**Working Title**

**Lawyer Ethics for California Immigration Attorneys**

**OVERVIEW OF THE IMMIGRATION SYSTEM**

Some foreign nationals who come to the USA are immigrants; others have a non-immigrant status. Most foreign nationals make their applications and receive their visa or immigration status from the United States Citizenship and Immigration Service (USCIS), which is a division of the Department of Homeland Security (DHS), which in turn is a Cabinet Department in the Executive Branch of the government. This syllabus does not address people who go through other federal agencies. Appeals from actions in DHS are heard in immigrations courts, which are in the U S Department of Justice (DOJ), under the supervision of the

U S Attorney General, a different Cabinet Department. The immigration courts also determine petitions for removal of immigrants. Hearing level cases are assigned to immigration courts, which are part of the Executive Office for Immigration Review (EOIR). The appellate level of immigration courts is the Board of Immigration Appeals (BIA), which is also part of EOIR.

**OVERVIEW OF ATTORNEY DISCIPLINE**

**IN THE DHS IMMIGRATION SYSTEM**

The USCIS and the EOIR have Rules of Professional Conduct (RPC’s) that govern attorneys. For the most part, USCIS rules defer to EOIR Rules, which are contained in 8 CFR 1003.102. Thus, in addition to complying with the Rules of Professional Conduct that govern California attorneys, you have to comply with USCIS and EOIR Rules as well. Some of those EOIR rules have some nasty surprises for the unsuspecting attorney.

Both DHS and EOIR have become more active in enforcing their RPC’s in the past couple of years. Those people who enforce the rules now have a new set of managers, some of whom can be expected to lash out at the attorneys who represent immigrants.

 Read these rules before you talk to your first immigrant client.

<https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-33286/0-0-0-34396.html>

**“Protect yourself at all times.”**

Frankie Dunn (Clint Eastwood) to Maggie Fitzgerald (Hilary Swank)

who wants to become a professional boxer

in the movie *Million Dollar Baby*

**THE INTERPLAY BETWEEN STATE AND FEDERAL RULES**

**OF PROFESSIONAL CONDUCT**

California RPC 1-100(D) requires all California lawyers to obey California RPC’s wherever you may be. Exception: if you are practicing in a jurisdiction that has a rule of **mandatory conduct** that contradicts the California rule, you follow that mandatory rule when acting in that jurisdiction.

If you are an out of state attorney practicing immigration law in California, consult the rules of your home state. Then read Cal Bus & Prof 22442.2(c), which governs out of state attorneys practicing immigration law in California.

*Gadda v Ashcroft* (9th Cir 2004) 377 F 3rd 934. The Court held that Mr. Gadda could be disciplined in California and the Ninth Circuit for misconduct in the EOIR and in the INS (predecessor agency to USCIS). Had the USCIS or Ninth Circuit acted first, the attorney would have been subject to the expedited reciprocal disciplinary statute, Cal Bus & Prof 6049.1. That code section imposes an expedited process in California attorney discipline that is based on any other attorney discipline, including that of a federal agency.

EOIR also has a process for reciprocal discipline, as does most every federal court and every state. Reciprocal discipline thus depends upon who gets you first, after which you move at the speed of light through the disciplinary systems everywhere else you are admitted.

*Theard v. U.S.* (1957) 354 U.S. 278, [77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342]. Federal courts do not automatically discipline an attorney due to state discipline, but the state court determination “of course brings title deeds of high respect.”

**ADDITIONAL LEGAL RESEARCH**

There is applicable law in addition to statutes, rules, and the published cases of supreme courts and courts of appeal. The BIA publishes precedent cases. The State Bar Court publishes disciplinary cases. The State Bar of California, along with several local bar associations, publish ethics opinions, which are given “great weight.”

**THE BASIC FEDERAL LEGAL OUTLINE**

**Immigration is governed by “Immigration and Nationality Act,”** and it is codified in Title 8 of the United States Code, beginning at 8 USC 1101. Regulations pertaining to immigration are in Title 8 of the Code of Federal Regulations, beginning at 8 CFR 1.1. If you represent immigrants at the USCIS (United States Citizenship and Immigration Services) or the EOIR (Executive Office for Immigration Review), then you are governed by the Rules of Professional Conduct for those agencies. Those rules were last revised on January 19, 2017.

**USCIS & EOIR**. The USCIS Rules of Professional Conduct are recited at 8 CFR 292.3. The rule incorporate the EOIR RPC’s at 8 CFR 1003.102, and recites that the EOIR will actually hear any disciplinary case arising out of USCIS. §292.3 reiterates the duty of zealous advocacy while simultaneously noting that an attorney can disciplined “in the public interest.”

**Who may represent immigrants?** Attorneys admitted in any state may represent immigrants. Under certain circumstances, so may law students, law graduates, and even certain accredited representatives of certain nonprofit organizations. See 8 CFR 1292.1. Once again, this syllabus is focused on the comparison between California and federal RPC’s. Out of state attorneys should consult the rules in their state of admission, but also comply with Cal Bus & Prof 22442.2(c).

**Representation in federal courts.**  When you take your client’s case to the federal courts, first of all remember that each federal district court requires separate admission from your state court and from each other. Second, each has its own rules of professional conduct too. California district courts generally follow the California State Bar Rules of Professional Conduct.

**FRIVOLOUS CONDUCT**

8 C.F.R. § 1003.102(j) (1): “A practitioner engages in frivolous behavior when he or she knows or **reasonably should have known** that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to harass or to cause **unnecessary delay**. Actions that, if taken improperly, may be subject to disciplinary sanctions include, but are not limited to**, the making of an argument on any factual or legal question**, the submission of an application for discretionary relief, the filing of a motion, or the filing of an appeal.” (**Emphasis added**) \*\*\*\*

By way of contrast, California typically relies on civil sanctions to deter frivolous conduct (See CCP 128.5 and 128.7). However, in *Weber v State Bar* (1988) 47 Cal 3rd 492, 507, after a finding of disciplinary culpability, the attorney’s frivolous lawsuit against the State Bar was considered as a factor in aggravation to increase the level of discipline. See also *Sullivan v State Bar* (1946) 28 Cal 2nd 488, to the effect that an attorney’s subjective intent may be a defense to an accusation of frivolous conduct.

**NEGLIGENCE & COMPETENCE.**

8 C.F.R. § 1003.102 (q): “Fails to act with reasonable diligence and promptness in representing a client…

(1) A practitioner's workload must be controlled and managed so that each matter can be handled competently.

(2) A practitioner has the duty to act with reasonable promptness. This duty includes, but shall not be limited to, complying with all time and filing limitations \*\*\*\*

(3) A practitioner should carry through to conclusion all matters undertaken for a client, consistent with the scope of representation as previously determined by the client and practitioner, unless the client terminates the relationship or the practitioner obtains permission to withdraw in compliance with applicable rules and regulations.\* \* \* \*

(4) Promptly comply with reasonable requests for information, except that when a prompt response is not feasible, the practitioner, or a member of the practitioner's staff, should acknowledge receipt of the request and advise the client when a response may be expected….

*Gadda* is also a reminder that simple negligence can be the vehicle for discipline in federal courts and agencies. By way of contrast, California does not discipline for simple negligence. *Matter of Respondent P* (1993) 2 Cal State Bar Court Rptr 622, 631-632; *Guzzetta v. State Bar*, (1987) 43 Cal.3d 962. Thus,

Cal Rule 3-110(A), “A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.”

Then read the official Discussion to Rule 3-110, last paragraph, which has no parallel in the EOIR Rules:

“In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances.”

California requires attorneys to keep clients reasonably informed of significant developments, Bus & Prof 6068(m) and RPC 3-500.

Other EOIR rules that touch on competence include:

8 C.F.R. § 1003.102 (t) Failure to submit a signed and completed Notice of Entry of Appearance as Attorney.

8 C.F.R. § 1003.102 (u) Repeatedly filing boilerplate pleadings that reflect little or no attention to the specific factual or legal issues applicable to a client's case.

**SOLICITATION OF PAYING CLIENTS**

8 C.F.R. § 1003.102(d), and California RPC 1-400(B) both prohibit in person solicitation of paying clients. See *Rose v State Bar* (1989) 49 Cal 3rd 646, improper to solicit a witness to become a client.

This syllabus is intended for pro bono attorneys, so it does not discuss the regulation of attorney fees.

**TWO SIGNIFICANT CASES**

***Gadda v Ashcroft* (9th Cir 2004) 377 F 3rd 934**

*In Re Gadda* (BIA 2003) 23 I & N Dec 645

*Matter of Gadda* (2002) 4 Cal St Bar Ct Rptr 416

The State Bar Court recommended to the California Supreme Court that Mr. Gadda be disbarred. As a result, the former BIA and the EOIR ultimately disbarred him from immigration practice. The Ninth Circuit ruled that the State was not preempted from imposing discipline for his conduct in immigration cases, thus refusing to set aside the California disbarment. Furthermore, since many immigration cases wind up in the Ninth Circuit, it was appropriate for the Ninth Circuit to impose reciprocal discipline, or to exercise its independent power to discipline Mr. Gadda.

The *Gadda* case is replete with multiple acts of incompetence in representing immigrants in asylum cases. The Ninth Circuit cited as an example, four children who were denied asylum and ordered to depart from the country. Their parents became naturalized citizens, but Gadda never sought to adjust the children’s status to legal residents of citizenship.

The State Bar Court Review Department found that Mr. Gadda had failed to perform competently in approximately 25 cases. Among his deficiencies were missed court appearances, sending his client to court without him, failing to inform his clients of hearing dates, failing to get documents translated into a language his clients could understand, failure to supervise a contract attorney whom he sent to cover hearings.

The significance of *Gadda* in this syllabus is that the state and federal courts imposed discipline for Misconduct in immigration agencies. Mr. Gadda’s conduct was egregious and prolonged, but the power to discipline could be exercised in all courts and agencies where Mr. Gadda was admitted.

***Matter of Valinoti* (2002) 4 Cal St Bar Ct Rptr 498**

Mr. Valinoti claimed he was an “appearance attorney” and that he worked with various nonattorney “immigration service providers” who prepared and helped file the immigrants’ paperwork. None of the providers met the immigration law requirement for nonattorneys. See 8 CFR 208.3 (family members helping with asylum applications); 8 CFR 292.1 (regulations governing nonattorney representative in DHS); Cal Bus & Prof 22440 et seq, on immigration consultants.

When he did appear, attorney Mr. Valinoti filed the EOIR Form G-28, as was proper. However, by deeming himself an “appearance attorney,” he blithely walked away from the client without getting an approval to do so from the immigration court, thus violating RPC 1003.102(q)(3).

*Valinoti*  also cites two INS precedent cases for the proposition that there is no such thing as a “limited appearance” in immigration proceedings.

*Valinoti*, like federal immigration regulations, requires an attorney to keep proper books and records, in the event there is a question of what an attorney did. The duty to do so is based on the need to explain yourself in disciplinary proceedings or civil actions by clients.

Mr. Valinoti demonstrated a stunning ignorance of immigration law over a long period of time, in the representation of many clients. Nevertheless, his case stands for need to have a reasonable working knowledge of immigration law if you are going to assume representation of an immigrant. And the need to be careful of what sort of reliance you place on people who are not attorneys.

**USEFUL LINKS**

8 CFR 292.3 (USCIS RPC’S)

<https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-30297/0-0-0-30371.html#0-0-0-19247>

8 CFR 1003.102 (EOIR RPC’S)

<https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-33286/0-0-0-34396.html>

8 CFR 1292.1 (Representation of others at the DHS)

<https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-40195/0-0-0-40200.html#0-0-0-22225>

Immigration Court Practice Manual

<https://www.justice.gov/eoir/office-chief-immigration-judge-0>

Precedent Decisions of the BIA

<https://www.justice.gov/eoir/ag-bia-decisions>

Published Cases of the California State Bar Court

<http://www.statebarcourt.ca.gov/Opinions/PublishedOpinions.aspx>

State Bar Rules of Professional Conduct

<http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct.aspx>

Draft Revised 5/1/17

**USE OF THIS SYLLABUS**

The first version of this syllabus was originally prepared by California attorneys Jerome Fishkin and Mary Grace Guzmán. Our purpose is to give some grounding to volunteer attorneys who offer pro bono help to immigrants caught up by the new executive orders. Feel free to reproduce and this material, but please give us credit for the first draft. And send us a copy of your syllabus or article.

If you are using this material in another state, you will of course want to delete the California references and insert applicable law from your own state.

If you find errors in the syllabus, please tell us.

Send materials to Jerome@FishkinLaw.com.

**THE AUTHORS**

**Jerome Fishkin** has been a practicing attorney since 1971. He currently represents attorneys in disciplinary investigation and trials, primarily at the State Bar of California. He has represented attorneys in other forums, including USCA Ninth Circuit, US District Courts in California, USCIS, OED (USP&TO), Social Security Office of General Counsel. He also represents moral character applicants at the State Bar.

Jerry remembers the early days of his practice, when he represented draft resisters during the Vietnam War. It was the lessons of those days that prompted him to work on this syllabus, knowing that attorneys who represent the politically unpopular clients will themselves come under attack.

Jerry and his partner Lindsay Slatter were the pro bono attorneys for the first undocumented immigrant to be admitted to practice law-- *In Re Garcia* (2014) 58 Cal 4th 440.

**Mary Grace Guzmán** represented immigrants and criminal defendants when she was a solo practitioner. As an associate at Fishkin & Slatter LLP, she represented and advised moral character applicants and attorneys. She is presently a conflicts attorney at Covington & Burling LLP.