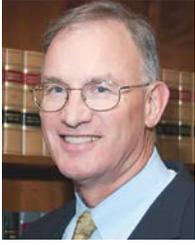


Bar Counsel's Message

by Edward L. Davis



Immigration Law: the Ethical Dilemmas of a Highly Specialized Practice Area

IN THE FISCAL YEAR ending June 30, 2017, the Virginia State Bar received 3,304 complaints of attorney misconduct. This is an increase of about 4.4 percent from the year before, but otherwise about the same as in recent years. The bar does not assume that an attorney is guilty of misconduct upon receiving a complaint. The team of attorneys in the Office of Bar Counsel's intake department summarily dismisses more than half of these complaints on the basis that the allegations do not constitute violations of the Rules of Professional Conduct. For complaints alleging minor acts of professional misconduct, the bar often asks the attorneys to resolve the issues with their clients and avoid the opening of formal disciplinary files. In the past fiscal year, the bar closed 749 such cases — 23 percent of all complaints received — in this manner without creating disciplinary records.

The intake attorneys assigned the remaining 516 complaints, about 16 percent, to the disciplinary attorneys for preliminary investigation. Some of these complaints involved highly specialized areas of practice in which the bar encourages attorneys to practice regularly, not sporadically.¹ One such area is immigration law.

Last year the bar assigned 16 immigration complaints for preliminary investigation, about twice as many as in the two preceding years, but lower than other preceding years. Very few of these complaints resulted in public discipline. Many of the complaints were against attorneys not admitted to

practice in Virginia.² This is because immigration courts do not require attorneys to be admitted in the states where they practice immigration law, only that they be admitted to practice law in at least one state. Other complaints have involved Virginia lawyers practicing immigration law in other states.³ The complaints often involve attorneys who receive fees for immigration work but fail to complete it due to lack of diligence or lack of the legal proficiency needed to do so.

The intricacies of immigration procedures can place attorneys in difficult ethical dilemmas. Immigrants wishing to challenge adverse removal decisions often allege that their attorneys were ineffective and hire new counsel to raise the issue on appeal or in motions to reopen. Pertinent case law provides that to perfect such claims, immigrants must satisfy three procedural requirements.⁴ One such requirement is that a complaint be filed with the appropriate disciplinary authorities concerning the prior attorney's breach of ethical or legal responsibilities, and, if not, to explain why not.⁵ Counsel must verify the validity of the client's claims before filing with disciplinary authorities. Failure to do so can result in disciplinary action by the Executive Office for Immigration Review (EOIR) and the Department of Homeland Security (DHS). Some attorneys are unaware that, in certain circumstances, a disciplinary complaint is not necessary to meet the required criteria. An explanation, such as prior counsel made every effort to

remedy the situation, can meet the criteria.⁶ Counsel may accomplish this simply by contacting the prior counsel.

Another ethical dilemma may arise when attorneys apply for asylum on behalf of their clients with the intent of achieving the cancellation of collateral removal actions. The two proceedings have completely different criteria. Asylum may be sought affirmatively, outside the context of immigration court and before the asylum office, and defensively, in the context of removal proceedings in immigration court. Regardless, prior to filing an asylum application, attorneys should carefully review the client's claim to ensure that it is colorable in law and in fact and that it can be supported by some form of evidence.⁷ Attorneys who file asylum applications without such vetting may be subject to disciplinary action by the EOIR and DHS. Such disciplinary action can lead to reciprocal discipline in Virginia.

Fortunately, the complaints against Virginia immigration attorneys have seen a downward trend in recent years. Attorneys confronted with the ethical dilemmas mentioned in this article may contact organizations such as the American Immigration Lawyers Association (AILA) for guidance.

Endnotes:

- 1 Comment [1] to Rule 1.1 of the Rules of Professional Conduct provides that a lawyer can provide adequate representation in a wholly novel field through necessary study and that

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competent representation can be provided through the association of a lawyer of established competence in the field in question.

- 2 See e.g. *the Matter of Bibi Bahizi Musafiri*, VSB Docket No. 15-041-101879, involving a New York attorney practicing immigration law in Virginia who received a public reprimand with terms for failure to communicate, protect her client's interests, and account for client funds. Musafiri later suffered a six-month suspension of her privilege to practice

in Virginia for noncompliance with the terms.

- 3 See e.g. *in the Matter of Douglas Paul Wacholz*, VSB Docket No. 12-033-090763, involving a Virginia attorney practicing immigration law in Nevada. Respondent consented to the revocation of his law license on charges that he did not complete an immigration matter after being paid in full and lost accountability of the client's funds. Respondent also consented to disbarment in Washington, DC, based upon other misconduct in Colorado.

- 4 *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), 857 F.2d 10 (1st Cir. 1988).
5 *Id.*
6 *Lu v. Attorney General*, 259 F.3d 127 (3rd Cir. 2001).
7 *Ethical Considerations Related to Affirmatively Filing an Application for Asylum for the Purpose of Applying for Cancellation of Removal and Adjustment of Status for a Nonpermanent Resident*, American Immigration Lawyers Association, AILA Doc. No. 16110105 (Posted 11/1/16).

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