REGULATING IMMIGRATION LEGAL SERVICE PROVIDERS: INADEQUATE REPRESENTATION AND NOTARIO FRAUD

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on behalf of

The Subcommittee on Addressing Inadequate Representation

Immigrants are often easy prey for bogus or incompetent attorneys, “notarios,” scam artists, and other bad actors who take advantage of immigrants’ limited knowledge of U.S. law, lack of English fluency, and lack of cultural knowledge to charge exorbitant fees for wild promises of green cards and citizenship that the bad actors cannot—or in some cases never intended to—deliver. Such exploitation is merely a symptom, however, of the larger problem of inadequate access to competent legal counsel by foreign nationals seeking to navigate our labyrinthine scheme of

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immigration laws, regulations, and policies. Contrary to popular belief, not all of these foreign nationals are “illegal aliens” who slipped over our southern border; many are entitled to obtain lawful immigration status, if only they had adequate guidance from qualified counsel to help them seek it. Unfortunately, there is no constitutionally guaranteed right to counsel in immigration proceedings (even in cases where deportation is at stake), and competent private and nonprofit resources are limited. After illustrating the nature of the problem with some real-life stories of immigrants who have been victimized by fraudulent service providers, and discussing the current state of the law with respect to who constitutes the inadequate practice of immigration law and who is legally permitted to represent immigrants in immigration matters, this report proposes changes to local, state, and federal law and policy that would help to combat fraudulent activities by unscrupulous nonlawyers and inadequately trained lawyers alike. These and other proposals are put forth in an attempt to help lay the groundwork for ensuring that immigrants in need of competent legal counsel can access the help to which they should be entitled.

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INTRODUCTION

Immigration law is exceedingly complex and constantly changing, reflecting both the sheer density of a highly codified area of law as well as changing cultural and political attitudes toward immigrants. Remarking on the intricate and confusing Immigration and Nationality Act (INA), one federal district court judge said, “The immigration laws and certain of the regulations in furtherance of them present a maze which understandably causes confusion.”1 Another court said, “We have had occasion to note the striking resemblance between [the immigration] laws we are called upon to interpret and King Minos’s labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Act are examples we have cited of Congress’s ingenuity in passing statutes certain to accelerate the aging process of judges.”2 When even sophisticated and well-educated federal judges find U.S. immigration laws so perplexing, it is no wonder that immigrants caught up in the system—whether they seek to apply affirmatively for an immigration benefit, or are held in detention pending deportation,3 possibly with an imperfect grasp of the English language and

2. Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977).
3. Deportation (i.e., the expulsion of foreign nationals already present on U.S. soil) and exclusion (i.e., the barring of entry into the United States of foreign nationals who present themselves for admission at a port of entry) have both been called by the more bureaucratic term “removal” since the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009. Because the term “deportation” is more familiar to most readers, however, we use the terms interchangeably.
undoubtedly with little or no access to qualified legal counsel—are not only ill-equipped to navigate the system on their own but are easy prey for bad actors who victimize immigrants by charging ruinous fees for dubious, if not outright fraudulent and damaging, results.

Unfortunately, it is clear to anybody who has examined the plight of immigrants in this country that those who need qualified legal assistance are poorly served by the currently available resources. And while some will say that undocumented immigrants are people who entered the United States illegally and therefore should not expect any help (especially government-subsidized help) in “jumping the line” ahead of foreign nationals who entered the country through lawful channels and waited their turn, it is important to recognize that not all immigrants who are out of lawful immigration status entered the country illegally. Many may have entered as students but were unable to keep up with their coursework and therefore fell out of lawful status. Others may have been lawfully employed but were later laid off and fell into unlawful status in that way. Many have fled war or persecution abroad and are seeking asylum in the United States. Some immigrants may have been brought to the United States as infants by their parents, and find themselves as adults unable to pursue higher education or find a legitimate job due to circumstances completely beyond their control. Some may even be lawful permanent


5. The INA does not provide for any grace period for lawful temporary workers, such as those who were admitted on H-1B visas (for professional-level workers in what are called specialty occupations) or L-1 visas (for intracompany transferees) who are laid off or otherwise terminated from their employment. Indeed, the legacy Immigration and Naturalization Service (INS) specifically said, in correspondence with a Dallas attorney, that because such workers are admitted into the United States for the sole purpose of providing services to their employer, they are no longer in valid immigration status as soon as they are terminated from employment. See INS Discusses Status of H-1B and L-1 Nonimmigrants Who Are Terminated, 76 INTERPRETER RELEASES 378, 385–87 (1999) (reproducing correspondence between Dallas attorney and INS Business and Trade Branch Chief).


7. One example is recounted by Elizabeth T. Reichard, Esq., who represented this person in Immigration Court. Gabriel moved to the United States from Brazil when he was eight years old. He came here to be reunited with his mother, who had come to the United States one year earlier. As a young child, he had no say in the decision to move here; he was told that he was going to be with his mother and go to Disney World. Upon settling in the United States, however, Gabriel was able to make the American Dream a reality. Despite growing up in a single-parent household of limited means, he worked hard to build a bright future. He studied and practiced tirelessly to develop his skills as a baritone opera singer and has been awarded numerous scholarships and accolades as a result. He has been described as the “next Plácido Domingo.” He enrolled as a full-time student, majoring in vocal performance, at the Conservatory of Music at Purchase College of the State University of New York (SUNY). Unfortunately, while traveling by train to an arts camp during the summer of 2008, Gabriel was picked up and detained by U.S. Immigration and Customs Enforcement. He is currently in removal proceedings and does not have any relief in sight. Gabriel knows no other way of life, and looks, acts, and sounds American in every way. See Letter from Elizabeth T. Reichard, Esq., 2008–09 Fragomen Fellow, N.Y. City Bar Justice Ctr., to author (Sept. 23, 2009) (on file with author).
residents—granted the right to live permanently in the United States—but find themselves detained by the U.S. Department of Homeland Security (DHS) after having been convicted of minor crimes, such as shoplifting, and subject to deportation to a country where they know little of the language or culture, have few if any family ties, and possess limited options for earning a living (rendering the promise of “permanent” residence illusory). Finally, it should be noted that in the case of low-skilled but hardworking laborers filling jobs that do not require much in the way of formal education or work experience—that is, the people who pick our crops, landscape our gardens, clean our houses, work in our meatpacking plants and textile factories, labor on our construction sites, and care for our children—there really is no “line” to jump, since the law only provides for ten thousand immigrant visas (i.e., “green cards”) per year for such workers. Compared to the approximately one million people who enter the United States each year as lawful permanent residents—and the estimated hundreds of thousands per year who enter illegally, drawn by the magnet of jobs in want of workers—the eight-year wait for one of the ten thousand available immigrant visas seems like a sucker’s bet.

8. For example, in 2000 there were widespread press accounts about Mary Anne Gehris, a German-born permanent resident who came to the United States as an infant and who, upon applying for naturalization as an adult, was ordered deported because thirteen years earlier she had entered a guilty plea in the state of Georgia to misdemeanor charges stemming from pulling the hair of another woman in an argument over the affections of a man. Under harsh new measures enacted as part of IIRIRA, many misdemeanors as trivial as Gehris’s were reclassified as “aggravated felonies,” which render the noncitizen who committed them deportable. See, e.g., Anthony Lewis, Abroad at Home: ‘Measure of Justice,’ N.Y. TIMES, July 15, 2000, at A13 (detailing other minor crimes that, under IIRIRA’s retroactivity clause, later subjected people to deportation). Happily for Gehris, the Georgia Board of Pardons and Paroles pardoned her, freeing her from the threat of deportation. Others have not been so lucky.


10. According to the latest government figures, 1,107,126 persons became lawful permanent residents (LPRs) of the United States in 2008. See Office of Immigration Statistics, U.S. Dep’t of Homeland Sec., U.S. Legal Permanent Residents: 2008, at 1, available at http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf. “The majority of new LPRs (58 percent) already lived in the United States when they were granted lawful permanent residence. Nearly 65 percent were granted permanent residence based on a family relationship with a U.S. citizen or legal permanent resident of the United States. The leading countries of birth of new LPRs were Mexico (17 percent), China (7 percent), and India (6 percent).” Id. Approximately 15 percent gained permanent residence based on employment sponsorship. Id. at 3.

United States during the 1990s, for an estimated inflow of approximately 700,000 per year (although this is not the same as the net flow of undocumented immigrants, since many depart or die each year). Id. More recently, the Congressional Research Service (CRS) reported that of the estimated 36 million foreign-born people residing in the United States in 2005 according to the March 2005 Current Population Survey (CPS) by the U.S. Bureau of Census and the Bureau of Labor Statistics, approximately 30 percent (or nearly 11 million) are unauthorized, or undocumented, immigrants. See Hearing on Comprehensive Immigration Reform: Government Perspectives on Immigration Statistics Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary, 110th Cong. 1–2 (2007) (statement of Ruth Ellen Wasem, Ph.D, Specialist in Immigration Policy, Congressional Research Service, Library of Congress). And despite reports that undocumented immigrants have been leaving the United States in droves in the wake of the worsening economy, see, e.g., Octavio Rivera Lopez, Mexicans Leaving Under Duress, DALLAS MORNING NEWS, July 5, 2008, at A1; Kris Gutierrez, Illegal Immigrants Returning to Mexico in Record Numbers, FOX NEWS.COM, Aug. 22, 2008, http://www.foxnews.com/story/0,2933,409221,00.html; Thelma Gutierrez & Wayne Drash, Bad Economy Forcing Immigrants To Reconsider U.S., CNN.COM, Feb. 10, 2009, http://www.cnn.com/2009/US/02/10/immigrants.economy/index.html, the opposite is also true. See, e.g., Sam Dillon, Kidnappings, Long Feared in Mexico, Send Shivers Across Border, N.Y. TIMES, Jan. 5, 2009, at A1 (discussing how half the population of a town in Central Mexico has fled, many over the border to the United States, to escape criminals who have been engaging in kidnappings for ransom).

12. Section 1151 sets an annual family-sponsored immigrant visa lower limit of 226,000, and an annual employment-based immigrant visa upper limit of 140,000 (of which, as mentioned above, no more than 10,000 per year can be made available to low-skilled workers). 8 U.S.C § 1151 (2006). The U.S. Department of State is responsible for the allocation of immigrant visas, and issues a monthly “Visa Bulletin,” which summarizes its forecast of “green card” availability for the coming month. Each month, the State Department sets a cut-off date for each immigrant visa category. Only a foreign national whose priority date (his or her place in line) is earlier than the cut-off date for a particular category is eligible to apply for adjustment of status to permanent residence or for an immigrant visa. If the State Department designates a category as “current,” any foreign national eligible for the category may apply for adjustment or an immigrant visa. If a category is designated as “unavailable,” the annual quota of immigrant visas has been met and immigrant visas are no longer available in that category. See U.S. Department of State, Visa Bulletin, http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html (last visited Oct. 2, 2009) (archiving the U.S. Department of State’s monthly visa bulletins). For example, in April 2009 (seven months into the 2009 fiscal year, which ran from October 1, 2008 to September 30, 2009), the cut-off date for the so-called “other workers” category (i.e., workers with less than two years of education or experience relevant to the job they would perform in the United States) was March 1, 2001, indicating a wait of over eight years. See U.S. Department of State, Visa Bulletin for April 2009, http://travel.state.gov/visa/frvi/bulletin/bulletin_4438.html (last visited Oct. 2, 2009). One month later, in May 2009, visas in the “other workers” category were no longer available for the remainder of the fiscal year. See U.S. Dep’t of State, Visa Bulletin for May 2009, http://travel.state.gov/visa/frvi/bulletin/bulletin_4454.html (last visited Oct. 2, 2009). Even when cut-off dates move forward, they do not necessarily do so in real time, and sometimes they even move backward. For example, the cut-off date in March 2009 was March 15, 2003, which means there was a “retrogression” of more than two years between March and April, something the State Department imposes periodically in order to regulate the flow of visas so as not to exceed each year’s statutory limit. See U.S. Department of State, Visa Bulletin for April 2009, supra (explaining retrogression in April 2009). This makes it extremely difficult for both employers and prospective employees to predict when a permanent visa might ultimately become available for any particular worker.
However, even for those immigrants who are detained pending a deportation hearing, often in real prisons with hardened criminals, there is no guaranteed right to counsel as there is for those charged with crimes. While the INA does provide that persons in removal proceedings shall have the “privilege” of being represented by counsel of their choosing, such representation must be “at no expense to the Government.” Since there is no public defender for indigent immigrants, those held in detention must make do with an inadequate, ad hoc non-system of charitable and religious organizations, public interest law groups, solo practitioners, and pro bono attorneys and law students, who are in short supply even in large urban areas and may be completely unavailable to those held in facilities located in remote rural locations. Persons who are not in detention but are nonetheless living under the radar in the larger community often seek representation from unscrupulous service providers who may or may not be lawyers; who may or may not know enough, or anything, about the complex statutes and regulations that set out how to apply for legal status; or who may or may not even be qualified to obtain such status.

This report seeks to document some basic facts about the inadequate representation of immigrants, not as an end in itself, but as a beginning in a longer-range project of (1) combating fraudulent activities by unscrupulous nonlawyers and inadequately trained lawyers, who prey on the hopes and dreams of immigrants and (2) advocating for the creation of models for the delivery of legal services to immigrants. In Part I, we illustrate the nature of the problem with the story of an immigrant family that was victimized by an unscrupulous “service” provider, and report some basic facts and figures about immigration matters heard before the U.S. Department of Justice Executive Office for Immigration Review (EOIR), which includes the Immigration Courts and the Board of Immigration Appeals (BIA or Board). In Part II, we discuss what constitutes the unauthorized practice of law (and the unauthorized practice of immigration law in particular), with a focus on the governing rules and cases in New York. Part III covers who is permitted under the relevant federal regulations to represent foreign nationals in immigration proceedings, and Part IV is a discussion of what constitutes ineffective assistance of counsel in the immigration context. Finally, in Part V, we will set out some possible ways to begin to grapple with the dilemma of inadequate legal representation of immigrants in the United States. In doing so, we seek to lay out the debate over how to deal with the problem and propose some plans of attack. Others have already

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begun this important conversation, and we hope that still others will continue it.

I. CONSEQUENCES OF INADEQUATE REPRESENTATION

Let us begin with a real story of real people who have been victimized by a bad actor, in this case a nonlawyer holding herself out as an expert in immigration law. Mr. Gary Ali and his family suffered irreparable harm after being victimized by an unaccredited, nonattorney service provider, Ms. Maria Maximo. Preying upon the naïveté and desperation of the Alis, Ms. Maximo and her organization stole almost $2000 of their money and submitted asylum applications without their knowledge. This not only placed the Ali family into removal proceedings, but also led to many years of hardship.

The Alis lawfully entered the United States in February 1996 on B-2 (visitors’) visas. They subsequently overstayed their visas, as Mr. Ali was an unskilled worker and did not have any means by which to obtain lawful work authorization. Mr. and Mrs. Ali never sought or received public assistance. They paid taxes and obtained solid and regular employment. They are active members of their community and church and do not have any criminal history.

In 2004, when their oldest daughter was applying to college, Ali made efforts to legalize his family’s status in the United States. He had heard from people in his community that Maria Maximo could help obtain work authorization and lawful permanent resident status for him and his family. He heard this from trusted sources, so he retained Maximo and paid her upwards of $2000 for her services. At her direction, the Alis signed “legalization papers,” which were actually asylum applications. These were filed with U.S. Citizenship and Immigration Services (USCIS), the immigration-benefits-granting arm of DHS.

After submitting documents that he believed would result in work authorization and permanent residence, Ali and his family received notices to appear at the asylum office. Ali did not know what asylum was, but he

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16. See, e.g., Robert A. Katzmann, *The Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3 (2008). A symposium on the right to counsel in immigration proceedings was held on April 22, 2004, in New York City. See Eleanor Acer, Chris Nugent, William Van Wyke, Lory Rosenberg & Judy Rabinovitz, *No Deportation Without Representation: The Right to Appointed Counsel in the Immigration Context*, IMMIGRATION BRIEFINGS, Oct. 2005, at 1 (providing a summary and transcript of the symposium). The symposium was given in memory of the late Arthur Helton. Id. The program was organized by the Immigration and Nationality Committee of the Association of the Bar of the City of New York (ABCNY), and was sponsored by the Immigration Committee, Human Rights First (formerly the Lawyers Committee on Human Rights) and the American Civil Liberties Union (ACLU). Id.

17. The facts of the Ali case were recounted to the author by Elizabeth T. Reichard, Esq., who later represented Mr. Ali in Immigration Court. See Letter from Elizabeth T. Reichard, Esq., 2008–09 Fragomen Fellow, N.Y. City Bar Justice Ctr., to author (Jan. 7, 2009) (on file with author).
and his family attended the interview because they felt it was part of the green card process described by Maximo. An immigration officer told Ali about asylum, at which point he realized that the wrong application had been filed for him. He asked to withdraw his application and statement, but was not permitted to do so. Instead, Ali and his family were placed into immigration removal (i.e., deportation) proceedings. Today, he and his family have a final order of removal that has been entered against them.

In spite of the removal order, Ali felt compelled to bring Maximo to justice. He reported Maximo’s activities to USCIS, the police, the District Attorney, the Department of Consumer Affairs, and the New York Attorney General. He was involved in the federal case against Maximo, who ultimately pleaded guilty to mail fraud and was sentenced to 17.5 years in prison.\textsuperscript{18}

While Maximo has been punished for her bad acts, the Ali family continues to suffer. The stress of the ordeal caused great strain on the family. The couple is now divorced because the stress on the household was simply too much to bear. Ali’s daughter, who saw no future because she could not regularize her status, attempted to commit suicide. Most significantly, the Ali family still has a final order of removal against them, which the government can elect to execute at any time. They have been allowed to remain in the country temporarily so that they can provide further information to the authorities about the Maximo case. Upon the completion of this case, however, they will be removed from the country unless other relief becomes available.

The Alis were not Maximo’s only victims. Maximo pleaded guilty to a felony information stating that, from June 2004 through early 2005, she prepared applications for approximately 500 undocumented immigrants to a supposed “work permit program,” through which, she claimed, the immigrants would obtain U.S. work permits. Maximo charged each of her approximately 500 clients $500 per application. There was, however, no such “work permit program.” USCIS regulations only provide employment authorization to certain nonimmigrants who possess designated temporary work visas, to certain intending immigrants (such as certain asylum applicants, or persons applying for adjustment of status to permanent residence), and to lawful permanent residents.\textsuperscript{19} Because the supposed


\textsuperscript{19} See 8 C.F.R. § 274a.12 (2009) (setting out classes of aliens authorized to accept employment incident to status); id. § 274a.13 (discussing those aliens who are required to apply for employment authorization).
program to which Maximo’s customers were applying did not exist, USCIS denied the all of the applications she filed on their behalf.\footnote{See News Release, U.S. Immigration and Customs Enforcement, Woman Pleads Guilty to Million-Dollar Fraud of Immigration Applications (Mar. 19, 2007), http://www.ice.gov/pi/news/newsreleases/articles/070319ny.htm [hereinafter Million-Dollar Fraud].}

In another facet of the scheme, “between May 2005 and January 2006, Maximo charged approximately 1,700 people between $500 and $2,500 for the preparation of applications to what she promoted as a ‘legalization program’ open to virtually any illegal immigrant.” She claimed that applicants to the program could obtain work permits and, in time, green cards. In reality, Maximo filed applications for the LULAC program (a program named after a lawsuit involving the League of United Latin American Citizens).\footnote{See Newman v. U.S. Bureau of Citizenship & Immigration Servs., Civ. No. 87-4757-WDK(CWx) (C.D. Cal. Feb. 18, 2004), available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f014176543f6d1a/?vgnextoid=0e1b3d4544e010VgnVCM1000000ecd190aRCRD&vgnextchannel=2492db65022ee010VgnVCM1000000ecd190aRCRD (formerly League of United Latin American Citizens (LULAC) v. INS).} The LULAC program was a limited amnesty program for certain foreign nationals who were denied the opportunity to apply for legalization under the 1986 Immigration Reform and Control Act because they had traveled outside of the United States and returned on some type of visa; one of the eligibility requirements was that the applicant had resided in the United States since at least January 1, 1982. Maximo, however, informed applicants who did not fulfill the residency duration requirement that they were eligible for a green card under the program and filed applications on their behalf. As a result, according to a 2007 news release from U.S. Immigration and Customs Enforcement (ICE), “at the time charges were filed against Maximo on March 29, 2006, USCIS had already rejected more than 750 of Maximo’s LULAC applications on the ground that the immigrant had not lived in the United States since 1982.” Maria Maximo earned more than $1,000,000 from her scams.\footnote{See Million-Dollar Fraud, supra note 20.}

What about noncitizens who find themselves in Immigration Court, fighting government charges that they are subject to removal? Recent years have seen a steady increase in cases filed in Immigration Court. There was a 17% increase between Fiscal Year (FY) 2004, with 299,735 cases filed, and FY 2008, with 351,477 cases filed.\footnote{Office of Planning, Analysis & Tech., U.S. Dep’t of Justice, FY 2008 Statistical Year Book A1 (2008) [hereinafter FY 2008 Year Book], available at http://www.usdoj.gov/eoir/statspub/fy08syb.pdf.} According to EOIR statistics, in 2008, 40% of respondents in Immigration Court were represented by counsel, and 24% of cases involved some application for relief.\footnote{Id. at A1–A2.} In 2007,
approximately 319,000 immigrants were removed from the United States. In 2008, the number was 359,000—the sixth consecutive record high. Between 2006 and 2007, enforcement initiatives spearheaded by ICE, the immigration enforcement arm of DHS, resulted in a 21% spike in immigrant detention. In 2008, detentions increased further (from 311,000 in 2007 to 379,000 in 2008). Many of the immigrants detained in FY 2008 ultimately appeared before immigration judges. According to one study, in 2004, only about 10% of detainees were represented by counsel.

Encouragingly, in recent years appeals before the BIA have decreased by 25%. In FY 2008, a large majority of respondents with appeals—78%—were represented by counsel. This statistic is impressive; however, it is unfortunate that it is not until this late stage in the process that respondents obtain counsel.

Foreign nationals who appear in Immigration Court have a much greater likelihood of securing relief from removal if they are represented by counsel.

For example, several studies have shown that asylum seekers are much more likely to be granted asylum when they are represented in immigration proceedings. In political asylum cases, 39% of non-detained, represented asylum seekers received political asylum, compared with 14% of non-detained, unrepresented asylum seekers. Eighteen percent of detained, represented asylum seekers received asylum, compared with three percent of detained, unrepresented asylum seekers.
II. WHAT CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW?

While the bars and legislatures of each state set out the specific parameters of what constitutes the unauthorized practice of law within their jurisdictions, the rules governing the unauthorized practice of law in New York and the cases interpreting them provide a handy framework. Also discussed below are several New York cases involving attorneys who aided nonlawyers in the unauthorized practice of immigration law in particular, as well as case law from other jurisdictions addressing unauthorized practice by nonlawyer immigration service providers.

*United States v. Maximo*, discussed earlier, helps to illustrate the real damage done to people who rely on nonlawyers who hold themselves out as immigration experts. A more recent case came to light in early 2009, when Victor Espinal—who had a thriving business representing immigrants in New York City for seventeen years—was arrested for allegedly pretending to be an immigration attorney. According to the New York County (Manhattan) District Attorney’s office, Mr. Espinal falsely claimed on his business cards that he was a licensed attorney admitted to the bar in California. He was arraigned on charges related to three victims—including three counts of larceny, one count of scheming to defraud, and two counts of practicing law without a license—but in fact his victims may have been legion: hundreds of his former clients showed up at a free legal clinic hosted by the City Bar Justice Center at the Association of the Bar of the City of New York in February 2009, where more than fifty volunteer lawyers tried to assess the damage Espinal may have caused to many immigrants’ claims for legal status. Many of them were low-income workers who had paid Espinal thousands of dollars for his services.

A brief note on notarios is also in order here. Many nonlawyers who provide immigration services of one kind or another to immigrants refer to themselves as “notarios” as a way of preying on Spanish-speaking immigrants who assume that notarios are attorneys or who misconstrue the American “notary public” as being equivalent to the “notario público,” who in many Latin American countries possesses training and authority similar to an attorney or judge in the United States.

34. See News Release, N.Y. County Dist. Att’y (Jan. 21, 2009), http://manhattanda.org/whatsnew/press/2009-01-21.shtml. Espinal’s business card also implied that he was admitted to the bar in the Dominican Republic. Id. Even if that were true, however, it would not authorize him to practice law in the United States.


36. A succinct explanation is provided by the Colorado Supreme Court on its website:

Q: Is a notary the same as a notario publico?
A: No. In Latin American countries, the notario publico is a high-ranking official with considerable legal skills and training. Unlike the U.S. notary, the
out as notarios in the United States are often known to charge excessive fees for services that may constitute the unauthorized practice of law and to mishandle immigration documents and procedures, often precluding immigrants who had legitimate claims from pursuing those claims due to missed deadlines, a lack of understanding of immigration laws, policies and procedures, or outright fraud.37

In Chinese-speaking communities, it is often Chinese-speaking travel agents who charge immigrants for advice on how to regularize their immigration status, even though travel agents are clearly not authorized to practice immigration law. Other nonlawyers in other immigrant communities may simply hold themselves out as immigration consultants, and may again cross the line into the unauthorized practice of law in rendering advice and charging fees for the preparation and filing of immigration applications. Even use of the term “immigration consultant” is problematic, because it implies that the person has some kind of authority or expertise in immigration law. It is presumably precisely for this reason that a number of states have enacted legislation that specifically regulates the use of the term.38


38. See, e.g., MNN. ST. ANN. § 325E.031, subdiv. 3(2) (West 2004) (providing that any person who provides or offers to provide immigration assistance services may not represent, hold out, or advertise titles or credentials such as “notario” or “immigration consultant” that “could cause a customer to believe that the person possesses special professional skills or is authorized to provide advice on an immigration matter”); COLO. REV. ST. § 12-55-110.3 (2008) (prohibiting persons from representing themselves as an “immigration consultant” or “expert on immigration matters”). A full list of state laws and
This is not to denigrate the hard work of many dedicated nonlawyers, who are often employed by or affiliated with charitable or religious organizations, work diligently in immigrant communities to alert people to their legal rights, and legitimately assist them in applying for immigration benefits to which they might be entitled. As discussed further in Part III.A, infra, DHS and EOIR regulations actually allow for the representation of immigrants before these bodies by specified classes of nonlawyers. We are concerned here with those instances in which such “representation” crosses the line into the unauthorized practice of law, especially in those egregious cases where nonlawyers are deliberately cheating and victimizing immigrants for profit and, in so doing, often denying them rights and benefits to which they would otherwise be entitled.

A. Rules Governing Unauthorized Practice of Law in New York

Under New York Judiciary Law section 478, a person not admitted as an attorney in New York is prohibited from appearing as an attorney in a court of record in New York, rendering legal services, or holding himself or herself out as being entitled to practice law.39 Courts interpreting Judiciary Law section 478 (and its predecessor, Penal Law section 270) have held that the practice of law is not confined to court work alone, but includes the preparation of legal instruments of all kinds, all advice to clients, and all actions taken for clients in matters connected with the law.40

In addition to applying to one who misrepresents himself or herself as being entitled to practice in the courts, the “‘holding out’” provision of section 478 applies to one who holds himself or herself out as entitled to practice as a lawyer “‘in any other manner.’”41 Furthermore, “the legal advice and opinions [must be] directed to particular clients.”42

regulations that can be used to regulate or prosecute notarios or immigration consultants can be found on the website of the American Bar Association. See ABA, Laws and Regulations That Can Be Used To Regulate or Prosecute Notarios, http://www.abanet.org/publicserv/immigration/notario/state_code_sections.pdf (last visited Oct. 2, 2009), see also N.Y. County Lawyers’ Ass’n v. Dacey, 234 N.E.2d 459 (N.Y.), rev’d 283 N.Y.S.2d

39. N.Y. JUD. LAW § 478 (McKinney 2005); People v. Jakubowitz, 710 N.Y.S.2d 844, 845 (Sup. Ct. 2000) (opining that, “while . . . not a model of clarity,” Judiciary Law section 478 provided sufficient guidance as to what conduct it prohibits and thus was not unconstitutionally vague).


42. In re Rowe, 604 N.E.2d 728, 731 (N.Y. 1992) (holding disbarred attorney’s law-related article merely discussing the state of the law (i.e., not directed at any particular reader) was not the practice of law where article “‘neither rendered advice to a particular person nor was intended to respond to known needs and circumstances of a larger group’”); see also N.Y. County Lawyers’ Ass’n v. Dacey, 234 N.E.2d 459 (N.Y.), rev’d 283 N.Y.S.2d
In legal services consisting of legal advice rendered to a single client may constitute the practice of law, it does not constitute “practice” where the contact with the client was minimal and part of “customary and innocuous” practices. As to the nature of the law contemplated by Judiciary Law section 478, it is not limited to New York state law. Similarly, “when legal documents are prepared for a layman by a person in the business of preparing such documents, that person is practicing law whether the documents be prepared in conformity with the law of New York or any other law.” The preparation of legal forms involving judgment by the preparer in furtherance of a legal claim has thus been found to be a form of legal advice prohibited by Judiciary Law section 478.

B. New York Courts’ Application of the Rules and Underlying Policy Governing Unauthorized Practice

Under the above rulings applying Judiciary Law section 478 and its predecessor, since at least 1919, the New York Court of Appeals has found that nonadmitted individuals were engaged in the unauthorized practice of law where the services they performed were primarily the preparation of forms and related advice on matters involving legal consequences.

In People v. Alfani, the court convicted a nonlawyer of unlawful practice under Penal Law section 270. As a “Notary Public,” Alfani prepared “legal instruments and contracts by which legal rights [were] secured,” and he held himself out as being in the business of providing such services. Two state investigators posing as private parties approached him for assistance with the sale of a business and they advised him of the terms. For a fee, Alfani advised them as to what documents were needed to be drawn and filed with the appropriate agencies and he prepared such documents. The court found that such conduct constituted the practice of law not otherwise authorized because Alfani provided advice regarding

984 (App. Div. 1967) (finding nonadmitted author of book providing forms and instructions on completing them in a manual on how to avoid probate did not engage in practice of law where author had no personal contact or relationship involving confidence and trust with a particular individual).

43. El Gemayel, 533 N.E.2d at 248 (holding Lebanese attorney located in Washington, D.C., who provided legal advice in the form of a letter to a New York client regarding whether Lebanese courts would honor a Massachusetts order did not engage in “practice” of law where bulk of services performed by attorney occurred in Lebanon and only contacts with New York were in the form of phone calls to report on the progress of the case).

44. In re Roel, 144 N.E.2d 24, 26 (N.Y. 1957) (determining that “[w]hether a person gives advice as to New York law, Federal law, the law of a sister State, or the law of a foreign country, he is giving legal advice” within the scope of Judiciary Law section 478).

45. Id.

46. Sussman v. Grado, 746 N.Y.S.2d 548, 553 (Dist. Ct. 2002) (finding “independent paralegal,” by filling out forms to enforce a judgment, engaged in the practice of law by determining the manner in which to proceed to secure a legal right).

47. 125 N.E. 671 (N.Y. 1919).

48. Id. at 673.
how legally to effectuate the sale through the preparation of certain
documents, held himself out as being entitled to prepare such documents
(albeit not as an attorney), and did in fact prepare them as a business.\textsuperscript{49}

In \textit{In re Bercu},\textsuperscript{50} an accountant, who did not hold himself out as an
attorney, rendered advice at the request of the president of a corporation for
which he did not regularly provide accounting services. The advice
consisted of researching a particular tax issue about which the accountant
believed there was case law supporting a particular course of action. He
found the case and gave his opinion in writing as to its effect. The
accountant “admitted that this work was not an isolated instance” and that
he often gave advice of a similar character to others.\textsuperscript{51} The New York
Court of Appeals affirmed the Appellate Division’s reversal of the trial
court’s dismissal on the basis that the legal advice provided by the
accountant was prohibited under Penal Law section 270. While
recognizing that there is “overlapping of law and accounting,”\textsuperscript{52} the
Appellate Division focused on the difference between “dealing with a
question of law which is only incidental to preparing a tax return and . . .
addressing [oneself] to a question of law alone.”\textsuperscript{53}

In \textit{In re Roel},\textsuperscript{54} the court found that a foreign lawyer was guilty of
practicing law in violation of Penal Law section 270 “even though he
practiced exclusively foreign law.” Roel advised individuals on Mexican
law only, including divorce law, and prepared legal papers and documents
required for divorce actions in Mexico upon grounds not recognized by the
law of New York. The court concluded that those activities fell within the
scope of Penal Law section 270, which encompassed advice on state,
federal, or foreign law. Since Roel was not licensed in New York, he was
held in contempt.

In \textit{Spivak v. Sachs},\textsuperscript{55} the court found that a California attorney who was
not admitted in New York and did not hold himself out as being able to
appear in court nevertheless engaged in the unauthorized practice of law by
providing legal advice to a New York resident in New York over a two-

\textsuperscript{49} Id. at 675. In so ruling, the court cited the policies underlying the proscriptions
against the unauthorized practice of law: “[t]he reason why preparatory study, educational
qualifications, experience, examination, and license by the courts are required, is not to
protect the bar . . . but to protect the public.” \textit{Id.} at 673. The court noted that because
“knowledge and ability alone are insufficient for the standards of the profession, a character
committee also investigates and reports upon the honesty and integrity of the [attorney].” \textit{Id.}
The court correctly observed that the fundamental purpose of the foregoing is “to protect the
public from ignorance, inexperience, and unscrupulousness.” \textit{Id.} Significantly, the court
expressed particular concern about the damage that may result from the unauthorized
practice of law out of court and without the benefit of the “impartial supervision of a judge.”
\textit{Id.}

\textsuperscript{51} \textit{Id.} at 215.
\textsuperscript{52} \textit{Id.} at 216.
\textsuperscript{53} \textit{Id.} at 220.
\textsuperscript{54} 144 N.E.2d 24 (N.Y. 1957).
\textsuperscript{55} 211 N.E.2d 329 (N.Y. 1965).
week period. The attorney reviewed drafts of separation agreements drafted by other attorneys, expressed his opinion about various provisions therein relating to financial arrangements, custody, and jurisdiction, and urged the client to engage different New York counsel. The court ruled that the services Spivak provided—which included direct advice and counsel as to important marital rights, jurisdiction and alimony, and custody issues over time—clearly constituted the practice of law consistent with the policy underlying section 270. That policy was “to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions.”

More recently, in an action for damages against a nonlawyer who mishandled a legal matter, the court found that a nonadmitted “independent paralegal” who maintained a business under the name “Accutech Consulting Group, Inc.” crossed the line between the mere filling out of forms and rendering legal services where she undertook the task of preparing a “turnover” order without knowing what it was. The order failed to comply with the New York Civil Practice Law and Rules and thus was rendered ineffective. The court found that the paralegal’s conduct amounted to the practice of law because she used “independent judgment” in determining how to obtain the turnover order.

Two cases in which the New York Court of Appeals found that a nonlawyer did not engage in the unlawful practice of law also provide useful guidance. In People v. Goldsmith, discussed in Spivak, the Court of Appeals reversed a conviction that had been affirmed by the Appellate Division against Goldsmith for violating Penal Law section 270. The very brief opinion states only that the ground for reversal was that there was “no evidence that defendant held himself out to the public as being entitled to practice law within the meaning of section 270.” It appears that the court adopted the findings and reasoning set forth in the dissenting opinion below, to wit, that Goldsmith did not engage in the unlawful practice of law where (1) the evidence did not establish that he was “in the business of preparing legal instruments”; (2) he had prepared only one “will” drawn at the instructions of his customer; (3) he had not given any legal advice in connection with the preparation of the will; and (4) he had not “held himself out as an attorney and counselor at law.”

The criminal Goldsmith case clearly reaffirmed the criteria set out in Alfani.

56. Id. at 331.
58. Id. at 552.
59. 164 N.E. 593 (N.Y. 1928).
60. Id. at 593.
Years later, in Bennett v. Goldsmith, a civil case for injunctive relief based on the unauthorized practice of immigration law, the Court of Appeals affirmed the trial court’s dismissal of the action after a temporary restraining order had been granted on the basis of the allegations. Although there is no published trial court opinion dismissing the action, the Court of Appeals’s one-page decision states that the trial court found (1) that Goldsmith had not appeared as an attorney in any court of the state or city of New York on behalf of another; (2) “that under the existing laws and rules of practice and departmental regulations, a layman may practice before the U.S. Immigration Department in connection with an application for visas for immigrants and applicants”; and (3) that Goldsmith had never represented that he was an attorney or authorized by New York State to practice law in New York. In other words, the court held that what Goldsmith did was lawful because he did not engage in certain acts deemed to be the practice of law prohibited by New York and, to the degree he did engage in acts constituting the “practice” of law, such acts were permitted by federal statute or regulation at that time. It is important to note, however, that this decision—which remains the leading New York case on the unauthorized practice of immigration law—dates from 1939; immigration law and practice is significantly more complicated today. Moreover, unlike in 1939, the federal government now limits who can represent immigrants before USCIS and Immigration Courts to attorneys and accredited representatives.

C. New York Courts’ Application of the Rules and Underlying Policy Governing Unauthorized Practice of Immigration Law in Disciplinary Cases

Two fairly recent New York State Supreme Court Appellate Division, First Department disciplinary decisions also support the proposition that the services performed by agencies in the preparation of forms or other documents for submission in immigration matters and related advice constitute the unauthorized practice of law. In In re Muto, the First Department found that agents engaged in the unauthorized practice of law, and that the respondent attorney had “lent himself to [an] ‘insidious system’” under which the agency generally perform[ed] the actual legal work, and retain[ed] an attorney to front for it in the Immigration Court. . . . [where the] attorney retained by an “agency” . . . generally ha[d] little or no contact with the client,

62. 280 N.Y. 529 (1939).
64. 280 N.Y. at 30.
65. See the discussion of who is authorized to represent foreign nationals in immigration matters in Part III.A, infra.
exercise[d] no control over the case, and serve[d] at the pleasure of the “agency,” which [paid] his fee.  

In In re Meltzer, the First Department found, based on stipulated facts and charges, that a corporation co-owned by an attorney and his nonattorney paralegal engaged in the unauthorized practice of law when the corporation undertook the representation of certain noncitizens seeking permanent residence by filing the appropriate application with the legacy Immigration and Naturalization Service (INS, now USCIS). The court sustained the charge that Meltzer aided the unauthorized practice of law. Finally, in In re Rodkin, the First Department (in a decision finding that the respondent attorney aided in the unauthorized practice of law by virtue of his business arrangement with several nonlawyer agencies) concluded that the services performed by these agencies constituted the unauthorized practice of law.

These disciplinary decisions are the only recent cases in New York that address what constitutes the unauthorized practice of law in the immigration context. A combined reading of these cases suggests that the person who interviews the client, decides which application forms should be completed, files the application with the government, and retains control of the applicant’s file is making a legal judgment as to whether the client is eligible for an immigration benefit and what information is required under the law to qualify for the benefit. In short, the work performed by notarios and immigration consultants today—unlike the work performed by Mr. Goldsmith as described in Bennett v. Goldsmith—constitutes the practice of law.

D. Case Law from Other Jurisdictions

Cases from other states are in accord with the New York case law. For example, in State Bar of Texas v. Cortez, the Supreme Court of Texas affirmed the trial court’s imposition of an injunction against a nonlawyer immigration service provider on the basis that he was engaged in the unauthorized practice of law. Cortez was “in the business of providing bookkeeping and immigration services” primarily to Spanish-speaking persons, including assistance to persons who were seeking to obtain visas and permanent residency. Cortez selected and completed appropriate

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67. Id. at 69.
69. 798 N.Y.S.2d 430 (App. Div. 2005); see also In re Lefkowitz, 848 N.Y.S.2d 76 (App. Div. 2007) (finding the respondent attorney aided in the unauthorized practice of law by virtue of his employment by an immigration services company owned by nonlawyers and staffed by nonlawyer agents, and by accepting referrals by another nonlawyer immigration agent, who would prepare and file asylum applications, and would then pay Lefkowitz when an attorney was needed to represent clients at interviews or attend hearings in Immigration Court).
70. 692 S.W.2d 47 (Tex. 1985).
71. Id. at 48.
immigration forms for customers, interviewed the customers, and filled out preprinted INS forms according to instructions provided by the INS for a fee, usually $400. At the time, Texas’s statutory definition of the practice of law, like New York’s, encompassed services rendered out of court. In determining that Cortez’s services constituted much more than the ministerial act of filling out a form, the court relied on Florida Bar v. Moreno-Santana. The Florida Supreme Court held that the preparation of immigration forms to change a noncitizen’s immigration status requires legal training, and it enjoined a nonlawyer service provider from preparing such forms and from advertising or representing the ability to perform such services. The Texas court opined that while “the act of recording a client’s responses . . . on [an immigration form] probably does not require legal skill or knowledge, the act of determining whether [the form] should be filed at all does require special legal skills” since, among other things, the filing of certain forms on behalf of an illegal alien not otherwise known to the government may make deportation more likely, and this “requires a careful determination of legal consequences.”

In Oregon State Bar v. Ortiz, the Oregon Court of Appeals affirmed the lower court’s decision enjoining a nonlawyer from practicing law where the nonlawyer did more than fill in the blanks of INS application forms under the direction of the clients. In Ortiz, the nonlawyer advised the clients of the benefits available, how to obtain them, and what forms were to be used. In determining that the nonlawyer had engaged in the practice of law based on the above, the court relied on prior Oregon precedent involving real estate matters holding that the practice of law includes

“the drafting or selection of documents and the giving of advice in regard thereto any time an informed or trained discretion must be exercised in the selection or drafting of a document to meet the needs of the person served. The knowledge of the customer’s needs obviously cannot be had by one who has no knowledge of the relevant law. One must know what questions to ask. Accordingly, any exercise of an intelligent choice, or an

72. TEX. REV. CIV. STAT. ANN. art. 320a-1, § 19(a) (Vernon 1986), repealed by Act of May 21, 1987, ch. 148, § 3.02(a), 1987 Tex. Gen. Laws page no. 611 (“For purposes of this Act, the practice of law embraces the preparation of pleadings and other papers incident to actions of special proceedings and management of the actions and proceedings on behalf of clients before judges in courts as well as services rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined. This definition is not exclusive and does not deprive the judicial branch of the power and authority both under this Act and the adjudicated cases to determine whether other services and acts may constitute the practice of law.”).
73. 322 So. 2d 13 (Fla. 1975).
74. Cortez, 692 S.W.2d at 50.
informed discretion in advising another of his legal rights and duties, will bring the activity within the practice of the [legal] profession."\textsuperscript{76}

As in \textit{Cortez}, the court in \textit{Ortiz} opined that while it may “not require legal skill to fill out the forms, . . . an understanding of the consequences attendant on their completion and filing with the immigration service does require legal skill and judgment.”\textsuperscript{77} Noting the complexity and constant change in immigration law and the potential adverse consequences that are at issue in deciding how to obtain the benefits eligible to an alien, the court found that Ortiz’s activities went “beyond merely filling in the blanks under the direction of a customer” and that he was properly enjoined from “advising clients about what benefits are available, how to obtain those benefits and advising what forms to use.”\textsuperscript{78}

Notably, the court in \textit{Ortiz} considered federal regulations governing who may “represent” others before agencies in immigration proceedings, noting that “representation” was defined broadly to include the preparation of documents on behalf of another.\textsuperscript{79} The court found that although INS (now DHS) regulations permit certain classes of lay people to “represent” others, Ortiz did not so qualify.\textsuperscript{80}

In \textit{Washington v. Flores},\textsuperscript{81} the Washington Court of Appeals convicted a nonlawyer of engaging in the unauthorized practice of law by providing assistance to Spanish-speaking clients in immigration and other matters. Flores expressly or implicitly “held himself out as entitled to practice law,” in part by describing himself as a “paralegal,” and he charged a fee for his services.\textsuperscript{82}

In affirming the conviction, the court specifically rejected Flores’s argument that under federal law he was permitted as a layperson to represent immigrants and that under Washington state law nonlawyer “immigration assistants” may accept compensation for basic clerical duties and may make referrals to attorneys.\textsuperscript{83} As to federal law, the court concluded that Flores did not qualify because under 8 C.F.R. § 292.1(a)(3) only “reputable individuals” who are approved by an immigration official, do not receive remuneration, have a preexisting personal relationship with the immigrant, and are not persons who regularly engage in immigration practice or preparation are permitted to represent noncitizens.\textsuperscript{84} As to state

\textsuperscript{76} Id. at 1070 (quoting Or. State Bar v. Sec. Escrows, Inc., 377 P.2d 334, 339 (Or. 1962)).
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 1071 (internal quotation marks omitted).
\textsuperscript{79} Id. at 1069 & n.1 (citing 8 C.F.R. § 1.1(i), (k), (m) (1985)). The federal regulations are discussed in Part III, \textit{infra}.
\textsuperscript{80} Id. at 1069.
\textsuperscript{82} Id. at *6, *12–14.
\textsuperscript{83} Id. at *9.
\textsuperscript{84} Id. at *9–10.
Finally, in a disciplinary proceeding against a California lawyer, the California Supreme Court affirmed, without opinion, the state bar court's one-hundred page determination finding that, among other things, the respondent (James R. Valinoti) had engaged in numerous acts of neglect of immigration matters and also aided the unauthorized practice of immigration law by nonlawyer notarios from whom he accepted referrals.

At his disciplinary proceeding, Valinoti defended against numerous charges of neglect by asserting that he was only an “appearance attorney” retained for the limited purpose of making court appearances and, accordingly, was not otherwise responsible for out of court preparatory work performed by the nonlawyer immigration providers. The court dismissed Valinoti’s argument that under federal and California law nonlawyer immigration providers were legally permitted to advise aliens on immigration issues, to prepare and file forms, pleadings, and other documents in connection with such matters, and to refer their clients to immigration attorneys like himself for appearances in Immigration Court. The court specifically held that under federal law, the nonattorney immigration services providers were not legally permitted to perform the above services and that by “relying on or permitting the providers to, inter alia, prepare and file immigration applications . . . and other documents, for his clients.”

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85. Id. at *10.
87. In re Valinoti, No. 96-O-08095, 2002 WL 31907316 (Cal. State Bar Ct. Dec. 31, 2002). Valinoti had a high-volume practice representing Mexican nationals seeking political asylum who also used the services of nonlawyer immigration service providers to prepare their applications and other related documents for submission to the INS and Immigration Court. The Spanish-speaking clients initially retained the service providers, who called themselves notarios for assistance in obtaining permanent residency, and generally paid a flat, all-inclusive fee; the clients did not speak English and generally signed the applications without knowing exactly what was written. After the interview stage, the notarios “referred” the client to Valinoti, “who the providers knew would not steal their clients by taking over the clients’ cases . . . . because, had he done so, it would have reduced the number of referrals he would have received from the [notarios] in the future.” Id. at *8. The “referrals” were made by the notarios—on or very shortly before the court appearances—who “walked the hallways outside immigration court courtrooms with the [client] the day of the hearing looking for [Valinoti].” Id. Moreover, Valinoti did not meet with the client to review the case or otherwise “obtain the facts necessary to properly represent the client at the initial hearing.” Id. Valinoti’s fee was set by the “notario” and was paid by the notario or sometimes the client. Valinoti did not maintain his clients’ files. Valinoti often recommended after the first hearing that the client accept voluntary departure. Id.
88. Id. at *3.
89. Id. at *52. As to the question of federal law, the court concluded—on the basis of the interplay of the definitions in 8 C.F.R. § 1.1 and the provisions of 8 C.F.R. § 292.1 as to who may represent an alien, relevant INS General Counsel opinions, and state decisions on unauthorized practice of law in other states including Alfini, Cortez, and Ortiz—that the notarios had engaged in the unauthorized practice of law and that Valinoti aided such unauthorized practice. Id. at *12.
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E. State and Local Statutes Addressing the Unauthorized Practice of Law

Many states have laws like New York’s Judiciary Law section 478, and even some municipalities—such as New York City—have enacted laws that seek to combat the unauthorized practice of law. In some cases, such laws are specifically directed at the unauthorized practice of immigration law, especially by the travel agents, notarios, and other immigration consultants who often prey on immigrant populations.

For example, through the implementation of a Consumer Affairs ordinance, New York City has sought to regulate nonattorneys who provide immigration services. The ordinance governs nonattorneys who provide any form of assistance with immigration matters for compensation. While permitting “immigration assistance services,” the ordinance prohibits these nonattorneys from providing legal advice. Notably, what constitutes immigration assistance as opposed to legal advice is not defined. Rather, the ordinance concentrates on prohibiting certain conduct, such as the provider stating or implying that he is able to obtain special favors, threatening to report the customer to immigration authorities, failing to provide the customer with copies of all documents, or refusing to return original documents. The ordinance seeks to preclude these providers from using language that may incorrectly imply that they are attorneys or otherwise authorized to provide immigration representation (e.g., as an Accredited Representative of the Board of Immigration Appeals).

Under this ordinance, immigration assistance services providers must execute a written agreement with their customers and provide each customer with a copy. The contract must itemize all of the services to be provided as well as fees and expenses, and provide the customer with three days to cancel the contract. Further, each provider must post within his or her office a sign clearly stating that “the individual providing assistance is not a licensed attorney and may not give legal advice.” All advertisements must contain similar language.

New York State has a similar law, containing almost identical provisions regulating immigration assistance providers. A written contract and surety is required, as well as the posting of signs and the inclusion in all advertisements of language clearly stating that the provider is not an attorney and cannot give legal advice. Similarly, what constitutes legal

91. Id. § 20-771.
92. Id.
93. Id.
94. Id. § 20-772.
95. Id. § 20-773.
96. Id. § 20-774.
98. Id.
advice is not defined. Violation of any provision is a class A misdemeanor, and courts may also impose restitution or reparation to victims.99

With the failure of Congress to enact any comprehensive immigration reform, many states across the nation have stepped into the breach in recent years and have enacted their own laws aimed at combating illegal immigration, and some of these laws contain provisions directed at nonlawyers who seek to assist foreign nationals in applying for immigration benefits such as green cards and asylum. For example, the State of Georgia enacted the Registration of Immigration Assistance Act in 2008, with the goal of “establish[ing] and enforc[ing] standards of ethics in the profession of immigration assistance by private individuals who are not” licensed attorneys.100 This Act prohibits the provision of any “immigration assistance service” that requires legal judgment, analysis, or advice101 by any person who is not a licensed attorney, under the direct supervision of a licensed attorney, or an employee of a nonprofit or similar organization recognized by the Board of Immigration Appeals.102 Persons not falling into these categories are required to post signs stating that they are not attorneys and may not provide legal advice or accept fees for legal advice.103

Specifically, section 43-20A of the Georgia Code provides that a nonlawyer who provides or offers to provide immigration assistance service may perform only the following services:

1. (1) completing a government agency form, requested by the customer and appropriate to the customer’s needs only if the completion of that form does not involve a legal judgment for that particular matter;104

2. “[t]ranscribing responses to a government agency form which is related to an immigration matter” but not advising a customer as to his or her answers on those forms;105

3. “translating information on forms to a [customer] and translating the [customer’s] answers to questions posed on [those] forms”;106

4. “[s]ecuring for the [customer] supporting documents currently in existence, such as birth and marriage certificates, which may be needed to be submitted with government agency forms”;107

5. “[n]otarizing signatures on government agency forms, [if] the person performing the service is a notary public commissioned in

99. Id. § 460-i.
101. Id. § 43-20A-2.
102. Id. § 43-20A-6(a).
103. Id. § 43-20A-6(b).
104. Id. § 43-20A-5(a).
105. Id.
106. Id.
107. Id.
the State of Georgia and is lawfully present in the United States";108

(6) “[p]reparing or arranging for the preparation of photographs and fingerprints”;109

(7) “[a]rranging for the performance of medical testing (including X-rays and AIDS tests) and obtaining reports of such test results”;110

(8) “[p]erforming such other services that the [office of the] Secretary of State determines by rule may be appropriately performed by such [persons].”111

The Georgia law has served as a model for a similar law in South Carolina.112 Other key states (i.e., states with high rates of illegal immigration) that have enacted laws regulating the activities of nonlawyer immigration consultants include, but are not limited to, Arizona,113 California,114 Colorado,115 Illinois,116 New Jersey,117 and Pennsylvania.118

III. FEDERAL REGULATIONS GOVERNING THE REPRESENTATION OF FOREIGN NATIONALS IN IMMIGRATION MATTERS

Federal regulations specify who may represent foreign nationals in immigration proceedings and the criteria they must meet. In addition, the regulations set out rules and procedures concerning standards of representation and professional conduct for practitioners who appear before DHS and EOIR.

108. Id.
109. Id.
110. Id.
111. Id.
A. Who Can Represent Foreign Nationals in Immigration Matters?

Rules set out in Title 8 of the Code of Federal Regulations provide that only the following may represent foreign nationals in immigration proceedings.

1. Attorneys, Recognized Organizations, and Accredited Representatives
   
a. Attorneys

Foreign nationals may hire a licensed attorney who may charge or accept a fee for representing them in immigration proceedings. The attorney must be eligible to practice law in and “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.”

b. Recognized Organizations

Foreign nationals may obtain representation from a nonprofit, religious, charitable, social service, or similar organization that is established in the United States and is officially recognized by the BIA in the EOIR. To be recognized by the BIA, the organization must have established that it has adequate knowledge and experience to provide immigration services.
and that it charges or accepts only nominal fees for those services. An organization’s recognition does not expire, but the BIA may withdraw recognition at any time if the organization fails to meet the minimal qualifications required by regulation.  

\textit{c. Accredited Representatives}

Foreign nationals may also be represented by an accredited representative who is affiliated with a recognized organization (i.e., an organization that has been recognized by the BIA as specified above). Accredited representatives may charge or accept a nominal fee set by the organization through which they gained their accreditation. The accredited representative must be of good moral character and accredited by the BIA through an application submitted by their recognized organization. Application procedures for accreditation of representatives are similar to the procedures for recognition of organizations. The application must be a written statement or résumé that fully states the nature and extent of the proposed representative’s experience and knowledge of immigration and naturalization law and procedure, and that explains the type of work the representative will be doing. It should also specify whether full or partial accreditation is requested. Full accreditation allows the representative to represent the foreign national before DHS, the Immigration Courts, and the BIA. Partial accreditation allows the representative to represent the person only before DHS. The BIA’s accreditation of a representative expires every three years, but can be renewed through an application submitted by the representative’s recognized organization.

\textit{2. Qualified Representatives}

Immigrants may choose to be represented by a qualified representative who will work without compensation and who is familiar with the provisions of immigration law and with the rules of practice in Immigration Court. Qualified representatives may be any of the following persons who meet the conditions specified in the regulations:

\begin{itemize}
  \item \textit{Representatives who are officially accredited by the BIA appear on the roster listing maintained by the BIA and available on the EOIR website. See supra note 121. The Recognition and Accreditation Program Coordinator maintains alphabetical rosters of all recognized organizations and their accredited representatives. These rosters are available on EOIR’s website. See DEP’T OF JUSTICE, RECOGNIZED ORGANIZATIONS AND ACCREDITED REPRESENTATIVES ROSTER (2009), available at http://www.usdoj.gov/eoir/statspub/recognitionaccreditationroster.pdf (recognized organizations); DEPARTMENT OF JUSTICE, ACCREDITED REPRESENTATIVES ROSTER (2009), available at http://www.usdoj.gov/eoir/statspub/accreditedrep roster.pdf (accredited representatives).
  
  \item \textit{8 C.F.R. §§ 292.2(d), 1292.2(d).
  
  \item \textit{Id. §§ 292.1, 1292.1.}
\end{itemize}
• “A law student who is enrolled in an accredited U.S. law school, or a graduate of an accredited U.S. law school who is not yet admitted to the bar,”126
• Reputable individuals of good moral character who have a personal or professional relationship with the represented alien (e.g., relative, neighbor, clergy, co-worker, or friend),127 or
• An “accredited official” of the government to which the represented immigrant owes allegiance (e.g., a consular officer).128

3. Free Legal Services Providers

EOIR’s Office of the Chief Immigration Judge maintains a current list of free legal services providers who meet the qualifications specified in the regulations.129 They include the following:

• Recognized organizations;
• Organizations not recognized;130
• Bar associations; and
• Attorneys.131

The list of free legal services providers is provided to persons who are in immigration proceedings.132

Under the definitions in 8 C.F.R. §§ 1.1 and 1001.1, the term “representation” before DHS and EOIR [under 8 C.F.R. §§ 292.1 and 1292.1] “includes practice and preparation.”133 “Practice” is defined, in pertinent part, as “the act or acts of any person appearing . . . through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with [DHS, or any

126. Id. § 1292.1(a)(2). The language requiring that a law student be enrolled at a U.S. law school and the language requiring that a law graduate hail from an accredited U.S. law school do not appear in DHS’s equivalent regulation at 8 C.F.R. § 292.1(a)(2). See Part III.B, infra, for a discussion of the new EOIR rule that amended the agency’s regulations.
127. Id. §§ 292.1(a)(3), 1292.1(a)(3).
128. Id. §§ 292.1(a)(5), 1292.1(a)(5).
129. 8 C.F.R. § 1003.61.
130. While these organizations may not be on the list of EOIR—“recognized” immigration service providers as set out in 8 C.F.R. § 1292.2, they must still demonstrate that they provide free legal services to indigent aliens and that they have an attorney on staff. See 8 C.F.R. § 1003.62(b).
131. Id. § 1003.62.
133. 8 C.F.R. §§ 1.1(m), 1001.1(m).
immigration judge], or the Board.”134 The term “preparation,” as used in
the definition of “practice” is defined, in pertinent part, as
the study of the facts of a case and the applicable laws, coupled with the
giving of advice and auxiliary activities, including the incidental
preparation of papers, but does not include the lawful functions of a
notary public or service consisting solely of assistance in the completion
of blank spaces on printed Service forms by one whose remuneration, if
any, is nominal.135

While what constitutes a nominal fee is not defined in the regulations,
under case law the term “nominal” as used in connection with fees charged
by accredited organizations has been held to mean “a very small quantity or
something existing in name only as distinguished from something real or
actual.”136

B. New EOIR Rule

In December 2008, the EOIR published a final rule in the Federal
Register that makes changes to the rules and procedures concerning
standards of representation and professional conduct for practitioners who
appear before EOIR, which includes the Immigration Courts and the
BIA.137 This rule amends only the EOIR regulations governing
representation and appearances, and professional conduct under chapter V
of 8 C.F.R. The rule does not make any changes to the DHS regulations
governing representation and appearances or professional conduct
(discussed in Part III.A, supra).138

EOIR’s regulations already set forth who may represent individuals in
proceedings before EOIR139 and also set forth the rules and procedures for
imposing disciplinary sanctions against practitioners who engage in
“criminal, unethical, or unprofessional conduct or in frivolous behavior”
before EOIR.140 The final rule increases the number of grounds for
discipline, improves the clarity and uniformity of the existing rules, and
incorporates miscellaneous technical and procedural changes. The changes
are based upon the Attorney General’s initiative for improving the
adjudicatory processes for the immigration judges and the Board, as well as
EOIR’s operational experience in administering the disciplinary program
since the current process was established in 2000.141

134. Id. §§ 1.1(i), 1001.1(i). The EOIR provision updated the language that still appears
in the DHS provision referring to the “Service” instead of DHS.
135. Id. §§ 1.1(k), 1001.1(k) (emphasis added).
137. 73 Fed. Reg. 76,914 (Dec. 18, 2008) (to be codified at 8 C.F.R. pts. 1001, 1003,
1292) (effective Jan. 20, 2009).
138. The discussion below is taken from the Supplementary Information to the final rule.
139. Supra note 119.
141. 73 Fed. Reg. 76,914.
The regulations also already allowed EOIR to sanction practitioners, including attorneys and certain nonattorneys who are permitted to represent individuals in immigration proceedings (representatives), when discipline is in the public interest; namely, when a practitioner has “engaged in criminal, unethical, or unprofessional conduct or in frivolous behavior.” Sanctions may include expulsion or suspension from practice before EOIR and DHS and public or private censure.\(^{142}\) As EOIR mentioned in the Supplementary Information to the final rule, the agency “frequently suspends or expels practitioners who are subject to a final or interim order of disbarment or suspension by their state bar regulatory authorities—this is known as ‘reciprocal’ discipline.”\(^{143}\)

The Attorney General reviewed EOIR’s responsibilities and programs, and concluded that,

among other things, the immigration judges should have the tools necessary to control their courtrooms and protect the adjudicatory system from fraud and abuse. Accordingly, the Attorney General determined that the existing regulations, including those at [8 CFR §§ 1003.101–109], should be amended to provide for additional sanction authority for false statements, frivolous behavior, and other gross misconduct. Additionally, the Attorney General found that the Board should have the ability to effectively sanction litigants and practitioners for defined categories of gross misconduct.

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In part, the rule responds to the Attorney General’s findings and conclusions by adding substantive grounds of misconduct modeled on the American Bar Association Model Rules of Professional Conduct (2006) (ABA Model Rules) that will subject practitioners to sanctions if they violate such standards and fail to provide adequate professional representation for their clients. Specifically, the grounds for sanctionable misconduct have been revised to include language that is similar, and sometimes identical, to the language found in the ABA Model Rules, as such disciplinary standards are widely known and accepted within the legal profession. Although EOIR does not seek to supplant the disciplinary functions of the various state bars, this rule aims to strengthen the existing rules in light of the apparent gaps in the current regulation. In addition, these revisions will make the EOIR professional conduct requirements more consistent with the ethical standards applicable in most states.\(^{144}\)

IV. WHAT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL?

While it may be difficult to describe with clarity what constitutes ineffective assistance of counsel in any particular matter, it is probably fair to say that most judges know it when they see it. Whether immigrants, on

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\(^{143}\) 73 Fed. Reg. 76,915 (discussing 8 C.F.R. §§ 1003.102(e), .103).

\(^{144}\) Id.
the other hand—who are unfamiliar with our legal system and, in particular, with the laws and regulations governing immigration—are in a position to recognize ineffective assistance when that is all their counsel provides is another matter. The EOIR regulations, however, set out a number of grounds for the imposition of disciplinary sanctions against practitioners that could be regarded as a road map to poor lawyering, including (but not limited to) the following:

- “Repeatedly failing to appear for pre-hearing conferences, scheduled hearings, or case-related meetings;”145
- “Engaging in conduct that is prejudicial to the administration of justice or [that] undermines the integrity of the adjudicative process;”146
- “Fail[ing] to provide competent representation to a client” (i.e., representation that utilizes “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation);”147
- “Fail[ing] to abide by a client’s decisions concerning the objectives of representation, and fail[ing] to consult with the client;”148
- “Fail[ing] to act with reasonable diligence and promptness in representing a client;”149
- “Fail[ing] to maintain communication with the client throughout the duration of the client-practitioner relationship;”150
- “Repeatedly fil[ing] notices, motions, briefs, or claims that reflect little or no attention to the specific factual or legal issues applicable to a client’s case, but rather rely on boilerplate language indicative of a substantial failure to competently and diligently represent the client.”151

Whether any of these acts, or others, rise to the level of ineffective assistance of counsel is necessarily judged on a case-by-case basis, taking all facts and circumstances into account. In some cases, ineffective assistance is not deliberate, but is the result of the well-intentioned but inexperienced attorney who takes on more than he or she is trained to handle.

145. 8 C.F.R. § 1003.102(l).
146. Id. § 1003.102(n).
147. Id. § 1003.102(o).
148. Id. § 1003.102(p).
149. Id. § 1003.102(q).
150. Id. § 1003.102(r).
151. Id. § 1003.102(u).
Take, for example, the story of Maria, which illustrates how immigrants often suffer from inadequate, but not ill-intentioned, representation. Her saga also emphasizes the complexities of the immigration laws and the need for experienced representation.

Maria came to the United States in the late 1980s from Mexico. While working at a factory in Manhattan, she met the man who would ultimately become her husband, a lawful permanent resident, also of Mexican descent. They moved in together, married, and had two children.

During their twelve years together, Maria’s husband subjected her to physical and verbal abuse. She was punched, grabbed, hit, and threatened. She was isolated, publicly humiliated, and verbally assaulted. Her husband drank heavily and often used Maria’s immigration status as a means to control and oppress her. Maria sank into a deep depression and lost all self-esteem. She describes the 1990s as a total blur. Her primary goal was to protect her children.

It was not until May 2002 that she mustered the courage to leave her abusive husband and seek refuge for herself and her two children at a domestic violence shelter. She ultimately obtained legal assistance with her case and her well-intentioned attorneys successfully filed an I-360 self-petition under the Violence Against Women Act (VAWA) that, once approved, entitled her to apply for permanent residence. They then proceeded to file an application for adjustment of status to permanent residence on Maria’s behalf. This should have been the final step in her process to legalize her status.

Unfortunately, her lawyers did not perform the proper due diligence in making Maria’s application. For example, although her lawyers researched the issue, they never reached a conclusion as to whether or not a prior order of deportation had ever been filed against her. In fact, Maria was eligible to obtain her green card regardless of whether there was such an order, but the manner in which she needed to apply for permanent residence differed based on this fact. Because her adjustment application was filed with the wrong entity, Maria was forced to undergo months of humiliation and hardship at the hands of ICE.

Maria submitted her application to USCIS (which would have been the correct procedure had she not been subject to a deportation order) and later appeared for her adjustment of status interview. It turns out, however, that in the mid-1990s, during the height of her domestic abuse, Maria’s workplace had been raided by ICE officials. She was fingerprinted and processed at that time. Unbeknownst to her (and to her attorneys) ICE subsequently filed a deportation order against her. Still, it would have behooved her attorneys to simply call the Immigration Court’s hotline to

152. This account was conveyed by Elizabeth Reichard, Esq., who represented Maria in Immigration Court. See Letter from Elizabeth T. Reichard, Esq., 2008–09 Fragomen Fellow, N.Y. City Bar Justice Ctr., to author (Sept. 21, 2009) (on file with author).
check. Had they known about this simple procedure, Maria could have avoided ICE intervention and adjusted her status more easily in court.

Instead, she was fed to the wolves. When Maria appeared for her adjustment interview with USCIS, she was met by ICE officials who arrested her and sought her detention. She pled for herself, arguing that she had two minor U.S. citizen children for whom she cared exclusively. She was also five months pregnant and barely making ends meet as a home health aide. ICE officials showed her some mercy and placed her into an ankle bracelet monitoring program rather than in a detention facility. Still, hardship ensued. Maria had to report to ICE each week. This required her to travel a great distance and take time off from work. ICE also made weekly, surprise visits to her home between eleven o’clock at night and six o’clock in the morning. This terrified her children, who could not understand why their mother was wearing a large apparatus on her ankle and why she was constantly being visited by government officers.

Through new counsel, Maria was able to obtain green-card status through a proceeding in Immigration Court. However, because the application was improperly filed at the outset, this single mother was forced to pay approximately $1000 in additional filing fees. She spent the duration of her pregnancy with swollen ankles in an ankle bracelet. This made her look like a criminal in her neighborhood. It also added additional months of stress to her application process.

Do her attorneys’ actions, or lack thereof, rise to the level of ineffective assistance of counsel? Since Maria ultimately obtained the relief—permanent residence—that she sought, the answer may be no. Still, the hardship she and her children suffered was brought on by the dearth of qualified legal counsel available to noncitizens in this country.

A. Case Law on Ineffective Assistance of Counsel

The BIA’s decision in Matter of Lozada,153 which was later affirmed by the U.S. Court of Appeals for the First Circuit, provides a procedural framework for a claim of ineffective assistance of counsel in immigration proceedings. In Matter of Compean154—a decision issued on January 7, 2009, just two weeks before the Bush Administration left office—then Attorney General (AG) Michael Mukasey (who had specifically requested that the BIA refer the Compean and related decisions to him for review) held that people in removal proceedings have no constitutionally protected right to counsel and therefore no right to have their cases reopened when counsel was ineffective. Compean thus effectively overruled Lozada (and a

subsequent administrative decision, *In re Assaad*¹⁵⁵ and, as articulated by the American Immigration Law Foundation, “unraveled decades of legal precedent guaranteeing due process to people facing life-changing consequences—namely, deportation.”¹⁵⁶ However, on June 3, 2009, Attorney General Eric Holder withdrew the previous Attorney General’s order and, pending the outcome of a rulemaking process, directed the BIA and the immigration judges to continue to apply the previously established standards for reviewing motions to reopen based on claims of ineffective assistance of counsel.¹⁵⁷

In *Lozada* the Board assumed, consistent with the earlier rulings of two federal courts of appeals, that a foreign national in deportation proceedings may have a constitutional right to effective assistance of counsel grounded in the Due Process Clause of the Fifth Amendment.¹⁵⁸ The Board then went on to establish three threshold requirements that a person must satisfy to reopen deportation proceedings based on ineffective assistance of counsel.

First, the Board held that a foreign national seeking to reopen deportation proceedings based on a claim of ineffective assistance of counsel must submit an affidavit detailing the agreement entered into with counsel as it pertained to the actions to be taken and the representations counsel made or did not make in this regard.¹⁵⁹ Second, the foreign national must inform counsel of the allegations of ineffective assistance and give him or her the opportunity to respond.¹⁶⁰ Finally, the person must file a complaint with the appropriate disciplinary authorities, such as a state bar, with respect to any violation of counsel’s ethical or legal responsibilities, or adequately explain why no filing was made.¹⁶¹ In addition to these requirements, a person alleging ineffective assistance of counsel in an immigration matter must also show that he or she was prejudiced by the actions or inactions of counsel.¹⁶² The Board noted that such requirements are necessary to provide a basis for evaluating the many claims presented, to deter baseless allegations, and to notify attorneys of the standards for representing foreign nationals in immigration proceedings.¹⁶³

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¹⁵⁵. 23 I. & N. Dec. 553 (B.I.A. 2003) (finding that *Lozada* was “in accord with controlling precedent in most circuits,” which have consistently recognized a due process right to effective assistance of counsel).


¹⁵⁸. *Lozada*, 19 I. & N. Dec. at 638 (holding that “[a]ny right a respondent in deportation proceedings may have to counsel is grounded in the fifth amendment guarantee of due process” (citing Magallanes-Damian v. INS, 783 F.2d 931 (9th Cir. 1986); Paul v. INS, 521 F.2d 194 (5th Cir. 1975))).


¹⁶⁰. *Id.*

¹⁶¹. *Id.*

¹⁶². *Id.*

¹⁶³. *Id.* at 639–40.
The Board revisited these procedures in *In re Rivera*,\(^{164}\) where the Board set forth further policy reasons for the “complaint” requirement of *Lozada*. The Board noted that such a filing increases its confidence in the validity of the particular claim, reduces the likelihood that an evidentiary hearing will be needed, and serves the Board’s long-term interests in monitoring the representation of noncitizens by the immigration bar.\(^{165}\) The Board further determined that the bar-complaint requirement acts as a protection against collusion between counsel and client to achieve delay in proceedings.

As the Board later observed in *In re Assaad*, *Lozada* provided a measure of protection for aliens who are prejudiced by incompetent counsel. As a removal proceeding has the potential to deprive a respondent of the right to stay in the United States, which can include separation from family and return to possible persecution, the procedures in that proceeding must be fundamentally fair. Moreover . . . the courts have consistently recognized that ineffective counsel may deprive an alien of a fair hearing.\(^{166}\)

While the need to file a complaint with the bar in order to pursue an ineffective assistance of counsel claim often means that lawyers are subject to disciplinary investigations for what amounted to strategy and tactics rather than ineffective assistance, *Lozada* at least recognizes that, while the Sixth Amendment right to counsel may not apply in deportation proceedings since they are considered civil in nature, persons in deportation proceedings do have some right to counsel based on Fifth Amendment due process guarantees.

**B. State and Local Statutes and Rules Regarding Ineffective Assistance of Counsel**

While immigration is governed by federal law, attorneys are licensed to practice law at the state level, and attorney discipline is handled on a state-by-state basis.\(^{167}\) As such, attorney complaints of ineffective assistance of counsel must be reported to the appropriate disciplinary committee in the state where the offending attorney is licensed. Attorneys may be disciplined for an array of malfeasances including unreasonable fees, failure to safe-keep client property, incompetence, and lack of diligence or communication.\(^{168}\) State disciplinary committees typically have the power to privately sanction attorneys, publicly censure attorneys, suspend attorney

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165. *Id.* at 605.
168. See, *e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.1–1.5, 1.15 (1996).
licenses temporarily, and disbar attorneys permanently. They accept complaints from individuals who believe they are the victims of attorney malpractice and investigate their claims’ veracity, disciplining as necessary.

While each state has its own attorney discipline system and corresponding disciplinary rules, the rules adopted typically require that attorneys provide competent representation utilizing “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Attorneys must also exercise diligence, including promptness in representing a client. State ethics rules further require that lawyers communicate effectively and promptly with clients, consult reasonably with them, and keep clients updated on case status. Fees must also be reasonable.

Despite state bars having both the authority and the power to discipline attorneys who fail to effectively assist clients with immigration matters, by all accounts there are practitioners who repeatedly fail to assist immigrants effectively. While it should also be noted that there are many highly capable and extremely effective members of the immigration bar, it remains true that many immigrants experience ineffective assistance of counsel. For example, in *Aris v. Mukasey*, the U.S. Court of Appeals for the Second Circuit concluded that a lawyer provided ineffective assistance of counsel where he failed to inform his client of an immigration hearing and the subsequent deportation order entered in absentia. In its decision, the court noted that “[w]ith disturbing frequency, this [c]ourt encounters evidence of ineffective representation by attorneys retained by immigrants seeking legal status in this country.” There exist many such stories.

V. POSSIBLE SOLUTIONS

The problems described in this report—ranging from well-intentioned but inadequate legal representation, to clearly ineffective assistance of counsel, to egregious and predatory fraud—are large and multifaceted. The shortage of qualified immigration counsel and the spotty services available through community organizations, legal services organizations, and pro bono attorneys, leave immigrants without ready access to basic due process.
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when faced with removal, and inadequate legal assistance when seeking affirmatively to obtain lawful immigration status. The solution to this problem must, likewise, be multifaceted.

A. Make the Unauthorized Practice of Law a Felony

First, we recommend making the unauthorized practice of law a felony at both the state and federal level. In addition, such laws should include language defining what constitutes the practice of law.

At the state level, most states that have laws regarding the unauthorized practice of law make violation of such statutes a misdemeanor. For example, in New York, “[p]racticing or appearing as attorney-at-law without being admitted and registered”178 is a class A misdemeanor,179 which is punishable by up to one year in jail.180 As a practical matter, however, persons found guilty of class A misdemeanors in New York rarely serve any time in jail. Moreover, the two-year statute of limitations for class A misdemeanors181 serves as a significant barrier to prosecution, since two years is often an insufficient period of time for prosecutors to investigate and prosecute. For example, many of the illicit businesses run by notarios, travel agents, and immigration consultants often close up shop and move to a different location and/or use a different name to evade detection. The two-year statute of limitations is also insufficient because the two-year time period generally starts to run at the commission of the offense. However, given the lengthy processing times by federal immigration agencies, many victims do not realize that they have been scammed until many months (or sometimes years) have passed. In addition, most victims—due to fear of deportation or of law enforcement in general—will not report the crime right away, if at all. Even when victims do make timely reports, they often do not even have the complete name of the person who cheated them, which makes identifying and locating the person a difficult and time-consuming process.

Ideally, then, the unauthorized practice of law in New York should be made a class E felony, which is punishable by up to four years in prison182 and carries a five-year statute of limitations.183 The law should also allow for charges to be enhanced to a class D felony—which is punishable by up to seven years in prison184—in the case of those who engage in the unauthorized practice of law with the intent to defraud more than one person. This provision could be used to prosecute ongoing businesses, i.e., full-fledged immigration consultant ventures that process large numbers of bogus or unauthorized immigration applications. There are already some

178. N.Y. JUD. LAW § 478 (McKinney 2005).
179. Id. § 485.
180. N.Y. PENAL LAW § 70.15(1) (McKinney 2009).
181. N.Y. CRIM. PROC. LAW § 30.10(2)(c) (McKinney 2003).
182. N.Y. PENAL LAW § 70.00(2)(e).
183. N.Y. CRIM. PROC. LAW § 30.10(2)(b).
184. N.Y. PENAL LAW § 70.00(2)(d).
states, notably Arizona\(^{185}\) and South Carolina,\(^{186}\) that have made the unauthorized practice of law a felony, so models for such laws exist.

In addition, state laws prohibiting the unauthorized practice of law should specifically define what constitutes the practice of law. In New York, there is case law addressing the unauthorized practice of immigration law, but it does not specifically define what actually constitutes the practice of law within the immigration context, and, as discussed earlier, the leading case dates from 1939 and does not account for the complexity of immigration law today.\(^{187}\) What is really needed is a statute that not only includes a general definition of what constitutes the practice of law, but that includes a specific provision clarifying that the completion of immigration forms constitutes the practice of law. Consideration should also be given to enacting a state law that specifically prohibits the provision of immigration-related services for compensation unless authorized (i.e., by attorneys or authorized representatives), clearly defines what constitutes immigration-related services (like the Georgia law discussed earlier),\(^{188}\) and establishes a regime for both civil enforcement and criminal liability. In New York City, the Consumer Affairs ordinance discussed earlier seeks to accomplish this objective\(^{189}\) but falls short because, while it sets out what an “immigration assistance services” provider cannot do, it fails to define clearly what such a provider can do. New York could also be encouraged to establish an agency specifically charged with regulating the unauthorized practice of law. Such an agency would be empowered to seek stipulations or injunctions as to the nonlawyer, which could aid in eventual criminal prosecution.

Making the unauthorized practice of law in any jurisdiction a federal crime would also help combat the problem of notarios and immigration consultants, as well as people who purport to “practice” other types of law, and could be crafted in such a way so as not to usurp the authority of state bars that actually license attorneys in individual states. A specific law should also be enacted at the federal level to prosecute fraudulent immigration consultants (both attorneys and nonattorneys); federal jurisdiction is needed because the problem is nationwide, and bad actors are often able to operate out of the reach of the state bars precisely because they are exploiting federal immigration laws. One reason why incompetent attorneys practicing immigration law often evade discipline is that, because immigration law is federal law, most states (including New York) do not require admission to the state bar for attorneys who limit their practice to

\(^{188}\) See supra notes 100–11 and accompanying text.
immigration law.\footnote{See, e.g., Bruce A. Hake, \textit{Counterpoint: State Bar Admission Is Not Required To Practice Immigration Law in a State}, 12 AILA MONTHLY MAILING 685, 685 (1993).} Consideration should therefore also be given to pressuring state bar authorities to enact a rule providing that an attorney who maintains an office for the practice of immigration law within the state must be admitted to practice in the state, so that state bar disciplinary committees would then have the authority to discipline these attorneys.

B. Reform Existing Laws That Allow Nonattorneys To Represent Immigrants

State and local laws that permit nonattorneys to provide immigration services (such as New York City’s Consumer Affairs Law)\footnote{Supra notes 90–96 and accompanying text.} do immigrants a disservice, since they veil unaccredited, nonattorneys with legitimacy. Indeed, the very phrase used in the New York City law (and in many state laws) to describe nonlawyers (i.e., providers of “immigration assistance services”)\footnote{N.Y., N.Y., ADMIN. CODE § 20-770.} implies that the providers are authorized to do more than act as scriveners to complete a form on an immigrant’s behalf and, instead, are permitted to offer services that affect the legal rights of immigrants, which would seem to cross the line into the practice of law.

At the same time, we must recognize that overturning such laws is no easy task, and so long as they exist, efforts should be made to give them actual force. In New York, this should involve bringing big players to the table (the Mayor’s office, leadership from the local chapter of the American Immigration Lawyers Association (AILA) and the City Bar Association, politicians, etc.) to put pressure on Consumer Affairs, the Attorney General, the District Attorney, and EOIR to enforce the law and go after violators.

The New York Attorney General’s office has, in fact, recently made the investigation of immigration fraud a priority. In May 2009, Attorney General Andrew M. Cuomo announced that his office had issued more than fifty subpoenas to organizations and individuals across the New York City area as part of his sweeping investigation into immigration fraud. The investigation focuses on allegations that immigrants and their families are being targeted for fraudulent and unauthorized immigration-related services and, in some instances, with false promises of U.S. legal permanent residency and/or citizenship. The individuals and organizations under investigation allegedly hold themselves out as “legitimate immigration service providers and offer services they are not authorized to perform.”\footnote{See News Release, Office of the Att’y Gen., Cuomo Launches Sweeping Investigation into Immigration Fraud Across the New York City Area (May 28, 2009), http://www.ag.ny.gov/media_center/2009/may/may28a_09.html.} The May 2009 announcement came on the heels of a lawsuit brought earlier that month by the Attorney General’s office against a Queens businesswoman who orchestrated an immigration scam that defrauded more than a dozen immigrants out of tens of thousands of dollars. In the lawsuit,
the Attorney General alleged that the woman “charged her victims up to $15,000 in exchange for help in securing permanent residence,” but that “her victims received none of the legal documentation they were promised.”

Disturbingly, the New York City Consumer Affairs Law regulating activities by providers of “immigration assistance services” exempts nonprofit organizations that are not BIA-accredited from its purview inadvertently creating a dangerous loophole allowing many such entities to persist in performing bad, even fraudulent, work on behalf of immigrants. Moreover, many so-called nonprofit organizations that are not BIA-accredited, but are providing immigration services, are in fact vastly profitable enterprises that abuse their tax-exempt, nonprofit status in part as a way of gaining credibility in immigrant communities.

At a minimum, local laws regarding the provision of immigration assistance services should limit who can provide such services to (a) an attorney licensed in any state who is eligible to practice law; (b) someone working under the supervision of an attorney, such as a law student, paralegal, or clerk; and (c) nonprofit, religious, charitable, social service, or similar organizations that have gained appropriate accreditation with DHS and/or the EOIR, charge nominal fees, and have agreements with an experienced practicing lawyer, though such mentor need not be on staff. The latter requirement, for example, would aid in the prosecution of nonprofits that are not accredited but manage to operate via agreements with attorneys who sign applications or file notices of appearance but do not actually perform the real legal work required to prepare the paperwork that is filed on an immigrant’s behalf.

Efforts should also be made to encourage local district attorneys nationwide to create programs modeled on the New York County District Attorney’s Office’s Immigrant Affairs Program, and to encourage prosecutors to focus on unsavory partnerships between unaccredited service providers and attorneys. The Immigrant Affairs Program investigates

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195. N.Y., N.Y., ADMIN. CODE § 20-770(b)(2).

196. The San Francisco-based Immigrant Legal Resource Center produced a manual in March 2000, Immigration Consultant Fraud: Laws and Resources, which is meant to “assist district attorneys, U.S. Attorneys, and others in prosecuting persons who offer bogus services to immigrants with the promise of obtaining immigration benefits.” Although somewhat out of date, the manual provides a clear overview of the extent of the problem and a useful model—based on existing California law—of how other states could proceed to fight immigration fraud in their jurisdictions. See KATHERINE BRADY, IMMIGRATION CONSULTANT FRAUD: LAWS AND RESOURCES (2000), available at http://www.ilrc.org/anti-
and prosecutes a variety of crimes committed against immigrants, including the unauthorized practice of law by nonattorneys and other scams perpetrated by both attorneys and nonattorneys. For example, in early August 2009, New York County District Attorney Robert M. Morgenthau announced the indictment and arrest of two individuals for illegally practicing law by operating a fraudulent immigration consulting business in Chinatown. The indictment marked the first criminal enforcement of New York City’s Immigration Assistance Services Law. The defendants were “indicted on charges of grand larceny, scheme to defraud, practicing or appearing as an attorney-at-law without being admitted and registered, and violating the Immigration Assistance Services Law.”

As for the EOIR/DHS accreditation process for nonattorneys, we recommend changes that include requiring attorney supervision of all nonlawyers who represent people in immigration matters; implementation of an ongoing training component, modeled on state continuing legal education (CLE) requirements, for nonlawyer representatives to retain their accreditation; and addition of specific language to the regulations that defines what a “nominal fee” is. Our recommendation on the latter point is that accredited organizations should be able to cover administrative and labor costs so that they can stay afloat, but they should not be for-profit ventures.

C. Educate Immigrants About the Importance of Securing Qualified Legal Counsel

Local authorities and bar groups should partner in creating public education campaigns to educate immigrants about who can provide immigration representation services, how to report illegal activities, and where to go for proper legal representation. Specifically, efforts should be made to build public awareness in immigrant communities as to why it is important to use only a licensed attorney in immigration matters. Efforts should also be made to combat the widespread myth that attorneys necessarily cost more than unlicensed notarios or immigration consultants, and to clarify that in the United States, notaries are not attorneys and are not competent or authorized to provide legal advice.

It is equally important to communicate to immigrants that the licensing of attorneys gives clients certain protections that are not available when relying on nonattorneys, including (1) background and character checks performed by the state licensing authority; (2) the existence of lawyers’ funds that are often available to compensate defrauded clients; and (3) a disciplinary system to sanction attorneys who provide ineffective assistance or commit a crime.

fraud/pdf/District_Attorney_Manual.pdf; see also ABA, Laws and Regulations, supra note 38.

In many cases, however, education of immigrants must commence on a more basic level. Given that many immigrants are uneducated, lack fluency in English, or simply come from vastly different cultures, local bar associations or chambers of commerce could be encouraged to offer basic training to immigrants in how to conduct a business transaction. For example, what types of questions should one ask during an initial consultation with an attorney? How can one verify if a person holding him- or herself out as an attorney really is licensed to practice law? What is a reasonable consultation fee? Just communicating, for example, that fees should not normally be paid in cash, that one has a right to copies of all documents prepared or filed on one’s behalf, and that in hiring an attorney one has the right to ask questions (the attorney is essentially the client’s employee, after all), could go a long way in many immigrant communities.

Local bar associations seeking to combat the unauthorized practice of law should also be encouraged to look for a well-documented, egregious, and sympathetic case of immigration fraud—such as United States v. Maximo—and publicize its details far and wide so that the public is made aware that the problem exists.

D. Encourage Lawyers To Report the Unauthorized Practice of Law

The immigration bar in most cities is small enough that it is often the case that licensed immigration attorneys know about people who are operating in immigrant communities without a law license. Nonetheless, attorneys are often reluctant to report such individuals to the authorities (in part, perhaps, due to the strictures of local professional conduct rules). Even when they do so (sometimes on an anonymous basis), the phony attorneys often continue to operate, in part because they are beyond the reach of state bar disciplinary authorities, and in some measure because they often elude prosecution by dissolving their businesses and re-forming them in other guises or in other locations. Even when the actions of unlicensed attorneys do come to light, they often continue to operate with impunity, partly because of the barriers to prosecution mentioned earlier.198

198. For example, a reader posted the following comment on the New York Times’s website on January 28, 2009, in response to an article about Victor Espinal:

I am an immigration attorney and have worked in the Washington Heights community. I have known since 1993 that Victor Espinal was not an attorney. He had previously represented individuals before the Executive Office for Immigration Review also claiming to be an attorney. When it was discovered that he was not licensed to practice law he was banned from Immigration Court. He may have done much for his community but he was also practicing law without a license. He was holding himself out to be an attorney when he was not and that is illegal. There is no rush to judgement, he lied and that lie finally caught up with him.

Posting of miguel to City Room, http://cityroom.blogs.nytimes.com/2009/01/21/man-arrested-for-pretending-to-be-immigration-lawyer/ (Jan. 28, 2009, 7:54 EST). Assuming that this comment is accurate, it raises the obvious question of how Espinal was allowed to
Local bar associations should be encouraged to create committees or task forces charged with investigating the unauthorized practice of law in their jurisdictions. AILA is already focused on the specific issue of unauthorized practice of immigration law nationally, and the New York chapter has its own committee dedicated to this issue locally. Attorneys who know of persons who are practicing law without a license and who know of attorneys who associate themselves with those who engage in the unauthorized practice of law should be encouraged to report such persons to the authorities.

E. Implement Mandatory Training of Immigration Attorneys

Mandatory training of attorneys who engage in the practice of immigration law should be implemented. Such training should be offered both to attorneys in good standing who desire certification as immigration specialists, and to attorneys who have been sanctioned for disciplinary violations.

A number of state bar associations offer optional certification of specialists in various fields of law in their state. States that offer certification as immigration specialists include California, Florida, North Carolina, and Texas.199 Such programs typically require attorneys who seek certification as specialists to pass a written examination in their specialty field, demonstrate a high level of experience in the specialty field, fulfill ongoing education requirements, and be favorably evaluated by other attorneys and judges familiar with their work. Looking to California as a model, an applicant must demonstrate that, within the five years immediately preceding submission of the written application, he or she has been substantially involved in the practice of immigration and nationality law. A prima facie showing of substantial involvement is made by participation as “principal attorney in one hundred and fifty cases” in designated categories, and in six of thirteen designated procedures.200

While certification is optional in the states that offer it, given the complexity of immigration law consideration should also be given to creating a mandatory immigration bar exam, much like the patent bar exam administered by the U.S. Patent and Trademark Office.201

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201. See GENERAL REQUIREMENTS BULLETIN FOR ADMISSION TO THE EXAMINATION FOR REGISTRATION TO PRACTICE IN PATENT CASES BEFORE THE UNITED STATES PATENT AND
There are also private organizations that have created ABA-accredited certification programs, and AILA should be encouraged to develop such a program for immigration attorneys.

Finally, state bar disciplinary committees should be encouraged to require training as part of any sanction imposed on attorneys by disciplinary entities. The parameters of such training for immigration attorneys could be developed with the assistance of EOIR and AILA.

F. Increase Authority of Immigration Judges To Report Incompetent Attorneys

While immigration judges are not likely to have much direct exposure to nonlawyers who prepare bogus immigration applications or provide immigrants with erroneous advice on immigration matters (although in rare cases, nonlawyers who are BIA accredited do represent immigrants in removal proceedings), they do sit in the front row of the theater of bad lawyering. In the past, immigration judges in New York City routinely reported attorneys to the First and Second Judicial Departments’ disciplinary committees when warranted, but they have recently been advised by EOIR’s General Counsel that, in fact, federal regulations prohibit them from doing so. Department of Justice (DOJ) reporting rules require all DOJ employees (which include immigration judges) to submit any complaints to DOJ’s Office of Public Responsibility (OPR) if they involve DOJ attorneys, or to the DOJ’s General Counsel if they involve non-DOJ attorneys. The General Counsel will then vet complaints and determine whether to forward them to the appropriate state bar disciplinary committee.

Since immigration judges see ineffective assistance of counsel at the most critical time in an immigrant’s trajectory through the system—i.e., during a hearing at the end of which the judge will determine whether the person can remain in the United States or must be removed—everyone involved (except for the incompetent lawyers, of course) would be best served if immigration judges were granted the authority to (1) contact the relevant state bar disciplinary committee directly about specific attorneys and (2) contact the local district attorney about egregious attorney conduct warranting criminal investigation and possible prosecution. Since, in many cases, nonlawyers who are BIA accredited do represent immigrants in removal proceedings, they do sit in the front row of the theater of bad lawyering.


202. See supra note 199 and accompanying text.

203. The relevant regulation is found at 28 C.F.R. § 0.39a(a)(9), and provides, in pertinent part, that the General Counsel shall “[r]eview proposals from Department employees to refer to appropriate licensing authorities apparent professional misconduct by attorneys outside the Department.” 28 C.F.R. § 0.39a(a)(9) (2008).

204. The U.S. Department of Justice’s Office of Public Responsibility (OPR) reports directly to the Attorney General and is responsible for investigating allegations of misconduct involving DOJ attorneys. See United States Department of Justice, Office of Professional Responsibility, http://www.usdoj.gov/opr/ (last visited on Oct. 2, 2009), for a more detailed description of the OPR.
cases, incompetent attorneys are merely last minute stand-ins for nonattorneys who have prepared the underlying paperwork on behalf of hapless immigrants, notifying the district attorney at this stage would also enable prosecutors to ferret out more instances of nonattorneys operating ongoing, for-profit immigration consultant businesses.

G. Increase Protection for Defrauded Immigrants

A relatively straightforward way of providing a remedy for immigrants whose rights have been impaired by fraudulent service providers would be to make a simple amendment to existing federal law. Under the Victims of Trafficking and Violence Protection Act (VTVPA) of 2000, U visas are available to noncitizens who have suffered substantial physical or psychological harm as the result of crime and who have been, or are likely to be, helpful to law enforcement.205 The U visa also provides a path to permanent residence for the victim. The policy reason behind development of the U visa was to encourage law enforcement to work with and protect immigrant crime victims, and to encourage immigrant crime victims to report crimes and cooperate with law enforcement.206

Currently, U visas are available to direct or indirect victims of a number of designated crimes, ranging from rape and torture to obstruction of justice and perjury.207 Amending the regulations to include victims of fraud would support the U visa’s purpose in encouraging immigrants to report criminal activity to the proper authorities, and would enable victims of immigration fraud to obtain permanent residence for themselves and their immediate family members in the process.

H. Lobby Congress To Create a Statutory Right to Counsel in Removal Proceedings

Finally, much of the fraud and heartache created by unlicensed notarios and immigration consultants could be eliminated if only there were a right to counsel in removal proceedings. Given the judicial consensus that the Sixth Amendment does not apply because removal proceedings are civil rather than criminal matters (ignoring the fact that banishment and exile can, in many cases, constitute a much more severe punishment than imprisonment),208 efforts should be made to create a statutory right to counsel instead. With renewed talk of comprehensive immigration reform

208. See Fong Yue Ting v. United States, 149 U.S. 698, 759 (1893) (Field, J., dissenting) (“As to its cruelty, nothing can exceed a forcible deportation from a country of one’s residence, and the breaking up of all the relations of friendship, family, and business . . . .”).
occurring among federal lawmakers and even among organized labor, this could form just one small part of a new federal law aimed at restructuring our existing immigration system.

CONCLUSION

As made clear by recent news events—such as the arrest of Victor Espinal in New York and the hundreds of immigrants who showed up at the New York City Bar’s free legal clinic on just one occasion, desperate for help in regularizing their immigration status, and the civil judgment that attorneys from the Bryan Cave law firm won against a notario in Maryland—the exploitation of immigrants by unsavory service providers, lawyers and nonlawyers alike, continues apace. Such exploitation is merely a symptom, however, of the larger problem of inadequate access to competent legal counsel by foreign nationals seeking to navigate our labyrinthine scheme of immigration laws, regulations, and policies. Contrary to popular belief, not all of these foreign nationals are “illegal aliens” who slipped over our southern border; many are entitled to obtain lawful immigration status, if only they had adequate guidance from qualified counsel to help them seek it.

While a problem of this magnitude is not easily solved, there are a number of concrete changes that could be made to law and policy—as we have outlined above—that would make an enormous difference in the lives of the affected immigrants and their family members (the latter of whom may actually be lawful permanent residents or U.S. citizens in many cases). However, such changes would also redound to the benefit of our legal system as a whole, restoring a sense of integrity to an aspect of our law that does not currently reflect the ideals of justice on which this nation was founded. We can do much better than this. We must do much better than this.


211. See supra notes 34–35 and accompanying text.

212. See supra note 37.