Outline Ethics: Ineffective assistance
Panelists: Justin **Burton,** Bryon **Large,** Cyrus **Mehta,** Debbie **Smith**
Moderator: Nicole **Wilson**

1. **Prevention; How to avoid ineffective claims**
    a. **Presenters:** Justin; Bryon
        i. Model Rule 1.1 Competence
        ii. Model Rule 1.3 Diligence
        iii. Model Rule 1.4 Communication
            1. Promptly inform client of any decision
            2. Reasonably consult with a client about objectives
            3. Keep client reasonably informed on a matter
            4. Promptly comply with reasonable requests for information
            5. Consult with the client on any limitation imposed on attorney's conduct
            6. An attorney shall explain the matter to allow the client to make informed decisions
        ii. Model Rule 1.5 Retainer Agreements
            1. Fees shall be based on a variety of factors
            2. The scope of the representation
            3. The agreement itself- shall be completed before or within a reasonable time after retained
            4. Sign the agreement?
            5. Check local rules - wide variance among jurisdictions
        Iiii Model Rule 1.16 Withdrawal of Representation
            1. Mandatory grounds for withdrawal
            2. Permissible grounds for withdrawal
            3. Need permission of tribunal to withdraw if matter is before one
            4. Do not prejudice client when withdrawing
            5. Promptly return client's file

2. **What types of complaints are common? How are they evaluated?**
    b. **Presenters:** Bryon
        i. Learning from Regulation Counsel
            1. Attorney strategy decisions vs. Rule violations
            2. How are they investigated
            3. What types get prosecuted
                a. Not every *Lozada* claim
                b. Civil malpractice vs. rule violations

3. <u>Specific Types of disciplinary complaints: Similarities and difference</u>

- **c. Presenters:** Bryon; Debbie; Cyrus
  - i. <u>Not limited to *Lozada*</u>
    1. *Matter of Lozada (Board Decision)*
       - a. What is *Lozada*
         - i. A motion to reopen or reconsider based upon a claim of ineffective assistance of counsel requires (1) that the motion be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be Informed of the allegatione leveled against him and be given an opportunity to respond, and (3) that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not.
       - a. When to use Lozada and when not to
         - i. Suggestions and personal successes from speaker experiences
       - b. Following all three requirements of Lozada
       - c. When is a bar complaint not required
       - d. EOIR investigations following Lozada
         - i. What happens in an EOIR investigation
         - ii. How is it different from other forms of discipline
    2. *Lozada v. Strickland*
       - a. ***Strickland v. Washington***, 466 U.S. 668 (1984)
         - i. a decision by the Supreme Court of the United States that established the standard for determining when a criminal defendant's Sixth Amendment right to counsel is violated by that counsel's inadequate performance.
         - ii. The Court established a two-part test for an ineffective assistance of counsel claim: a criminal defendant must show two things:
           1. Counsel's performance fell below an objective standard of reasonableness.
           2. Counsel's performance gives rise to a reasonable probability that if counsel had

performed adequately, the result would have been different.

b. Where does this overlap with *Lozada*; what are the diffrences

3. *Padilla and Lozada*
    a. ***Padilla v. Commonwealth of Kentucky**, 559 U.S. 356 (2010)*
        i. United States Supreme Court decided that criminal defense attorneys must advise noncitizen clients about the immigration consequences of their criminal proceedings.
        ii. **Duties of Counsel resulting from *Padilla***
            1. The duties of Counsel recognized in Padilla are broad. If the law is unambiguous, attorneys must advise their criminal clients of the immigration consequences that will result from a conviction.
            2. if the immigration consequences of a conviction are unclear or uncertain, attorneys must advise that such consequences "may" result.
            3. Finally, attorneys must give their clients some advice about removal or immigration consequences: counsel cannot remain silent about immigration.

4. <u>How do you defend yourself; Best Defenses</u>

d. Presenters: Cyrus; Bryon

i. <u>Dual Perspectives</u>

1. Defense experiences and strategies as the defender (Cyrus)
    a. Cyrus has represented several attorneys in disciplinary matters and will discuss particular instances, cases and strategies.
2. Expectations of disciplinary Counsel and best defenses and strategies to us from the perspective of the evaluator/individual in the disciplinary role (Bryon)
    a. Hiring Counsel
    b. Cooperation with process
    c. Reciprocal discipline

To Err is Human: Addressing Mistakes Made in Business Immigration Cases

by Leslie DiTrani, Cyrus D. Mehta, and Stephen Yale-Loehr[*]

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Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, is the Managing Partner of Cyrus D. Mehta & Partners PLLC in New York City. Mr. Mehta is past chair of AILA's Ethics Committee and a member of the ABA Commission on Immigration. Mr. Mehta also serves as Special Counsel on immigration matters to the Departmental Disciplinary Committee, Appellate Division, First Department, New York. Mr. Mehta is also the former chair of the Board of Trustees of the American Immigration Council and former chair of the Committee on Immigration and Nationality Law of the New York City bar. He is a frequent speaker and writer on contemporary immigration topics, including ethics.

Stephen Yale-Loehr is co-author of *Immigration Law and Procedure*, the leading immigration law treatise, published by LexisNexis. He also teaches immigration and asylum law at Cornell Law School, and is of counsel at Miller Mayer in Ithaca, NY. He chairs AILA's business immigration response team. He graduated from Cornell Law School in 1981 *cum laude*, where he was Editor-in-Chief of the *Cornell International Law Journal*. He received AILA's Elmer Fried award for excellence in teaching in 2001, and AILA's Edith Lowenstein award for excellence in the practice of immigration law in 2004.

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INTRODUCTION

All attorneys make mistakes.[1] This is especially true in business immigration law, which is always in a state of flux. Business immigration has become especially prone to attack under the Trump administration, whose new mission is to protect U.S. workers under the Buy American and Hire American executive order,[2] not to welcome immigrants. An attorney who fails to keep abreast of the latest trends that result in adverse decisions can also be perceived by the client to have made a mistake when the client receives a denial.

This article first addresses the ethical bases for competence. It then discusses common mistakes in H-1B and labor certification cases, what to do when documentation does not turn out as anticipated, and how to deal with missed deadlines and incorrectly filed applications.

ETHICAL BASIS FOR COMPETENCE

[*] The authors thank Sophia Genovese, an associate at Cyrus D. Mehta & Partners PLLC and Eleyteria Diakopoulos, a student at Brooklyn Law School, for their assistance.

[1] *See, e.g.*, Cyrus D. Mehta & Anastasia Tonello, "Dealing with Mistakes and How to Avoid them in the Practice of Immigration Law," *AILA's 16th Annual NY CLE Handbook* 28 (2013).

[2] Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 21, 2017), *available at* www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/.

A brief overview of the ethical rules can help the lawyer competently and diligently represent clients, and thus minimize mistakes. Rule 1.1 of American Bar Association's Model Rules of Professional Conduct (Model Rule) imposes a duty of competence:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[3]

Comment 1 to Rule 1.1 further states, "[i]n many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances."[4] While the baseline for competence is that of a general practitioner, we posit that for a lawyer to be competent in business immigration, or for that matter any area of immigration law, the lawyer must have developed expertise in his or her area of specialization. As immigration law has been attracting lawyers from other fields, it is worth noting that an inexperienced lawyer is not prohibited from handling a novel matter, provided he or she can gain competence through necessary study or by associating with a lawyer of established competence in the field.[5]

Model Rule 1.3 requires that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." The duty of diligence is closely related to the duty of competence, and a violation of one often results in the violation of the other.

LEGAL MALPRACTICE LIABILITY

A lawyer is more likely to face malpractice liability, even for an isolated mistake, rather than professional discipline. While violation of an ethical rule should not in itself give rise to malpractice liability, a breach of such a rule could be used as evidence of a breach of an applicable standard of conduct. To establish that a lawyer was negligent in a malpractice case, the plaintiff must: 1) prove that an attorney-client relationship existed; 2) establish the standard of care in the community, which is established through expert witness testimony; and 3) provide that the client would have succeeded in the underlying matter "but for" the defendant attorney's negligence.[6] While it may not always be clear when the attorney-client relationship was established (and indeed the perception of the "client" may conflict with that of the attorney), the "but for" standard is a high bar and should put the brakes on frivolous law suits.

COMMON MISTAKES IN THE H-1B AND PERM CONTEXTS

While a comprehensive catalogue of every potential mistake that can occur in immigration practice is beyond the scope of this article, we discuss some commonly encountered mistakes below to alert readers to them and thus endeavor to prevent them from happening.

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[3] Model Rule of Professional Conduct 1.1 (2016).

[4] *Id*. at Comment 1; *see also* 8 CFR §1003.102 ("Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.").

[5] Comment 2 to Rule 1.1. *See also* parallel DHS disciplinary rule at 8 CFR §1003.102(o).

[6] *AmBase Corp. v. Davis Polk & Wardwell,* 8 N.Y.3d 428 (2007).

In the business immigration arena, the potential for mistakes are immense. Indeed, the PERM labor certification process is so hyper-technical and time sensitive that even the best of attorneys can commit an error. If the attorney neglects to file the PERM within 180 days from the first advertisement, or files within 30 days of an advertisement (except one of the three for professional positions), the application will be denied.[7] Such a denial may have devastating effects for a noncitizen who is about to start the sixth year of his or her H-1B status, since the filing of a new PERM in the sixth year will preclude the extension of the H-1B status beyond the sixth year under § 106(a) of the American Competitiveness in the Twenty-first Century Act of 2000.[8] In other business areas too, the timely filing of an H-1B petition to be considered under the lottery for that fiscal year can be a high stakes game. If there is any error in the filing, such as an unsigned form or incorrect payment, it can result in a rejection and the petitioner will not be counted in the H-1B cap for the relevant fiscal year, and will have to wait for the following year.

In some cases, when a mistake has occurred, the lawyer should do whatever it takes to remedy the mistake. It would also be prudent to eat the costs if a re-filing can ameliorate the situation. Given that the employer must pay for all costs relating to a labor certification,[9] it remains an open question whether the attorney can cover the costs of a labor certification as they relate to advertisements and recruitment. The prohibition, however, regarding reimbursing the employer for the costs relating to a labor certification, including attorney fees, apply to the alien and not to the attorney, and so it may be defensible if the attorney who made the error when preparing the PERM application covers the cost on behalf of the employer.[10]

There are also situations when the attorney may be responsible for the mistake of another, such as a credential evaluation agency. For example, if the attorney requests an evaluation from a professor, it is important to ensure that he or she is an official in a college who has authority to grant college level training or experience.[11] If the attorney fails to ensure this, the U.S. Citizenship and Immigration Services (USCIS) will not recognize the evaluation, which in turn may jeopardize the H-1B petition. It is thus incumbent upon the attorney to ensure that the credential evaluation precisely meets one of the criteria in 8 CFR § 214.2(h)(4)(iii)(D) and not rely on the credential evaluation agency to do so. On the other hand, the attorney should not be faulted if the USCIS rejects a professor's subjective expert opinion on whether a position qualifies as a specialty occupation. So long as the attorney took reasonable care to ensure that the professor was qualified to render an expert opinion, the attorney can hardly be blamed if the USCIS disregards the opinion.[12]

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[7] 20 CFR §656.17(e).
[8] USCIS Final Rule, *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 Fed. Reg. 82398 (Nov. 18, 2016, effective Jan. 17, 2017); *see also* 8 CFR §214.2(h)(13)(iii)(E).
[9] 20 CFR §656.12(b).
[10] FAQs on Final Rule to Reduce the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity (May 17, 2007), www.foreignlaborcert.doleta.gov/pdf/fraud_faqs_07-13-07.pdf.
[11] 8 CFR §214.2(h)(4)(iii)(D).
[12] In *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO 2012), the Administrative Appeals Office (AAO) held that uncontroverted testimony of an expert is reliable, relevant, and probative as to the specific facts in issue.

Similarly, when the government changes its policy, as it did on March 31, 2017,[13] by suddenly treating entry-level computer programmers unfavorably, an attorney ought not be blamed for failing to advise the employer about the risks of selecting this occupation. By contrast, an undetected mistake can explode after many years, thus magnifying the harm to the client. Assume, for an example, that an H-1B petition is selected under the master's cap in the FY 2013 H-1B lottery, but five years later and after a few extensions, the USCIS discovers that the beneficiary graduated from a for-profit graduate school and should not have been selected in the master's cap in the first place. The USCIS then denies the current H-1B extension request and revokes the prior H-1B petitions. It is debatable whether the attorney would be found to have violated either an ethical rule or be guilty of malpractice. The attorney can argue that the USCIS did not question the master's degree five years ago. Even if the degree was from a for-profit university, it may have passed muster under §101(a) of the Higher Education Act of 1965 as the university must have been either a "public or other non-profit institution." A for-profit university could have arguably still been "public" under the law of the state if it awarded scholarships to low income students or accepted veterans. One could also argue that there was no way for the USCIS to prove whether the beneficiary was accepted under the master's or the regular cap. Of course, if the argument is unsuccessful, as evidenced by unpublished non-precedential decisions of the USCIS Administrative Appeals Office,[14] the client will have to qualify under a new H-1B cap and the beneficiary will no longer be able to work for the employer or even remain in the United States. The problem will likely be obviated if the beneficiary is selected under a new H-1B cap. If not, other alternative visa strategies should be considered on behalf of the beneficiary.

The bottom line is that a business immigration attorney must develop a high level of expertise, be proactive, and anticipate pitfalls that might trap the client even in the future. If a mistake occurs, even if the attorney may not have been found to have violated Rule 1.1, he or she could still be susceptible to malpractice liability. In such an instance, the attorney as defendant must be prepared to use an expert witness, and the side that prevails is based on whose expert witness was more convincing.

Suppiah v. Kalish[15] highlights the importance of expert testimony in a malpractice action. In this case, the defendant lawyer filed a petition for a new H-1B visa instead of an extension because, he believed, the latter option was not possible since plaintiff could not establish that he had been continuously employed during his H-1B validity period.[16] The plaintiff argued that the lawyer committed legal malpractice by not seeking to extend his status because securing a new visa

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[13] See USCIS Memorandum, Rescission of the December 22, 2000 "Guidance memo on H1B computer related positions" (Mar. 31, 2017), AILA Doc. No. 17040300.

[14] *See, e.g.*, *Matter of C-C-C-, LLC*, ID# 394629, at 4 (AAO July 28, 2017) (finding that "the Petitioner provide[d] no evidence to demonstrate that the Beneficiary was approved under the regular H-lB Cap as asserted"); *Matter of R-, Inc.*, ID# 390599, at 4 (AAO May 11, 2017) (noting that "it was the Petitioner's affirmative choice to select the Master's Cap exemption and the regulations generally do not permit H-1B petitioners to claim eligibility under alternative grounds"); *Matter of S-S-0-, Inc*., ID# 96174, at 3 (AAO Apr. 25, 2017) (similarly finding that the Petitioner could not argue on alternative grounds by citing to 8 CFR §214.2(h)(8)(ii)(B), which provides, "[p]etitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied").

[15] 76 A.D. 3d 829, 832 (1st Dep't 2011).

[16] 8 CFR §214.1(c)(4) ("An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status"); 8 CFR §214.2(h)(11)(iii)(A)(1) (a petition is subject to revocation if "[t]he beneficiary is no longer employed by the petitioner in the capacity specified in the petition").

required him to travel to Sri Lanka for consular processing, a country he deemed too dangerous to travel to. The plaintiff, having refused to travel to Sri Lanka, thus fell out of status and was terminated from his position.[17] The lawyer moved for summary judgment and submitted plaintiff's employer's records as conclusive evidence that plaintiff's employment was terminated, and so extending the visa was not possible.[18] The lawyer also argued that the plaintiff was responsible for the failure of the renewal strategy because he failed to maintain a current passport that would allow him to travel abroad for the visa. In opposition to the motion, plaintiff submitted an affidavit from an immigration law expert that opined that the lawyer had committed malpractice because he failed to take the position that plaintiff was benched, rather than terminated, for sixteen months, and was therefore continuously employed, thus allowing for an extension petition.

Although the dissent highlighted that the expert provided no basis in law to support either of these suggestions, the court nevertheless determined that the burden of proof rested with the defendant and he thus should have provided expert testimony that explained why an extension petition was not possible.[19] The lawyer's lack of expert testimony was decisive in the denial of his motion for summary judgment even though the lawyer's strategy was not unethical and was probably within the standard of care for business immigration lawyers. Regardless of how strongly an immigration lawyer believes his or her strategy is supported by the law, given the complexity of the issues, the lawyer must use an expert witness when sued by a client for malpractice.

WHEN DOCUMENTATION DOES NOT TURN OUT AS ANTICIPATED

Sometimes documents do not turn out the way you want. For example, the corporate structure may not match what the client told you in the initial consultation, such that there is no affiliate relationship for an L-1. Or perhaps the company cannot prove to the satisfaction of the USCIS that it has the ability to pay the beneficiary's wage.

If possible, set up systems to minimize the likelihood that such mistakes occur in the first place. For example, consider a two-stage engagement letter that starts with a flat fee for a few hours of work to verify that a petition is possible and that the petitioner has the necessary documents. If you and the client clear the first step, the second step of preparing and filing the petition can begin. If the case does not progress to the second stage, at least you have been paid for your initial work on the case and have a clean breaking point.

Another example: some E-2 clients either cannot settle on an ownership or corporate structure or change the structure halfway through your preparation of the petition. To help prevent this, specify the ownership/corporate structure in the engagement letter and state that you will charge extra if the ownership/corporate structure changes.

When documentation does not turn out as anticipated, it is often not because you made a mistake, but because the client cannot or will not produce the information that you think is necessary for an approval. In such situations, you have several choices:

[17] *Suppiah v. Kalish*, *supra* note 15, at 830-31.
[18] *Id*. at 831.
[19] *Id*. at 834.

- **First**: you can refuse to file the petition.

- **Second**: you can warn the client that without the necessary documentation, the USCIS is likely to deny the case. That way, if the client instructs you to file the case anyway, at least they have been forewarned.

- **Third**: you can file the case, hope that the USCIS will issue a request for evidence (RFE), and that the client will be able to produce the evidence by that time. However, this approach has problems. The USCIS interprets *Matter of Katigbak*[20] for the proposition that a petitioner must establish eligibility at the time of filing. A petition cannot be approved at a future date if the petitioner becomes eligible based on a new set of facts.[21]

  The USCIS has applied *Katigbak* in a variety of contexts. For example, in *Matter of Izummi*,[22] an EB-5 case, the immigration agency held that a petitioner may not make a material change to the petition in an effort to make a deficient petition conform to immigration requirements.[23] The USCIS has interpreted *Izummi* broadly to deny petitions that were arguably deficient at the time of filing.

- **Fourth**: you can file the petition and hope for the best. That seldom works, however. Moreover, even if the petition is initially approved, the USCIS might later revoke the approval or deny an extension if it discovers that the initial documentation was faulty.[24]

MISSED DEADLINES AND INCORRECTLY FILED APPLICATIONS

As time goes by, it seems that the practice of immigration law is increasingly becoming a landscape of minefields, gotchas, and traps for the unwary. From the first days of law school we have known the commandment that thou shalt never miss a deadline, but we may not have appreciated how easily a deadline can be missed when an otherwise timely filed petition is delivered to the wrong Service Center or Lockbox. With USCIS constantly changing filing locations, shifting work among Service Centers, and separating premium processing from regular processing, to name a few ways to confuse us and our staff, an incorrectly filed application could happen to anyone. This practice pointer seeks to guide practitioners in coping with, responding to, and – hopefully – fixing the situation when an application is incorrectly filed or a deadline is missed.

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[20] 14 I&N Dec. 45 (INS Regional Comm'r 1971).
[21] *Id*. at 49.
[22] 22 I&N Dec. 169 (INS Assoc. Comm'r for Examinations 1998).
[23] *Id*. at 175.
[24] See USCIS, Policy Memorandum PM-602-0151, *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status* (Oct. 23, 2017), www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf (last visited Feb. 27, 2018). For a summary and analysis of this policy change, see Cyrus Mehta, *The Empire Strikes Back – USCIS Rescinds Deference To Prior Approvals In Extension Requests* (Oct. 30, 2017), http://blog.cyrusmehta.com/2017/10/the-empire-strikes-back-uscis-rescinds-deference-to-prior-approvals-in-extension-requests.html (last visited Feb. 27, 2018).

For incorrect filings, we start from the premise that you have filed something in the wrong place and that the correct filing location was published. Missed deadlines are just that – deadlines that occur through inattention, mistake, or because an incorrect filing led to a delay in getting the application to the right place. What to do next? Do you have to:

1. tell the client?
2. redo the work at no charge?
3. absorb the out of pocket expenses?
4. notify your malpractice carrier?

Does it make any difference if the mistake was caused by the mistake of a third party such as a courier or delivery service?

Types of Mistakes

Before answering these questions, let us categorize the mistake from least to most consequential.

1. Filed in the wrong place with no negative impact except for lost time.
2. Missed deadline where there is time to redo things, such as
    a. Failure to file an I-140 within 180 days of PERM approval where there is plenty of H-1B time remaining, or
    b. Failure to file a PERM application prior to recruitment timing out where there is time to redo the application.
3. Incorrect filing or missed deadline where there is not enough time to redo things.

Types of Remediation

Always Tell the Client

Even a seemingly inconsequential mistake in this area impacts something, and you will reap benefits from being candid.

Manage Who Is Responsible for Quality Control

It is all too easy to have things fall through the cracks when your practice gets busy. And when there are multiple attorneys and paralegals working on a matter, it is easier for mistakes to be made. It is critical to develop and maintain a system of accountability. Learn from your mistakes. What system, process, or workflow in your office failed or was not implemented to prevent the mistake from happening?

Do Not Charge for the Extra Work to Fix It

This is another cardinal rule. You made the mistake, and your client will be much more forgiving if you bear the cost.

Absorb the Expense

It is sometimes a good idea not only to redo the work for free, but to also pay any additional costs or filing fees. Collateral damages are more difficult. Suppose an employee is out of work for a period of time because of your mistake, or even worse – he or she has to return home and loses the opportunity to live and work in the U.S. We do not think it is useful to discuss whether any individual mistake constitutes malpractice, but it would seem appropriate to notify your insurance carrier where the damages could begin to mount.

Apply for Discretionary Relief from USCIS

Where there is not time to redo something, this may be your only option. See the discussion below.

Do Extra Work for the Client at No Charge to Help Rebuild the Relationship

Every client interaction is an opportunity to build the relationship. Think creatively about what may make amends for the error.

Have the Client Work with a Different Attorney Where the Relationship Has Reached the Point That the Client Has Lost Confidence

When confidence is gone, it's best to step aside and help the client transition to another attorney who can handle the matter. It is in your best interest to develop a relationship with a trusted colleague you can refer such matters to. At least then, your old client and their new attorney won't be trash-talking you.

The Courier Service Will Not Bear Responsibility

It is certainly possible that a delivery error or delay can be the cause of a missed deadline, and if so, you should point that out in your remediation efforts. However, it is very unlikely that you will be able to shift responsibility for any damages to the courier. Their liability is typically limited to a refund of the courier fee, which they'll happily give you.

Preventive Measures

1. If possible, build in time for mistakes to happen. Set deadlines earlier.
2. Use the track FedEx email to be sure the filing is delivered (this is time consuming but it can be helpful).
3. Use a tickler system for receipts so you can follow up (there is no receipt with a request for evidence, so you will have to check those manually).
4. Set time aside for thorough docket review and management.
5. Have one person responsible for tracking deadlines and ensuring compliance.

How to Fix It

Missed status filing deadlines are potentially catastrophic, but there is a saving provision at 8 CFR §214.1(c)(4) that can be very helpful. Failure to file a request for extension of stay or change of status prior to the expiration of a prior status may be excused in the Service's discretion where it is demonstrated at the time of filing that:

(a) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
(b) The alien has not otherwise violated his or her nonimmigrant status;
(c) The alien remains a bona fide nonimmigrant; and
(d) The alien is not the subject of deportation or removal proceedings.

By its terms, this provision applies only to extensions of stay but in practice it can be applied to requests for change of status. Thankfully we do not have to rely on it often, but anecdotal experience shows that the Service is reasonably generous in applying this provision to repair law firm mistakes. We have also seen it used to fix multiple errors by well-meaning employers who attempted to file H-1B petitions without knowing what they were doing. In every instance, a mea culpa statement is necessary and the beneficiary has to be shown to be blameless. In our experience, the language stating that the beneficiary has not *otherwise* violated his or her status means that the Service will countenance continued employment for the petitioning employer while the request is being adjudicated. It should not be necessary to take the employee off the payroll in such a situation.

Unfortunately, the U.S. Department of Labor has no such provision. If a deadline is missed in the PERM context there is nothing more to do but start over.

CONCLUSION

To err is human, and to receive a favorable decision under 8 CFR §214.1(c)(4) can approach the divine. But reaching out to USCIS is not the only option. Be candid about your mistakes. Look for remediation strategies that minimize their damage. Rebuild your relationship with the client. Understand what went wrong and take affirmative steps to ensure that it does not happen again. Sometimes that is the best we can do.

WITHDRAWAL OF REPRESENTATION IN IMMIGRATION PRACTICE

Updated December 2017

By Cyrus D. Mehta

How many times has an immigration practitioner wished to withdraw from a sticky immigration case, especially where the client is no longer cooperating, refusing to pay fees or there is a suspicion that the client has not told the truth on an application? A lawyer who feels stuck on a case and wants to get out should carefully consult the ethical rules that provide for when and how an attorney may decline or terminate representation. While a lawyer may feel justified in withdrawing from representation, the client may have a completely different perception and feel let down by the lawyer, and perhaps even cheated. It is therefore important to tread carefully prior to withdrawing from representation, relying on the specific ethical rule or set of rules, and to carefully communicate to the client one's inability to continue or decline the representation in a candid and detailed manner.

The lawyer may start with Rule 1.16 of the American Bar Association's (ABA) Model Rules of Professional Responsibility, which sets forth an elaborate framework for when to decline or terminate representation, as well as the attorney's obligations to the client during the process. While this article refers to the ABA Model Rule, you must also consult with the version of Rule 1.16 in your state bar rules. For instance, Rule 1.16 of the New York Rules of Professional Conduct is even more extensive than the ABA Model Rule. Finally, it is also crucial to review the regulation governing professional conduct for immigration practitioners at 8 CFR §1003.102, especially §1003.102(q)(3), which requires an immigration practitioner to carry through to conclusion all matters undertaken within the scope of the representation unless the client terminates or the practitioner obtains permission to withdraw in compliance with applicable rules and regulations.

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To facilitate discussion and analysis, ABA Model Rule 1.16 is reproduced below in its entirety:

Client-Lawyer Relationship

Rule 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Declining Representation

Rule 1.16 speaks to both declining representation before it has commenced and terminating representation after it has commenced. While it may be difficult to foresee problems at the outset and one does not have the benefit of hindsight at this stage, a lawyer, through experience, can develop a good nose to feel out a case and decide when to decline representation, especially when he or she senses that a case may become problematic down the road. It is always easier to decline representation before the start of a case than terminating representation after the case has started.

If a lawyer knows[1] that a client will engage in a violation of the ethical rules, such as file a fraudulent document to support an application for political asylum, the attorney must decline representation. Even if the lawyer does not have actual knowledge, but reasonably believes that the client may engage in criminal or fraudulent conduct, while not mandatory to decline representation, it is still advisable to decline representation in order to avoid other ethical obligations when the lawyer does possess actual knowledge.[2]

1 ABA Rule 1.0(f) defines the term as follows: ""Knowingly," "known," or "knows" denotes actual knowledge of the fact in questions. A person's knowledge may be inferred from circumstances."

2 As will be discussed below, in addition to mandatory withdrawal, the lawyer also has ethical obligations under Rule 3.3 regarding candor to the tribunal, where in addition to withdrawal, the lawyer will have to take reasonable steps to remedy the fraud.

Similarly, if the case appears to be terribly complicated and long drawn out, the lawyer must decide whether it is worth taking the case for what the client is willing to pay. While a lawyer may be tempted to take on the case to help a needy or deserving client, it is important to foresee what kind of resources will be needed to carry out the representation through completion, as well as consistently provide competent and diligent representation throughout the matter. While it may also be tempting for a lawyer who is having a slow week to take on a complex removal case based on the client's initial willingness to pay the first round of fees, it is important to predict how long the case will last and whether the client will be able to sustain paying additional fee installments through the case. This is not to suggest that a lawyer should not take on cases when a client is unable to pay the full fee, but the lawyer must be willing to then continue to provide competent representation despite the fact that the client may not be able to pay the anticipated fees. The key issue is whether the lawyer is willing and capable to carry out the matter to its conclusion. If the lawyer is unable to do that, it is better to decline representation at the outset. Once representation has been declined, it is important to ensure that this has been clearly communicated to the client. Otherwise, consider a nightmare scenario where the client mistakenly expects the lawyer to have represented him or her, such as filing a motion to reopen an *in absentia* order by a certain deadline, and the lawyer believed that he or she had clearly declined representation.[3]

Mandatory Grounds of Withdrawal

Under 1.16(a)(l)-(3) a lawyer must withdraw if the representation will result in the violation of the rules of professional conduct or other law; the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or the client is discharged.[4] In the litigation context, even in a removal proceeding or in federal court, a lawyer cannot unilaterally withdraw but must move the court to withdraw.[5] 1.16(c) specifically requires the lawyer to comply with the applicable law requiring notice or permission of a tribunal when terminating a representation. Thus, the mandatory ground at the very minimum requires the lawyer to move to withdraw, subject to the court granting the lawyer permission to do so. In moving to withdraw, a lawyer may still want to keep the reasons confidential and a statement such as "professional considerations require termination of the representation ordinarily should be accepted as sufficient."[6] Finally, 1.16(c) notes that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Thus, regardless of the lawyer's good faith reason to withdraw, the tribunal has the final say.

1.16(a)(1) requires a lawyer to withdraw when the representation will result in a violation of the rules of professional conduct or other law. Thus, a lawyer must withdraw if the client proposes, for example, to file an application with fraudulent evidence and the lawyer knows that such evidence is fraudulent.[7] It also would require the lawyer to withdraw when there is an irreconcilable conflict of interest, which cannot be resolved under Rule 1.7. In the practice of immigration law, the lawyer frequently represents

3 For example, INA §240(b)(5)(c) requires a motion to reopen to be filed within 180 days of an *in absentia* order if the alien demonstrates that the failure to appear was due to exceptional circumstances.

4 Again, it is important to consult with your own state professional responsibility rules. New York Rules of Professional Responsibility Rule 1.16(b)(4) adds another mandatory ground for withdrawal from representation, as follows: "[T]he lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, of is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person."

5 *See* Chapter 2.3 of the Immigration Court Practice Manual, available at https://www.justice.gov/eoir/office-chief-immigration-judge-0, and Chapter 2.3 of the Board of Immigration Practice Manual, available at http://www.justice.gov/eoir/vll/qapracmanual/apptmtn4.htm. Based partly on *Matter of Rosales*, 19 I&N Dec 655 (BIA 1988), the Immigration Court Practice Manual outlines the following steps for the immigration practitioner:

1. The reason(s) for withdrawal, in conformance with applicable state bar or other ethical rules;
2. The last known address of the alien;
3. A statement that the attorney has notified the alien of the request to withdraw as counsel or, if the alien could not be notified, an explanation of the efforts made to notify the alien of the request;
4. Evidence of the alien's consent to withdraw or a statement of why evidence of such consent is unobtainable; and
5. Evidence that the attorney notified or attempted to notify the alien, with a recitation of specific efforts made, of (a) pending deadlines; (b) the date, time, and place of the next scheduled hearing; (c) the necessity of meeting deadlines and appearing at scheduled hearings; and (d) the consequences of failing to meet deadlines or appear at scheduled hearings.

6 *See* Comment 3 to Rule 1.16.

7 It should be noted that a related rule at 8 CFR §1003.102(c) relating to candor to the tribunal only requires a "reckless disregard" standard.

two clients, such as the employer and employee, or two spouses, and if there is a conflict, which cannot be resolved or cannot be waived, the lawyer may have to withdraw from the representation with respect to both parties.[8] 1.16(a)(1) also intersects with Rule 3.3, which prohibits a lawyer from offering evidence that the lawyer knows to be false or does so with "reckless disregard" under 8 CFR §1003.102(c). If the lawyer unknowingly files an application with a false statement or a fraudulent document, and comes to know of its falsity after it has been submitted to a tribunal, the "lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[9] Thus, withdrawal under certain circumstances may not in itself be sufficient. In a situation where a lawyer belatedly realizes that a client has made a false statement in say an asylum application, which has already been filed in immigration court, the lawyer, even after withdrawal from representation, depending on his or her bar rules, may have to take remedial measures to withdraw the false statement, even if that means disclosing it to the tribunal. Again, one needs to check the state bar rules, as there are plenty of variations to Rule 3.3. Some jurisdictions may require withdrawal without revealing the client's fraud to the tribunal, while other jurisdictions such as New York[10] may require revealing to the tribunal after all other reasonable measures to remedy the matter have failed.

With respect to 1.16(a)(2), a lawyer is only required to withdraw when the physical or mental condition "materially impairs" the lawyer's ability to represent the client and not where the lawyer is willing to persevere even if he or she finds it difficult to do so. A lawyer with a disability, therefore, is not required to withdraw, even if it causes him or her unreasonable difficulty, so long as the disability does not materially impair his or her ability to represent the client.

Under 1.16(a)(3) a client may discharge a lawyer with or without cause. A lawyer must immediately withdraw under these circumstances.

Regardless of the circumstances triggering mandatory withdrawal, a lawyer must still take steps to protect the client's interest under 1.16(d), which is discussed below.

Permissive Grounds of Withdrawal

Rule 1.16(b) provides several grounds under which the lawyer may withdraw, even though it is not mandatory to do so. While paragraphs (l)-(7) are self-explanatory, it is worth noting that just as a client can discharge a lawyer at any time, a lawyer may also discharge the client at any time and even without cause under 1.16(b)(1), so long as it can be accomplished without material adverse impact to the client's interest. The precaution to ensure that there is no "material adverse impact" only applies to paragraph (b)(1). If a lawyer withdraws under paragraphs (b)(2)-(7), it can be done even if the withdrawal does result in material adverse impact to the client. The lawyer withdrawing under any of the permissive grounds, however, must still protect the client's interest under 1.16(d).

A discussion on "material adverse impact" is warranted here. On one level, a withdrawal is bound to cause inconvenience to the client who will need to find and retain a new lawyer, and also develop trust and confidence with the new lawyer, who in turn will need to come up to speed with the client's matter. Rule 1.16(b)(1) does not bar inconvenience or disappointment caused to a client as a result of a lawyer's withdrawal; it only bars adverse impact to the client's legal interest. If a lawyer drops the ball on the client on the last day (and an extension is not available) before a response is due on a Request for Evidence (RFE) on an L-1B petition for a specialized knowledge worker, then such a scenario would likely be construed as causing a material adverse impact on the client's interest. It would be a herculean task for a client to retain a new lawyer on the last day to respond to complex legal and evidentiary issues raised in the RFE regarding satisfying the specialized knowledge requirements.[11] Even if the client is successful in retaining one at the last moment,

8 For an in-depth analysis on how waivers can be effectively utilized to minimize conflicts when representing two parties, *see* Cyrus D. Mehta, *Counterpoint: Ethically Handling Conflicts between Two Clients Through The Golden Mean*, 12 Bender's Immigration Bulletin, 1147 (Aug 16, 2007).
9 *See* Rule 3.3(b).
10 *See* New York Rules of Professional Responsibility Rule 3.3(b).
11 For a definition of specialized knowledge under the L-1B visa, *see* INA §214(c)(2)(B); 8 CFR § 214.2(I)(1)(ii)(D).

the likelihood of a quality submission might be diminished due to the shortage of time, along with the potential financial burden for the client to pay a premium over the regular fee to the new lawyer who would need to drop all other matters in order to urgently respond to the RFE.

On the other hand, in the above scenario, the lawyer may have notified the employer client about the need for providing evidence well in advance of the deadline to respond to the RFE. The client fails to cooperate all along and the lawyer informs the client that if she does not provide the evidence two days before the deadline, he will be forced to withdraw. The retainer agreement also calls for an additional fee to respond to an RFE, and the lawyer also requests that the client pay the fee prior to the deadline. When the lawyer informs the client that he is withdrawing, the client submits the requested evidence, as demanded, but one day before the deadline and pleads with the lawyer to file the response. Upon a careful examination of the documentation, the lawyer reasonably believes that some of the crucial evidence to justify that the client's employee has specialized knowledge is fraudulent.[12] The lawyer suspects this because the certificates that demonstrate that the specialized knowledge employee went to training programs appear to be fake. The lawyer proposes that if he continues with the representation, the suspected fraudulent evidence be left out from the response, but the client insists that the lawyer submit it. The client also refuses to pay the additional fee on the ground that the fee paid at the time of submitting the initial L-1B petition was large enough to cover a response to an RFE.

Under this hypothetical, several permissive grounds pursuant to 1.16(b) to withdraw have triggered, as follows:

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent

This provision gives the lawyer an escape hatch to withdraw from representation, even if the lawyer does not have actual knowledge of the fraud but only has a reasonable belief about the fraudulent document. A lawyer can withdraw before the application of Rule 3.3 triggers if the lawyer later gains actual knowledge of the fraud, which requires a lawyer to take reasonable remedial measures, including in some jurisdictions, disclosure to the tribunal. Thus, a lawyer may decide to withdraw when he or she has a reasonable belief so that compliance under Rule 3.3 is not required.

(3) the client has used the lawyer's services to perpetrate a crime or fraud

Based on the lawyer's reasonable belief that the client persists in a course of action that the lawyer believes to be criminal or fraudulent, can a lawyer also infer that the lawyer's services were used to perpetrate a crime or fraud? In the example, can the lawyer believe that the entire claim of specialized knowledge that was made in the initial L-1B petition was also bogus? Paragraph (3) does not provide a standard such as in paragraph (2). Is it actual knowledge or something less than that? But one can infer by analogy that a lawyer needs to have a reasonable belief that his services were used to perpetrate a crime or fraud rather than harbor just a mere suspicion or hunch.[13]

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement

This paragraph triggers only when the lawyer and client have a "fundamental disagreement," and not when there is a difference of opinion. Also, this provision is not applicable when the client merely fails to follow the advice of the lawyer when it normally involves a decision that is generally for the client to decide, such as the decision to settle a matter or going to trial. In the example above, it can be argued that there appears to be a fundamental disagreement, as opposed to a mere difference of opinion, regarding how to respond to the RFE to demonstrate specialized knowledge. The client insists that the lawyer submit a document that the lawyer

12 In such a situation, it is most likely that the lawyer is representing both the employer and the employee client, and thus the lawyer has ethical obligation to both, even if the employer client is paying the lawyer's fees.

13 *See* Simon's New York Rules of Professional Conduct Annotated, 2017 Edition, West (using similar analysis regarding New York Rules of Professional Responsibility Rule 1.16(c)(3)).

reasonably believes is fraudulent. Even if the client insists that it is a genuine document, the lawyer believes that it may not stand up to scrutiny as he has never heard of such a training program. The document on its face does not appear very authentic and a search on Google also does not come up with any results about the existence of such a training program. The lawyer further believes that the submission of such a document will also incur the suspicion of the USCIS, which would hurt the case more than if the document was not submitted, but the client still insists that the lawyer submit this document. The lawyer can also argue that the client's insistence to submit a suspicious-looking document at the very last moment, without giving a chance for further verification, is repugnant to him. The lawyer should arguably be able to withdraw under this provision.

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled

A lawyer may withdraw when the client has failed to pay the fee due under the agreement. This ground requires a lawyer to show more than the client's current inability or delay in paying the fee.[14] Here, in the above example, the client has refused to pay the additional fee and "fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services." Moreover, the provision also triggers when the lawyer has given a reasonable warning that withdrawal will occur if the obligation is not fulfilled. It would be different if the lawyer insisted on a new fee agreement after the RFE was issued, but here, the additional fee was already agreed to by the client in the retainer agreement at the outset of the representation. If the only issue was the disagreement on the fee, and assuming that the lawyer did not suspect the genuineness of the evidence and the client was unable to pay prior to the deadline due to lack of funds, then the lawyer may have more difficulty justifying withdrawal under this provision.

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client

This is self-evident in the above example. Representation has clearly been rendered difficult by the client. The lawyer has had to also turn away other fee-generating work to respond to the RFE, for which the client has refused to pay. Moreover, the lawyer also knows that responding to the RFE may not be the end of the matter. The USCIS will likely deny the L-1B petition or may commence a criminal investigation. The client has refused to pay for responding to the RFE and may not pay even as the case gets more difficult, due to the client's obstinacy.

(7) other good cause for withdrawal exists

The lawyer may also be able to argue that antagonism has developed between himself and the client, which renders the representation difficult, even impossible. Moreover, if the lawyer is representing both the employer and employee, it is also likely that an irrevocable conflict of interest has developed when the employer client is willing to back down from submitting the evidence but the employee client insists on its submission.

None of these grounds require the lawyer to ensure that the withdrawal will be accomplished without material adverse effect on the interests of the client. Still, the lawyer must still take steps to reasonably safeguard the interests of the client according to 1.16(d), infra, and where there are two clients, then the lawyer must be mindful of safeguarding the interests of both. Finally, as required under the mandatory withdrawal grounds, the lawyer, if before a tribunal, must seek the permission of the tribunal when terminating a representation. If the tribunal refuses to grant permission, the lawyer is required to continue with the representation.

Seeking Permission of The Tribunal Before Withdrawing

It has already been emphasized that when the matter is before

14 *See* N.Y. State Bar Op. 598 (1989), which states that withdrawal is not appropriate in the case of a client's financial inability to pay. Factors to be considered include 1) "[t]he amount of work performed and paid for in comparison to the work remaining," 2) "the amount of the fees paid to date," and 3)"the likely effect on the client."

a tribunal, 1.16(c) specifically requires the lawyer to comply with the applicable law requiring notice or permission of a tribunal when terminating a representation.[15]

A lawyer must therefore follow the rules of the tribunal before withdrawing from representation. Even if a client acquiesces to the withdrawal, it is still incumbent upon the lawyer to follow the applicable rules of the tribunal before terminating representation. Thus, imagine a situation where an appeal brief is due in federal circuit court after a petition for review on an immigration matter has been filed, and the client refuses to pay for the brief, as previously agreed, as she is no longer interested in pursuing the matter in court. The client does not care if the lawyer does not file the brief and defaults on the appeal. Still, a lawyer who fails to follow the court rules before withdrawing does so at his or her own peril.

For one, courts frown upon a lawyer who withdraws only because a client is unable to pay the fee. In *Bennett* v. *Mukasey,* 525 F.3d 222 (2d Cir. 2008), the Second Circuit recalled a mandate and reinstated a petition for review from a decision of the Board of Immigration Appeals when the lawyer failed to take the required action after filing a petition for review because the client refused to pay his fee. Judge Newman of the Second Circuit observed, in addition to the fact that non-payment of legal fees without more is an insufficient basis for withdrawal (citing *US v. Parker,* 439 F.3d 81, 104 (2d Cir. 2006)), that the lawyer failed to comply with several obligations to the client upon withdrawing under the former New York Disciplinary rules.[16]

Another unpublished decision of the Second Circuit, *In re David Yan,* 390 Fed. Appx. 18, 2010 WL 3154111 (C.A. 2), is also relevant. This case involved disciplinary proceedings against an immigration attorney who defaulted on the court's scheduling orders several times. The attorney's excuse was that his clients failed to pay him or wished to pursue alternative immigration remedies. In citing *Bennett* v. *Mukasey, supra*, the Second Circuit held:

> As noted by Judge Newman of this Court, "a lawyer's practice of accepting an initial retainer fee and then deliberately failing to take required action because of non-payment of additional fees, thereby permitting his client's petition to be dismissed, is unacceptable." *Bennett v. Mukasey* (citation omitted). "[A] retained lawyer can either pursue contractual remedies to collect unpaid fees or seek leave to withdraw, but he cannot abandon his client for lack of a promised payment nor neglect his professional responsibilities until such payment has been made…" Furthermore, if it is unclear whether a client wishes to proceed, an attorney may, depending on the circumstances, request: an extension of time to file his brief, a stay of the appeal, withdrawal as counsel, withdrawal of the appeal or advice from the Court. Yan's failure to take any of the preceding action was a disservice to his clients, this Court, and the public.

Interestingly, Yan's sanction by the Second Circuit, after all this, was being publicly reprimanded and directed to attend CLE programs covering federal appellate practice and appellate writing!

A discussion of the immigration regulation relating to termination, 8 CFR § 1003.102(q)(3), becomes relevant at this juncture, which provides:

> A practitioner should carry through to conclusion all matters undertaken for a client, consistent with the scope of representation as previously determined by the client and practitioner, unless the client

15 The term "tribunal" is defined broadly in ABA Model Rule 1.0(m):
"Tribunal" denotes 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.

16 *See also*, *In re Meenan*, 117 A.D.3d 42, 986 N.Y.S.2d 135 (2nd Dep't 2014) (holding that attorney violated disciplinary rule by stopping work on client's appeal of a denied cancellation of removal application due to nonpayment of legal fees without seeking the tribunal's leave to withdraw from the representation); *In re Tustaniwsky*, 758 F.3d 179 (2014) (finding that although the Respondent, a Junior Associate, was instructed by his employer not to file motions due to the client's nonpayment, he nevertheless acted in contravention of his ethical obligations.)

> terminates the relationship or the practitioner obtains permission to withdraw in compliance with applicable rules and regulations. If a practitioner has handled a proceeding that produced a result adverse to the client and the practitioner and the client have not agreed that the practitioner will handle the matter on appeal, the practitioner must consult with the client about the client's appeal rights and the terms and conditions of possible representation on appeal...

The rule appears to suggest that only the client can terminate the relationship. If the lawyer wishes to terminate the relationship, it must obtain permission to withdraw in compliance with the applicable rules and regulations. If the matter is in Immigration Court, or the Board of Immigration Appeals, there is a clear procedure for withdrawing in that forum as outlined in the Immigration Court Practice Manual and Board of Immigration Appeals Practice Manual, Chapter 2.3, *supra.*

However, the rule regarding withdrawal from the Department of Homeland Security (DHS) is far from clear. Under 8 CFR §292.4, once a Notice of Entry of Appearance, Form G-28, has been filed:

> [t]he appearance will be recognized by the specific immigration component of DHS in which it was filed until the conclusion of the matter for which it was entered.... *Substitution* may be permitted upon the written withdrawal of the attorney or accredited representative or upon the filing of a new form by a new attorney or representative.

It is not clear whether withdrawal will only be recognized if there is a substitution of counsel, or whether a lawyer may unilaterally withdraw under the grounds stipulated in Rule 1.16. It makes no sense to bar a lawyer from withdrawing especially when the lawyer is required to do so under 1.16 under certain circumstances. DHS has no procedure for an attorney to obtain permission from the DHS to withdraw, and thus § 1003.102(q)(3) does not square with § 292.4. Until there is more clarity from the DHS, it is suggested that the lawyer notify the DHS, or its component, such as the USCIS, regarding a withdrawal rather than do nothing. Notification of the withdrawal to the DHS component will potentially immunize the lawyer from suspicion of wrongdoing should the client later persist in a course of conduct that is criminal or fraudulent, unbeknownst to him or her.

Finally, it is worth mentioning that an agreement that carefully sets forth when the representation will come to an end is in the mutual interests of both the lawyer and the client. If the matter terminates after the Immigration Judge or immigration official (in the case of a benefits application) issues a decision, and if the decision is adverse, the lawyer must be mindful of the caution in § 1003.102(q)(3), which requires him or her to "consult with the client about the client's appeal rights and the terms and conditions of possible representation on appeal."

Safeguarding The Interests of The Client

Paragraph 1.16(d) is by far the most pivotal section. It requires the lawyer, upon termination of representation to the extent reasonably practicable to protect the client's interests, and then provides for example, such as:

giving reasonable notice to the client

Essentially, a lawyer must endeavor not to ambush a client without advance notice of termination. It is important to fully communicate to the client well in advance about why the lawyer is terminating representation. However, as seen from the example above involving the L-1B petition, there may be times when the lawyer finds it impossible to provide advance notice, such as when the client intends to commit perjury or perpetrate fraud. In such an instance, it could be argued that the client has no right in being assisted by a lawyer to commit perjury or fraud, and termination under such circumstances, even if sudden, may in exceptional circumstances be justified.

allowing time for the employment of counsel

The withdrawing lawyer must stay on the case to the extent

that it allows for time for the client to retain the services of another lawyer. It would, for example, behoove the withdrawing lawyer to continue to notify the client about any correspondence that he or she may receive from the USCIS regarding the matter. To every extent possible, the withdrawing lawyer may also wish to request an adjournment or extension of time from the court or tribunal, if applicable, in order for the client to find another lawyer. It is important for the lawyer to follow the rules of the court regarding the facilitating of time for the employment of new counsel. The lawyer may also be required to still make a personal appearance until the court confirms that a lawyer may withdraw.

surrendering papers and property to which the client is entitled

It is most important that the lawyer promptly return the file to the client who has withdrawn from representation or been discharged by the client. In the practice of immigration law, the lawyer generally undertakes dual representation, and thus it is important that if the lawyer is withdrawing from the representing both clients, such as the employer and employee or both the spouses, the lawyer provide a copy of the file to both clients. In *Sage Realty Corp* v. *Proskauer Rose Getz & Mendelsohn,* 91 N.Y.2d 20 (1997), the New York Court of Appeals held that a client has presumptive access to the attorney's entire file except for two narrow exceptions, which include 1) documents which might violate a duty of non-disclosure to a third party, and 2) "firm documents intended for internal law office review and use," such as the attorney's assessment of the case or preliminary impressions for internal purposes.[17] Be sure to consult your state bar ethics opinions and possible case law for guidance on surrendering client files.

In an employment-based immigration case, an attorney may likely withdraw from the representation as a result of a conflict of interest, especially when the employee's employment has terminated. Although the employer has filed the labor certification application and 1-140 petition on behalf of the foreign national employee, the latter may often also request a copy of these documents. It serves no purpose to withhold these documents from the employee. The employee too has an interest in these documents for purposes of obtaining an H-1B extension beyond the sixth year[18] or to port to another employer.[19] While it may be possible to waive access to these documents in the event of a termination, having the employee waive his or her right to the labor certification and 1-140 petition, may be viewed as a non-consentable waiver given the importance of these documents to the employee even after termination.[20] Some immigration attorneys assume sole representation of the employer, thus obviating the need to consider an employee as a client and be subjected to all the obligations that are owed by an attorney to a client. While it is beyond the scope of this advisory to examine the merits of this approach, in brief, it comes with its own perils as the employee may have relied upon legal advice and perceived the attorney as his or her own lawyer in addition to being the employer's.[21] On

17 *See* New York State Bar Report Of The Special Committee On Immigration Representation, which sets forth important standards for immigration practitioners, and provides inter alia useful guidance on file maintenance, and what should be in a client's file in an immigration matter. The report is available at https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=27499.
Specifically, the following guidance under G-File Maintenance is worth noting: "A representative has the duty to maintain his or her client's file. This includes keeping in a secure and confidential place: (a) all paper and electronic correspondence to and from the relevant government agencies; (b) all paper and electronic evidentiary records—documents, certificates, letters of support, declarations or affidavits, and any other records—from the client, his or her friends and family, the A-File, government agencies, criminal/family/other courts, medical professionals, and any other individuals, agencies, and institutions; (c) all correspondence, motions, briefs, evidence, and other attachments filed with the relevant court/agency or sent to/from opposing counsel; and (d) all notices, correspondence, and decisions received from the relevant court/agency."

18 Under §106(a) and §104(c) of the American Competitiveness in the 21st Century Act, an alien can claim an extension of H-1B status beyond six years based on the filing of a labor certification and 1-140 petition. Under § 106(a), either the labor certification or the 1-140 petition must have been filed at least one year before the start of the sixth year in order for the alien to obtain an extension of one year beyond the sixth year. Under §104(c), if the labor certification and 1-140 petition are approved, and the alien is unable to file for adjustment of status because of a backlog in the priority date, the alien can claim a three-year extension in H-1B status beyond the sixth year.

19 AC21 enacted §204(j) of the INA, which allows the underlying labor certification of an employer to remain valid even if the foreign national changes jobs or employers in the same or similar occupational classification for which the certification was issued.

20 See *Matter of V-S-G- Inc*., Adopted Decision 2017-06 (AAO Nov. 11, 2017) (clarifying that beneficiaries of approved I-140 petitions who exercise job portability are "affected parties" under DHS regulations for the purposes of revocation proceedings of their visa petitions and must be afforded an opportunity to participate in those proceedings).

21 For a criticism of the sole representation approach in immigration practice, see Bruce A. Hake, *Dual Representation in Immigration Practice*, Ethics in a Brave New World 28 (John L. Pinnix, et al. eds., AILA 2004).

the other hand, it may be possible for the employee to waive access to certain aspects of the employer's information in the file, especially with respect to sensitive financial information belonging to the employer and which would not serve any purpose to the employee with respect to an H-1B extension or being able to exercise job flexibility.

In conclusion, NY City Bar Op. 1999-7,[22] provides an interesting teaching moment. In a dispute, where the wife accuses the husband of domestic violence, the City Bar opined that the husband cannot demand the "entire file" concerning the wife's immigration status. According to this opinion, since the attorney is bound by a duty of loyalty toward both clients, absent any prior agreement designating only one spouse as the client, one co-client cannot use the lawyer against the other co-client in the event of a dispute. Thus, where there is a dispute, an attorney may decide to provide documents that are essential to the client requesting them and may withhold others, such as the tax returns of one party, especially when there is a domestic dispute between two spouses. While the rule of thumb is to hand over the entire contents of the file to both clients, an attorney may at times use judgment in the event of a dispute between the two parties and withhold documents that are not germane to the other party. In such a situation, it may be prudent on the part of the lawyer to disclose that he or she is not providing all of the documents.

refunding any advance payment of fee or expenses that has not been earned or incurred

It is important to refund unearned fee upon termination of representation. If the lawyer has taken an advance fee based on an hourly fee, the lawyer must only keep the portion based on the number of hours spent on the matter. Similarly, if the lawyer has charged a flat fee, and the lawyer has not completed the work that was the subject of the fee, the lawyer should refund the unearned amount and explain in a letter the basis for calculating the earned and unearned portions of the retainer.

Most immigration lawyers charge flat fees. Suppose a flat fee was charged to work on a labor certification case, which included preparing and filing the application. If the lawyer only took preliminary steps, such as formulating the position for the labor certification, prior to any recruitment steps being undertaken, and the lawyer withdraws from representation at this stage, the rule requires the lawyer to refund the portion of the fee that would have covered additional steps towards filing, such as advising regarding the recruiting for the position, and preparing the PERM ETA 9089 application, which did not occur.

A non-refundable retainer is unethical in New York[23] and in many other jurisdictions, so lawyers are advised to check their own state bar rules regarding unearned retainers.

The lawyer may retain papers relating to the client to the extent permitted by other law

In the case of a fee dispute, a lawyer may retain a client's papers as a retaining lien. Yet, the legitimate exercise of a retaining lien may still prejudice the client. Can an immigration attorney keep the approval notice and new 1-94 of an L-1B petition as a retaining lien in the event that the client has unjustifiably not paid the fees owed to the lawyer? If the withholding of the approval notice will prejudice the client, such as impair his or her right to travel, then it is clear that the lawyer's ethical obligation to safeguard the interest of the client takes precedence over the lawyer's right to execute a lien over the client's property.

Conclusion

Termination of representation seldom comes without emotions on the part of both the lawyer and the client. The client may feel disappointed and let down when the lawyer withdraws from representation. Regardless of the justification for the termination, a disappointed client will try to find fault with the lawyer's representation. Hence,

22 Available at www.nycbar.org.

23 *See In re Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (1994). *But see,* Alan Goldfarb, "Accepting Advance Flat Fees Means Thinking About Having to Return Them," AILA Doc. No. 16032367, Mar. 23, 2016, at 2, note 5 (explaining that a general retainer may be nonrefundable as it is "an availability fee, [not] for services").

the importance of Rule 1.16. Lawyers need to carefully adhere to it when withdrawing from representation. If done properly, with advance notice and allowing time for the client to pick up the pieces and go elsewhere, there will be less reason for the client to find fault with the lawyer. Lawyers seldom get disciplined for violating 1.16. Rather, 1.16 is linked to all of the other important ethical rules, such as the duty to act competently (Rule 1.1), diligently (Rule 1.3), avoid irreconcilable conflicts of interest (Rule 1.7), and to exercise candor towards the tribunal (Rule 3.3). Termination exposes the lawyer to other ethical rules, and thus a lawyer must ensure scrupulous compliance with all of the applicable ethical rules while representing the client.[24]

Indeed, termination cannot get a lawyer out of trouble for not being competent. If the lawyer makes a mistake, terminating, without trying to set the matter right or communicating to the client about how to, can land the lawyer into even more hot water. Conversely, when the client fires the lawyer, the lawyer tries to hold on to the case or file, without realizing that the client has moved on and this desperate action will hurt him or her.

Rule 1.16 is crucial. Keep it with you at all times. It gives you the know-how on how to practice ethically and when to pull out without getting into trouble!

24 The lawyer must also keep abreast of the parallel disciplinary grounds for immigration practitioners under 8 CFR §1003.102, especially with respect to failing to provide competent representation (§1003.102(o)); failure to act with reasonable diligence (§1003.102(q)(l) and (2)); and failure to maintain communications with the client (§1003.102(r)).