AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Bite-Sized Ethics: Desperate Clients, Enforcement Priorities, and Asylum

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Q. I have been meeting with many potential clients who have lived here for years with no criminal problems or run-ins with ICE. They are now asking me to file something, anything, to give them authorization to stay in case ICE tries to arrest them. With executive orders that target immigrants who were previously considered "low priority" for removal, they fear being deported and, in many cases, separated from their U.S.-born children. What can I do?

Given the recent media about ICE enforcement activities and the rhetoric from the new administration, it is not surprising that there is significant fear in immigrant communities. Indeed, it is likely that the administration is intentionally sowing fear as part of its "get tough" policies on immigrants.

As lawyers, we want to be able to calm the fears of our clients and one of the most difficult issues we are currently facing is the helplessness we feel when we cannot tell a client that he or she is not a priority for removal. Because the Kelly memo[1] explicitly rescinded the Obama era enforcement priorities, essentially leaving anyone without lawful status vulnerable to enforcement, it is more important than ever that every non-citizen has an in-depth consultation with a qualified immigration lawyer to assess her potential eligibility for relief.

Q. Is it better to file a weak application for something than to have my client remain completely "undocumented"?

Filing an affirmative application for relief with USCIS has always involved a risk-benefit analysis. Unlike assisting someone who is already in removal proceedings and "has nothing to lose" with a weak but colorable defense, most affirmative applications filed with USCIS place a client who is undocumented and not known to the government, onto the radar. Under the Obama era enforcement memos, we could counsel our clients with some certainty about their likelihood of being placed in removal proceedings based on the enforcement priorities that the previous administration laid out: specifically, those who were security threats, had been convicted of serious crimes, or were recent border crossers, were most at risk.[2]

We can no longer give our clients any assurance that if their affirmative application is denied, they should not fear being placed in removal proceedings. So, at the same time the risk of having nothing pending has increased, the risk that filing a weak claim will lead to removal has also increased.[3]

1 "Enforcement of the Immigration Laws to Serve the National Interest," February 20, 2017, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf

2 "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf

3 Pursuant to regulations, USCIS issues Notices to Appear to all asylum applicants who are not granted asylum by the asylum office and who are not in

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Q. My client expresses a general fear of returning to his country based on violence there, but nothing ever happened to him. He has been in the U.S. for several years and I don't see a clear exception to the one-year filing deadline. He is desperate to file something. Can I ethically represent him on an asylum application?

Asylum applications are very fact-specific. Whether you may ethically file will depend on whether your client truly expresses a subjective fear of return based on a protected ground and whether there is a legitimate argument that his fear is objectively reasonable. The relevant ethics rules to consult are:

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

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous[4], which includes a good faith argument for an extension, modification or reversal of existing law.

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

> (j) Engages in frivolous behavior in a proceeding before an Immigration Court, the Board, or any other administrative appellate body under title II of the Immigration and Nationality Act, provided:
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> (1) A practitioner engages in frivolous behavior when he or she knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to harass or to cause unnecessary delay. Actions that, if taken improperly, may be subject to disciplinary sanctions include, but are not limited to, the making of an argument on any factual or legal question, the submission of an application for discretionary relief, the filing of a motion, or the filing of an appeal. The signature of a practitioner on any filing, application, motion, appeal, brief, or other document constitutes certification by the signer that the signer has read the filing, application, motion, appeal, brief, or other document and that, to the best of the signer's knowledge, information, and belief, formed after inquiry reasonable under the circumstances, the document is well-grounded in fact and is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, and is not interposed for any improper purpose.

Therefore, before filing an asylum claim, it is important for you to ascertain whether your client actually has "an arguable basis in law or in fact" to file. If he truly articulates a fear of return and you have a novel argument to push for a modification of existing law, you may be able to ethically file, provided, of course, that you explain clearly to your client the difficulties with the case and the strong possibility that he may get a removal order.

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lawful status. 8 CFR §208.14(c).

4 Note that while there is a separate provision 8 C.F.R. § 1208.20 barring "frivolous" asylum applications where "frivolous" is defined as "deliberately fabricated," this definition of frivolous is separate and apart from the more common meaning of the word addressed in the text above. So, while a practitioner is forbidden from filing an application that has deliberate fabrications, the fact that everything in the application is truthful does not prevent the practitioner from running afoul of the more common "frivolous" rule discussed above.

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With the current delays in asylum office adjudications (2-5 years)[5], delays in immigration court that can stretch several years, and further potential delays at the Board of Immigration Appeals, it may be tempting to file an application that will give your client employment authorization and some color of law status that could last for the foreseeable future. But if your client admits that he does not really fear returning to his country, if your research of country conditions leads you to believe that you cannot argue in good faith that his fear is objectively reasonable, or if you do not see any nexus to a protected characteristic or argument for a fear of future torture, you would likely violate the above ethics rules by filing. The rules explicitly forbid filing an application "for any improper purpose" or for the purpose of causing "unnecessary delay." If you determine there is no legal basis for asylum, and your purpose in filing is to give your client the security of having an application pending, that would be an "improper purpose" and could subject you to disciplinary proceedings.

Q. Are there important factors I need to consider other than the ethics rules in deciding whether to represent a client in filing for asylum?

There are at least two other closely related considerations.

First, you need to consider the asylum-specific consequences of filing a "frivolous" claim. A legal finding that an applicant filed a frivolous asylum claim carries very severe consequences. If there is a determination that an applicant knowingly fabricated any material elements of the claim, she will be permanently ineligible for any future immigration benefits. INA §208(d)(6).

As a result, you need to be especially careful that a desperate client does not willfully create material facts to make a weak asylum case stronger.

Second, if you file a frivolous asylum claim for a client without any basis in law or fact, you may incur criminal liability. The lawyer signs the I-589 as preparer, which means acknowledging that he is subject to criminal or civil liability in preparing an asylum application with false information. According to 18 U.S.C. §1546, "Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations… or knowingly presents any such application … shall be fined under this title or imprisoned…"

5 Affirmative asylum scheduling bulletin https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin