Professionalism Perspectives

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From the Editor's Desk

By Cassidy Chivers

Like 2020 itself, the fall edition of Professionalism Perspectives is a bit out of the ordinary. As we have all retreated into our respective bunkers and contemplated new ways to maintain our profession, many of us have struggled with a "silo" effect: working from home offices, reducing our communications with clients and colleagues to email and zoom, and drastically limiting in person interactions. There is very little spontaneity anymore. We can't just pop into our partner's office for a quick chat. We don't run into colleagues at conferences or lunch meetings. Remote practice has also presented unprecedented challenges for working parents, new associates and solo practitioners alike. We have all been forced to alter our perspectives – literally.

Thus, this edition takes us on a tour of new and different perspectives. Our first article by law school ethics professor Carol Langford, entitled, "A New Era: Covid Forces Change in the Bar and the Bar Exam," explores the long view: how will the pandemic change law school, the bar exam and licensing requirements? Are we at an inflection point? The second article by immigration lawyer Safiya N. Morgan, entitled, "How To Help Immigrants to Avoid the 10-Year Green Card Scam," takes us into the world of immigration advocacy. Those of us who represent lawyers and law firms in disciplinary and malpractice defense cases understand that we must learn the underlying area of law in which our clients practice. Immigration law is no exception. Ms. Morgan explains a prevalent problem in the practice of immigration law that has caught the attention of bar regulars in recent years. Finally, we return to the familiar: an update on a common conflicts issue. Lindsay Christenson's article, entitled "Too Close for Comfort? Personal Relationships with Opposing Counsel May Create Ethical Dilemmas," discusses new ABA Formal Opinion 494 and provides guidance on how to determine when your personal life conflicts with your professional one, and the steps required to address the conflict.

We hope you enjoy these articles and that you all are staying safe during this time. Happy Holidays.

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Feature Articles

A New Era: COVID Forces Change in the Bar and the Bar Exam

By Carol M. Langford

A new day is dawning, and change is in the air for both lawyers and future lawyers. Prior to COVID we could all hear the drum beats of clients wanting more – more work for less fees, more of our time, even on weekends; and more high maintenance, or risk losing their business. At the same time, law students were struggling, and inflation was hitting the typical American so hard that they could barely pay for college, much less a lawyer. Forget the Consumer Price Index – ask any law student, solo practitioner or public interest lawyer about their struggle to pay costs to live and eat, especially in large urban areas.

It was easy then to push off really looking at how to make legal services cheaper, or working to figure out a way to unburden law students of their hefty tuition. After all, we struggled as new lawyers to pay off our student loans and make a path in life that, if not extremely lucrative, was at least a very good living. And we had our own businesses and families to deal with. Who had time to really sit down and address these issues?

And then COVID struck, and nothing in the teaching of future lawyers or in the practice of law will ever be the same again. Ever, even with a vaccine. Does all this change mean that we have thrown out the baby with the bathwater? Well, let's look at some of the changes, and see if we can discern the future forest for the trees.

First, I do not think the term "law professor" will ever mean the same thing again. That is because the old business model of charging a fortune for an adjunct professor to come to class and ponder torts and contracts like Socrates might have done is no longer viable. Well, it might still be viable for some schools like Harvard and Stanford with "ginormous" – as the students would say – endowments. Law schools used to get away with their fees because there were always lenders willing to pony up a loan to a future lawyer. Schools profited tremendously until around 2008, when the foreclosure crisis hit, demand for legal jobs declined and students were less inclined to take on law school debt. Schools started dipping into the pool of less qualified students to make their nut.

This had disastrous consequences for some schools, as their Bar exam pass rates took a nose dive. As an adjunct professor of ethics I was what I call a "soldier of fortune"—I taught and still teach professional responsibility at various law schools. I saw a change over these years in exam writing and analysis. Good enough writing is essential to the practice of law. I could see early on some students would struggle with the Bar exam. Good law schools hired tutors and exam writing specialists to help the students develop the skills needed to pass the Bar. Yet, if anything, in some schools the scores got worse. It was not entirely clear how to deal with the problem as the scores in some schools would go up, only to go back down again on the next exam.

When COVID came on the scene, the already struggling student was forced to go home or try to finish classes in a two bedroom house with five roommates. I quickly learned to teach on Zoom, as law schools - even law schools with hospitals annexed to the school – had no testing or PPE. Most wisely decided that putting young people without fully developed prefrontal cortexes in classrooms together would not end well.

I could not fail to miss the new Zoom "classrooms" of these students - tiny spaces with curtain room dividers, dogs and cats with big chew toys roaming into the Zoom student gallery, and children reaching out to be hugged while dad was taking lecture notes. My own classroom became my kitchen, where I could lean over my computer and conveniently grab a Starbucks cold brew during class breaks. I called my class "Ethics from Professor Langford's Kitchen." We got the job done, but I am certain the students wondered at the price they were paying to not get all the tangible and intangible benefits of a physical school. Law students like to interact; they still want to argue over the jurisdictional implications of Pennoyer vs. Neff and chat about their boring professional responsibility professors.

What do I see in the future for law schools? First, I see the rise of online schools at half the cost, in every state. The State Bar of California recently accredited three fully online schools to allow multiple pathways to the practice of law. And I see even the top tier schools creating a hybrid teaching platform wherein some professors are told to teach online and some in person. Or, to teach both online and in person. My guess is that tenured professional professors will be the first to be brought back to the classrooms, and adjuncts will stay online. Tenured professors, though, might

become as hard to find as a rare spotted yellow bellied sap sucker. And tuition costs will likely go down.

There is no ABA accredited law school in California – my state – where tuition is less than $30,000 a year. We have 18 ABA accredited law schools, and 23 that are not ABA accredited. Graduates of either are eligible to take the Bar exam, unlike in other states. However, the dropout rate in the non-ABA accredited schools is extremely high. An LA Times investigation revealed that nine out of ten students drop out of unaccredited schools overall. The benefit of an unaccredited school: it offers flexibility in scheduling, lower admission standards and lower fees.

I do think more students will embrace this model in the future, as the face of the California lawyer is changing. Unlike in the past where the typical law school graduate was a single Caucasian male from a middle class or monied family, graduates now represent all ethnic groups and many are in their 30s, and even 40s. They have lived a little, and that means that some have criminal histories and have had substance abuse issues. A few have children. In short, these are people who did not follow a traditional path to law school, and gravitate to schools that offer night programs and schedule flexibility.

Second, the Bar exam has changed, and I do not think it is a temporary change. A survey of how individual states are modifying their Bar exams is a real eye opener. While some states like Alabama allowed their July Bar to go forward as usual but with safety protocols like social distancing and health screenings, states like Alaska made out-of-state applicants follow Alaska's travel-related requirements before they would be allowed into the exam site, including quarantining or a negative COVID test right before entering the state. Other states, like California, cancelled their July Bar exam and re-scheduled for the fall, with an online only option. Still others cancelled the exam entirely for 2020, looking instead to 2021 for another exam. And a few brave souls granted what is known as "diploma privilege," meaning their graduates need not take any exam at all.

Diploma privilege is a hotly debated topic. Currently Washington, Oregon and Utah allow it due to the pandemic. Essentially it means students would not have to take a Bar exam at all. This privilege has historical precedent; prior to 1870 a lawyer was trained purely by apprenticeship. There were not a lot of law schools back then, and the lucky few with friends in high places secured positions where they could draft up contracts and wills while studying treatises. Law schools were later started to give the middle class a path into the law, and around 1900 a formal written Bar exam began to replace apprenticeships.

Will we eliminate the Bar exam altogether even after the COVID crisis is over? I hope not, at least in California. The Bar exam gave me a bedrock of knowledge that alerts me to issues outside of my specialty. However, during the pandemic I could see the usefulness of diploma privilege in a state where law schools are sparse, and all fully ABA accredited.

We do not yet know how this crisis will play out and until we do I think most states will be reluctant to scrap the entire exam. Many states will hesitate to treat unaccredited and accredited schools differently, especially in this time of upheaval, making the privilege harder to support. However, with regard to people coming from other states where they are already licensed – my crystal ball indicates that they will one day not have to take another Bar exam at all. In other words, reciprocity will be the norm.

This means that regional State Bars will be less powerful and we will have one big "National Bar." A lawyer in Texas could practice in New York, as he would have a sort of "National Bar License" to do so. Why not? We already have California lawyers working remotely from many other states, advising California clients on California law. This is the logical step forward. Individual states would still handle the admission and disciplining of lawyers.

In most countries around the world, there exists a type of national license and no need for a state or regional license. So, a lawyer in France can work anywhere in France. And it gets even better than this! A lawyer licensed in any EU country can work in any EU country. Here, lawyers for the federal government generally only need a state license for federal employment in all 50 states, which shows that there might not really be a need for licenses in all states a lawyer will practice in her lifetime. Also, federal practice areas like immigration law only require the attorney be licensed and in good standing in one state. That is very similar to a "National Bar" license.

The third big change is the provisional licensing of lawyers. Where this would once have been seen as a curveball from deep left field, I now see it as the future of lawyering. What exactly is provisional licensing? Well, it's complicated, and can mean different things in different states. But in California, it means that any student graduating in 2020 by order of our Supreme Court can practice law under the supervision of a lawyer before passing the Bar exam, and even before clearing moral character. To me, it is a hybrid of the old apprenticeship model of training lawyers. Why do we even need provisional licensing? Well, mainly because students could not take the July Bar exam, and when they do take it are likely to fail at alarming rates. Unless they are provisionally licensed, they will have job

offers revoked as law firms tried to figure out what the pandemic might really mean for their business models. Graduates are universally broke, and need to work as full-fledged lawyers fast. They are caring for their parents and families while wondering how they will pass the Bar exam in a house full of people forced to stay inside.

Let's face it – the pandemic was and is a debacle, and the California Supreme Court was wise enough to see that. Lest anyone think we are "letting the camel's nose into the tent" at great risk of having the camel make our provisional licensing tent home, rest assured that this camel cannot handle trust accounts nor practice law without supervision. The provisionally licensed lawyer must identify him or herself as provisionally licensed. And if they do not clear moral character, they are on the sidelines until they can do so. Since very few applicants get denied or abated for moral character reasons, there will be few who have to warm the bench for a season.

I am unsure about the MPRE exam at this point and whether they will have to pass it before being cleared to be provisionally licensed, but I think it is a good idea if they do.

Do I see this program as continuing past its expiration date? I do. Not just because we have no vaccine yet, but because even if we get one it would have to be low cost or free to assist in developing herd immunity, and even then still many would not get it. But also because I see the next ten years bringing much social upheaval, and an economic rollercoaster that will leave us all breathless (buy gold). Law students will *have* to work early, because inflation will mean they cannot survive if they do not. And lawyers will support it, as they can get a provisionally licensed lawyer at a lower price, increasing their profit margins, and allowing them to charge less to clients who have a lower ability to pay.

I see this as a societal good. It is not like it has not been tested in some form already – in Mexico students major in law while in college and graduate in four years, instead of four years of college and four years of law school. But, in Mexico they might work throughout the school year in a law firm and every summer, so that by the time they graduate they are ready enough to work in a law firm. This gives international students an advantage over the typical American law student, as the foreign student will spend about 1/3 the cost of what our students pay. The foreign student can then come to the U.S. and graduate at our law schools with an LLM, and sit for our Bar exam in select states.

All these changes will be reflected in changes in our ethics Rules. I see states like Arizona already seeking to change their Rules to allow non-lawyer participation in law firms. States are also right now considering various licensure levels of what I call legal aides; like legal document assistants and paralegals who can do the work once relegated to first year associates at law firms.

At first my concern was that these "sort of lawyers" would eat the lunch of the practicing lawyers. But I do not see that happening. Paralegals in some firms already do the work of lawyers even if sub silencio. Many good legal secretaries have always filled out draft pleadings. And there will always – always – be a need for a bright lawyer who really understands a complicated area of law. I do not see that changing.

Last, I look in my crystal ball and see the rise in online mediation. I recall years ago advising my clients to mediate, only to have them refuse and urge me to gird my loins and do battle. But who can afford a discovery war now? Not the average client. We already see this change coming in the decline in the rate of depositions that are being taken in civil cases.

All this change is coming at a fast pace. But really, with the rise of computers and AI, how long could this be put off? We already had computerized research, and Nolo Press offering online blank pleading documents. There is even a computer that can offer up traffic ticket defenses. Next on the horizon is BCI – Brain Computer Interface where lawyers might one day be able to *think* their computer should send a document and the computer will pull it up and send it. Celebrity engineer Elon Musk is already testing this on a pig, to see if it can speed recovery from strokes and injuries. And the military is testing it to see if it can enhance the intellectual abilities of its troops.

As Elon Musk would say "The future is going to be weird." I say "Accept these changes, embrace them, and even cheer them." Work to make this all better by sitting on a Bar committee that writes the law in these areas.

To do otherwise is to rapidly—at the speed of sound—be left behind.

When Carol M. Langford is not looking into her crystal ball, she is a lawyer specializing in ethics advice, bar admissions, and attorney discipline. She is an adjunct professor of professional responsibility at the University of San Francisco School of Law and Hastings College of the Law. She assisted in the drafting of the rules of professional conduct, the disciplinary standards, and the provisional licensing rules for California.

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Too Close for Comfort? Personal Relationships with Opposing Counsel May Create Ethical Dilemmas Without Disclosure and Consent from Client.

By Lindsay Christenson

On July 29, 2020, the American Bar Association ("ABA") issued Formal Opinion 494, analyzing ABA Model Rule of Professional Conduct ("Model Rule") 1.7(a)(2). The Rule prohibits a lawyer from representing a client without informed consent if there is a significant risk that the representation will be materially limited by a lawyer's personal interest. The opinion seeks to assist lawyers in evaluating their personal relationships with opposing counsel, in order to determine whether a conflict exists and if so, the requirements for continued representation.

Not all relationships will automatically disqualify a lawyer from representation. Rather, the lawyer must carefully consider the nature of the relationship to determine if the lawyer's professional judgment would be materially affected. Specifically, Model Rule 1.7(a)(2) addresses the concern that a relationship with opposing counsel may lead a lawyer to inadvertently reveal client confidences or may affect the lawyer in judgment or loyalty to the client. Only relationships that may affect a lawyer's independent professional judgment are considered a potential conflict of interest.

The opinion divides relationships into three general categories—intimate relationships, friendships, and acquaintances- and analyzes the disclosure and client consent requirements for each. As is evident throughout the opinion, ambiguity often exists, particularly when relationships do not classify within traditional or bright-line categories. Lawyers should exercise careful discretion in determining their duties under Rule 1.7, erring on the side of disclosure if any such uncertainty exists.

Intimate Relationships

An intimate relationship is marriage, engagement, cohabitation or an exclusive personal relationship. A lawyer must disclose to their client an intimate relationship with opposing counsel and may only continue representation if: (1) the client gives informed consent confirmed in writing; and (2) the lawyer reasonably believes they can provide competent and diligent representation. (Model Rule 1.7(b).) A failure to disclose intimate relationships and obtain informed consent can lead to discipline, disqualification or other significant consequences.

For non-exclusive intimate relationships, a lawyer should consider whether the relationship creates a significant risk that the representation of either client will be materially limited. The ABA recommends disclosure and informed consent even for non-exclusive intimate relationships as a prudent measure.

Although not explicitly addressed, the opinion indicates that intimate relationships that have ended, or end during representation, will generally be treated in the same manner as current intimate relationships and therefore may also require disclosure and informed consent.

Friendships

A friendship is considered a relationship with "a degree of affinity greater than being acquainted… the term connote[s] some degree of mutual affections…" (ABA Formal Opinion 488 note 5, at 4.)

Close friendships between opposing counsel should always be disclosed and if there is a significant risk that the representation of one or more clients will be materially limited, then the lawyer should also obtain informed, written client consent. Lawyers who regularly socialize, communicate, or coordinate activities or routinely spend time together, share confidences and intimate details of their lives, exchange gifts on holidays or special occasions, or who may have developed a mentor-protégée relationship while colleagues are considered to be close friends.

For friendships with a lesser degree of affinity, only disclosure may be required and in some instances neither consent nor disclosure may be warranted. The lawyer should consider for example, how often they see the friend and how often they communicate or keep in touch.

Ultimately, whether a friendship must be disclosed, and informed client consent obtained, is largely left to the lawyer's independent judgment. However, the lawyer should consider the nature of the friendship and determine whether there is a significant risk it may materially limit representation and if so, whether they can competently and diligently represent their client.

Acquaintances

Acquaintances are relationships that "do not carry the familiarity, affinity or attachment of friendships" and are coincidental or superficial, as compared to a friendship. (ABA Formal Opinion 494 at 7.)

This will often include collegial or professional relationships. Acquaintances do not need to disclose the relationship to their clients. Interestingly, the ABA still recommends disclosure, as it allows the lawyer an opportunity to discuss how the collegial relationship with opposing counsel may actually assist in the representation.

Regardless of the nature of the relationship, the role of the lawyer subject to the personal conflict should also be considered. Sole or lead counsel is more likely to have a non-waivable conflict than a lawyer with a subordinate role, no direct decision-making authority and minimal contact with opposing counsel.

Waiver of a Personal Interest Conflict

A waiver of a personal interest conflict requires the lawyer to obtain the affected client's informed consent, confirmed in writing, and the lawyer's reasonable belief "that the lawyer will be able to provide competent and diligent representation". (Model Rule 1.7(b)(1).) The lawyer must act as a reasonably prudent and competent lawyer in determining whether they can adequately represent their client in the face of a personal conflict.

Once the conflict is waived, the lawyer must not reveal information relating to the representation, unless otherwise permitted under the Model Rules, and must take reasonable measures to ensure that confidential information is not inadvertently disclosed to opposing counsel. This is particularly relevant for lawyers who are married or cohabitating.

If a lawyer determines at any time that they cannot provide competent and diligent representation due to the personal conflict, the lawyer must withdraw from the representation. However, personal interest conflicts, whether intimate, friendship or acquaintance, are generally not imputed to a lawyer's firm, as long as the conflict does not present a "significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." (Model Rule 1.10(a)(1).)

A lawyer should also keep in mind that notwithstanding a personal conflict under Model Rule 1.7, they may also be required to disclose a relationship with opposing counsel under the duty of communication in Model Rule 1.4.

Application of Model Rule 1.7

While providing a thorough explanation and application of the above three categories, the ABA opinion notably fails to address relationships on the other end of the spectrum. Negative or strongly adverse relationships with opposing counsel may be just as likely as an intimate relationship or close friendship to affect a lawyer's professional judgment. Yet, the opinion does not discuss whether such animosity warrants disclosure and/or informed consent. Rule 1.7 ostensibly seeks to prevent emotions and biases from affecting a lawyer's representation. Therefore, presumably the same duties to disclose and obtain consent would also be required in contentious relationships, if prevalent enough to present a threat to the lawyer's independent judgment. (Jack Marshall, *The American Bar Association Has Lost Faith in Professionalism, It Seems* (October 8, 2020) https://ethicsalarms.com/2020/10/08/the-american-bar-association-has-lost-faith-in-professionalism-it-seems.)

The opinion also does not address the disparity of the rule's application across various legal sectors and communities. In a close-knit or small legal environment, all lawyers may have some form of preexisting relationship with one another. Counsel in such communities or specialties should be cognizant that in order to comply with the rule, they may be more often required to disclose and/or obtain client consent than those practicing in larger cities or more general practice areas. (David Hricik, *ABA Issues Opinion Addressing Conflicts Arising out of Relationships with Opposing Counsel* (October 7, 2020) https://patentlyo.com/hricik/2020/10/addressing-conflicts-relationships.html.)

It is clear the ABA strongly supports disclosure of a relationship with opposing counsel, even in instances where Rule 1.7 may not necessarily require it and even when a lawyer may subjectively feel the relationship will not affect their representation. A conservative approach may be warranted, given the significant legal consequences that can result from a failure to disclose.

In *People v. Jackson* (1985) 167 Cal.App.3d 829, the defendant was convicted of several violent felonies. Just before sentencing, he discharged his court-appointed lawyer and moved for a new trial on grounds of ineffective assistance of counsel and prosecutorial misconduct. The prosecutor and defense counsel had casually dated for eight months, prior to and during the defendant's case. Despite defense counsel's belief that the relationship would not affect his professional judgment, the court found disclosure was required. The court noted that those who sustain a dating relationship over a period of months

are generally perceived as sharing a strong emotional or romantic bond. Such a close relationship reasonably gives rise to speculation as to a lawyer's "zealous representation and professional judgment," and "subtle influences" could affect advocacy efforts. (*Id.* at 833.) As a result, the lower court's denial of the defendant's motion for a new trial was reversed.

In another similar matter, the defendant was convicted of first degree murder. He appealed his conviction and moved for a new trial, both of which were denied. The defendant then retained new counsel and filed a second motion for new trial, arguing his original defense counsel had a conflict of interest arising from the lawyer's intimate, year-long relationship with an assistant district attorney. The ADA had worked in the appellate division of the office but did not in any way participate in the defendant's appeal and the relationship ended before the appellate brief was filed and oral argument occurred. The court found there was no actual conflict of interest, given the ADA did not participate in the appeal and the two did not live together nor develop a financial or personal interest in each other's careers. However, the court also held that because the relationship *might* have given rise to a potential conflict of interest, it should have been disclosed. (*Commonwealth v. Stote* (2010) 456 Mass. 213.)

In concluding its opinion the court stated, "We remind members of the bar of their professional obligation under rule 1.7(b) to disclose to their clients any intimate personal relationship that might impair their ability to provide untrammeled and unimpaired assistance of counsel… Even if an attorney reasonably believes that he or she can continue to represent the client vigorously, the attorney should err on the side of caution by disclosing the relevant facts…and asking whether the client consents to the representation." (*Id.*at 224.)

In *DeBolt v. Parker* (N.J. 1988) 560 A.2d 1323, husband and wife lawyers of different firms separately represented the estates of a deceased husband and deceased wife, respectively. Eventually, the administratrix of the wife's estate brought a civil suit against the husband's estate and the company whose employee had caused the auto accident leading to the couples' death. The wife lawyer withdrew from representation when the civil suit was initiated, as her client's interests became directly adverse to that of her husband's client. After withdrawal she sought allowance of fees for her services rendered. The court noted that forfeiture of fees was an option for cases in which conflicts of interest exist between husband and wife or familial relationships, such that withdrawal is warranted. Forfeiture of fees recognizes the difficulty a client may face in retaining new counsel in the middle of litigation and "absent forfeiture, there is no risk in the decision to represent potentially adverse interest[s]." (*Id* .at 1330.)

As indicated by case precedent, some courts are inclined to find a conflict of interest even when the preexisting relationship may seem remote or tenuous to the lawyers involved. In order to avoid future challenges or detriment to the client down the line, it is generally the best course of action to disclose the relationship to the client, particularly when the conflict arises from some form of intimate relationship or close friendship.

Conclusion

Not all personal relationships with opposing counsel create a conflict requiring disclosure or client informed consent. A lawyer must carefully evaluate the nature of the relationship—intimate, friendship or acquaintance—and the role of the lawyer within the representation.

If the relationship is intimate in nature, the lawyer must disclose the relationship, obtain informed client consent, confirmed in writing, and determine whether they can provide competent and diligent representation to the affected client. If the relationship is a friendship, the lawyer must determine how close the friendship. For close friends, disclosure and informed consent should generally be obtained; for lesser known or less frequently encountered friends, consent and even disclosure may not be required. For acquaintances, a lawyer typically will not need to disclose the relationship to the client.

If a lawyer reasonably believes that informed consent is required under Model Rule 1.7, they should confer with opposing counsel. If opposing counsel disagrees, the lawyer should then consider whether to raise the issue with the court, if the matter is in litigation, and whether the lawyer has an obligation to report opposing counsel under Model Rule 8.3, for a violation of the Rules of Professional Conduct. Even if not required by the nature of the personal relationship, disclosure is generally always recommended and may avoid future adverse consequences and can serve as an opportunity for the lawyer to foster and maintain positive client relations.

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How to Help Immigrants Avoid the 10-Year Green Card Scam

By Safiya N. Morgan

An immigrant who wants to remain permanently in the United States will usually have the goal of obtaining a green card. An immigrant with a green card, also known as a lawful permanent resident, is an immigrant who has affirmatively applied for and been approved by the United States Citizenship and Immigration Service (USCIS) to permanently live and work in the United States and has the freedom to travel to and from the United States with very few restrictions. Many green card holders will also eventually become eligible for United States citizenship, which has advantages even beyond being a green card holder, including protection from being deported from the United States for certain criminal acts or for traveling outside of the U.S. for extended periods of time, and expanded ability to petition for family members to obtain status in the U.S.

In my years of immigration practice, I have consulted with numerous clients who desire a green card and who have fallen victim to or believed in the 10-year green card scam. The 10-year green card scam is a scheme by which an unscrupulous attorney or an individual engaged in the unauthorized practice of law such as a notario publico, promises an immigrant that they can help them to obtain a work permit and then green card based on the fact that they have lived in the United States for 10 years.

As a result, the word on the street amongst many immigrant communities is that if you have been present in the United States for at least 10 years, regardless of whether you were lawfully admitted (for example with a visa), or whether you entered without inspection (for example by crossing the border), you will be eligible for a green card, no questions asked.

This misinformation cannot be further from the truth, as there is no affirmative case that an immigrant can file to request a green card solely on the basis of having lived in the United States for 10 years. Unfortunately, some immigration attorneys have not helped to correct this misperception because they have offered to represent their clients in a "10-year green card case", either to obtain a work permit, a green card, or both for their client, without explaining what that really means.

What the "10-year green card case" actually means is that the attorney will typically file a meritless or weak asylum case for the client, which raises plenty of ethical questions and prejudices the client, with the ultimate goal of having the asylum case denied as a way to place their client in removal proceedings, also known as deportation proceedings.

The attorney will do this because denied asylum cases are automatically referred, by operation of law, to the immigration court; and an immigrant must have a removal case pending in the immigration court to ask for a green card based on their 10 years of presence in the United States. Without the denied asylum case, it is quite difficult for an immigrant to start removal proceedings on their own.

Once in removal proceedings, the attorney will have their client assert a defense called "cancellation of removal," which requires 10 years of residence in the United States among other requirements, and, when successful, results in a green card being issued to the immigrant and the dismissal of their removal case.

The problem with this strategy is that it is neither quick nor easy. It is not cheap, as it takes a long time, a lot of work and private attorneys charge high rates for the complicated case. But unfortunately many immigrants are lured under such false pretenses to hire an attorney who will purport to assist them with this type of case. Also, there is no guarantee that the cancellation of removal defense will succeed, and if the defense fails, the immigrant may be issued a deportation order by the immigration judge and be forced to return to their country of origin.

Cancellation of removal is a form of relief in a deportation case that is difficult by design. Under INA §240A(b)(1), to be eligible for cancellation of removal, the immigrant must demonstrate:

1. She or he has been physically present in the United States continuously for at least ten years;
2. she or he has had good moral character for ten years;
3. She or he has not been convicted of certain offenses [crimes listed in INA sections 212(a)(2), 237(a)(2), or 237(a)(3)]; and
4. to deport her or him would cause exceptional and extremely unusual hardship to her LPR or U.S. citizen spouse, child, or parent.

Moreover, under INA §240A(c), cancellation of removal is not available to everyone and it excludes:

(a) individuals who already have received cancellation of removal, suspension of deportation, or INA §212(c) relief;

(b) individuals who persecuted others, or are inadmissible or deportable under the anti-terrorist grounds; and

(c) crewmen who entered after June 30, 1964, and certain "J" visa exchange visitors.

There are many nuances to unpack, in terms of assessing each element required for cancellation of removal. Suffice it to say that the immigration attorney has a duty of care and diligence to fully screen their client for eligibility for the cancellation of removal defense before placing them at risk of deportation by filing a meritless or weak asylum case.

For example, if the immigrant was physically present in the United States during 10 years but has an extensive criminal history involving multiple or serious crimes, they are less likely to qualify for cancellation of removal in immigration court.

Another huge hurdle the immigrant must overcome is being able to demonstrate that if they were to be deported, it would cause "exceptional and extremely unusual hardship" to their spouse, child, or parent—a very high standard to prove. The catch is that their spouse, child or parent must either be a United States citizen or green card holder. Moreover, the hardship must go above and beyond the objective impact we would expect the deportation of a beloved family member to have on the family who is left behind. This hardship must be exceptional, extreme, and provable with credible evidence.

As a result, a properly assessed immigrant may have several red flags showing they are unable to meet the criteria for a strong cancellation of removal defense. Yet, from the immigrant's perspective, they tend to believe their attorney did a good job because soon after the asylum case is filed, they receive a work permit. With the work permit, the immigrant can work legally in the United States for the first time, apply for a Social Security Number and start paying taxes.

While the immigrant feels they are on the right track to fixing their immigration status -- they are not out of the woods just yet. If the immigrant's asylum case is denied, they will end up in immigration court and need a strong defense to avoid being deported.

When I have spoken to clients who are in some stage of this situation, they are so happy to have a work permit but they do not understand that they may have been ineligible for their asylum case or that their asylum case was perhaps already denied by USCIS. Moreover, some of these immigrants have been notified by their immigration attorney that they have an upcoming date for their case, but many do not understand that this date is not a simple appointment or interview at USCIS -- but instead a trial date in their deportation case, in immigration court, in front of an immigration judge.

When I inform clients of these facts regarding the true nature of their case, they are often shocked, confused and scared. The worst nightmare of many immigrants, particularly those who lacked immigration status in the first place or who have a lapsed immigration status, is to have a deportation case. The vast majority of vulnerable immigrants would not purposely place themselves at increased risk for deportation by taking steps to initiate their own removal case. The stakes are undoubtedly highest once an immigrant has a deportation case.

What advice can we give to clients to protect themselves from this scenario, or to at least help them to make an informed decision if they choose to go this route with their immigration attorney? As usual, it depends heavily on each client's set of specific circumstances.

For example there are a select few clients who will have a merit-based asylum claim, even if they have been in the United States past the one year filing deadline for asylum. Or there may be a client who came to their attorney and was already in removal proceedings, and thus filing for asylum as a grounds of defense to their deportation case or seeking cancellation of removal as a defense to their deportation case is less risky.

But for the vast majority of clients, they are indeed ineligible for an asylum claim and they do not understand that they are being placed in removal and the risks that entails. As a result, we can generally advise immigrants to follow four recommendations to protect themselves from unwittingly becoming a victim of the 10 year green card scam.

First, the immigrant should confirm that they are working with an immigration attorney who is in good standing in the state where they are licensed and who has no history of complaints filed against them, whether in the state where licensed or in the federal immigration court. Working with an attorney, as opposed to an individual who is unauthorized to practice law, will give the client an added layer of

protection. The client should be suspicious if the attorney promises the case will be quick or easy—as those are two things that immigration law unfortunately is not! If the attorney's fees are exorbitant, that is another risk factor. The client should also be suspicious if the attorney guarantees a particular outcome since USCIS and the immigration court have the final say in the case.

Second, the immigrant should do a consultation with at least two immigration attorneys before hiring one to ensure they have a second opinion on their options. Doing so will allow the immigrant to decrease their risk of pursuing a frivolous case. If the two attorneys, for example, reach different conclusions on whether the client is eligible for asylum and cancellation of removal, then that is a risk factor that should give the client pause to investigate the situation further.

Third, once the client selects an attorney to work with, they need to be clear about exactly what they are doing. The client needs to have a retainer agreement that accurately describes the scope of the representation and the total cost for the services in writing. The client should also ask the attorney what the possible outcomes are for any immigration relief that is identified, and the possible consequences of pursuing various options. If the client truly understands the work being done, the client should be able to explain the type of case they are filing and why they are eligible in their own words.

Fourth, the client should track the progress of their case. If the client is working with a private attorney, they should request receipts to track all payments made. The client should also ask for a copy of any and all documents that their attorney has submitted on their behalf to the immigration authorities. Finally, the client should request copies of all correspondence from USCIS and the immigration court related to their case, to allow them to track their case status.

At the very least, by following these recommendations the immigrant will have a complete and accurate record of what their attorney did on their behalf. If an issue arises in the future, as to the client's eligibility for the underlying asylum case or the cancellation of removal defense, the immigrant will be in a better position to track what happened and to ensure that they received effective assistance of counsel. For most immigrants to the United States, having a deportation case is their biggest fear, and they would not purposely and knowingly place themselves at a higher risk for removal. Therefore, immigrants should be advised to take these steps to protect themselves.

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