking for.[24] In Professor Keyes' words, "[p]erhaps answering yes shows respect or even some awe for the legal system, the same system that drew the lawyer into the profession in the first place."[25]

A lawyer who follows an institutional values-based philosophy would likely have faith in "the system," believing that the laws and courts are essentially fair and just. A lawyer who finds our current laws and court system to be deeply flawed and in need of dramatic change would be less likely to choose such a philosophy. On the other hand, a lawyer might express his views that the system needs change (and even work toward making the change happen) while at the same time believing that in gray areas his personal code of ethics must give way to institutional values until such change occurs. To give an analogous political example to illustrate the point more clearly, it is widely known that John McCain has sometimes voted to confirm certain Presidential nominees who he would not have chosen personally and who might work against some of the laws and policies he believes to be important. Citing the maxim that "Elections have consequences," he might vote to confirm such a candidate so long as he or she is competent.

A Client-Centered Philosophy of Practice

Using a client-centered philosophy of practice, the lawyer would "take any action that will advance the client's interest so long as the action does not clearly violate a rule of ethics or other law (the principle of professionalism)."[26] Professor Keyes argues forcefully that such a philosophy be adopted by all immigration court lawyers, given the gravity of the matters before the tribunal and the unfairness under current regulations and laws.[27] With regard to answering in the affirmative on the broad question posed on the I-918, she argues that "the defensible path of saying 'no' even when possibly the truth is 'yes,' is

20 For an overview of some important philosophies of institutional values, see Nathan M. Crystal, " *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1235 at 1242-1244.

21 Professor Crystal notes that "philosophies of morality and institutional values are not inconsistent because institutional values often embody moral principles." Nathan M. Crystal, *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1242, 1243.

22 See 8 CFR 103.2(a).

23 Perhaps this line of thinking most closely aligns with Professor Brad Wendell's philosophy of lawyering briefly outlined by Professor Crystal. Nathan M. Crystal, *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1243, 1244.

24 The drafters of the form are apparently fishing for an admission under INA § 212(a)(2)(A)(i), though certain responses may lead an officer to believe the client is a "drug abuser or addict" under INA §212(a)(1)(A) or give them "reason to believe" that the client "is or has been an illicit trafficker in any controlled substance…" under INA §212(a)(2)(C)(i).

25 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 533.

26 Nathan M. Crystal, Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility (2007) 51 *St. Louis U.L.J.* 1241.

27 See generally Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 532, FN 268.

a choice made by the zealous advocate."[28] But she admits that "for the risk-averse among us, this choice comes dangerously close to a collision with duties to the legal system."[29] As immigration lawyer and ethicist Cyrus Mehta points out in his article on the subject in the negative could lead to problems with "an overzealous prosecutor or bar investigator," but he also provides an in-depth illustration of just how complicated and unclear the matter really is.[30] The Board of Immigration Appeals (BIA) has held that "a valid admission of a crime for immigration purposes requires that the alien be given an adequate definition of the crime, including all essential elements, and that it be explained in understandable terms."[31] The argument that some make is unless the client has been presented with the law under these terms, he or she cannot possibly answer the question in the affirmative. This might then lead one to the conclusion that in practice only a criminal defense lawyer might be required to check "yes," as only they would know all the essential elements of the crime. But there might exist the rare circumstance in which an individual might have officially made a previous admission before a government official, thereby satisfying these requirements and necessitating an affirmative answer. And a lawyer might further argue that if this question were to be interpreted as a broad "catch all," then virtually everyone would have to check the "yes" box. The lawyer could argue that the government must be aware that most lawyers and foreign nationals who prepare these forms do not interpret the forms in this broad manner. Otherwise, nearly everyone—almost certainly those who drive automobiles—would be answering "yes" to the question and explaining that they have broken traffic laws (often misdemeanors under state law) countless times and have possibly committed other crimes that they were not even aware of. Perhaps the most compelling argument of all in the context is that "guilt" with respect to a particular crime is a legal term. Checking the "yes" box when a client has not been convicted according to INA Section 101(a)(48)(A) essentially involves the client's own lawyer assuming the role of both judge and jury with respect to the conduct in question.[32] Furthermore, checking the "yes" box could lead to fundamentally unfair results for those who were never charged with a crime. Assume the client checks the "yes" box, though his conduct was never called into question by authorities. This might then lead to further inquiry by immigration officials and an official admission under INA 212(a)(2), ultimately resulting in a finding that he is "inadmissible" under immigration law. Another client who has done the same thing is charged with shoplifting, which ultimately results in "pre-trial intervention" (PTI). The client makes no formal admission, completes a program under state law that allows him to avoid jail time, and avoids a final disposition that qualifies as a conviction under INA 212(a)(2). He checks the "no" box to the "Have you ever committed a crime or offense…" question and provides a copy of the certified original disposition showing successful completion of PTI in response to another question on the form, asking whether he has ever been arrested or charged with a crime. No further questions are asked of this client, and he is not found inadmissible. This provides strong support for the lawyer who checks the "no" box in our hypothetical situation, but serious risks remain, which is why this option would likely only be selected by the client-centered lawyer.

The self-interested lawyer works to minimize his personal risk and prioritizes himself when representing his client. The morality-based lawyer prioritizes her personal ethical system. The lawyer who adopts an institutional values approach prioritizes the broader ethical system of the whole over that of the individual. But the truly client-centered lawyer prioritizes the client above all else.

28 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 533.
29 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 533.
30 Cyrus Mehta, *Crime Without Punishment: Have You Ever Committed A Crime For Which You Have Not Been Arrested?*, at http://blog.cyrusmehta.com/CyrusMehta/wp-content/uploads/wp-post-to-pdf-enhanced-cache/2/crime-without-punishment-have-you-ever-committed-a-crime-for-which-you-have-not-been-arrested.pdf (last accessed July 5, 2017).
31 Matter of K, 7 I&N Dec. 594 (BIA 1957).
32 See Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 532.

Developing Your Own Philosophy of Practice

Every lawyer should formally draft her or his own philosophy of practice.[33] You have a philosophy of lawyering whether you are aware of it or not.[34] If you are not aware of it, then your clients probably do not know what it is either. Develop a written philosophy and hone it through time. This allows you to clarify your thoughts and can be an invaluable guide when making difficult decisions. Professor Crystal makes several suggestions as to how lawyers might provide their philosophy of lawyering to clients. I strongly support lawyers providing a philosophy of practice (or better yet, their more comprehensive philosophy of lawyering) to their clients because this allows the client to make an informed decision about who to hire, but I stop short of suggesting this as a requirement. A lawyer's website would be the ideal place to post this and reference to it in the engagement letter would be a good idea.[35] While it would seem likely that a client would only choose a lawyer with a client-centered practice, there are plenty of examples in which a client might prefer a different kind of lawyer. An evangelical Christian might choose a lawyer who makes her discretionary decisions based upon the guiding principles of her religion. A lawyer who espouses a philosophy of practice based in institutional values might, out of respect for the rule of law, develop a deep understanding of her field of practice and thus provide outstanding legal representation to her clients. And a client might choose to hire a lawyer despite her having a more of a self-interested philosophy of practice, provided she has stellar track record of success.

Lawyers also benefit from having a philosophy of practice. It is this lawyer's opinion that many lawyers are unhappy with their work because they are not living in a manner that is consistent with their vision and values. Developing a written philosophy of lawyering can help the lawyer along the path to greater career satisfaction. Those who work as employees may decide to quit their job and work someplace else or start their own firms. Others might decide to change the way they practice. And as immigration lawyers face increasingly more difficult ethical decisions, a formal, written philosophy of practice can serve as the bedrock upon which these decisions are made. The hypothetical in this article provides one such example.

Immigration lawyers should not only know the immigration laws, but also the criminal statutes that could possibly affect their clients and them.[36] And to effectively represent our clients, we must know the ethics rules inside and out. Put another way, every lawyer should be an expert in the Rules of Professional Conduct, including the comments thereto. Lawyers must be keenly aware of the rules that do not allow for discretion,[37] and they must exercise clear and sound judgment as to the boundaries of discretion.[38] Now more than ever, lawyers need a set policy to guide them in discretionary matters, and clients deserve to know how their lawyers will handle these issues before hiring the lawyer. Developing a formal philosophy of practice is a way to achieve this.

33 See Nathan Crystal's articles on the subject.
34 "Because discretion is so pervasive in the practice of law, lawyers develop, either thoughtfully or haphazardly, a general approach for making these decisions." *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 75 (2000).
35 See *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 97 (2000).
36 Cyrus D. Mehta and Alan Goldfarb, *Up Against a Wall: Post-Election Ethical Challenges for Immigration Lawyers*, Jan. 11, 2017, (AILA Doc. No. 17011200).
37 For example, a lawyer may not charge a contingency fee in a criminal case or certain family law matters. See Rule 1.5(d).
38 See, for example, the reasonableness requirements of ABA Model Rule 1.7.

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Profile
Randolph practises exclusively in the field of Canadian immigration and citizenship law. He is certified by the Law Society of Upper Canada as a Specialist in Immigration Law. He has been listed in Best Lawyers in Canada for immigration law for several years, including 2019. Additionally, he has been recognized by *Who's Who Legal* in 2018 as a leading expert in corporate immigration in Canada.

Randolph has a wide-ranging practice that includes matters pertaining to the transfer and relocation of executive and managerial personnel. He advises on a wide variety of matters related to applications for Canadian immigration. Randolph also represents clients in immigration-related litigation. He has argued cases before all three divisions of the Immigration and Refugee Board, as well as the Federal Court of Canada. Randolph also has general experience in the area of civil litigation including administrative law, and has practised at one of Canada's largest law firms.

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- Speaker: "Designing Global Payroll and Benefit Programs", Canadian Employee Relocation Council, Annual Conference, September 2015 (Montreal)
- Co-author: "Case Comment: *Canadian Reformed Church of Cloverdale, B.C. v. Canada (Minister of Employment and Social Development Canada*)", *ImmQuest*, Autumn 2015
- Speaker: "Navigating The New Rules in Canada's Immigration System", Canada Employee Relocation Council Conference, Toronto, May 2015
- Co-author: "Case Comment: Baba v. New Brunswick (Minister of Post-Secondary Education, Training and Labour)", *Immigration Law Reporter,* February 2015
- Speaker: "Criminal Inadmissibility", Ontario Bar Association, Canada/U.S. Border Immigration: Sixth Annual Fall Conference, October 2014
- Co-editor: *A Practical Guide to Provincial Nominee Programs in Canada Immigration Law* (Published by Carswell)
- Panellist: "Let's Take it Outside: Litigating Before Arbitration Panels, Administrative Tribunals and Disciplinary Boards", Ontario Bar Association, 2014
- Co-author: "Rodriguez Hernandez v. Canada" and "R. v. Appulonappa: Case Comment", *Immigration Law Reporter*, May 2013
- Moderator and speaker: "Federal Court Litigation Updates, Trends and Challenges", with Chief Justice Paul S. Crampton, March 2013
- Author: "Deputy Judges of the Federal Court and Mandatory Retirement", *ImmQuest*, February 2012
- Moderator: "Tech Processing Know How", Canadian Bar Association, Citizenship and Immigration Law Conference, 2011
- Author: "Canada v. Mavi – Case Comment", *Toronto Law Journal*, October 2011
- Author: "Mavi v. Canada (Attorney General) – Case Comment, *Immigration Law Reporter*, September 2011
- Author, Presenter: "How to Bring A Foreign Worker into Canada?", Six Minute Employment Lawyer, Law Society of Upper Canada, June 2011
- Co-author: "Top 10 Issues in PNP-Eastern/Central Canada", Canadian Bar Association, Citizenship and Immigration Law Conference, 2011
- Author: "Hijacking of Aircraft in 1984 Still Carries Consequences – Case Comment: Saini v. Canada (Minister of Public Safety and Emergency Preparedness)" *Immigration Law Reporter*, May 2011
- Author: "A Tale of Two Decisions: Arif v. Canada (Minister of Citizenship and Immigration)", *Toronto Law Journal*, November 2010
- Author: "Addendum-Felipa v. Canada (Minister of Citizenship and Immigration)", *Toronto Law Journal*, July 2010
- Author: "Felipa v. Canada (Minister of Citizenship and Immigration)", *Toronto Law Journal*, June 2010

- Moderator: “Top Ten Protected Person Cases”, Canadian Bar Association Annual Immigration Conference, Halifax, Nova Scotia, May 2010
- Author: “Mavi v. Canada (Attorney General): Sponsorship Obligations and Government Obligation of Procedural Fairness”, *Toronto Law Journal*, March 2010

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Barbara C. Brenner is Of Counsel with Whiteman Osterman & Hanna LLP, and practices with the Firm's Immigration Group. Ms. Brenner represents clients in a broad range of immigration matters, focusing on family- and employment-based petitions and applications, waivers of inadmissibility and removability, and naturalization and citizenship cases. She was previously a partner in the law firm of Copland and Brenner and has limited her practice to U.S. immigration and nationality laws since 1990.

Affiliations

Ms. Brenner has been a member of the American Immigration Lawyers Association (AILA) since 1994. She is also a member of the American Bar Association, the National Immigration Project of the National Lawyers Guild, the Albany County Bar Association and the Albany County Women's Bar Association.

Ms. Brenner is admitted in New York State (1990) and the Commonwealth of Massachusetts (1989).

Professional/Community

Ms. Brenner regularly participates as a panelist and speaker throughout the Capital District; upcoming and recent events include the immigration panel at the annual convention of the Women's Bar Association of the State of New York, a panel by The Federalist Society and symposium by the National Lawyers Guild at Albany Law School, training sessions by the New York Immigration Coalition at The Legal Project, and numerous other presentations at educational institutions and houses of worship. Ms. Brenner supports the work of Capital District organizations including The Legal Project and the Capital Region Immigration Collaborative, and is committed to community involvement.

Ms. Brenner was appointed to serve as a member of the Committee on Character and Fitness of the Appellate Division, Third Judicial Department, for a five-year term commencing in November 2018.

Background/Education

Ms. Brenner earned her Juris Doctor degree as a *cum laude* graduate of SUNY Buffalo School of Law in 1989. She graduated *summa cum laude* from SUNY Geneseo with a Bachelor of Arts degree in English.