Professional Responsibility in Immigration Practice and Government Service

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Today there are many controls which assure professional responsibility in the practice of immigration law and in related government service. This article provides an in-depth discussion of the authority the courts, the Immigration and Naturalization Service, and the states have to discipline individual practitioners whose conduct violates ethical standards. It examines some specific ethical problems that arise frequently in immigration practice and describes the types of sanctions imposed. Finally, this article details the professional responsibility standards regulating the conduct of those involved in government service.

INTRODUCTION

Recently, a practitioner in the District of Columbia made the following observation:

> The newspaper publicity given to the gossipy side of life in Washington

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often convinces people who should know better that the only way you can get something done in Washington is by knowing someone and putting in "the fix." Obviously there are grains of truth in such pronouncements but too many lawyers are scared away from agency practice for the wrong reasons. The commonly accepted fiction that attorneys prevail by slipping something through an agency, by lawyering by telephone or winning by the connections they built up while at the agency, is going if not gone. Agencies are inscrutable only from a distance and the various statutory controls which now affect the ethical and personal aspects of lawyering have greatly reduced the leverage gap between the "fixer" and the ethical practitioner for several reasons.[1]

The authors of this article believe that the following aspects of agency law have contributed to an improved ethical environment. First, there is an increased emphasis on openness in government, provided by the Freedom of Information Act,[2] the Government in the Sunshine Act[3] and the Ethics in Government Act.[4] Second, there are watchdogs both within and outside institutional agencies.[5] Third, the change in public attitudes has affected the conduct of agency business. Agency personnel rarely accept behind-the-scenes maneuvering by attorneys that occurred in the past. In fact, today such maneuvering may result in the agency involved developing a bias against an attorney's case.[6]

In immigration practice and government service there are several controls which govern lawyers' ethical behavior. The Immigration and Naturalization Service (INS) promulgates its own standards of conduct. The INS may initiate proceedings against attorneys who violate its standards to suspend or disbar them from practicing before the agency. State courts, traditionally able to regulate the conduct of attorneys licensed in their state, may sanction lawyers for unprofessional conduct in handling immigration matters. The federal courts may also discipline attorneys who practice before them. Criminal proceedings may be instituted against any attorney who makes, conspires to make, or aids or abets the making of a false statement to the INS. In addition, government attorneys and other employees are also subject to various federal statutory provisions regulating their ethical conduct.

The purpose of this article is to examine in-depth the various mechanisms for assuring professional responsibility in immigration practice and related government service and to illustrate the use of

1. Fox, *Some Considerations in Representing Clients Before Federal Agencies*, 8 BARRISTER 21 (1981).
2. Freedom of Information Act, 5 U.S.C. § 552 (1982).
3. Government in the Sunshine Act, 5 U.S.C. §§ 551-52b (1982).
4. Ethics in Government Act, 18 U.S.C. § 201 (1982).
5. *See generally* Fox, *supra* note 1. *E.g.*, Ralph Nader and Common Cause, Chamber of Commerce, The National Association of Manufacturers, the agency inspector general state bar disciplinary committees, and the Office of the Attorney General.
6. Fox, *supra* note 1.

these controls in sanctioning the unethical conduct of immigration practitioners. The first part of this article will review the authority of the INS, the state, and the federal courts to enforce standards of professional responsibility. It will also discuss the types of criminal charges which may be brought against an attorney who perpetrates a fraud on the INS. The second section will provide specific examples of the ethical problems which arise frequently in immigration practice and will demonstrate the types of sanctions which are imposed against attorneys who act unethically. The final section will detail some of the provisions governing the standard of conduct of government employees.

ENFORCEMENT OF PROFESSIONAL RESPONSIBILITY

The Authority of the INS

In *Goldsmith v. United States Board of Tax Appeals*[7] the United States Supreme Court held that an administrative agency, which has general authority to promulgate its own rules of procedure, may also set standards determining who may practice before it.[8] The general authority of the INS to establish its own rules of procedure is found in section 103 of the Immigration and Nationality Act (INA).[9] This section empowers the Attorney General to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this Act" to administer and enforce the immigration and naturalization laws.[10] Section 292 of the INA further provides that in any exclusion or deportation proceeding, the person involved has the privilege of being represented "by such counsel, *authorized to practice in such proceedings*, as he shall choose."[11] Courts regard these INA provisions as adequate to satisfy the standards of *Goldsmith*.[12]

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7. 270 U.S. 117 (1926).
8. *Id.* at 122.
9. 8 U.S.C. § 1103 (1982).
10. *Id.*
11. *Id.* at § 1362 (emphasis added).
12. *See, e.g.*, Koden v. United States Dep't of Justice, 564 F.2d 228, 233-34 (7th Cir. 1978) (applying the Supreme Court standards for determining who may act as counsel before administrative agencies, as set forth in *Goldsmith*. While *Goldsmith* dealt with the Board of Tax Appeals, *Koden* applied the Court's rationale directly to the INS).

> We think that the character of the work to be done by the Board, the quasi-judicial nature of its duties, the magnitude of the interests to be affected by its decisions, all require that those who represent the taxpayers in the hearings should be persons whose qualities as lawyers or accountants will secure proper service to their clients and to help the Board in the discharge of its important

Not only does the INS determine who may practice before it, but it also has the authority to discipline those individuals. It is elementary that an administrative agency which has the authority to admit attorneys to practice before it has the concomitant power to disbar, suspend, or otherwise discipline those attorneys for unethical conduct.[13] Further, the sanctions which are imposed need not be limited to unethical conduct in a proceeding pending before the INS or the Board of Immigration Appeals (the Board).[14] The "magnitude of the interests to be affected by [an agency's] decisions [necessitates that those who represent individuals before an agency] should be persons whose qualities as lawyers . . . will secure proper service to their clients and . . . help . . . in the discharge of its important duties."[15]

The regulations governing admission to practice before the INS and the conduct of those authorized to practice before the INS are set out in the Code of Federal Regulations (CFR).[16] Lawyers licensed in any state, possession, territory, commonwealth, or the District of Columbia and not under any type of suspension, disbarment, or restraint may appear before the INS in a representative capacity. In addition, the following persons may represent others before the INS: 1) law students and law graduates meeting certain requirements; 2) reputable individuals; 3) accredited representatives and organizations; 4) accredited officials of governments to which the person entitled owes allegiance; 5) foreign attorneys properly licensed and engaged in the practice of immigration law; 6) persons authorized to practice before December 23, 1952; 7) former employees of the INS, if not in violation of the rule restricting former government employees from representing others in matters in which they were involved; and 8) attorneys who want to enter a case as amicus curiae, if it is in the public interest to do so.[17]

The term "representation" before the Board and the INS includes both practice and preparation.[18] Practice is defined as "the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application or petition" before or with the INS.[19] "'[P]reparation', constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary ac-

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duties.

Id. at 232-33 (quoting *Goldsmith*, 270 U.S. at 121).

13. *In re* Rhodes, 370 F.2d 411, 413 (8th Cir. 1967), *cert. denied*, 386 U.S. 999 (1967).

14. *Koden*, 564 F.2d at 234.

15. Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117, 121 (1926).

16. 8 C.F.R. 292 (1984).

17. *Id.* at § 292.1.

18. *Id.* at § 1.1(m).

19. *Id.* at § 1.1(i).

tivities, including the incidental preparation of papers . . . ."[20] It does not include the lawful functions of a notary public or services consisting solely of assistance in the completion of blank spaces on INS forms for a nominal or no fee by one who does not hold himself out as qualified in legal matters or in immigration and naturalization procedures.[21]

Section 292.3(a) of the Code of Federal Regulations (CFR) provides that an attorney or other representative may be suspended or barred from further practice by the Board "if it shall find that it is in the public interest to do so."[22] Fourteen listed activities are deemed to merit such a sanction. These include: charging excessive fees; fraud; bribery; threats; willful misinformation; unethical solicitation of business; practicing or aiding another to practice law without authorization or during suspension or disbarment by another court or agency; assisting another to practice while under discipline; contemptous conduct; failing to give part of a record back to the government; a felony conviction and sentence of one year or more of imprisonment; false certification of a copy of a document; or willfully making false representations regarding qualifications or authority to represent others in a case.[23] These categories of unethical conduct are not, however, the exclusive grounds for disciplinary proceedings. Thus, an attorney's or representative's violation of well-recognized ethical principles contained in a state code of professional responsibility, while practicing before the INS, may lead to disciplinary action by that agency.[24]

If an investigation establishes to the satisfaction of the regional commissioner of the INS that disciplinary proceedings are warranted, the commissioner will direct that a copy of the written charges be served upon the attorney or representative. The accused party is then given an opportunity to respond to the charges and to request a hearing before a representative of the regional commissioner. If an answer is not filed by the party within the prescribed period of time, all defenses to the charges are waived. If a hearing is not requested, the regional commissioner must forward the complete record to the Board with his recommendations.[25] When a hearing is requested before the representative of the regional commissioner, it

20. *Id.* at § 1.1(k).
21. *Id.*
22. *Id.* at § 292.3(a).
23. *Id.*
24. *Id.*
25. *Id.* at § 292.3(b).

is assumed that a record of the hearing will be sent to the Board, although the regulations do not so require. The Board or the office of the Attorney General, depending on the disposition of the case, are the sole bodies authorized to issue a final order.[26]

Next, the individual whose conduct has been called into question, accompanied by counsel, if desired, and a representative of the regional commissioner may appear before the Board for oral argument. Before any disciplinary sanction is imposed, allegations of misconduct must be established by evidence which is "clear, convincing, and unequivocal."[27] The decision of the Board is final, unless the order is to suspend or disbar, in which case the record will be referred to the Attorney General for review. The order of the Attorney General, in such a case, becomes the final determination of the proceeding. When suspension or disbarment is ordered, the individual may not thereafter practice law until authorized by the Board.[28]

Traditional Authority of States

It is a well-settled principle that states may regulate those who desire to practice law within their boundaries. Today, each state sets its own standards for admission to practice, commonly found in a code of professional responsibility and disciplinary procedures.

The majority of codes are based on the Model Code of Professional Responsibility (Model Code), adopted by the American Bar Association in 1969. The Model Code consists of three interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. The Preamble and Preliminary Statement explain the proper function of each part. "The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationship with the public, with the legal system, and with the legal profession."[29] The Ethical Considerations are aspirational principles upon which lawyers can rely for guidance in specific situations.[30] These are objectives which every member of the profession should strive to achieve. The Disciplinary Rules set mandatory minimum levels of conduct, below which a lawyer will be subject to discipline.[31]

In August 1983 the American Bar Association adopted the Model Rules of Professional Conduct (Model Rules). The Model Rules con-

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26. *Id.*
27. *In re* Koden, 15 I. & N. Dec. 739 (BIA 1974; A.G. 1976; BIA 1976) *aff'd*, 564 F.2d 228 (7th Cir. 1977).
28. *Id.*
29. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1981).
30. *See id.*
31. *Id.*

sist only of Rules and Comments. Some of the Rules are imperatives which the lawyer must follow; others are precatory, defining areas in which the lawyer may use his discretion. The Rules also define the nature of the relationship between the lawyer and other individuals. The main function of the Comments is to "provide guidance for practicing in compliance with the Rules."[32] At present, the majority of states are in some stage of reviewing the Model Rules.

A state's power to regulate who may practice law within its boundaries may, however, be superseded when a federal statute stands in conflict with a state rule. In *Sperry v. Florida*,[33] which involved the practice of patent law by a non-attorney, the United States Supreme Court enunciated the basic precept that the supremacy clause permits the practice of law by a non-attorney if he or she is previously authorized to do so by the federal agency. The Court stated:

> A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. "No State law can hinder or obstruct the free use of a license granted under an act of Congress."[34]

In *Silverman v. State Bar of Texas*,[35] the Fifth Circuit held that the *Sperry* decision applied to attorneys who practiced before federal agencies. The court stated:

> At the outset it might be well to note that federal patent laws, like other laws of the United States enacted pursuant to constitutional authority, are a part of the supreme law of the land, and when state law touches on an area of those federal statutes, federal policy may not be set at naught and its benefits may not be denied by state law, even if the state law is enacted in the exercise of otherwise undoubted state power.[36]

Thus, the supremacy clause requires that states permit individuals authorized by INS regulations to practice before that agency in their state. They may, however, discipline attorneys for unethical behavior in handling immigration matters, and bring actions against those individuals who are not authorized to practice under INS regulations. For example, several successful unauthorized practice of law cases have been brought by the Florida Bar against persons practicing im-

32. MODEL RULES OF PROFESSIONAL CONDUCT Scope (1983).
33. 373 U.S. 379 (1963).
34. *Id.* at 385 (citation omitted).
35. 405 F.2d 410 (5th Cir. 1968).
36. *Id.* at 413 (citing Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964), *reh'g denied*, 376 U.S. 973 (1964)).

migration law.[37]

A related issue concerns the authority of a state to govern an attorney's conduct in a foreign jurisdiction. This situation generally arises when an attorney violates the code of professional responsibility in the state where he or she is licensed, by performing an unauthorized act with regard to an immigration matter, in another state in which he or she is not licensed. It is reasonable to assume that the former state would retain jurisdiction to discipline an attorney licensed by it, although the actions complained of occurred elsewhere. In fact, the Model Rules now provide that a lawyer admitted to practice in a particular state is subject to the disciplinary authority of it, although engaged in practice elsewhere.[38]

Ethical standards are applicable not only to private attorneys, but also to those attorneys employed by the government. Governmental attorneys must comply with the code of professional responsibility of the state where they are licensed to practice. However, the effectiveness of state disciplinary codes, at least in certain circumstances, is questionable. The Assistant Attorney General has stated that: ". . . the supremacy clause bars state authorities from regulating the conduct of United States employees in the performance of their official duties in a manner inconsistent with federal law."[39] Thus, where a state professional responsibility code conflicts with a government employee's duties, federal law will govern.

The Authority of the Federal Courts

The federal district courts have established their own procedures for admitting attorneys to practice before them and for disciplining attorneys who violate ethical standards. The power to formulate these procedures derives from Rule 83 of the Federal Rules of Civil Procedure, which permits each district court to "make and amend rules governing its practice not inconsistent [with these rules]."[40]

The admission, suspension, and disbarment of attorneys who practice in the federal courts of appeals are likewise governed by federally created procedural rules.[41] Any attorney who has been admitted to practice before either a federal court or the highest court of any state and who possesses good moral and professional character, is eligible for admission to the bar of a court of appeals.[42] Under the

37. *E.g.*, Florida Bar v. Lugo-Rodriguez, 317 So. 2d 721 (1975); Florida Bar v. Retureta-Cabrera, 322 So. 2d 28 (1975); Florida Bar v. Escobar, 322 So. 2d 25 (1975).
38. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1983).
39. Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel to Charles B. Renfrew, Deputy Attorney General 35 (April 18, 1980) (discussing DR 7-104 and federal criminal prosecutions).
40. FED. R. CIV. P. 83.
41. FED. R. APP. P. 46.
42. *Id.* at 46(a).

Federal Rules of Appellate Procedure a court may suspend or disbar an attorney when he or she "has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court . . . ."[43]

Each federal court of appeals "by action of a majority of the circuit judges in regular active service may make and amend rules governing its practice not inconsistent with these rules."[44] Thus, many of the federal courts of appeals have promulgated additional rules which govern the admission to practice and set professional responsibility standards for their respective circuits. Supreme Court Rules 5 through 8, which govern admission and practice in the Supreme Court, are similar to the Federal Rules of Appellate Procedure.[45]

The disbarment or suspension of an attorney by a state court is not conclusively binding on a federal court, although state disciplinary action is entitled to respect.[46] Moreover, federal courts generally have no authority to reexamine or reverse the sanctions imposed by a state court. However, the federal courts have an independent duty to make their own determination of whether the withdrawal of the privilege of practicing before them is warranted in a particular instance.[47] These same principles have been found to be applicable to disbarment or suspension proceedings by the INS, initiated after a state disciplinary action.[48]

The Criminal Statutes

The United States Attorney has the power to bring criminal charges against an attorney who advises a client to make false representations to the INS, or who knows that the representations of his or her client are false. Such an attorney may be liable under either or both of the following federal criminal statutes:

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, or makes any false writing or document knowing the same to contain

43. *Id.* at 46(b).
44. *Id.* at 47.
45. Sup. Ct. R. 5-8, 445 U.S. 988 (1979).
46. *In re* Ruffalo, 390 U.S. 544, 547 (1968), *modified*, 392 U.S. 919 (1968), *reh'g denied*, 391 U.S. 961 (1968); Theard v. United States, 354 U.S. 278, 282 (1957).
47. *In re* Fleck, 419 F.2d 1040, 1042 (6th Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).
48. *In re* Bogart, 15 I. & N. Dec. 552 (BIA 1975; A.G. 1976; BIA 1976).

any false, fictitious or fraudulent statements or representations, or makes or uses any false fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.[49]

> Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or . . . [W]hoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed there under, or knowingly presents any such application, affidavit, or other document containing any such false statement — Shall be fined not more that $2,000 or imprisoned not more than five years, or both.[50]

Further, "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."[51] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof . . . and one or more of such persons do any act to affect the object of the conspiracy,"[52] each may be fined up to ten thousand dollars, or imprisoned up to five years, or both.

Thus, it is evident that attorneys and representatives who practice immigration law are subject to careful scrutiny, to insure that their conduct is ethical and comports with the standards of professional responsibility. One instance of unethical conduct may not only prevent an attorney or representative from carrying on his livelihood, but could also result in his or her imprisonment.

SPECIFIC PROFESSIONAL RESPONSIBILITY PROBLEMS IN IMMIGRATION PRACTICE

Frivolous Actions

While a lawyer has a responsibility to represent the interests of his or her clients zealously, this duty is limited by the mandate that the tactics he or she employs remain within the bounds of the law.[53] For instance, a lawyer may not bring a frivolous appeal. The bringing of such an appeal is a recurring ethical problem in immigration practice. Part of the lawyer's eagerness in bringing such an action may

49. 18 U.S.C. § 1001 (1982).
50. *Id.* at § 1546.
51. *Id.* at § 2.
52. *Id.* at § 371.
53. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1982).

be attributed to the fact that under the immigration laws, an alien who files a petition for review in federal court is generally granted an automatic stay of deportation.[54] As a rule, the courts will not dissolve the stay. Thus, by bringing an appeal, the attorney can prolong his client's stay in the United States.

The Model Code provides that a lawyer shall not bring any action on behalf of a client "when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."[55] The Model Code further states that a lawyer shall not "[k]nowingly advance a claim or defense that is unwarranted under existing law. . . ."[56] An exception is made if the claim or defense can be supported by "good faith argument for an extension, modification, or reversal of existing law."[57]

The standards of the Model Rules and the Model Code concerning frivolous actions have the same general effect. However, the test of frivolity utilized by the Model Rules is an objective one. The test requires that "[a] lawyer *shall not* bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[58] A special exception is made in criminal cases, or those involving incarceration, permiting an attorney to "so defend the proceeding as to require that every element of the case be established."[59]

An attorney who brings a frivolous appeal will be in violation of the standards of professional responsibility, and may also be in violation of the Federal Rules of Appellate Procedure, and potentially of other federal statutes. A court of appeals may award damages and single or double costs to an appellee if it finds that an appeal is frivolous.[60] This rule applies to both court review and the enforcement of agency orders.[61] Furthermore, federal statutory law provides that "[w]here a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing

54. Immigration and Nationality Act of 1952 § 105(a)(3), 8 U.S.C. § 1105a(a)(3) (1982) [hereinafter cited as INA].

55. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1982).

56. *Id.* at DR 7-102(A)(2).

57. *Id.*

58. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) (emphasis added).

59. *Id.*

60. FED. R. CIV. P. 38.

61. *Id.* at 20.

party just damages for his delay, and single or double costs."[62] An attorney who "so multiplies the proceedings" in any case in a federal court as to "increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."[63]

When dealing with frivolous actions in immigration cases, the federal courts are especially sensitive to the attorney's duty to represent his or her client zealously. Nevertheless, when it is obvious that an appeal is brought solely to delay an alien's deportation, the courts will indicate their disapproval of such actions, often by imposing sanctions against the attorney involved. In sanctioning attorneys for frivolous appeals the courts use various mechanisms. In some cases disciplinary action is taken; in other cases costs and damages are imposed. In some instances no action is taken, but nevertheless the frivolous action can jeopardize the alien's status.

In re Bithoney[64] is an excellent example of the discipline of an attorney for a frivolous appeal, despite the overwhelming sensitivity of the court to the attorney's duty to represent his or her client zealously. Bithoney filed a total of nine frivolous petitions for review. In response to the first three appeals the court granted motions to dismiss, not only because Bithoney's petitions for review had no merit, but also because he failed to diligently prosecute them by never filing responses to INS motions for summary judgment. The court warned Bithoney that "[t]his court does not propose to have appeals taken simply for the purpose of staying an enforcement of immigration orders, and when prosecution is not diligently pursued, the court presumes that this was the purpose."[65] Bithoney then filed three more petitions for review. Briefs were submitted in two of these cases only because the court specifically requested them at a pretrial conference. Nevertheless, in all three cases the court found the appeals to be patently frivolous. The court then referred the question of Bithoney's abuse of the legal process to the United States Attorney to determine whether to institute disciplinary proceedings. When Bithoney filed three more patently frivolous appeals, the court granted summary judgment for the government.[66]

In its petition for disciplinary action, the government alleged that Bithoney violated his oath as a member of the bar and was "guilty of conduct unbecoming a member of the bar of the court."[67] This conduct, if substantiated, constituted grounds for suspension or disbarment from the bar of a court of appeals, and for other "appropriate

62. 28 U.S.C. § 1912 (1982).
63. *Id.* at § 1927.
64. 486 F.2d 319 (1st Cir. 1973).
65. *Id.* at 320-21.
66. *Id.* at 321.
67. *Id.*

disciplinary action."[68] In addition to requesting sanctions for the frivolous claims, the government asked for disciplinary action based on Bithoney's felony conviction for aiding and abetting the making of a false acknowledgement.[69]

Bithoney argued his filing of frivolous claims was not improper, but rather was required by the attorney's obligation to "zealously" represent his clients. The court responded:

> The mere finding that a position advanced was frivolous must not be cause for discipline of the attorney because of the danger that such action might inhibit the bar from the most vigorous advocacy of clients' positions and thus restrict meaningful access to the court. Furthermore, an attorney would face an intolerable dilemma when the needs or instructions of his client would force him to argue a position which he personally may feel to lack merit, and which could lead to punitive action against him by the court.
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> Sensitivity to these considerations requires that we indulge every presumption in favor of the attorney who presents or defends a position which is found to lack support. We must insure that there is breathing room for the fullest possible exercise of the advocacy function. But there must be limits. Canon EC 7-1 states that the duty of a lawyer is to represent his client zealously, but only "within the bounds of the law." The processes of this court are made available for the general good; to the extent that they are abused they become less available to those genuinely in need of them. Such abuse also lowers public esteem for the judicial system and, particularly in the situation presented here, can unjustifiably result in unmerited benefit.[70]

Despite the concern of the court with Bithoney's obligation to represent his client zealously, it suspended his license and fined him five hundred dollars.[71] It found Bithoney's frivolous appeals to be in flagrant violation of the proper behavior of a member of the bar, and to represent gross negligence justifying punishment. The court noted that Bithoney's failure to diligently prosecute four of his appeals was even more serious, constituting a breach of duty not only to the court but to the client.[72]

In *Acevedo v. Immigration and Naturalization Service*,[73] the court assessed costs directly against an attorney for petitioning the INS to reopen an alien's deportation hearing, without showing grounds therefore, and subsequently appealing the decision with the apparent intent of delaying his client's deportation. The court noted that ordinarily costs would be assessed against the petitioner, but in

68. *Id.*
69. *Id.* at 321-22.
70. *Id.* at 322.
71. *Id.* at 325.
72. *Id.* at 323.
73. 538 F.2d 918 (2nd Cir. 1976).

this instance they were more appropriately assessed against his attorney. The court stated it was unlikely his client could pay the costs. Moreover, it was also unlikely that the petitioner, a Salvadoran with only a modest education, was responsible for prosecuting the frivolous appeal. Finally, the court found that it was the petitioner's attorney who caused the litigation to be unreasonably prolonged. Therefore, he was the proper person to be assessed the costs.[74]

Der-Rong Chour v. Immigration and Naturalization Service[75] is another case that demonstrates the disapproving attitude of the courts toward an attorney who used court procedures to stay a client's deportation, by filing baseless motions.

In assessing the petitioner and his attorney double costs and damages of $1000 for filing the frivolous motions, the court stated:

> The petition appears to represent one more step in an outrageous abuse of civil process through persistent pursuit of frivolous and completely meritless claims in an effort to stall a deportation that has been repeatedly ordered by the Board and has been affirmed by us. [T]here is not even a colorable legal or factual basis for the relief sought before the Board or here and, as we noted in *Ballenilla-Gonzales v. INS*, (cite omitted), "our government should not be forced to tolerate the practice, all too frequently adopted by aliens once they become subject to a deportation order, of using the federal courts in a seemingly endless series of meritless or dilatory tactics designed to stall their departure as long as possible.[76]

Filing frivolous claims to delay the execution of a deportation order may prejudice an alien's case, although no sanction is ordered

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74. *Id.* at 921.

75. 578 F.2d 464 (2nd Cir. 1978), *cert. denied*, 440 U.S. 980 (1979). The petitioner was a crewman who overstayed his grant of voluntary departure and therefore became subject to deportation. Nearly three years later, when apprehended by the INS, he applied to the district court for a writ of habeas corpus. The application was based upon his acquisition of a labor certification, ownership of property, engagement to a permanent resident alien, and the pendency of general amnesty legislation in Congress. When the INS raised the issue of his prior deportation order, Chour attacked it on due process grounds. The district court dismissed the petition, directing Chour to exhaust his administrative remedies.

Chour then filed an appeal of the court's order and a motion with the INS to reopen the deportation proceedings. After his appeal was denied and the INS refused to reopen his deportation proceedings, Chour appealed to the Second Circuit, resulting in an automatic stay of his deportation. However, the Second Circuit affirmed the district court's denial of the petition for habeas corpus and the decision of the INS, finding Chour's claims to be frivolous.

Chour also filed a petition with the INS requesting his classification as an immediate relative, based on his recent marriage. He similtaneously applied for political asylum. The INS denied his asylum claim, ordering him to surrender for deportation. He then brought an action in district court to enjoin his deportation, alleging that he had the right to either an adjustment of his status, or, a stay of deportation. The court determined that these latest actions were without merit, as crewmen were not eligible for a status adjustment.

Chour then filed a petition for review of the decision of the INS denying his motion to reopen the deportation proceeding, again delaying his deportation. The court assessed double costs and damages of $1000 against him and his attorney.

76. *Id.* at 467-68.

against his attorney. In *Hibbert v. Immigration and Naturalization Service*,[77] an alien used a sham marriage arrangement to obtain voluntary departure. When the INS learned of the arrangement, it ordered his deportation. Hibbert filed various motions and appeals, arguing that in the five years following his testimony regarding the sham marriage he had established good moral character. Hence, he claimed the INS could not use the testimony to deny his request for voluntary departure.[78] The statutory definition of "good moral character" excluded a person who gave false testimony during the relevant period to obtain immigration benefits.[79]

The court held that the five year period was not a statute of limitations. In addition, it found that the denial of voluntary departure by the immigration judge and the Board was a proper exercise of their discretion, due to Hibbert's abuse of the immigration process. The court, in affirming the denial of voluntary departure, made the following strong statement regarding Hibbert's abuse of the immigration process:

> Hibbert has remained in the United States as long as he has only because of his repeated flouting of lawful orders and frivolous, but well-timed, applications for relief. One who fits within the statutory definition of bad moral character does not transform himself into a paragon of virtue by five years of artful dodging. We will not allow the immigration laws to be manipulated in this way, using the courts to create the equities they are meant to discover.[80]

In the case of *In re Cheung*[81] the Board refused to grant an alien's motion to reconsider a previous decision denying a stay of deportation. This was due to the alien's previous counsel's use of dilatory tactics to prolong his stay in the United States. Although the court agreed that the label of frivolousness should not be attached to a respondent's vigorous and persistent exercise of his rights, it stated that, "[n]onetheless, when repeated legal actions are initiated on a claim whose substance has repeatedly been found nil, the respondent's motives in continued prosecution will of necessity become suspect, and the label of dilatoriness will validly attach."[82]

In a recent case, *Diaz-Salazar v. Immigration and Naturalization Service*,[83] the court held that an attorney's filing of a petition for

77. 554 F.2d 17 (2nd Cir. 1977).
78. *Id.* at 20.
79. INA, *supra* note 54, at § 101(f)(6), 8 U.S.C. at § 1101(f)(6).
80. *Hibbert*, 554 F.2d at 21 (citation omitted).
81. 16 I. & N. Dec. 244 (BIA 1977).
82. *Id.* at 245.
83. 700 F.2d 1156 (7th Cir. 1983), *cert. denied*, 462 U.S. 1132 (1983).

review to keep his client in the country did not constitute adequate cause justifying sanctioning the attorney.[84] In this case, the immigration judge denied Diaz-Salazar's motion to reopen deportation proceedings for consideration of suspension of deportation, and dissolved his stay of deportation. Diaz-Salazar appealed the denial. On the date set for his deportation, however, the Board did not have the case record and therefore the hearing could not proceed. Consequently, the attorney requested a stay of deportation from the Board which was denied. The attorney then filed a writ of habeus corpus which the Board also denied, on the basis of lack of jurisdiction. In response, the attorney filed a petition to review the denial of the motion to stay the deportation proceedings.[85]

The court granted the government's motion to dismiss on the basis that it clearly did not have jurisdiction, but refused to reprimand or assess costs against the attorney. Instead, it held that the attorney was only assaying all possible routes to prevent his client from being deported, pending a final determination of his suspension of deportation claim. Further, the court found that although the proper route would have been to appeal the denial of the writ of habeas corpus, the circuit court had never had such a jurisdictional issue presented before it in the past. Therefore, there was no reason to assume that this course should have been immediately apparent to the attorney.[86]

Although filing a frivolous petition for review in federal court may not be sufficient grounds to warrant disciplinary measures, repeated use of the appellate process solely to delay an alien's deportation, without any legal basis, may be sanctionable. Courts are reluctant to interfere with the attorney's duty to represent clients zealously, but will not tolerate dilatory and groundless tactics. Frivolous appeals may result not only in disciplinary action against the attorney, but also in the imposition of damages and costs against both the attorney and his client. Thus, attorneys must confine their zealous representation of clients within the bounds of the law.

Fraud

An attorney's participation in the perpetration of a fraud in an application or petition submitted to the INS may not only result in disciplinary action, but may also subject the attorney to criminal liability and possibly imprisonment. Under the INS regulations an attorney may be suspended or disbarred for willfully misleading, misinforming, or deceiving an officer or employee of the Department of Justice "concerning any material and relevant fact in connection

84. *Id.* at 1159.
85. *Id.* at 1158-59.
86. *Id.* at 1159.

with a case."[87] Both the Model Code and the Model Rules prohibit an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.[88] Similarly, a lawyer may not counsel or assist a client in conduct which the lawyer knows to be criminal or fraudulent.[89] Under the Model Code, a lawyer must not "[k]nowingly use perjured testimony or false evidence," "[k]nowingly make a false statement of law or fact," or "[p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false."[90] Similar prohibitions are found in the Model Rules.[91]

Several of the cases involving fraud by attorneys in immigration practice have concerned participation in the arrangement or furtherance of sham marriages to obtain lawful permanent residency for their clients. An alien who marries a United States citizen can obtain lawful permanent residency status, without having to go through the preference system.[92] However, a marriage entered into solely to obtain benefits under the immigration laws will be deemed fraudulent.[93]

An attorney who files a petition and an application for a person or persons involved in sham marriages may face criminal charges, although not specifically aware of the facts which establish the false statements. For instance, in *United States v. Sarantos*,[94] an attorney who prepared visa petitions for couples was found guilty of conspiring to make false statements to the INS, defrauding the United States, and aiding and abetting others to make false statements, despite the fact the government failed to prove that the attorney was ever explicitly told that the couples were not even living together. At trial, the evidence demonstrated that some of the couples shared no common language, that divorce papers were executed simultaneously with the immigration forms, that someone told the attorney involved that a "wife" was receiving a fee, and that he was indirectly in-

87. 8 C.F.R. § 292.3(a)(3) (1984).
88. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1982); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1983).
89. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1982); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983).
90. MODE CODE OF PROFESSIONAL RESPONSIBILITY (1982); *see* DR 7-102(A)(4)-(6) (1982).
91. *See* MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 3.3 (1983).
92. *See* INA, *supra* note 54, at § 201, 8 U.S.C. at § 1151.
93. *See id.* at § 241(c), 8 U.S.C. at § 1251(c).
94. 455 F.2d 877 (2nd Cir. 1972).

formed that the parties were not living together.[95]

On appeal, the issue involved the instruction concerning the aiding and abetting charge that "he knew . . . [the statements] were false and that he willfully and knowingly participated in furthering the conduct."[96] The trial court's charge to the jury was:

> [I]f you find that Mr. Sarantos acted with reckless disregard of whether the statements made were true or with a conscious effort to avoid learning the truth, this requirement is satisfied, even though you may find that he was not specifically aware of the facts which would establish the falsity of the statements.[97]

Sarantos objected to this instruction as being an incorrect definition of "knowledge." He argued, *inter alia*, that this construction altered the attorney-client relationship and made the attorney "an investigative arm of the government."[98]

The appellate court sustained the actions of the trial court. It held that the purpose of the aiding and abetting instruction was to prevent the attorney's circumvention of criminal sanctions by deliberately closing his eyes to the obvious risk that his clients were engaging in unlawful conduct. While an attorney need not investigate the truth of his or her client's assertions, "he cannot counsel others to make statements in the face of obvious indications of which he is aware that those assertions are not true."[99]

In *In re Chu v. Association of the Bar of The City of New York*,[100] an attorney was convicted of a federal offense and disbarred for his involvement in a sham marriage case. The attorney had procured permanent resident status for several aliens by arranging their marriage to United States citizens, paid to marry them. He faced charges of making and submitting false and fraudulent documents to the INS, and offering false statements and testimony by witnesses in a proceeding before the INS. The court sentenced him to concurrent six month suspended prison sentences, placed him on probation for two years (conditioned upon his not representing or counseling anyone on matters before the INS) and fined him twenty-three thousand dollars.[101]

New York law, at the time the case was heard, provided for the mandatory disbarment of an attorney who was convicted of a felony. However, the lower court denied the imposition of automatic disbarment and ordered a hearing due to a conflict between federal and state statutes. On review, the New York Court of Appeals reversed

95. *Id.* at 880.
96. *Id.*
97. *Id.*
98. *Id.* at 881.
99. *Id.*
100. 42 N.Y.2d 490, 369 N.E.2d 1, 398 N.Y.S.2d 1001 (1977).
101. *Id.* at 490, 369 N.E.2d at 2, 398 N.Y.S.2d at 1002 (1977).

and ordered automatic disbarment. It stated:

> When it is the underlying conduct of the attorney which calls for [a] disciplinary response, it makes little sense to say that although the conduct has been defined as felonious throughout the Nation and under Federal law, the attorney is not to be automatically disbarred unless our State Legislature has enacted a precisely matching felony statute.[102]

Additionally, the court noted that the federal and state statutes regarding the willful filing of false statements with government agencies were similar.[103]

In another New York case, *In re Leifer*,[104] the court convicted an attorney of conspiring to make false statements to the INS, giving him a suspended sentence of three years, two years of probation, and a fine of ten thousand dollars. Initially, the trial court disbarred the attorney based on *Chu*; however, the attorney sought an order vacating or modifying the order of the court and received a hearing.[105]

On appeal the New York Supreme Court held that the attorney's suspension from practice for the two years and eight months was a sufficient sanction, noting that New York law no longer required mandatory disbarment. The court based its decision upon several grounds, including the fact that the federal felony of which the attorney had been convicted was not a felony under state law, the attorney's community contributions, and his repentant attitude.[106]

In *In re Milstein*[107] the court accepted an attorney's resignation from the bar due to his indictment and subsequent guilty plea in a United States District Court to conspiring to obstruct the governmental functions of the INS, by assisting an alien to obtain an immigrant visa as a permanent resident through a sham marriage arrangement, making and using a false petition, having knowledge that the document contained false statements, and corruptly endeavoring to influence a witness to be absent from a proceeding pending before the INS. The court sentenced the attorney to imprisonment for two years, and ordered that he not apply for readmission to the bar within five years of the decision of the court, and only after first obtaining a pardon.[108]

In *In re Lentini*,[109] the federal court which punished the attorney,

102. *Id.* at 494, 369 N.E.2d at 3, 398 N.Y.S.2d at 1003.
103. *Id.*
104. 80 A.D.2d 272, 438 N.Y.S.2d 789 (Sup. Ct. 1981).
105. *Id.* at 273, 438 N.Y.S.2d at 790.
106. *Id.*
107. 49 A.D.2d 881, 373 N.Y.S.2d 207 (Sup. Ct. 1975).
108. *Id.* at 882, 373 N.Y.S.2d at 208.
109. 43 A.D.2d 479, 352 N.Y.S.2d 630 (Sup. Ct. 1974).

and the state court which disciplined him, were comparatively lenient, due to the attorney's previous good record. Lentini pled guilty in a United States District Court to the charge of conspiracy to defraud the INS. He admitted that he had conspired with his client to commit fraud in regard to a sham marriage, in order to obtain permanent resident status for the client. The federal judge imposed only a one year suspended probation sentence as the attorney had no prior record of misconduct. Although the charge constituted serious professional misconduct, the state court held censure to be a sufficient sanction, due to mitigating factors (including an otherwise impeccable legal career of over twenty years and a good reputation with the INS).[110]

Although in some sham marriage cases the attorney involved is not convicted of violating criminal statutes, the state bar may still impose discipline. In *Weir v. State Bar of California*,[111] the Bar charged the attorney with advising several married clients, facing deportation, that they should obtain a divorce and marry United States citizens, who would petition to change their immigration status. Weir told them that after being granted permanent residency they could obtain a divorce from the United States citizens and resume their former marriages. The clients followed his advice. The INS denied motions to reopen the cases and the applications for permanent residency due to the false testimony and false statements made in the immigration applications. The INS later found the clients had entered into fraudulent marriages.

Weir denied any misconduct. The California disciplinary board disagreed with the State Bar, which found there was clear and convincing evidence that Weir had advised his clients as charged. The disciplinary board did find that petitioner *knew or should have known* that the allegations in the INS documents were false. Thus, the court sustained the findings of the board.[112]

The California Supreme Court found that Weir had committed various offenses which warranted disciplinary action. It noted that the most serious offenses were his repeated practice of forgery, fraud, and deceit with respect to his clients and the INS. Furthermore, the court noted that Weir made affirmative misrepresentations during the disciplinary proceedings, and demonstrated no remorse for his misconduct. The court ordered Weir expelled from the California State Bar.[113]

In re Timon[114] is another example of a state bar taking discipli-

110. *Id.* at 480, 352 N.Y.S.2d at 631.
111. 23 Cal. 3d 564, 591 P.2d 19, 152 Cal. Rptr. 921 (1979).
112. *Id.* at 570, 575, 591 P.2d at 23-24, 152 Cal. Rptr. at 923, 926.
113. *Id.* at 576-77, 591 P.2d at 24, 152 Cal. Rptr. at 926-27.
114. 40 A.D.2d 58, 337 N.Y.S.2d 454 (Sup. Ct. 1972).

nary action, despite the absence of any federal charges. Timon failed to disclose the intent of married couples testifying to the validity of their marriages before the INS. Timon's explanation was that the information contained in the petitions was accurate, that he had advised his clients their petitions were subject to investigation and substantiation by the INS, and that his understanding was that he only had an obligation to file their immigration forms.[115]

The court found that Timon had deliberately defrauded the government, and suspended him for eighteen months. It appeared that a stronger sanction would have been imposed but for the following mitigating factors: Timon assisted the INS in prosecuting the marriage arrangers who aided his clients, he had no part in arranging the marriages, he did not share his fees with the marriage arrangers, his fees were modest, his clients had no complaints, he did not attempt to influence any INS officer, he resigned from the Immigration Bar, and his participation in the fraud was due to his desire to assist fellow countrymen of his ethnic heritage.[116]

An attorney may not associate in any manner with a sham marriage. In addition, if an attorney is aware of indications that a sham marriage may have occurred, he or she cannot counsel a client to make statements which would further the fraud in order to obtain immigration benefits. If he or she does, the attorney will face potential criminal charges, as well as the loss of his or her license to practice law.

A recent case, *United States v. Lopez*,[117] demonstrates another method whereby an attorney attempted to defraud the INS. In this case, an attorney entered priority dates on twenty-two aliens' applications for adjustment of status, when in fact he had received no priority dates. The attorney faced charges of giving false information to the INS. At trial, he argued that he had falsified the dates because the need to first exhaust administrative remedies prevented him from representing his clients by a class action, or via a private Congressional bill. (The INS would not act on an adjustment of status application without a priority date; thus, falsifying the date accelerated the denial of the application, which allowed the attorney to pursue other avenues of relief.)[118]

A jury convicted the attorney. On appeal, the issue was whether

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115. *Id.* at 59, 337 N.Y.S.2d at 455.
116. *Id.* at 59, 337 N.Y.S.2d at 455-56.
117. 728 F.2d 1359 (11th Cir. 1984).
118. *Id.* at 1361.

the falsifications were material. The attorney argued that the falsifications were not material because the dates would be checked, discovered false, and the applications denied; thus, the falsifications would not have influenced the decision of the INS. The court held that "[t]he capacity of the falsehoods to compel a different agency response establishes 'materiality.' "[119] It indicated that it is not the actual result, but the deception which is crucial. The court also found it material that the aliens could receive collateral benefits during the time that their applications were pending, thus diverting scarce public resources.[120] This case clearly illustrates the proposition that the falsifications of an immigration application, although discoverable by the agency, will not be tolerated.

Dishonesty, Neglect and Delay

Several cases have imposed sanctions on immigration law practitioners for instances of dishonesty, neglect or delay. Many such cases involve attorneys who accept a fee in advance and then, contrary to their representations that they were working on their clients' cases, fail to perform any services. The professional responsibility codes and INS regulations forbid such inaction.

Under the Model Code, an attorney may not neglect a legal matter entrusted to him.[121] Neglect is defined as "indifference and a consistent failure to carry out the obligations which the lawyer has assumed for his client or a conscious disregard for the responsibility owed to the client . . . . Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith."[122] The parallel Model Rule provides that, "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[123] In addition, both the Model Code and Model Rules prohibit an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.[124] This standard includes prohibiting an attorney from misleading a client as to the progress of his or her case. The INS regulations provide for the suspension or disbarment of an attorney "[w]ho willfully deceives, misleads, or threatens any party to a case concerning any matter relating to the case."[125]

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119. *Id.* at 1362.
120. *Id.*
121. Model Code of Professional Responsibility DR 6-101(A)(3) (1982).
122. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1273 (1973).
123. Model Rules of Professional Conduct Rule 1.3 (1983).
124. Model Code of Professional Responsibility DR 1-102(A)(4) (1982); Model Rules of Professional Conduct Rule 8.4(c) (1983).
125. 8 C.F.R. § 292.3(a)(4) (1984).

In re Koden[126] illustrates a situation in which the INS disciplined an attorney for his unethical conduct in failing to prosecute his client's claim. In this case, the attorney had advised his client, at the initial interview, that he would promptly solve her immigration problems and accepted, in advance, five hundred and fifty dollars. When the client became concerned about the progress of her case, she was given an approximate date by which she would have her "residence." On several occasions, in response to inquiries by her brother as to the progress of her case, the attorney stated there was nothing to worry about and that he had filed an application on behalf of his client. He explained the delay by noting that the processing of such matters was often a lengthy procedure.[127]

In fact, Koden failed to file anything with the INS. The Board found that he had misled his client by accepting the fee, promising to obtain permanent residence status when he knew that it was unlikely that this would occur, falsely representing to the client's brother that he had filed the application and there was nothing to be concerned about, and by continuing to mislead his client after the publication of an article exposing his questionable practices.[128] The Board suspended him for one year.[129]

Another case in which the Board suspended an attorney's right to practice before the INS for one year, because he misled a client, is *In re Solomon*.[130] In this case, the attorney adequately represented his client in a deportation hearing, subsequently filing a visa petition for him. However, the Board held that because the client was the beneficiary of an approved visa petition, his attorney's advising him not to appear before the INS, in response to several calls and letters, coupled with the attorney's failure to appear on these occasions, was misleading and detrimental to the client. The attorney was found to have created conditions which lead to the imposition of a final order of deportation. The Board further held that the attorney's failure to follow up on his client's visa petition, although he informed his client that he had done so, was misleading and deceptive.[131] The Attorney General affirmed the decision of the Board and suspended the attorney from practicing before both the Board and the INS for six

126. 15 I. & N. Dec. 739 (BIA 1974; A.G. 1976; BIA 1976), *aff'd*, 564 F.2d 228 (7th Cir. 1977).
127. *Id.* at 753-55.
128. *Id.* at 758.
129. *Id.* at 741.
130. 16 I. & N. Dec. 388 (BIA 1977, A.G. 1977).
131. *Id.* at 405.

months.[132]

In several instances state courts have disciplined attorneys for their neglect, delay, and misrepresentation of clients before the INS. In the case of *In re Zeitler*,[133] the state brought a disciplinary action against Zeitler based on two separate incidents. The first involved a personal injury action which the attorney settled without informing his client. The second incident involved the representation of an alien in an immigration matter. Zeitler had willfully misrepresented to the INS that he had commenced a divorce action on behalf of his client, who intended to marry a United States citizen. The court suspended Zeitler from the practice of law for one year.[134]

In *Alkow v. State Bar of California*,[135] the Bar brought charges against an attorney for accepting fees from clients in advance, and failing to perform the services for which he had been retained. In one immigration matter, the attorney continually represented to his clients that he was diligently working on their cases when in fact he was not. The court held that the attorney's willful failure to perform legal services in itself warranted disciplinary action. His actions, the court found, constituted a breach of good faith and the fiduciary duty owed by an attorney to his or her clients. Although the nonperformance was caused by the attorney's negligence, the court stated that the deception of a client in any circumstance was reprehensible. The petitioner had a prior record of suspension for similar misconduct. Therefore, he was ordered disbarred.[136]

In four separate instances, in the case of *In re Morahan*,[137] an attorney accepted retainers of several thousand dollars for the representation of clients before the INS regarding their desire to obtain permanent resident alien status. The attorney never took any action on these cases, but in three instances he represented falsely to his clients that the INS had granted them permanent resident alien status. He ignored their requests for the return of his fees. He also ignored requests by the Bar Association for an explanation of his conduct. The court ruled that his unexplained conduct compelled the conclusion that he lacked the requisite moral fitness to continue as a member of the bar. Accordingly, he was expelled.[138]

Thus, it is clear that an attorney who undertakes to represent a client must do so diligently and promptly. He or she may not misrepresent to a client or to the INS the progress of a client's case.

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132. *Id.* at 420.
133. 69 N.J. 61, 350 A.2d 479 (1976).
134. *Id.* at 62, 350 A.2d at 480.
135. 3 Cal. 3d 924, 479 P.2d 638, 92 Cal. Rptr. 278 (1971).
136. *Id.* at 935-36, 479 P.2d at 645-46, 92 Cal. Rptr. at 285-86.
137. 50 A.D.2d 398, 379 N.Y.S.2d 66 (Sup. Ct. 1976).
138. *Id.* at 399, 379 N.Y.S.2d at 67.

ETHICAL PROVISIONS GOVERNING THOSE IN GOVERNMENT SERVICE

Government employees, like private immigration practitioners, are subject to numerous ethical controls. Criminal charges may be brought by the United States Attorney against an employee who violates federal statutes, such as those prohibiting bribery and conflicts of interest.[139] In addition, disciplinary action may be taken against an employee who violates the rules of their agency or department.

Part 45 of the Code of Federal Regulations governs INS employees, who are considered employees of the Department of Justice.[140] The statute encompasses conflicts of interest, private financial interests, outside employment, improper use of official information, investments, lectures, coercions, gifts, indebtedness, misuse of federal property, gambling, partisan political activities, miscellaneous criminal offenses, and the reporting of outside interests. Any violation of its provisions "shall make the employee involved subject to appropriate disciplinary action which shall be in addition to any penalty which might be prescribed by statute or regulation."[141]

Similar regulations govern the behavior of the employees of the Department of Labor[142] and the State Department.[143] State Department personnel are also subject to special restrictions, procedures, and enforcement policies governing gifts and decorations bestowed by foreign governments.[144] Additionally, all departmental employees are subject to part 735 of the Code of Federal Regulations,[145] which governs employee conduct and responsibilities. The scope of this part is similar to part 45, and contains the same general guidelines.

It is the policy of the INS to make each employee aware of his or her obligation to strictly adhere to these standards of behavior. The agency requires that its employees maintain high standards of conduct, not only in their official capacities, but also in personal activities. They must always:

> avoid taking any action or making any decision which results in or creates the appearance of (a) using public office for private gain, (b) giving preferential treatment to any person, (c) impeding Government efficiency or economy, (d) losing complete independence or impartiality, (e) making a Gov-

139. 18 U.S.C. §§ 201-24 (1982).
140. 28 C.F.R. pt. 45, Standards of Conduct (1984).
141. *Id.* at § 45.735-1(c).
142. 29 C.F.R. pt. (1984).
143. 22 C.F.R. pt. 10 (1984).
144. *Id.* at pt. 18.
145. 5 C.F.R. pt. 735 (1984).

ernment decision outside official channels, (f) abuse of official authority, or, (g) adversely affecting the confidence of the public in the integrity of the Government.[146]

Within the INS, the Office of Professional Responsibility (OPR) manages investigations of allegations of criminal acts or other misconduct by INS employees, and coordinates the program with both INS operations and other governmental agencies.[147] Under the rules, an allegation is defined as "information from any source that a known or unknown service employee has violated any law, Federal, State or Local, Departmental or Service regulation or any of the standards of conduct."[148] These standards include those found at title 28 of the Code of Federal Regulations, part 45, title 5 of the Code of Federal Regulations, part 735, selected provisions of the INS Administrative Manual, and the Officer's Handbook. All employees must immediately report any allegations of misconduct, and must participate in professional responsibility programs when required.[149] A failure to report, or delay in reporting an allegation may also constitute grounds for discipline.[150]

Once an allegation is received by the OPR or a regional office, a determination of whether "the alleged offense is prima facie misconduct" and whether an INS employee is involved must be made.[151] If it is found that an allegation does in fact involve misconduct by an INS employee, then a preliminary inquiry is conducted.[152]

Upon the completion of a preliminary investigation, the director of the OPR or the regional commissioner will review the preliminary inquiry report to determine if there is a basis for further investigation.[153] If there is such a basis, the matter is referred for further investigation within the INS. If a violation of local, state or federal criminal law (other than title 8 of the United States Code) is involved, the OPR will refer the report to the appropriate agency.[154] After further investigation, "[w]here the facts established reasonably support the allegation of misconduct,"[155] the report is (depending on the type of offense) forwarded either to the United States Attorney who has jurisdiction over the matter, or to the associate commissioner or the associate regional commissioner "to assure appropriate

146. IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS § 287.10(a) (1983).
147. *Id.*
148. *Id.*
149. *Id.* at 287.10(b).
150. *Id.* at 287.10(c).
151. *Id.* at 287.10(d).
152. *Id.* at 287.10(g).
153. *Id.* at 287.10(i)(2).
154. *Id.* at 287.10(i)(2)(c)(ii).
155. *Id.* at 287.10(k).

corrective action as warranted by designated officials."[156]

CONCLUSION

The growing visibility of immigration law, the impact of aliens on the society of the United States, and the role of the immigration lawyers involved in the process convey the impression that the professional misconduct encountered in immigration practice is of recent vintage. While such a conclusion is subject to doubt, it is true that both the public and the private sector lawyers involved in immigration practice are more sensitive to the development of ethical norms, the issues involved in legal malpractice, and both disciplinary and criminal sanctions. The body of professional responsibility law dealing with immigration law is beginning to take shape. Better research tools are making these evolving standards increasingly available to government agencies, the bar and the public.

156. *Id.* at 287.10(k)(2)(i)-(iv).