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ETHICAL PROBLEMS IN REPRESENTING ALIENS APPLYING FOR VISAS BASED ON MARRIAGES TO UNITED STATES CITIZENS

I. INTRODUCTION

How would you respond to a client who has asked you to file a petition for an immigrant visa to the United States by virtue of his or her questionable "marriage" to a United States citizen? If you decide to provide representation, and the marriage is found to be fraudulent, your legal career could be in jeopardy.

Currently, sham marriages pose a formidable problem for the Immigration and Naturalization Service (INS).[1] A marriage is classified as void for immigration purposes if the INS determines that it was invalid at its inception.[2] Although the INS conducts an interview of couples to substantiate their intent to establish a married life,[3] a large percentage of sham marriages escape detection.[4] The

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1. L.A. Daily J., Aug. 18, 1986, at 4, col. 3 [hereinafter L.A. Daily J.]. "Government data shows that while total immigration dropped 5.2% from fiscal year 1978 to fiscal 1985, the number of immigrants arriving as spouses of citizens soared 59%." *Id.* Many of these unions are shams. *Id.*

2. The general rule is that a marriage adhering to all the requirements of the law, but which the parties enter into with no good faith intent to live together and which is designed to circumvent the immigration laws will not be recognized. *In re* Phillis, 15 I & N Dec. 385 (BIA 1975); *In re* Matti, I & N Interim Dec. No. 2960 (BIA 1984); *In re* Laureano, I & N Interim Dec. No. 2951 (BIA 1983); *see generally* Lutwak v. United States, 344 U.S. 604 (1953). *Lutwak* involved criminal convictions based on a fraudulent scheme to gain entry for two brothers under the "War Brides Act." The brothers married U.S. citizens for the purpose of evading the immigration laws. The parties agreed beforehand to separate as soon as possible, and none of them ever coinhabited. *See also* Bark v. INS, 511 F.2d 1200, 1201 (9th Cir. 1975). In *Bark*, the court reversed the holding of the circuit court which denied petitioner adjustment of status because the marriage on which he based his application was a sham. The court of appeals stated that conduct of the parties after marriage is not determinative of the parties intent to establish a life together at the time of the marriage. Thus, the fact that the couple separated after the marriage was not the sole basis on which immigration benefits were denied.

3. T. FRAGOMEN, IMMIGRATION PROCEDURES HANDBOOK 11-3 (1983). *See generally* Danilov, *Marriage, Divorce, Legal Separation and the Alien*, 18 INT'L LAW. 675, 680 (1984), which elaborates on the two-step process by which the INS determines marital viability. In the first step, the husband and wife are interviewed separately and asked detailed questions concerning their married life. The second step involves post-marital surveillance of the couple. *See also* Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1249 (1986), which suggests that the INS interviewing techniques violate the constitutional right of privacy.

rise in sham marriage statistics is due in part to the scarcity of visas available for qualified applicants.[5]

Immigrant visas are allocated according to strict numerical and categorical requirements.[6] Spouses of United States citizens, however, are not subject to numerical restrictions.[7] These fortunate individuals gain immediate status as lawful, permanent residents.[8] Thus, marriage to a United States citizen is an especially attractive and expeditious route to the "American Dream." As one commentator noted: "So beneficial is the status of 'spouse of a U.S. citizen,' so simple is the procedure, so high the success rate, that it becomes more and more difficult to dissuade clients from taking this route to a Green Card."[9]

Because of increasing INS concern about sham marriages and stiff penalties for those who perpetrate them,[10] it is important that attorneys fully understand the legal and ethical ramifications of representing clients seeking marriage visas.

An attorney's ethical conduct as a member of the Immigration Bar is governed by federal statutes and regulations.[11] In addition, the

4. Statistics indicate that marriage fraud is increasing. In 1986, there were 100,000 visa applications based on marriages to United States citizens, a 59% increase from the year before. The INS estimates that one-third of more than 1,000 of these marriages are fraudulent. L.A. Daily J., *supra* note 1; *but see INS Success in Detecting Marital Fraud Questioned*, 59 INTERPRETER RELEASES 144 (1982) (letter by attorney implies that as many as ninety-nine percent of sham marriages are not detected by the INS).

5. *See generally* T. ALEINKOFF, IMMIGRATION PROCESS AND POLICY 96, 101 (1985). The wait for a visa to the United States is sometimes as long as ten years. *Id.*

6. The United States has a worldwide limitation of 270,000 immigrants per year, distributed among six categories. Visas are allocated to: (1) unmarried sons or daughters of U.S. citizens; (2) spouses and unmarried sons or daughters of lawful resident aliens; (3) qualified immigrants who are members of the professions or who display exceptional ability in the sciences or arts; (4) married sons or married daughters of U.S. citizens; (5) brothers and sisters of U.S. citizens who are twenty-one years old; and (6) qualified immigrants who perform skilled or unskilled labor for which there is a shortage of U.S. citizens to perform the work. 8 U.S.C. §§ 1153(a)(1)-(6) (1982).

7. *Id.* § 1151(a). *See also* L.A. Daily J., *supra* note 1. This article states that "[m]arriage confers a permanent residency certificate, commonly referred to as a 'green card,' that allows aliens to hold legal jobs and entitles them to all benefits afforded any American, such as food stamps, welfare, student loans."

8. 8 U.S.C. § 1151(a) and (b) (1982).

9. 59 INTERPRETER RELEASES 144 (1982).

10. The penalties imposed on an alien for participating in a sham marriage are severe. Deportation is almost a certainty. In addition, 8 U.S.C. § 1154 precludes the alien from receiving an immigrant visa based on any of the familial relationships enumerated in the Code. J. HING, HANDLING IMMIGRATION CASES § 4.24 (1985). *See generally* 8 U.S.C. § 1154(c) (1986) (stating that "no petition shall be approved if the alien" has entered the United States on an immigrant visa based on a "marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws.") *Id.*

11. 8 C.F.R. § 292.3(a)(3) (1988). This code section allows suspension or disbarment

American Bar Association's Model Code and Model Rules of Professional Conduct as modified or ratified by the states prescribe ethical norms.[12]

This comment addresses the ethical problems encountered by attorneys in their attempts to decipher the cases, federal regulations, and state law in the context of sham marriages. First, case law is analyzed. In this context, the reckless disregard test is discussed in terms of its relationship to the attorney-client privilege.[13] Second, the principles contained within the Model Code and Rules are applied to the attorney's role in handling marriage visas. Here, the legal practitioner's responsibility in exposing marital fraud is explored. This comment then studies the obligation imposed on the attorney by the attorney-client privilege to disclose suspected client perjury. Finally, suggestions are offered for the clarification of the ethical obligations imposed on the attorney who represents aliens attempting to immigrate through marriage.

II. Background

A. *Standards of Conduct: INS and Federal Regulations*

1. *Structure and Jurisdiction of the INS*

The power to enforce immigration laws is vested in the Attorney General.[14] It is his responsibility to "guard the frontiers, to determine the admissibility of those who seek to enter, and to expel

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for any attorney who "willfully misleads, misinforms, or deceives an officer or employee of the Department of Justice concerning any material and relevant fact in connection with a case." *Id.* Similarly, 18 U.S.C. § 1001 (1982) states, "whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both." *Id.*

12. Model Code of Professional Responsibility DR 7-102(A)(1), DR 4-101(A), (B)(1) (1980); Model Rules of Professional Conduct Rules 1.16, 3.3, 1.6 (1983); *see generally* Hersh, *Ethical Considerations of the Immigration Lawyer*, 51 Fla. B.J. 18, 21 (1977). *See* Heiserman, *Professional Responsibility in Immigration Practice and Government Service*, 22 San Diego L. Rev. 971, 978 (1985).

13. *See infra* text accompanying note 68.

14. 8 U.S.C. § 1103(a) (1982) states:

> The Attorney General shall be charged with the administration and enforcement of this Chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this Chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State: . . . [but, the] determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

Id.

aliens not entitled to remain in the United States."[15] Congress has specifically granted the Attorney General the option to delegate his duties to an officer or employee of the Department of Justice.[16] Consequently, the Attorney General exercises these powers through the Immigration and Naturalization Service, a division of the Department of Justice.[17]

The INS handles such matters as visa petitions, adjustments of status, citizenship adjudications, and deportations.[18] The Commission of Immigration and Naturalization heads the INS and is authorized to exercise all the functions delegated to the Attorney General by Congress.[19]

Because the INS is a federal agency, it has exclusive jurisdiction over members of the Immigration Bar.[20] Federal Immigration Regulations preempt state immigration laws.[21] Thus, the disciplinary action taken by the Attorney General is final,[22] and may not be contradicted by state laws.

Organizationally, the INS Commissioner is assisted by four Associate Commissioners, each with varying responsibilities.[23] The basic operating unit of the INS is the district office,[24] which is primar-

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15. C. GORDON & E. GORDON, IMMIGRATION AND NATIONALITY LAW § 1.4 (Student ed. 1982).

16. The Attorney General is "authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department . . . any of the powers, privileges, or duties conferred or imposed by this Chapter." 8 U.S.C. § 1103(a) (1982).

17. *Id.*

18. T. ALEINKOFF, *supra* note 5, at 82-87.

19. 8 U.S.C. § 1103(a) (1982).

20. 8 C.F.R. § 292.3(a) (1988); *But see* Koden v. United States Dept. of Justice, 564 F.2d 228, 233 (7th Cir. 1977) (any court or administrative agency which has the power to admit attorneys to practice has the authority to disbar or discipline attorneys for unprofessional conduct).

21. *See* Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) ("over no conceivable subject is the legislative power of Congress more complete" than it is over the admission of aliens); Boutilier v. INS, 387 U.S. 118, 123 (1967) (the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers, a power to be exercised exclusively by the political branches of government"); *see, e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941) (the Court held that the Federal Alien Registration Act preempted the Pennsylvania alien registration provisions).

22. 8 C.F.R. § 292.3(b) (1988).

23. T. ALEINKOFF, *supra* note 5, at 83.

24. T. ALEINKOFF, *supra* note 5, at 83. The central INS office is located in Washington, D.C. There are also four regional INS offices, which are subdivided into thirty-four district offices, headed by a district director. In turn, the district offices are divided into suboffices. Lawyers handling matters about individual aliens would not go to the Washington, D.C. office, but would take immigration matters to the local district office. T. ALEINKOFF, *supra* note 5, at 83.

ily concerned with matters of enforcement, adjudication, and service tasks.[25] Each district office is staffed by immigration judges who conduct exclusion and deportation proceedings, and who preside over a wide array of immigration hearings.[26]

Aliens may appeal adverse decisions to the Board of Immigration Appeals (BIA), a separate division of the Department of Justice.[27] The BIA is a quasi-judicial body which reviews the findings of the immigration judges.[28] One of the main functions of the BIA is to regulate membership of the Immigration Bar and "suspend or bar from further practice"[29] attorneys who violate INS regulations.

Disciplinary actions against an attorney begin with the regional commissioner of the INS.[30] If the regional commissioner's investigation reveals good cause for suspension or disbarment,[31] the attorney may request a hearing before an officer designated by the regional commissioner.[32] If the Board finds that suspension or disbarment is warranted, the Attorney General makes the final disposition on the case.[33] The errant attorney is then prevented from practicing immigration law anywhere in the United States until the adjudicator orders otherwise.[34]

2. *Federal Statutes and INS Regulations*

Attorneys are subject to both INS regulations and federal statutes. INS regulations allow disciplinary action if an attorney "will-

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25. T. ALEINKOFF, *supra* note 5, at 83.

26. T. ALEINKOFF, *supra* note 5, at 89.

27. T. ALEINKOFF, *supra* note 5, at 91. The INS regulations allow aliens excludable or deportable the right to appeal to the BIA, a five member review board, appointed by the Attorney General. 8 C.F.R. § 242.21 (1988).

28. T. ALEINKOFF, *supra* note 5, at 91-92.

29. 8 C.F.R. § 292.3(a) (1988).

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> The responsibility for initiating disciplinary proceedings is vested in the regional commissioner. . . . If . . . investigation establishes to the regional commissioner's satisfaction that disciplinary proceedings are warranted, he prefers written charges, serving the respondent personally or by registered mail, and giving him a period of at least 30 days to show cause why he should not be suspended or debarred from further practice. . . . The respondent may request a hearing, which will be granted before an officer designated by the regional commissioner. When the record is completed the regional commissioner forwards it to the Board.

C. GORDON & E. GORDON, *supra* note 15, § 1.15b(2).

31. C. GORDON & E. GORDON, *supra* note 15, § 1.15b(2).

32. C. GORDON & E. GORDON, *supra* note 15, § 1.15b(2).

33. C. GORDON & E. GORDON, *supra* note 15, § 1.15b(2).

34. 8 C.F.R. § 292.3(b) (1988) states: "When the final decision is for suspension or disbarment, the attorney/representative shall not thereafter be permitted to practice until authorized by the adjudicator rendering the final decision." *Id.*

fully misleads, misinforms, or deceives an officer or employee of the Department of Justice concerning any material and relevant fact in connection with a case."[35]

Federal criminal convictions in this area stem from violations of United States Code chapter 18, section 1001, which mandates prison terms or stiff fines for those who "knowingly and willfully" falsify a "material fact" when within the "jurisdiction of any department or agency of the United States."[36] A violation of this statute usually occurs during the initial stages of the visa application process. Aliens wishing to obtain visas usually retain attorneys to file visa applications at the INS district office (I-30 petitions[37] in the case of marriage visas). Lawyers who provide inaccurate information concerning their client's visa eligibility are deemed to have falsified a material fact for the purposes of Federal Immigration Regulations,[38] and negative consequences may result.

In *United States v. Lopez*,[39] for example, the defendant attorney falsified the priority dates on his clients' visa applications in order to accelerate their entry into the United States.[40] Lopez claimed that his actions were not material within the statutory definition because he falsified the prior dates not to defraud the INS, but to expedite the administrative procedure (which would allow for his client's entry). He contended that the success of his scheme did not depend on the false priority dates being *overlooked*, but on their being *discovered* by the INS. Thus, Lopez argued that the falsifications had no capacity to influence INS activity.[41] The court rejected this argument, finding that the falsifications were material because they in-

35. *Id.*

36. *See supra* note 11 for text of 18 U.S.C. § 1001.

37. Three important considerations dictate whether a person will be considered a "spouse": (1) validity of the marriage at the time it was performed; (2) existence of the marriage at present; and (3) a valid purpose in entering into the marriage. T. FRAGOMEN, *supra* note 3, at 11-18.

38. United States v. Bithoney, 472 F.2d 16 (2d Cir.) (attorney made false statement that his client took an oath as to validity of petition for relative visa), *cert. denied*, 412 U.S. 938 (1973); *In re* Milstein, 49 A.D.2d 881, 373 N.Y.S.2d 207 (1975) (conspiring to make a false petition to the INS for the issuance of an immigrant visa on the basis of a sham marriage arranged by the attorney warrants resignation); United States v. Maniego, 710 F.2d 24 (2d Cir. 1983) (criminal conviction of attorney based on conspiracy to defraud the INS arising from sham marriage scheme sustained); *In re* Leifer, 80 A.D.2d 272, 438 N.Y.S.2d 789 (1981) (attorney suspended from practicing law for two years and eight months because of defrauding INS).

39. 728 F.2d 1359 (11th Cir.), *reh'g denied*, 733 F.2d 908 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984).

40. *Id.* at 1361.

41. *Id.* at 1362.

creased the INS's paperwork and manpower requirements and greatly inconvenienced the Agency in general.[42]

B. *The Model Code and Rules of Professional Conduct*

In addition to federal regulations, attorneys are subject to the American Bar Association's Model Code or Model Rules of Professional Conduct if adopted by the state where they practice.[43]

The American Bar Association is the primary source of ethical standards for attorneys practicing in the United States.[44] The ABA created ethical norms as model guidelines to be adopted by each state's bar association. Ideally, they may also be incorporated into the state's legislation or sanctioned by the state supreme court.[45] Most states have adopted, with minor modifications, the Model Code.[46] Furthermore, many states have replaced the Model Code with the Model Rules.[47]

Federal agencies are not bound by state versions of either the ethical Rules or the Code.[48] Most federal courts, however, treat state codes as binding authority and many officially recognize the Model Code.[49]

1. *Model Code*

The Model Code originated from the Canons of Professional Ethics, drafted in 1908.[50] In 1969, the Canons were replaced by the ABA's Code of Professional Responsibility. The Code consists of

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42. *Id.*

43. *See infra* notes 44-47 and accompanying text.

44. Hazard, *An Historical Perspective on the Attorney-Client Privilege* 66 CALIF. L. REV. 1061, 1064 (1978). Hazard notes that the ABA's purpose in promulgating its ethics code is to "establish prevailing norms governing the responsibilities of the attorney in the attorney-client relationship. . . ." *Id.*

45. *Id.* at 1065 n.14. The "legal status" of ethics rules adopted by the states is ambiguous. Some courts treat state ethics codes as guidelines adopted by the courts. Other states, however, transform their ethical standards into legislation which can only be challenged on the basis of their unconstitutionality. *Id.*

46. L. PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY 6 (1984).

47. L. PATTERSON, *supra* note 46. There are now thirty states that have adopted the MODEL RULES OF PROFESSIONAL CONDUCT with some modifications. ABA/BNA, LAWYERS MANUAL ON PROFESSIONAL CONDUCT § 1.3 (1988).

48. L. PATTERSON, *supra* note 46, at 7.

49. L. PATTERSON, *supra* note 46, at 7. *See also In Re* Campos, 737 F.2d 824 (9th Cir. 1984). In *Campos*, the defendant attorney filed an appeal with the INS in order to prolong the INS's judgment on the immigrant status of his client. The court expressly recognized the Model Code of Professional Responsibility as the proper ethics code for attorneys to follow. *Id.*

50. Perillo, *A Case for Increased Confidentiality*, 13 FORDHAM URB. L.J. 3, 5 (1985).

three parts:[51] Canons, Ethical Considerations, and Disciplinary Rules. The Canons are "axiomatic norms"[52] which regulate lawyers' relationships with clients and other attorneys.[53] The Ethical Considerations signify the highest moral objectives which attorneys should strive to achieve.[54]

2. *Model Rules*

The Model Rules were drafted by a special commission of the ABA in response to the perceived inadequacy of the Code to meet the demands of a changing legal environment.[55] The Rules were adopted by the ABA on August 2, 1983, and are intended to supplant the Model Code as the official policy of the ABA.[56] The format of the Rules consists of rules of ethical conduct followed by commentary explaining their scope.[57]

Neither the Code nor the Rules prescribe punishments for ethical violations.[58] Instead, state courts confer penalties as "determined by the character of the offense and the attendant circumstances."[59] Disciplinary measures by state bar associations include disbarment, suspension, and private reprimands.[60]

Thus, attorneys who violate immigration laws are subject to disbarment or suspension from two distinct sources.[61] First, the Immi-

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51. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1979).

52. *Id.*

53. *Id.*

54. *Id.*

55. Giffen, *The New ABA Ethics Rules: A Change for the Better?*, 39 J. MO. BAR. 534 (1983). Giffen notes that the dissatisfaction with the Model Code arose from "loosened restrictions on lawyer advertising, a growth in the number of government lawyers reentering private practice, and novel arrangements for providing legal services 'which' all threatened to make portions of the Code irrelevant." The major factor, however, "was the perceived failure of the present Code to provide adequate guidance to the legal profession." *Id.* at 534.

56. L. PATTERSON, *supra* note 46, at 6.

57. MODEL RULES OF PROFESSIONAL CONDUCT Scope (1983). "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. . . . The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role." *Id.*

58. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1979); MODEL RULES OF PROFESSIONAL CONDUCT Scope (1983).

59. In Louisiana State Bar Ass'n v. Steiner, 204 La. 1073, 16 So. 2d 843 (1944), Justice Higgins stated in his concurring opinion, "[t]he severity of the judgment of this court should be in proportion to the gravity of the offenses, the moral turpitude involved, and the extent that the defendants' acts and conduct affect his professional qualifications to practice law." *Id.* at 1079-80, 16 So. 2d at 850 (Higgins, J. concurring).

60. *See infra* notes 96-99 and accompanying text.

61. *See supra* note 11 and accompanying text.

gration Bar may preclude an attorney from practicing immigration law before the BIA.[62] Second, state bar associations may level any punishment deemed appropriate for violations of the state ethics code.[63]

C. *Duty to Investigate Client Fraud*

1. *Case Law: The Reckless Disregard Test Versus the Clear and Convincing Evidence Test*

As discussed above, attorneys who file fraudulent information with the INS risk severe sanctions.[64] The general test for determining whether an attorney knew or should have known about his or her client's fraud was first developed in *United States v. Sarantos.*[65]

Sarantos was an attorney convicted of conspiracy to deceive the INS in connection with arranging sham marriages between United States citizens and Greek nationals.[66] The jury was instructed to find Sarantos guilty if they determined that he acted with "reckless disregard of whether the statements made were true or with a conscious effort to avoid learning the truth . . . even though he was not specifically aware of the facts which would establish the falsity of the statements."[67]

Sarantos unsuccessfully objected on the grounds that the reckless disregard standard was not sufficient to constitute knowledge as required by United States Code chapter 18, section 1001.[68] He maintained that the reckless disregard test undermined the attorney-client relationship by forcing attorneys to become "investigative arms of the government."[69]

United States v. Maniego[70] also involved federal conspiracy

62. *See supra* note 11 and accompanying text.

63. *See infra* notes 96-99 and accompanying text.

64. *See supra* note 36 and accompanying text.

65. 455 F.2d 877 (2d Cir. 1972).

66. *Id.* at 879.

67. *Id.* at 880.

68. *Id.* at 881. *See also* United States v. Egenberg, 441 F.2d 441, 444 (2d Cir. 1971), *cert. denied*, 404 U.S. 994 (1971). The court held fraudulent tax returns filed for departing aliens from a year prior to indictment were sufficient to show motive and fraudulent intent. The jury need only find that the defendant acted with reckless disregard as to whether the statement was true or that defendant acted with a conscious purpose to avoid learning the truth. *See also* United States v. Abrams, 427 F.2d 86, 91 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970). In *Abrams*, the appellant was not specifically aware of what his client's plans for departure were, but the jury could infer from the evidence that the appellant acted with reckless disregard as to whether the statements were true or not.

69. United States v. Sarantos, 455 F.2d 877, 881 (2nd Cir. 1972).

70. 710 F.2d 24 (1983).

charges against an attorney for arranging sham marriages. Although the defendant acknowledged the falsity of the information he gave the INS, he denied knowledge of his client's ruse at the time he filed the visa documents.[71] Citing *Sarantos* with approval, the court concluded that the defendant displayed " 'deliberate avoidance of positive knowledge' that [he] had 'every reason to believe was the fact.' "[72]

a. *The Reckless Disregard Test in State Courts*

State courts, including California's, have also utilized variations on the reckless disregard test to establish culpability in marriage fraud schemes.[73] In *Weir v. State Bar*,[74] the California Supreme Court disbarred an attorney for knowingly submitting false information to the INS; settling a claim without client's consent; and converting entrusted funds for his own use and benefit.[75] The court found that the petitioner knew or should have known allegations in the document filed with the INS were false, despite his denial that he had no "knowledge or reason to believe the marriages were fraudulent."[76] The court disbarred the attorney even though the disciplinary bar failed to uncover clear and convincing evidence of the petitioner's involvement in the scheme.[77]

b. *The Clear and Convincing Evidence Test*

A second standard used by the courts to prove an attorney's unethical practice is the clear and convincing evidence test.[78] This standard was condoned by the United States District Court in *In re Grand Jury Subpoena (Legal Services Center)*. In *Legal Services Center*, the defendants were attorneys charged with conspiring to de-

71. *Id.* at 28.

72. *Id.* (citing the lower court opinion).

73. *See* 61 INTERPRETER RELEASES 442 (1984). The Texas District 10 Grievance Committee reprimanded a lawyer for failing to adequately investigate the marital status of his client before filing with the INS. "*The attorney knew or should have known that his client's marital status was questionable.*" *Id.* (emphasis added). *See also* Weir v. State Bar, 23 Cal. 3d 564, 591 P.2d 19, 152 Cal. Rptr. 921 (1979) (defendant knew or should have known allegations in documents filed with the Immigration and Naturalization Service were false).

74. 23 Cal. 3d 564, 591 P.2d 19, 152 Cal. Rptr. 921 (1979).

75. *Id.* at 569, 591 P.2d at 24, 152 Cal. Rptr. at 926.

76. *Id.* at 570, 591 P.2d at 20, 152 Cal. Rptr. at 923.

77. *Id.*

78. *In re* Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958 (D. Mass. 1985).

fraud the INS.[79] The charges arose after they filed a section I-30 petition on behalf of their clients. The INS denied the first petition on the grounds that the petitioners' marriage was invalid.[80] The government relied on *Sarantos*, alleging that defendants displayed reckless disregard for the truth in failing to validate their clients' story.[81]

The court sanctioned the clear and convincing evidence test instead, a stricter standard for establishing client fraud.[82] The court held that the obligation to investigate the veracity of a client's story arose only when "clear information"[83] of fraud existed. Embracing *Sarantos*'s argument, the court stated: "So long as the attorney does not have obvious indications of the client's fraud or perjury, the attorney is not obligated to undertake an independent determination before advancing his client's position."[84]

2. *ABA Code and Rules*

Although the courts have not yet defined the attorney's duty to investigate the validity of a client's marriage in the context of the Model Code and Rules, several sections are applicable. First, DR 7-102(A) of the Code states: "In his representation of a client, a lawyer shall not . . . [p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false."[85] The Rules contain a parallel section which states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . ."[86]

Both of these provisions aid in determining that level of knowledge sufficient to constitute the creation or preservation of a sham marriage.[87] This issue of the cognizance level necessary to sustain a criminal conviction in turn raises questions concerning the extent to which attorneys must substantiate the truth of their client's asser-

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79. *Id.* at 960.
80. *Id.* at 969.
81. *Id.* at 968.
82. *Id.* at 969.
83. *Id.*
84. *Id.*
85. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5)(6) (1979) states:

> (A) In his representation of a client, a lawyer shall not:
>
> . . .
>
> (5) Knowingly make a false statement of law or fact.
>
> (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

86. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983).
87. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(6).

tions under the Code and Rules.

D. *Duty to Disclose Client Fraud*

1. *Case Law*

If attorneys are required to substantiate their clients' claims, the law must mandate to what extent the attorney's knowledge of a sham marriage requires disclosure to the INS. Both federal and state courts have implied that a duty to disclose sham marriages to the proper authorities exists.[88]

In *United States v. Rubenstein*,[89] the defendant attorney knew of his client's intent to divorce in six months, yet he prepared the immigration documents without disclosing this material fact to the INS.[90] The court stated that Rubenstein's knowledge of his client's intent to divorce constituted suppression of a material fact, even though the marriage was valid at the time Rubenstein filed the marriage visa.[91]

The *Rubenstein* doctrine was again utilized in the 1985 court of appeals case, *United States v. Chung Yup Yum*.[92] Even though Yum's clients were legally married, he was prosecuted for failing to reveal the sham nature of their marriage.[93] Although the legal validity of the union was not challenged, the parties' lack of mutual intent to live as man and wife nullified their marriage for immigration purposes.[94] An attorney aware of his client's untruths, the court held, is subject to federal criminal charges.[95]

At the state level, an attorney must also reveal client fraud to the INS. In *In re Timon*,[96] the defendant attorney was convicted of filing fraudulent visa petitions on his client's behalf. Later, at hearings to scrutinize his client's marriage, Timon refused to disclose his client's guise.[97] The court suspended Timon from practice for eighteen months for perpetrating a deliberate fraud on the government.[98]

Timon, however, perceived his duty to file the visa forms as

88. *See infra* notes 90-100 and accompanying text.
89. 151 F.2d 915 (2d Cir. 1945).
90. *Id.* at 917.
91. *Id.* at 918.
92. 776 F.2d 490 (1985).
93. *Id.*
94. *Id.*
95. *Id.*
96. 40 A.D.2d 58, 337 N.Y.S.2d 454 (1972).
97. *Id.* at 59, 337 N.Y.S.2d at 455.
98. *Id.*

being ministerial in nature. He argued that the information contained on the petitions was accurate and he advised his clients that "all petitions were subject to investigation and substantiation by the INS."[99]

In a similar situation, a Texas Bar Grievance Committee issued a private admonishment to an attorney who provided false information to the INS. Although the attorney claimed he was unaware the marriage was void when he filed the I-30 form, he discovered its falsity shortly thereafter. The committee admonished the defendant for not timely advising the INS of his client's ruse.[100]

2. *ABA Code and Rules*

Whether or not a lawyer may reveal client confidences is determined by both evidence law and the Code and Rules of Professional Conduct.[101] The attorney-client privilege is founded in evidentiary law.[102] The evidentiary privilege applies in judicial and other proceedings where a lawyer may be compelled to produce evidence regarding a client. In all other areas where the attorney-client privilege is inapplicable, the Code or Rules dictate when an attorney may or may not reveal client confidences.[103]

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99. *Id. See also* Oklahoma Bar Association v. Kirk, 723 P.2d 264 (Okla. 1986). In *Kirk*, the defendant attorney procured sham marriages for his clients. The court punished the defendant for not making "known to the I.N.S. authorities the fraudulent nature of the marriage." *Id.* at 265.

100. 61 INTERPRETER RELEASES 442 (1984). *See supra* note 73.

101. Hazard, *supra* note 44, at 1061. Hazard notes:

> The attorney-client privilege may well be the pivotal element of the modern American lawyer's professional functions. It is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good. The privilege is also considered necessary to the lawyer's function as confidential counselor in law on the similar theory that the legal counselor can properly advise the client what to do only if the client is free to make full disclosure.

Id.

102. *Id.* at 1063 n.7.

103. For purposes of this comment, only the ethical privilege is discussed.

Since the core of the legal structure is the adversary system, lawyers are expected to represent clients to the best of their abilities, zealously guarding their clients' interests. As advocates, lawyers can adequately prepare a case only if the client feels free to disclose all relevant facts about his situation. Wigmore defines the attorney-client privilege as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection may be waived.

The policy behind the attorney-client privilege is reflected in both the Model Code and the Model Rules, the latter being broader in scope.[104] Canon 4 of the Code states that a lawyer should "preserve the confidences and secrets of a client."[105] DR 4-101 qualifies this concept by dictating that: "[A] lawyer shall not knowingly . . . reveal a confidence or secret of his client."[106] A confidence is defined as "information protected by the attorney-client privilege under applicable law."[107] Secrets are "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or detrimental to the client."[108]

The Model Rules expand this definition in some areas and restrict it in others. The Code covers only information garnered from the professional relationship between the attorney and client.[109] In contrast, the Rules abandon the distinction between confidences and secrets and protect all information about a client "relating to representation" whether it was obtained before, after, or during the professional relationship.[110]

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8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2292 (McNaughton rev. 1961).

See Abramovsky, *A Case for Increased Confidentiality*, 13 FORDHAM URB. L.J. 11 (1985) for a detailed analysis of the attorney's duty to preserve client confidences. Abramovsky remarks that "[u]nless an attorney is well informed, it is impossible for him to meet his ethical obligation to represent clients zealously and effectively." *Id.* at 12. In People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798, *aff'd*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (4th Dept. 1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976), the lower court stated: "The effectiveness of counsel is only as great as the confidentiality of its client-attorney relationship. If the lawyer cannot get all the facts about the case, he can only give his client half of a defense." 83 Misc. 2d at 189, 372 N.Y.S.2d at 801. *See also* Hersch, *Ethical Considerations of the Immigration Lawyer*, 51 FLA. B.J. 18 (1977).

Another commentator observes:

> Historically, it has been presumed that an adversary system implemented by the legal profession is the best method of judicial resolution of controversies. . . . In the administration of justice, it is the adversary system that has been constructed to deal with this aspect of human nature. . . . To represent their clients zealously, attorneys are expected to exploit this system.

Kuhn, *Disclosure versus Confidentiality*, 29 CATH. LAW. 356, 357-58 (1984).

104. *See infra* notes 107-13 and accompanying text. The code protects information obtained during the professional relationship between the attorney and client. The rules, on the other hand, protect all confidential information garnered from the client.

105. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1979).

106. *Id.* DR 4-101(B)(1).

107. *Id.* DR 4-101(A).

108. *Id.*

109. Abramovsky, *supra* note 103, at 8. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A).

110. Abramovsky, *supra* note 103, at 8. Abramovsky notes that even information coming from third parties or "obtained prior to or after the existence of the attorney-client relationship" is protected. *Id. See generally* Vickrey, *Tell It Only to the Judge: Disclosure of*

The Rules limit the type of information that may be disclosed, while the Code allows disclosure of client confidences in a variety of situations.[111] The Rules permit disclosure only when the lawyer believes disclosure will prevent the client from committing a crime likely to result in death or substantial bodily harm.[112]

Both the Code and the Rules allow attorneys to withdraw from representation and mandate disclosure if the client perjures himself before a court or tribunal.[113] Disciplinary Rule 7-102 directs the attorney who received "clear information" that his client "perpetrated a fraud upon a person or tribunal" to command the client to rectify the fraud. If the client refuses, the attorney must reveal this refusal to rectify the fraud to the court.[114]

The Rules also compel lawyers to inform the court of client perjury if the client refuses to remedy the effects of his fraud.[115] However, the Rules allow attorneys to withdraw from the case before revealing a client's untruths to the court.[116]

Client Confidences Under A.B.A. Model Rules of Professional Conduct, 60 N.D.L. Rev. 261 (1984). *See also* Nahstoll, *The Lawyer's Allegiance: Priorities Regarding Confidentiality*, 41 Wash. & Lee L. Rev. 421 (1984).

111. *See* Model Code of Professional Responsibility DR 4-101(C)(3) which states: "A lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime," and Rule 1.6(B)(1) of the Model Rules of Professional Conduct, which states: "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."

112. Model Rules of Professional Conduct Rule 1.6(b)(1) (1983).

113. *See infra* notes 116-18 and accompanying text.

114. The text of Model Code of Professional Responsibility DR 7-102(B)(1) states:

> A lawyer who receives information clearly establishing that: His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

Id.

115. The remedial measures offered by the rules are as follows: remonstrate with the client confidentially. If this fails, withdrawal is recommended. Finally, disclosure is allowed. Model Rules of Professional Conduct Rule 3.3 comment (1983).

116. Model Rules of Professional Conduct Rule 1.16(a) (1983) states:

> Except as stated in Paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
>
> (1) The client persists in a course of action involving the lawyer's service that the lawyer reasonably believes is criminal or fraudulent;
>
> (2) The client has used the lawyer's services to perpetrate a crime or fraud. . . .

III. Statement of the Issue

Differing interpretations of the Model Code and Model Rules and the lack of precedent defining lawyers' ethical obligations in immigration law practice result in a moral "trilemma."[117] On one level, attorneys must obey INS regulations.[118] Superimposed on this duty is the obligation to comply with the ABA Code or Rules as adopted or amended by each state's bar association.[119] The duty to preserve the truth is pitted against honoring the attorney-client privilege.

This trilemma is further complicated because the Code and Rules mandate disclosure of client fraud in some circumstances,[120] yet prohibit it in others.[121] The lack of consensus in case law among jurisdictions further compounds the attorney's ethical maze.[122]

The decision to disclose information concerning the validity of a client's marriage creates an even greater legal and moral paradox. Revealing suspected or actual perjury may result in criminal charges for misrepresenting a material fact to the INS.[123] Disclosing confidential information, however, contravenes the ethical privilege as stipulated in the Model Code and Rules.[124]

The penalties for violating the ethical standard of disclosure are almost identical to the penalties imposed for violating the federal regulations.[125] It is virtually impossible for a conscientious attorney to follow one set of rules without breaching the others. Uniformity is required between the various statutes and regulations. Precise definitions governing the immigration lawyer's ethical obligations when filing for marriage visas are required.

117. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 123 (1985). "The lawyer is required to know everything, to keep it in confidence, and to reveal it to the court." *Id.*

118. *See* 8 C.F.R. § 292.3(a) (1988). *See also* Heiserman, *Professional Responsibility in Immigration Practice and Government Service*, 22 SAN DIEGO L. REV. 977, 978-80 (1985).

119. *See supra* note 45 and accompanying text.

120. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3).

121. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(B)(1).

122. *See supra* notes 45 and 47 and accompanying text.

123. 8 C.F.R. § 292.3(a)(3) (1988).

124. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b).

125. *See* 8 C.F.R. § 292.3(a)(3) (1988). *See also supra* note 34 and accompanying text.

IV. Analysis

A. *The Reckless Disregard Test Versus the Clear and Convincing Evidence Test*

The first step toward revising and clarifying the lawyer's ethical responsibility in the Immigration Bar begins with the elimination of the reckless disregard test and replacing it with the clear and convincing evidence test.[126] As noted earlier in *Sarantos*, the defendant argued that the reckless disregard standard was inappropriate to sustain a criminal conviction for defrauding the INS because it forces[127] attorneys to become "investigative arms of the government."[128] The court asserted that the attorney-client relationship was preserved because no investigation was necessary unless the fraud was obvious.[129] Without a definition of obvious fraud, attorneys have no way to gauge whether or not they have violated the reckless disregard standard.

Thus, the effect of *Sarantos* is to shift the burden of investigating sham marriages from the INS to attorneys. The INS is an organization created solely for the purpose of enforcing immigration laws.[130] Attorneys, on the other hand, have an ethical duty to "represent their clients zealously within the bounds of the law."[131] In *In re Timon*, Timon recognized the fundamental differences between the role of the INS and that of attorneys when he argued that the veracity of his client's claims should be substantiated by the INS, not by attorneys.[132]

The reckless disregard standard suggests that attorneys should interrogate clients before representation or risk reprimand. Thus, the practitioner is placed in a position adverse to his client's interests. Such a standard erodes the mutual trust on which the attorney-client relationship is based. This trust is especially crucial when alien clients are involved. The outcome of a visa application will often depend on successful communications between the attorney and his foreign client. As one commentator noted:

> The immigrant often is a complete stranger to the customs and

126. *Sarantos*, 455 F.2d at 877; *Legal Services Center*, 615 F. Supp. at 958.
127. 455 F.2d at 880.
128. *Id.*
129. *Id.* at 881.
130. 8 U.S.C. § 1103(a) (1982).
131. Model Code of Professional Responsibility EC 7-1 (1985).
132. *In re* Timon, 40 A.D.2d 58, 337 N.Y.S.2d 454 (1972).

> language of this country. He or she is often unfamiliar not only with the laws of the country but also with the way our system of justice operates and the goals it seeks to achieve. The fear of returning to a country where he or she faces possibly physical or mental persecution, economic hardship, or separation from family already in the United States, cannot be underestimated. Therefore, it is imperative that the immigration client feel secure in discussions with his attorney.[133]

The clear and convincing evidence test, advanced in *Legal Services Center*,[134] avoids the ethical dilemma created by the reckless disregard test: whether to investigate a client's integrity and destroy the attorney-client relationship, or not investigate and risk sanctions. The *Legal Services Center* court correctly recognized that to require an attorney to "ascertain the truth or falsity of his client's assertions" is "fundamentally inconsistent" with the duty to "represent a client zealously." The court noted that Disciplinary Rule 7-102(B) requires an attorney to rectify client fraud only on the basis of "clear information," and that "[t]o subject a lawyer to the obligation of investigating his client's assertion on less than 'clear information' would undoubtedly undermine a client's confidence in his attorney."[135]

Thus, the clear and convincing evidence requirement alleviates the difficulties encountered in using the reckless disregard test.[136] "Clear" denotes knowledge gained through actual client confessions or other reliable means. An investigation is not warranted unless there is overwhelming evidence that the client intends to perpetrate a fraud.[137] The clear and convincing evidence test is superior to the reckless disregard test because it preserves the autonomy of the attorney-client relationship.

B. *The Duty to Investigate Under the Code and Rules*

While *Sarantos* implies that attorneys must investigate a client's marriage when confronted with obvious falsehoods or risk censure,[138] the Model Code and Rules differ as to whether or not investigation is mandatory. The Model Code coincides with the *Sarantos* rationale. Disciplinary Rule 7-102(A)(6) dictates that an attorney

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133. Hersch, *supra* note 103, at 20.
134. 615 F. Supp. at 969.
135. *Id.*
136. *Id.*
137. *Id.*
138. 455 F.2d at 881.

"cannot participate in the creation or preservation of evidence when it is obvious that the evidence is false."[139] Arguably, an attorney who suspects fraud and files a petition with the INS acts recklessly by preserving false evidence. Furthermore, the same ambiguities surrounding the definition of obvious fraud seen in *Sarantos* exist in the Model Code.[140]

For purposes of detecting sham marriages, the Model Rules are superior to the Model Code because they take an approach more consistent with the clear and convincing evidence test.[141] They prohibit a lawyer from "assisting a client in conduct the lawyer knows is fraudulent."[142] Use of the word "knows" suggests absolute knowledge, gained from unequivocal evidence of client fraud.[143] This difference between the Model Code and the final version of the Rules shows that the ABA intended to strengthen the attorney-client privilege.[144] Thus, under the Rules, attorneys would not be required to verify their client's statements unless clear and convincing[145] evidence of fraud existed.

C. *The Duty to Disclose Suspected Fraud: The Model Code and Rules*

The above section discussed the point at which attorneys are required to question visa applicants regarding the validity of their marriage. Another problem that attorneys face in the sham marriage context also involves timing: When does the duty to disclose suspected or actual fraud arise?

Difficulties which arise in interpreting the Model Code and Model Rules can be illustrated by two hypotheticals:

1. A client comes to an attorney for an interview and openly confesses that he or she has entered a marriage solely for immigration purposes. Must an attorney disclose this fact to the INS?

2. A client asks an attorney to file an I-30 petition on his or her

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139. Model Code of Professional Responsibility DR 7-102(A)(6) (1985).

140. *Id.*

141. *Legal Services Center*, 615 F. Supp. at 969.

142. Model Rules of Professional Conduct Rule 1.2 (1983).

143. An earlier version of the Rules contained the words "knows or reasonably should know." *Id.* Rule 1.2(d) (Discussion Draft 1981). This version parallels the reckless disregard test; it can be inferred that "reasonable" knowledge constitutes information which less than "clearly" establishes client perjury. This assertion is supported by the fact that the framers of the Rules deleted "reasonably should know" because they felt it detrimentally weakened the attorney-client privilege.

144. *Id.*

145. Model Code of Professional Responsibility DR 7-102(A)(6) (1985).

behalf. The practitioner suspects that the client's marriage is a sham. Is there a duty to disclose his or her suspicions to the INS?

In the first situation, the resolution of the problem is relatively straightforward. Under the Model Rules, an attorney would clearly be justified in refusing representation.[146] It is arguable that the attorney must disclose fraud to the INS when no papers have yet been filed.[147] Canon 4 requires the lawyer to preserve the "confidences and secrets of a client."[148] Thus, the lawyer could probably conceal his client's marriage from the INS although he or she might feel an ethical obligation to reveal the marriage. Furthermore, since no papers have yet been filed, a willful misrepresentation has not yet occurred. The attorney is thus protected from criminal indictment.[149] However, it would be extremely unwise for an attorney to file an I-30 petition in this situation. The attorney-client privilege does not apply to attorneys who *knowingly* file false petitions with the INS, and criminal charges would most certainly result.[150]

The area of most concern for immigration attorneys is the second hypothetical situation. Application of the Model Rules and Code to this dilemma warrant non-disclosure of suspected fraud. Requiring otherwise would violate the attorney's duty in an adversary system to preserve the sanctity of the lawyer-client relationship.[151]

This assertion is supported by the fact, as noted earlier, that the recent revision in the Model Rules has solidified the attorney-client relationship. For example, the Rules do not mandate disclosure, except in the case of serious crimes.[152] Rule 3.3 also reflects this trend. It allows the attorney the option of taking remedial measures to remedy the effects of false information presented by the client.[153]

The Code, however, is slanted against client-lawyer confidentiality. Its scope is narrower than the Rules because it places no limits on the types of crimes which may be revealed.[154] Since defrauding the INS is a crime,[155] the Code would mandate disclosure. In cases

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146. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a) (1983).

147. *Id.*

148. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A)—(B)(2) (1985).

149. 8 C.F.R. § 292.3(A)(3) (1988).

150. J. HING, *supra* note 10, § 4.24 (most common and statutory law attorney-client privilege rules imply that the privilege is not applicable when client seeks legal help to perpetrate a fraud). *See, e.g.*, CAL. EVID. CODE § 956 (West 1984).

151. Kuhn, *supra* note 103, at 357-58.

152. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983).

153. *Id.* Rule 3.3.

154. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1985).

155. 18 U.S.C. § 1001 (1982).

of suspected fraud, attorneys who failed to disclose their suspicions to the INS would risk disbarment or suspension from their state's bar association.[156]

The Rules, however, ameliorate the ethical conflict created by the Code. According to the Rules, suspected fraud could not be revealed because it is not one of the serious crimes enumerated in Rule 1.6.[157] Therefore, in unclear cases, attorneys would feel safe in not revealing their suspicions.

Since the Rules give attorneys the option of revealing client fraud,[158] it is reasonable to assume that in situation two, an attorney would be entirely justified in not revealing his or her suspicions to the INS. Allowing attorneys the option of disclosing suspected fraud is not violative of the spirit of the Rules. Were attorneys expected to reveal suspected fraud, a perversion of the Rules' purpose would result. For example, filing a petition with the INS, while simultaneously alleging the existence of suspected fraud, would prejudice the application, probably precluding the client from receiving a fair and objective evaluation of his or her marital status. The result would be extremely unfair to the client if the attorney were misguided in his or her suspicions and the client's visa were denied.

In conclusion, a standard that does not require an attorney to divulge suspected fraud allows the attorney to represent his client with all the zeal that is ideally required. If fraud is suspected, however, that determination is best made during an interview with the INS.

V. Proposal

In order to ensure effective representation by immigration attorneys who wish to shield themselves from charges of unethical conduct, the INS must promulgate specific guidelines for lawyers handling marriage visas. The guidelines should contain profiles of typical sham marriages. Suggested questions designed to test the viability of a marriage would also serve as a useful tool in exposing marital schemes (these questions would be optional so as not to violate the attorney-client privilege).

In addition, since many lawyers are unaware of their legal liability for involvement in sham marriage rings, the guidelines should contain a summary of the penalties imposed for filing illegitimate I-

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156. *See supra* notes 96-99 and accompanying text.

157. Model Rules of Professional Conduct Rule 1.6 (1983).

158. *Id.*

30 petitions. Such warnings would deter attorneys from filing suspect petitions.

These standards would also help immigration attorneys make informed choices as to whether or not representation is warranted. In addition, attorneys who unwittingly file false petitions would have a better chance of being exonerated of wrongdoing if they show that their client's marriage matched the INS's description of a legitimate marriage.[159]

The INS should also recognize the clear and convincing evidence test[160] (as opposed to the reckless disregard test)[161] for measuring attorney fraud. The clear and convincing evidence test permits attorneys to honor both the attorney-client privilege *and* the goals of the INS.

At the outset, a definition of clear and convincing evidence should be introduced.[162] For example, clear evidence could denote statements by the client admitting the sham nature of the marriage.[163] Clear evidence could also include reliable evidence, voluntarily offered by third parties, or documentary items such as non-joint tax returns or disparate addresses.[164]

The clear and convincing evidence test alleviates the attorney's ethical dilemma in gray-area marriage cases. If the facts surrounding the marriage are ambiguous, the attorney's personal moral views may compel him or her to decline representation, even if there is no clear evidence of fraud.[165] However, the denial of representation in nebulous cases might violate the lawyer's duty to "represent . . . client[s] zealously within the bounds of the law."[166] As noted earlier, disparity in socio-economic status between couples does not always signal marital fraud. Those with suspected marriages may be deprived of the opportunity to have their union validated by the INS if a standard less than the clear and convincing evidence test is utilized. Thus, the clear and convincing evidence test affords attorneys the option of pursuing representation if the facts surrounding the marriage are ambiguous.

The INS's interests are protected because the clear and convinc-

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159. *See supra* note 2 and accompanying text.

160. *Legal Services Center*, 615 F. Supp. at 958.

161. *Sarantos*, 455 F.2d at 877.

162. *Legal Services Center*, 615 F. Supp. at 969.

163. *Id.*

164. *Id.*

165. *Id.*

166. Model Code of Professional Responsibility EC 7-1 (1985).

ing evidence standard eliminates the most blatant cases of fraud.[167] The burden of detecting sham marriages then shifts from attorneys to the INS.

Finally, the INS should officially recognize the Model Rules[168] and Disciplinary Rule 7-102 of the Model Code as the prevailing ethical standard for immigration attorneys. Presently, the ABA's goal of a uniform set of ethical norms is hindered by the wide spectrum of ethical codes among the states.[169] Since the INS has exclusive jurisdiction over members of its bar, immigration lawyers would be subject to the ethical axioms it adopts.

Specifically, Rules 1.6, 1.16 and 3.3[170] comply with the letter and spirit of the INS regulations and the attorney's obligations to the legal system. Rule 1.6 recognizes the absolute sanctity of the ethical privilege, thus furthering the attorney's goal of communicating fully and frankly with the client.[171] However, the Rules also preserve INS ideals. Rule 1.16 requires withdrawal if the attorney's services are utilized to perpetrate fraud.[172] This standard has a chilling effect on attorneys who would hide behind the confidentiality requirement of Rule 1.6.

Disciplinary Rule 7-102(B) of the Model Code is also useful because it incorporates the clear and convincing evidence test,[173] which weighs in favor of the attorney's interest, and mandates disclosure of client perjury.[174] This effectively recognizes the INS's objective.[175]

The scattered and ambiguous rules in force today governing the ethical behavior of immigration attorneys impair the ability of these practitioners to represent the client zealously[176] and effectively. With uniformity comes efficiency and understanding. Thus, a codification of the tests for fraud and the ethics rules would foster better relations between the Immigration Bar and the INS. As a result, both organizations would be better prepared to fulfill their obligations to their

167. *See supra* note 134 and accompanying text.

168. MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3, 1.16, 1.2, and 1.6 (1983).

169. *See supra* note 46 and accompanying text.

170. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.6, 1.16, 3.3 (1983).

171. *Id.* Preamble.

172. *Id.* Rule 1.6.

173. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1985).

174. *Id.*

175. For a discussion of the history and purpose of the INS, see CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., 2D SESS., HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE (1981).

176. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1985).

clients and the community.

VI. CONCLUSION

As sham marriage statistics increase,[177] the INS will search for more effective modes of detection. Some of these solutions will, undoubtedly, involve greater scrutiny of the Immigration Bar.[178] It is, therefore, in the immigration lawyer's best interest to understand his or her legal and ethical obligations under current laws and regulations.

This comment addressed the ethical problems attorneys encounter when representing clients applying for visas based on marriages to United States citizens. The background (Section III) explained the relevant law governing the attorney's conduct in the sham marriage context: federal regulation,[179] case law,[180] and the ABA Code and Rules of Professional Conduct.[181]

Section III also analyzed and synthesized these laws on two levels. First, case law was discussed. The reckless disregard test, used to determine culpability in marriage fraud schemes, was discounted because it erodes the attorney-client relationship. Second, the duty to discover and disclose client fraud was examined according to the Model Code and Rules. Because the Code and Rules are fraught with inconsistencies and are not uniformly followed by the states, there is no clear-cut solution to the above issues. However, imposing a duty to investigate and reveal suspected perjury would violate the attorney-client privilege.

Finally, this comment proposed that the solution to the above issues would best be achieved by expanding the INS guidelines regulating and delineating attorneys' ethical conduct as members of the Immigration Bar.

Until change is effected, however, immigration attorneys must continue their struggle to interpret INS regulations, case law and the ABA Code and Rules in the context of their own personal experience and moral perceptions.

Taryn L. Hook

177. *See supra* note 2 and accompanying text.
178. L.A. Daily J., Jul. 4, 1986, at 1, col. 2.
179. 8 C.F.R. § 292.3(A)(3) (1988); 18 U.S.C. § 1001 (1982).
180. *Sarantos*, 455 F.2d at 877.
181. *See supra* notes 113-18 and accompanying text.