



Legal Ethics in Immigration Matters: Legal Representation and Unauthorized Practice of Law

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Legislative Attorney

September 18, 2009

Congressional Research Service

7-....

www.crs.gov

R40822

Summary

The unauthorized practice of law by persons who are not attorneys, ineffective assistance by licensed attorneys, or other unethical conduct can cause irreversible harm to aliens seeking immigration benefits or relief. Aliens may forfeit, temporarily or permanently, the benefits they seek, due in part to the prevalence of unethical conduct targeting a population that some regard as particularly vulnerable to such abuses. In recent years, the Executive Office of Immigration Review (EOIR), the U.S. Citizenship and Immigration Services (USCIS), and various state attorneys general have taken action to address the problems posed by unethical conduct by immigration attorneys and by persons posing as immigration attorneys, such as so-called “notarios” and other immigration consultants.

The variety of existing laws and rules that may be used to deal with unethical conduct by lawyers and other representatives or consultants in immigration matters include the professional conduct and disciplinary rules of the EOIR and USCIS; the state court/bar rules and/or state laws governing ethical conduct of lawyers and other representatives/consultants, including laws regarding the unauthorized practice of law; the Federal Trade Commission Act; and state consumer laws, including consumer fraud laws and unfair and deceptive acts and practices laws. Various legislative proposals have been introduced in Congress to provide a federal, nationally applicable, and consistent framework for dealing with the problems presented by unethical conduct by attorneys and other representatives/consultants in immigration matters: H.R. 1992/S. 577, the Immigration Fraud Prevention Act of 2009; and §245 of H.R. 994, the Loophole Elimination and Verification Enforcement (LEAVE) Act. This report provides an overview of these issues.

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Introduction

The unauthorized practice of law by persons who are not attorneys, ineffective assistance by licensed attorneys, or other unethical conduct can cause irreversible harm to aliens seeking immigration benefits or relief. Aliens may forfeit, temporarily or permanently, the benefits they seek, due in part to the prevalence of unethical conduct targeting a population that some regard as particularly vulnerable to such abuses. In recent years, the Executive Office of Immigration Review (EOIR) in the U.S. Department of Justice (DOJ), the U.S. Citizenship and Immigration Services (USCIS) in the U.S. Department of Homeland Security (DHS), and various state attorneys general have taken action to address the problems posed by unethical conduct by immigration attorneys and by persons posing as immigration attorneys, such as so-called “notarios” and other immigration consultants.

The variety of existing laws and rules that may be used to deal with unethical conduct by lawyers and other representatives or consultants in immigration matters include the professional conduct and disciplinary rules of the EOIR and USCIS; the state court/bar rules and/or state laws governing ethical conduct of lawyers and other representatives/consultants, including laws regarding the unauthorized practice of law; the Federal Trade Commission Act; and state consumer laws, including consumer fraud laws and unfair and deceptive acts and practices laws. Various legislative proposals have been introduced in Congress to provide a federal, nationally applicable, and consistent framework for dealing with the problems presented by unethical conduct by attorneys and other representatives/consultants in immigration matters. This report provides an overview of these issues.

Legal Representation Before the USCIS and EOIR

The USCIS and EOIR are the administrative agencies that adjudicate cases involving immigration matters. More specifically, the USCIS accepts and adjudicates applications for immigration benefits, such as petitions for immigrant and nonimmigrant visas, applications for adjustment of status to lawful permanent residency, and asylum applications from aliens lawfully in the United States.¹ The EOIR adjudicates cases and issues related to the removal of aliens from the United States for various grounds of deportation or inadmissibility, detention of such aliens during and after removal proceedings, and asylum claims raised as defenses against removal.² While persons appearing before either the USCIS or the EOIR may choose to be advised by and represented by an attorney or other representative,³ a person is entitled by statute to such representation only in

¹ 6 U.S.C. §271.

² The EOIR comprises the Office of the Chief Immigration Judge, the Board of Immigration Appeals, the Office of the Chief Administrative Hearing Officer (OCAHO), the Office of General Counsel (which includes the bar/disciplinary counsel), and the administrative components. The Office of the Chief Immigration Judge oversees the immigration judges sitting in the immigration courts located throughout the United States. 8 C.F.R. §§1003.0, 1003.9.

The Office of the Chief Administrative Hearing Officer oversees the administrative law judges who adjudicate cases and issues regarding the unauthorized employment of aliens, unfair immigration-related employment practices, and related document fraud. INA §§274A, 274B, and 274C, codified as amended at 8 U.S.C. §§1324a, 1324b, and 1324c, and 8 C.F.R. §§274a.9, 1274a.9.

Decisions by these immigration judges and administrative law judges may be appealed administratively to the Board of Immigration Appeals. 8 C.F.R. §1003.1.

³ 8 C.F.R. §§103.2(a)(3), 1003.16(b); Immigration and Nationality Act (INA) §292, codified as amended at 8 U.S.C. (continued...)

removal proceedings before the EOIR, but not at government expense.⁴ Only licensed attorneys and other persons accredited as representatives by the Board of Immigration Appeals (BIA), the administrative appellate component of the EOIR, may represent persons in proceedings before the EOIR and the USCIS.⁵ These attorneys and representatives are subject to rules of conduct and disciplinary procedures established by the USCIS⁶ and the EOIR.⁷

Authorized Representatives

As noted above, a person in removal proceedings before the EOIR has the right to counsel by a licensed attorney or other authorized representative, but not at government expense.⁸ A person appearing before the OCAHO to respond to alleged violations of immigration laws regarding the employment of aliens is also entitled to be represented by counsel at no expense to the government.⁹ A person may be represented by a licensed attorney or other authorized representative with regard to submitting a petition or application to the USCIS.¹⁰ As discussed in this section, the regulations for the EOIR and the USCIS define who is an attorney or representative recognized by those agencies as qualified to represent persons in immigration matters.

An *attorney* includes “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, disbaring, or otherwise restricting him in the practice of law.”¹¹ An attorney outside the United States may also represent an alien in proceedings before the USCIS, but not before the EOIR.¹² For example, an alien outside the United States may retain an attorney outside the United States in matters such as submission of visa applications to a U.S. consulate abroad.

(...continued)

§ 1362.

⁴ INA § 292, codified as amended at 8 U.S.C. § 1362.

⁵ See 8 C.F.R. §§ 1.1, 292.1, 1001.1, 1292.1, discussed below in the “Authorized Representatives” subsection.

⁶ 8 C.F.R. § 292.3.

⁷ 8 C.F.R. §§ 1003.101-109 and 1292.3.

⁸ INA § 292 (codified as amended at 8 U.S.C. § 1362) and 8 C.F.R. § 1003.16(b).

⁹ 8 C.F.R. §§ 274a.9(d)(1)(ii)(A) and 1274a.9(d)(1)(ii)(A).

¹⁰ 8 C.F.R. § 103.2(a)(3).

¹¹ 8 C.F.R. §§ 1.1(f) and 1001.1(f). These sections are citations to parallel regulations of the USCIS and the EOIR, respectively. When the DHS was established, the immigration administrative and enforcement functions of the former Immigration and Naturalization Service were transferred from the DOJ to the DHS and various components of DHS. The EOIR remained in the DOJ. Some of the regulations for the EOIR parallel regulations of the USCIS, including the two subsections cited above, among others; there are some differences between some of the parallel regulations of the two agencies.

¹² 8 C.F.R. § 292.1(a)(6), compared to 8 C.F.R. § 1292.1(a). Under 8 C.F.R. § 292.1(a)(6), an attorney outside the United States is one “who is licensed to practice law and is in good standing in a court of general jurisdiction of the country in which he/she resides and who is engaged in such practice. Provided that he/she represents persons only in matters outside the geographical confines of the United States as defined in section 101(a)(38) of the Act [INA], and that the [USCIS] official before whom he/she wishes to appear allows such representation as a matter of discretion.”

The regulations for the USCIS and the EOIR authorize certain non-attorney representatives, including

- law students at accredited law schools, who are appearing at the request of the person entitled to representation and at the discretion of the USCIS or EOIR official before whom the students are appearing; are under the supervision of a faculty member, licensed attorney, or accredited representative, in a legal aid program or clinic conducted by a law school or non-profit organization; and are not receiving payment from the alien they represent;¹³
- law-school graduates not yet admitted to the bar, who are appearing at the request of the person entitled to representation and at the discretion of the USCIS or EOIR official before whom the graduates are appearing; are under the supervision of a licensed attorney or accredited representative; and are not receiving payment from the alien they represent;¹⁴
- reputable individuals of good moral character, who are appearing on an individual case basis, at the request of the person entitled to representation and at the discretion of the USCIS or EOIR official before whom the individuals are appearing; are not receiving payment; have a pre-existing relationship or connection with the person entitled to representation, e.g., as a relative, neighbor, clergyman, business associate, or personal friend (this requirement may be waived in cases where adequate representation would not otherwise be available); and provided that permission to appear shall not be granted to any individual who regularly engages in immigration and naturalization practice or preparation, or holds himself out to the public as qualified to do so;¹⁵
- accredited officials in the United States for the country of which an alien is a national, if the officials appear solely in their official capacity and with the alien's consent;¹⁶
- persons who are accredited by the BIA and are representatives of an organization designated by the BIA as qualified to provide representation;¹⁷ and
- persons formerly authorized to practice before the BIA and the former Immigration and Naturalization Service (INS) on the day before the effective date of the Immigration and Nationality Act (INA).¹⁸

In addition to those authorized to represent individuals before the USCIS or the EOIR, on a case-by-case basis, the BIA may permit an attorney or an organization represented by an attorney to

¹³ 8 C.F.R. §§292.1(a)(2) and 1292.1(a)(2).

¹⁴ *Id.*

¹⁵ 8 C.F.R. §§292.1(a)(3) and 1292.1(a)(3).

¹⁶ 8 C.F.R. §§292.1(a)(5) and 1292.1(a)(5).

¹⁷ 8 C.F.R. §§292.1(a)(4) and 1292.1(a)(4). The BIA maintains a list of the recognized organizations and their representatives. For more information on representatives and pro bono attorneys, see EOIR, *Representation of Aliens in Immigration Proceedings: Attorneys, Recognized Organizations, and Accredited Representatives; Qualified Representatives; Free Legal Services Providers* (Oct. 27, 2008), at <http://www.usdoj.gov/eoir/press/08/AccreditationFactSheet102708.pdf>.

¹⁸ 8 C.F.R. §§292.1(b) and 1292.1(b).

appear as *amicus curiae*, if the public interest will be served.¹⁹ Former employees of the DOJ are prohibited from representation that would violate the ethics rules of the DOJ.²⁰

Although an attorney is not provided to an alien at government expense, the Office of the Chief Immigration Judge maintains a list of organizations and attorneys whom the Chief Immigration Judge has qualified to provide free/pro bono legal services.²¹ The list of free legal services/pro bono providers is not the same as the list of organizations designated to provide accredited representatives that is maintained by the BIA because the Chief Immigration Judge's list of free legal services/pro bono providers includes attorneys. The list of organizations designated by the BIA does not include attorneys, and the accredited representatives for those organizations may not necessarily be attorneys. Bar associations that provide referrals to attorneys who appear pro bono in immigration proceedings and attorneys who declare that they provide pro bono services may be included on the Chief Immigration Judge's list of free legal service/pro bono providers. Additionally, an organization that is not on the list of organizations designated by the BIA may be included on the Chief Immigration Judge's list of free/pro bono legal service providers if it has a licensed attorney on its staff, or retains one at no expense to the alien represented, who can provide pro bono services to the alien.

New Ethics Rules

In August 2006, the DOJ developed measures to improve the quality of the Immigration Courts and the BIA.²² Recently, as one of these measures, the EOIR promulgated changes to the rules governing professional conduct and disciplinary proceedings for attorneys representing clients before the EOIR.²³ The new rule adds grounds for disciplinary sanctions that conform in many respects to the American Bar Association (ABA) Model Rules of Professional Conduct and also with the ethical rules in most states. The new rule also revised existing grounds for disciplinary actions.

Some of the current grounds for disciplinary sanctions that had been in place even before the recent amendments include²⁴

- charging a grossly excessive fee or a fee for immigration-related services that are supposed to be free for the person represented;
- engaging in bribery or coercion in connection with any case;

¹⁹ 8 C.F.R. §§292.1(d) and 1292.1(d).

²⁰ 8 C.F.R. §§292.1(c) and 1292.1(c). These parallel regulations of the USCIS and the EOIR cite a former DOJ regulation that no longer exists, 28 C.F.R. §45.735 – 7; the current regulations governing post-employment conflict-of-interest restrictions for former federal government employees are at 5 C.F.R. part 2641, promulgated pursuant to 18 U.S.C. §207.

²¹ 8 C.F.R. §§1003.61-1003.65.

²² Attorney General Gonzales, Memorandum on Measures To Improve the Immigration Courts and the Board of Immigration Appeals, August 9, 2006, at <http://www.usdoj.gov/ag/readingroom/ag-080906.pdf>, and EOIR, Fact Sheet on EOIR's Improvement Measures—Progress Overview, September 8, 2008, at <http://www.usdoj.gov/eoir/press/08/EOIRs22ImprovementsProgressOverview090508v2.pdf>.

²³ 73 Fed. Reg. 76914 (Dec. 18, 2008) (effective date was January 20, 2009).

²⁴ The disciplinary grounds are enumerated at 8 C.F.R. §1003.102(a)-(u); the grounds that had been in place even before the recent amendments are found at 8 C.F.R. §1003.2(a)-(m).

- knowingly or with reckless disregard making a false statement or willfully misleading, misinforming, threatening, or deceiving any person;
- soliciting professional employment—a practitioner is prohibited from distributing solicitation material in or around the premises of any building in which an Immigration Court is located;
- the attorney is or has been subject to a final order of disbarment or suspension or has resigned while a disciplinary investigation or proceeding is pending;
- knowingly or with reckless disregard making a false or misleading communication about qualifications or services by a material misrepresentation or omission of fact or law or by implying certification/recognition as an immigration specialist without certification by a state regulatory body or state-approved certifying organization;
- engaging in contumelious or obnoxious conduct that would constitute contempt of court in a judicial proceeding;
- the attorney has been convicted in any state or federal court of a serious crime;²⁵
- falsely certifying a copy of a document as being true and complete;
- engaging in frivolous behavior in an administrative immigration proceeding;
- engaging in conduct that constitutes ineffective assistance of counsel, as determined by the BIA, an immigration judge, or federal court, and that is the subject of a disciplinary complaint within one year of the determination;
- repeatedly failing to appear for pre-hearing conferences, hearings, and case-related meetings in a timely manner without good cause;
- assisting any person in activity constituting the unauthorized practice of law.

New grounds for disciplinary action added by the recent revisions include²⁶

- engaging in conduct that is prejudicial to the administration of justice or undermines the integrity of the adjudicative process;
- failing to provide competent representation to a client;
- failing to follow the client's decisions about the objectives of representation and to consult with the client about the means for achieving these objectives;
- failing to act with reasonable diligence and promptness;
- failing to maintain communication with the client;
- failing to disclose to the adjudicator controlling legal authority that is known by the attorney/representative to be directly adverse to the client's position and not disclosed by opposing counsel;

²⁵ "A serious crime includes any felony and also includes any lesser crime, a necessary element of which ... involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, dishonesty, bribery, extortion, misappropriation, theft, or an attempt, or a conspiracy or solicitation of another, to commit a serious crime." 8 C.F.R. §1003.102(h).

²⁶ 8 C.F.R. §1003.2(n)-(u).

- failing to submit a signed Notice of Entry or Appearance as Attorney or Representative when the attorney/representative has engaged in “practice” or “preparation” as defined in the DHS/EOIR regulations and has a pattern/practice of failing to submit such notices;²⁷ and
- repeatedly filing notices, motions, briefs, or claims that reflect little or no attention to the specific facts or legal issues in a client’s case and instead rely on boilerplate language, indicating a substantial failure to competently represent the client.

Disciplinary Action

USCIS and EOIR

Complaints about attorneys or legal representatives may be filed through either the USCIS or the EOIR, depending on whether the representation was before the USCIS or before the EOIR.²⁸ The USCIS and the EOIR have separate investigative jurisdiction over complaints about attorneys and representatives who appear before them. The USCIS investigates complaints about practitioners who appear before USCIS adjudicators, such as asylum officers, service center directors, and examiners. The EOIR investigates complaints about legal practitioners who appear before the BIA, the Immigration Courts, and the OCAHO.

The BIA oversees all formal disciplinary proceedings resulting from complaints. It conducts the same disciplinary hearing and appeals process for both agencies, thus ensuring a fair and consistent interpretation of the conduct rules. The recent changes to the regulations regarding disciplinary procedures for the EOIR included amendments to the formal disciplinary procedures conducted by the BIA and to the preliminary investigation and complaint procedures for the EOIR disciplinary counsel. These do not apply to the preliminary investigation and handling of complaints by the DHS, which has similar, parallel regulations governing the initial handling of disciplinary complaints against lawyers and other representatives of clients in adjudications before the DHS.²⁹

Each agency’s disciplinary counsel in the respective Office of General Counsel³⁰ receives complaints, conducts preliminary inquiries, and determines whether complaints have merit. If a complaint has merit, the disciplinary counsel may resolve it by issuing warning letters and admonitions and/or entering into agreements in lieu of discipline.³¹ If the complaint is not resolved by the disciplinary counsel, the counsel may initiate formal disciplinary proceedings by

²⁷ 8 C.F.R. §§1.1(i) and (k), 1001.1(i) and (k).

²⁸ Regulations establishing the complaint and disciplinary procedures are at 8 C.F.R. §§292.3 (USCIS complaints), 1292.3 (EOIR complaints), and 1003.101-1003.109 (formal BIA disciplinary procedures). For more information on the disciplinary procedures, see EOIR, *EOIR’s Disciplinary Program and Professional Conduct Rules for Immigration Attorneys and Representatives* (March 20, 2009), at <http://www.usdoj.gov/eoir/press/09/AttorneyDisciplineFactSheet.pdf>; chapter 10 of the Immigration Court Practice Manual at <http://www.usdoj.gov/eoir/vll/OCIJPracManual/Chap%2010.pdf> (chapter 10 last revised April 1, 2008); and chapter 11 of the BIA Practice Manual at <http://www.usdoj.gov/eoir/vll/qapracmanual/pracmanual/chap11.pdf> (chapter 11 last revised July 30, 2004).

²⁹ Regulations for DHS/USCIS are at 8 C.F.R. §292.3 (Professional Conduct for Practitioners—Rules and Procedures).

³⁰ Office of General Counsel of the EOIR or the USCIS Office of Chief Counsel in the DHS Office of General Counsel.

³¹ 8 C.F.R. §§292.3(d)(3), 1292.3(d)(3), and 1003.104(c).

issuing a Notice of Intent to Discipline (NID) with the opportunity for formal hearings.³² Attorneys and legal representatives who receive a NID have an opportunity to respond and request a hearing before an immigration judge, with subsequent appeals to the BIA, and judicial review by a federal district court.³³ Failure by a lawyer/representative to file a timely response to a NID constitutes an admission of the misconduct alleged in the NID and a forfeiture of the right to a hearing.³⁴ There are also provisions for immediate suspension and summary disciplinary proceedings based on a conviction for a serious crime or disbarment/suspension imposed by the highest court of a state or any federal court.³⁵

There are several disciplinary sanctions that the BIA may impose on an attorney/representative.³⁶ Permanent expulsion from practice before the BIA, the immigration courts, or the USCIS/DHS—or all three bodies—is the strongest action. Lesser sanctions include suspension from practice before these authorities, public or private censure, and any other disciplinary action deemed appropriate. An attorney/representative who has been expelled or suspended for more than one year may petition for reinstatement.³⁷

In addition to, or in lieu of, initiating disciplinary proceedings against a practitioner, the Offices of the General Counsels of DHS and EOIR, whichever has jurisdiction over a complaint, may notify any appropriate Federal and/or state disciplinary or regulatory authority of any complaint filed against an attorney or representative.³⁸ Any final disciplinary imposition of sanctions, other than a private censure, must be reported to any disciplinary or regulatory authority in every jurisdiction where the disciplined attorney/representative is admitted or otherwise authorized to practice.³⁹ Also, notice of all public discipline imposed by the BIA must be transmitted to the National Lawyer Regulatory Data Bank maintained by the ABA.⁴⁰

If the Offices of the General Counsels of DHS and EOIR receive credible information or allegations that an attorney/representative has engaged in criminal conduct, the matter shall be referred to the appropriate U.S. attorney or the DHS, and also to the Inspector General and Federal Bureau of Investigation, as appropriate.⁴¹ The Offices of General Counsels coordinate disciplinary actions with the relevant investigative and prosecutorial authorities so that neither the disciplinary nor criminal proceedings are jeopardized.

³² 8 C.F.R. §§292.3(e), 1292.3(e), 1003.105.

³³ 8 C.F.R. §§292.3(e) and (f), 1292.3(e) and (f), 1003.105, 1003.106.

³⁴ 8 C.F.R. §§292.3(e)(3)(ii), 1292.3(e)(3)(ii), 1003.103(d).

³⁵ 8 C.F.R. §§292.3(c), 1292.3(c), 1003.103.

³⁶ 8 C.F.R. §§292.3, 1292.3, and 1003.101.

³⁷ 8 C.F.R. §1003.107.

³⁸ 8 C.F.R. §§292.3(g) and 1292.3(g). The USCIS Office of the Chief Counsel is the component of the DHS Office of the General Counsel that generally handles USCIS-related attorney disciplinary actions.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 8 C.F.R. §§292.3(d)(4), 1292.3(d)(4), and 1003.105(d).

State Court/Bar Sanctions

State courts and state bars may discipline attorneys for unethical conduct related to the practice of immigration law, independently of any BIA-imposed disciplinary action. In a 2004 case,⁴² Miguel Gadda, an attorney licensed in California and sanctioned by the California State Bar Court and the BIA, attempted to argue that the federal regulatory scheme governing attorney conduct before the EOIR and the USCIS preempted the state's authority to discipline or regulate the conduct of attorneys who practice exclusively in immigration adjudications or the federal courts and, accordingly, the Supreme Court of California lacked jurisdiction to disbar him.⁴³ In a somewhat circular argument, he additionally asserted that because the California state sanctions were invalid, then the sanctions imposed by the BIA reciprocally, based on the California sanctions, were also invalid, and that any reciprocal sanctions imposed by the federal courts would also be invalid. The U.S. Court of Appeals for the Ninth Circuit rejected Gadda's argument and held that the federal disciplinary framework for immigration attorneys/representatives did not preempt state laws regulating attorneys.⁴⁴ The court noted that the federal regulations expressly recognized and contemplated a co-existing state regulatory scheme and that the federal authorities anticipated cooperating with state bar disciplinary authorities in investigating and disciplining misconduct to increase efficient use of resources and avoid duplicative efforts.⁴⁵

Disciplinary procedures vary from state to state.⁴⁶ Egregious violations of the ethical rules or codes for legal practitioners in a state may result in suspension or permanent disbarment from the practice of law or a referral for criminal prosecution. *In re Cole*⁴⁷ is a recent example of a brief suspension for failing to provide competent and diligent representation and to communicate with a client. Mr. Cole had failed to file a timely asylum application for a client, resulting in alternate orders for voluntary departure or removal. He then lied to his client about the status of his case. The client eventually learned the truth, terminated Mr. Cole's services, and retained other counsel. Because this incident was a first offense for Mr. Cole, he attempted to remedy his misconduct by assisting his client's new counsel in reversing the result of his misconduct, and apparently otherwise had a good professional reputation and history; the District of Columbia (DC) Court of Appeals imposed a 30-day suspension from practicing in DC. The court compared his case favorably with other cases of misconduct that had resulted in longer suspensions. In addition to the DC disciplinary sanctions, the BIA reciprocally suspended Mr. Cole from practicing before the BIA, immigration courts, and the USCIS/DHS for 30 days and subsequently reinstated him.⁴⁸

An attorney practicing before the USCIS/EOIR is required to report to those agencies any state or federal criminal conviction for a serious crime or disbarment/suspension by or resignation with an

⁴² *Gadda v. Ashcroft*, 377 F.3d 934 (9th Cir. 2004).

⁴³ 377 F.3d at 944.

⁴⁴ 377 F.3d at 939, 946.

⁴⁵ 377 F.3d at 945-946.

⁴⁶ Links to the various state laws/rules for ethics rules and disciplinary proceedings may be found at the National Organization of Bar Counsel website at http://www.nobc.org/research-professionalconductrules.aspx?ekmense=15074e5e_20_0_2682_2, and http://www.nobc.org/Disciplinary_Procedural_Rules.aspx?ekmense=15074e5e_20_0_1816_1, respectively; see also the state resources at the ABA Center for Professional Responsibility website at <http://www.abanet.org/cpr/links.html#States>, and links to state attorney disciplinary agencies at <http://www.abanet.org/cpr/regulation/directory.pdf>.

⁴⁷ 967 A.2d 1264 (D.C. App. 2009).

⁴⁸ See links to order for immediate suspension, final order of suspension, and order for reinstatement at the entry for Patrick J. Cole on the list of disciplined practitioners at <http://www.usdoj.gov/eoir/profcond/chart.htm>.

admission of misconduct from the highest court of a state or any federal court.⁴⁹ This notice must be given within 30 days of the *initial* order, even if an appeal of the conviction or discipline is pending, or immediate suspension from practice before the DHS or the EOIR will result. The notice requirement only applies to convictions or disciplinary actions on or after July 27, 2000.

Unauthorized Practice of Law (UPL)

Unauthorized practice of law (UPL) may entail the practice of law either by attorneys who are not licensed to practice in a particular jurisdiction (or before a particular agency) or by persons who are not attorneys but present themselves as qualified to give legal advice. The problems posed by UPL in immigration services have been widely reported by legal commentators and the media.⁵⁰ There are several avenues for dealing with such problems—state court rules and/or statutes defining the practice of law and prohibiting the unauthorized practice of law; federal laws prohibiting unfair and deceptive acts and practices (UDAP); and state consumer laws prohibiting UDAP. These topics will be briefly discussed below.

Background of Client/Consumer Problems

In recent years, the media, legal professional organizations, and immigrant advocacy groups have focused increased attention on the issue of the unauthorized practice of law. Much of the focus is on so-called “notarios,” persons who may be licensed as notary publics in a state but hold themselves out to be qualified to perform certain legal functions, taking advantage of confusion about the differences between notary publics in the United States and *notarios publicos* in Latin American countries.⁵¹ In countries with a legal system based on a Latin civil law model, *notario publico* is a term that refers to persons who are licensed to perform certain legal services.⁵² Therefore, aliens from countries where a notario is understood to be authorized to provide legal services may be easily defrauded by persons calling themselves notarios and presenting themselves as experts in immigration law and authorized to represent aliens in immigration matters. Similarly, aliens from certain Eastern European countries may mistakenly believe that travel agents may perform certain immigration-related services because in their home countries travel agents are authorized to assist in applying for visas.⁵³ Other high-profile cases have involved trusted community organizations, such as churches,⁵⁴ and lawyers who have been

⁴⁹ 8 C.F.R. §§292.3(c)(4) and 1292.3(c)(4).

⁵⁰ See *infra* notes 51-56 and accompanying text.

⁵¹ Anne E. Langford, *What's in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 Harv. Latino L. Rev. 115 (2004); Irena Lieberman, *Protecting Immigrants from Notario Fraud*, vol. 18, no. 3, Pass It On 2, Newsletter of ABA Government and Public Sector Lawyers Division (2009) at http://www.abanet.org/publicserv/immigration/notario/protecting_immigrants_from_notario_fraud_spr09vol18no3.pdf; ABA Commission on Immigration webpage warning of the dangers of notario fraud, at http://www.abanet.org/publicserv/immigration/notario/consumer_warnings.shtml; the ABA notario fraud website also lists civil and criminal cases at <http://www.abanet.org/publicserv/immigration/notario/cases.shtml>.

⁵² Langford, *supra* note 51.

⁵³ Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: a Look at State Laws Regulating Immigration Assistants*, 19 Geo. Immigr. L.J. 1, 5-6 (2004).

⁵⁴ Kirk Semple and Jenny Manrique, *Cuomo Widens a Probe Into Immigration Fraud*, N.Y. Times (May 29, 2009), reporting that Queens District Attorney Brown has filed charges against two pastors of a church, Iglesia Pentecostal Roca de Salvacion Eterna, accused of defrauding more than 100 immigrants with false promises of visas/green cards, at (continued...)

disbarred or suspended from practice who continue to practice immigration law.⁵⁵ Legal commentators have noted that the increase in such incidents is the result of a couple of factors, including the shortage of inexpensive, competent immigration lawyers and the singular vulnerability of the immigrant community, whose members may not be fluent in English or familiar with the U.S. legal system and may be more isolated from information that is more readily accessible to U.S. citizens.⁵⁶

Different Types of Legal Action

State Unauthorized Practice of Law Rules

Prohibitions against unauthorized practice of law, and the definitions of the practice of law and the unauthorized practice of law, are matters of state laws—statutes and/or state court/bar rules—and not a matter of federal laws.⁵⁷ Particularly in recent years, a number of states have enacted laws regulating the business of immigration services.⁵⁸ State laws may variously refer to non-attorney service providers as “immigration consultants” or “immigration assistants.”⁵⁹ These laws may establish what services immigration consultant/assistants may provide that do not constitute the practice of law, such as assistance in filling out forms or provision of information that does not amount to legal advice.

The ABA Model Rule 5.5 regarding the unauthorized practice of law prohibits an attorney from practicing law in a jurisdiction in violation of that jurisdiction’s regulation of the practice of law, and from assisting someone who is not a bar member from engaging in activities that constitute the unauthorized practice of law. The ABA has adopted a recommendation on the model definition of the practice of law (on which the Federal Trade Commission has commented).⁶⁰ It recommended that every state adopt a definition of the practice of law that should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity and a consideration of minimum qualifications, competence, and accountability.⁶¹ The report accompanying the recommendation

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http://www.nytimes.com/2009/05/29/nyregion/29immigration.html?_r=1&scp=1&sq=May%2029%20Cuomo&st=cse.

⁵⁵ See, e.g., EOIR, *EOIR Announces Latest Disciplinary Actions Under Rules of Professional Conduct* (January 15, 2009), describing, among others, the case of Paul A. Schelly, who was immediately suspended pending final disciplinary action by the California State Bar Court (disbarment recommended) for practicing immigration law while already suspended from practice in California, at <http://www.usdoj.gov/eoir/press/09/AttyDiscJan09.htm>.

⁵⁶ Moore, *supra* note 53 at 2-10; Alexandra M. Ashbrook, *The Unauthorized Practice of Law in Immigration: Examining the Propriety of Non-Lawyer Representation*, 5 *Geo. J. Legal Ethics* 237, 238-252 (1991-1992).

⁵⁷ ABA Standing Committee on Client Protection, *2009 Survey of Unlicensed Practice of Law Committees*; ABA, *Full-Text of State Laws for the Prosecution and Regulation of Notarios*, at http://www.abanet.org/publicserv/immigration/notario/full_text_state_code.pdf; Moore, *supra* note 53, generally; Ashbrook, *supra* note 56, generally.

⁵⁸ See National Conference of State Legislatures, *State Laws Related to Immigrants and Immigration, Jan. 1-Jun. 30, 2009* (July 17, 2009), at <http://www.ncsl.org/documents/immig/ImmigrationReport2009.pdf>; reports for other recent years are available through the NCSL website. At least one municipality has regulated such assistants; see Chicago Municipal Code reprinted at http://www.abanet.org/publicserv/immigration/notario/zetoony_chicago_municipal_code_4-372.pdf.

⁵⁹ See authorities *supra* note 57.

⁶⁰ See FTC comment, *infra* note 71.

⁶¹ See Resolution on the Model Definition on the Practice of Law and the accompanying Report at <http://www.abanet.org/leadership/2003/journal/100.pdf>. Various state definitions are reprinted as an appendix to the (continued...)

notes that many states have relied on state courts to establish the definition of exactly what services and activities constitute the practice of law through case law, rather than establishing a statutory definition.⁶²

There may be potential federal preemption issues with regard to some state UPL laws that may conflict with federal immigration regulations permitting non-attorneys to represent persons free of charge in proceedings before the USCIS/DHS and the EOIR.⁶³ The federal regulations do not permit representatives to engage in a for-profit business providing immigration legal services. They define “preparation” in the context of legal practice as meaning the study of the fact and law of a case and preparation of auxiliary documents in a proceeding coupled with legal advice, but not as including assistance in completing a form where the person providing such assistance does not purport to be qualified in legal matters and receives nominal remuneration.⁶⁴ Federal laws and regulations may preempt state laws permitting immigration consultants/assistants to engage in activities for a fee when federal law limits those activities to attorneys and fee-free accredited/qualified representatives.⁶⁵

Consumer Protection/Fraud and Unfair and Deceptive Acts and Practices (UDAP)

Federal Statute and Federal Trade Commission

Potentially, the Federal Trade Commission Act (FTCA),⁶⁶ the federal UDAP law, could be used by the Federal Trade Commission (FTC) to take action against unfair and deceptive acts and practices with respect to the practice of law. The FTCA prohibits unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. An unfair act or practice is one that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”⁶⁷ Under the FTCA, the FTC is authorized to investigate and bring civil enforcement actions against UDAP. The FTC may promulgate rules prohibiting specific acts and practices; issue cease-and-desist orders against certain acts and practices; seek injunctions, civil penalties, and consumer redress in federal courts; and refer possible criminal violations to the Attorney General for prosecution.

Although it does not appear that the FTCA has been used to enforce the prohibition against unfair and deceptive practices with respect to the unauthorized practice of law, the FTC has taken enforcement action against legal services groups with regard to false advertising of mortgage loan modification services⁶⁸ and price-fixing by criminal attorneys for representation of indigent

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report.

⁶² Report, *supra* note 61, at 13.

⁶³ Moore, *supra* note 53, at 15-26.

⁶⁴ 8 C.F.R. §§1.1(k) and 1001.1(k).

⁶⁵ Moore, *supra* note 53, at 15-26.

⁶⁶ Codified as amended at 15 U.S.C. §§41-58.

⁶⁷ 15 U.S.C. §45(n).

⁶⁸ FTC v. Data Medical Capital, Inc. *et al.*, Civil Action No. SA-CV-99-1266 AHS (EEx) (C.D. Calif.), see related documents, including 2001 stipulated final judgment/order and 2009 temporary restraining order for violations of the (continued...)

defendants.⁶⁹ The FTCA authorizes investigation and prosecution by the federal government only; it does not provide for private lawsuits by victims of fraud. In addition to enforcement actions, the FTC has filed amicus briefs in cases involving the practice of law,⁷⁰ including cases involving the unauthorized practice of law and advertisement of or solicitation for legal services. It has also issued other advocacy or advisory documents espousing positions with regard to the practice of law to assist state bars and other professional groups, such as the ABA, in adopting ethics/professional responsibility rules or model rules.⁷¹

Recently, Catholic Charities of the Archdiocese of Washington, DC, petitioned the FTC to take enforcement action against unfair and deceptive acts and practices in advertising by the immigration consulting industry, issue rules or guidelines for the industry establishing what acts constitute prohibited unfair and deceptive acts and practices, and to undertake consumer education to prevent notario and other immigration consulting fraud.⁷² The petition described state enforcement efforts and private lawsuits and noted that there is considerable variation in the scope and effectiveness of such efforts. The petition asserted that the FTC has the unique authority to coordinate state enforcement efforts and to use the national scope of its authority to effectively regulate the industry and conduct a national consumer education campaign. The FTC has not responded to the petition as of the date of this report.

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2001 final judgment/order, at <http://www.ftc.gov/os/caselist/x000001.shtm>.

⁶⁹ In the Matter of Robert Lewis, James Sowder, Gerald Wear, and Joel R. Yoseph, individually, FTC Docket No. C-4111, see related documents, including final consent order to cease and desist violations of the FTCA, at <http://www.ftc.gov/os/caselist/0310155/0310155.shtm>.

⁷⁰ See, e.g., FTC, *Announced Actions for May 25, 2004*, at <http://www.ftc.gov/opa/2004/05/fyi0434.shtm>:

“Commission authorization of the staff to file amicus brief: The Commission has authorized the filing of a joint amicus brief with the Department of Justice in *McMahon v. Advanced Title Services Company of West Virginia*, a case before the West Virginia Supreme Court of Appeals. The case concerns an opinion by the West Virginia State Bar Unauthorized Practice of Law Committee that would prohibit non-lawyers from performing various real estate settlement functions—including title searching, title reports, closings, and document deliveries.

“According to the joint brief, the state’s Supreme Court of Appeals should reverse the lower court’s decision, which adopts the State Bar opinion. The brief argues that allowing lay service providers to compete with lawyers in the provision of real estate settlement services is likely to benefit West Virginia consumers in a variety of ways. In addition, the brief states that there is no empirical evidence of likely harm to consumers from allowing non-lawyer settlements. Finally, according to the brief, even if the State Supreme Court was to find that the current protection afforded to consumers is insufficient, it could accomplish such consumer protection goals in a less-restrictive manner than by banning all lay closings.”

⁷¹ See, e.g., FTC and Antitrust Division, DOJ, *Letter to the ABA Task Force on the Model Definition of the Practice of Law* (December 20, 2002), at <http://www.ftc.gov/opa/2002/12/lettertoaba.shtm>. The FTC and the Antitrust Division of the DOJ issued a joint letter urging the ABA to substantially narrow or reject a proposed model definition of the practice of law. “By including overly broad presumptions of conduct considered to be the practice of law, the proposed Model Definition likely will reduce competition from nonlawyers. Consumers, in turn, will likely pay higher prices and face a smaller range of service options. The Task Force makes no showing of harm to consumers from lay service providers that would justify these reductions in competition.... Likewise, the Task Force, in recommending a proposed Model Definition of the practice of law, should allow lay competition that is in the public interest, and craft an appropriate definition of the practice of law that is based upon a careful review of the harms and benefits of lay participation in any service that the Definition would cover.”

⁷² *Petition to take Enforcement Action, and Promulgate Industry Guidance, and Consumer Education Concerning Deceptive Acts in the Immigration Consulting Industry* (filed February 3, 2009) at <http://www.abanet.org/publicserv/immigration/notario/petition.pdf>.

State Statutes and State Attorneys General

In addition to the FTCA, all of the states and the District of Columbia also have UDAP laws that vary widely in the scope of protection, the enforcement authority, the penalties authorized, and the private actions and remedies available to victims of fraud.⁷³ In some states, state court interpretation has also affected the scope of the laws.⁷⁴ Thus, these laws vary in effectiveness. In most states, the state attorney general's office is the state agency authorized to enforce the state UDAP laws, but in some states, complaints are instead handled initially by another agency, such as an Office of Consumer Affairs or Consumer Protection.⁷⁵

There have been a number of criminal and civil enforcement actions brought by state attorneys general. These have been brought for violations of UPL, UDAP, and other consumer fraud laws. For example, there have been actions in Arizona,⁷⁶ California,⁷⁷ Florida,⁷⁸ New York,⁷⁹ and Texas.⁸⁰ Additionally, aliens have brought private suits against persons fraudulently purporting to provide legal services.⁸¹

⁷³ National Consumer Law Center, *Consumer Protection in the States*, Appendix B, State-by-State Summaries of State UDAP Statutes (January 10, 2009), <http://www.consumerlaw.org/issues/udap/content/50-statessummariesFeb09.pdf>.

⁷⁴ *Id.* at 13.

⁷⁵ *Id.* at 16.

⁷⁶ See, e.g., Office of State Attorney General Terry Goddard Press Release, *Terry Goddard Warns Immigrant Community to Beware Of Companies Advertising "Servicios de Notarios"* (September 7, 2005) (publicizing notario scams and settlement of two civil cases brought against notarios), at http://www.azag.gov/press_releases/sept/2005/AGONotario.pdf.

⁷⁷ See, e.g., Patrick McGreevy, *18 Charged in Sting Targeting Immigrant Fraud; City prosecutor seeks to crack down on those who pose as attorneys or consultants to take thousands of dollars from victims*, L.A. Times, part 2, p. 3 (May, 14, 2003).

⁷⁸ E.g., *State v. Ruiz*, Case No. F03-3764, resulting in a plea agreement March 21, 2006, for fraud and theft, at http://www.dailybusinessreview.com/images/news_photos/56277/Plea_Agreement.PDF; the case originated from a complaint alleging unauthorized practice of immigration law.

⁷⁹ Media Center, Office of the Attorney General, *Attorney General Cuomo Shuts Down Three New York Companies Providing Fraudulent Legal Services To Immigrant Communities Across NYC And Long Island*, August 20, 2009, at http://www.oag.state.ny.us/media_center/2009/aug/aug20a_09.html; *Cuomo Launches Sweeping Investigation Into Immigration Fraud Across The New York City Area*, May 28, 2009, at http://www.oag.state.ny.us/media_center/2009/may/may28a_09.html; *Attorney General Cuomo Sues To Stop Immigration Ripoff Scheme That Falsely Promised Green Cards And Citizenship*, May 13, 2009, at http://www.oag.state.ny.us/media_center/2009/may/may13a_09.html. The last press release describes the lawsuit brought against a businesswoman who allegedly defrauded immigrants with false promises of obtaining lawful permanent residence; see *People v. Hernandez*, (May 12, 2009), civil enforcement petition at http://www.oag.state.ny.us/bureaus/civil_rights/pdfs/Hernandez%20Verified%20Petition.pdf. Allegedly, she defrauded several victims of at least \$82,500, collectively.

⁸⁰ See, e.g., Attorney General of Texas News Release, *Attorney General Abbott Files Criminal Complaint Against Operator Of Midland Immigration Services Scam; Hilda M. Armendariz charged with defrauding the public* (March 7, 2006), at <https://www.oag.state.tx.us/oagNews/release.php?print=1&id=1485>; Attorney General of Texas News Release, *Attorney General Abbott Sues West Texas Notario Operation; Asks for injunction, freeze on assets of unlicensed company that allegedly defrauded hundreds seeking immigration assistance* (September 8, 2004), at <https://www.oag.state.tx.us/oagnews/release.php?print=1&id=553>.

⁸¹ See, e.g., *Mendoza v. Ruesga*, 169 Cal. App. 4th 270, 86 Cal. Rptr. 3d 610 (Cal. App. 4th Dist. 2008) (undocumented aliens could sue for violations of the California statute regulating immigration consultants, and their undocumented status did not bar recovery under the unclean hands doctrine). See also, *In re Reyes*, Case No. 2009 02006 (Va. Cir. Ct. [Fairfax County] 2009) (Complaint), at http://www.abanet.org/publicserv/immigration/notario/inre_reyes_injunctionandconsent_decree.pdf, and *Argueta v. Mejia*, Case No. CAL08-2204 (Md. Cir.Ct. [PG County] 2008), at http://www.abanet.org/publicserv/immigration/notario/argueta_v_mejia.pdf.

Proposals for Federal Legislation and Policies

There has been legislation in recent Congresses to regulate immigration consultants/assistants and/or penalize fraudulent representation in immigration proceedings. Some of these proposals have been included in the various comprehensive immigration reform bills, while others have been free-standing bills primarily concerning immigration representation.

In the 111th Congress, several bills have been introduced. H.R. 1992/S. 577, Immigration Fraud Prevention Act of 2009, would add a new provision to the federal criminal code, 18 U.S.C. §1041, criminalizing schemes to defraud immigrants with regard to fraudulent representation in immigration matters. It would also provide for notice to aliens in removal proceedings about the list of pro bono attorneys/representatives available and the list of disciplined practitioners, and for outreach and education about fraudulent and legitimate representation. Section 245 of H.R. 994, the Loophole Elimination and Verification Enforcement (LEAVE) Act, would criminalize schemes to defraud aliens, specifically, making it unlawful to defraud a person with regard to a federal immigration matter and to fraudulently hold oneself out as qualified to represent persons in immigration matters.⁸² The penalty would be a fine and/or a maximum 15 years imprisonment.

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⁸² Similar legislation in recent Congresses includes H.R. 1645 §221(e), 110th Cong. (2007); H.R. 4065, §212, 110th Cong. (2007); H.R. 6789, §245, 110th Cong. (2008); S. 276, §105, 110th Cong. (2007); S. 330, §208, 110th Cong. (2007); S. 1348, §208, 110th Cong. (2007); S. 1639, §208, 110th Cong. (2007); S. 1984, §210, 110th Cong. (2007); S. 2294, §210, 110th Cong. (2007); H.R. 4437, §213, 109th Cong. (2005); S. 2454, §208, 109th Cong. (2006); S. 2611, §208, 109th Cong. (2006).

In contrast, there were some variant proposals in past Congresses that apparently have not been introduced in the 111th Congress. For example, §801 of H.R. 2330/S. 1033, in the 109th Congress, would have codified the attorney/representative regulations of the EOIR and provided for civil penalties and injunctive relief, for private suits, and for non-preemption of state and local laws with stronger protections. H.R. 6190, the Immigration Relief and Protection Act of 2006 in the 109th Congress, would have criminalized certain fraudulent and unethical conduct, including the unauthorized practice of law, with regard to immigration matters; provided for civil enforcement and penalties by the Attorney General and state attorneys general and for private suits; required the Attorney General to establish a task force to combat immigration consultant fraud; provided for outreach and education about such fraud for immigrants by DHS; and provided for non-preemption of stronger state and local laws. This bill was substantially similar to S. 3074, the Immigration Protection Act of 2000 in the 106th Congress. H.R. 654, the Immigration Services Consumer Protection Act of 2001 in the 107th Congress, would have reduced fraud in connection with the provision of legal advice and other services to individuals applying for immigration benefits or otherwise involved in immigration proceedings by requiring paid immigration consultants to be licensed and provide services in a satisfactory manner. It would also have provided for outreach and education for immigrants about consultant fraud and for non-preemption of stronger state laws.

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