Dealing with Mistakes and How to Avoid Them in the Practice of Immigration Law

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Every attorney can make a mistake. Even if an attorney claims to be perfect, there is likelihood that someone in his or her law firm might make a mistake. Mistakes are, thus, inevitable, and a fact of life. The question is how to prevent them, and if a mistake does happen, how to deal with it.

Immigration law is not exempt and, indeed, may be even more prone to mistakes as rules and policies are always in flux, and one has to deal with many agencies with often differing policies or rules, while handling immigration matters. Moreover, it goes without saying that immigration law is very complex, and a failure to comprehend or appreciate its complexities can also result in errors. From an ethical perspective, a lawyer is required to represent his or her clients competently. A competent lawyer will be less prone to committing mistakes.

We provide a quick overview of the standards that guide lawyers regarding competence.

ETHICAL BASIS FOR COMPETENCE

A lawyer is required to be competent. Rule 1.1 of the New York Rules of Professional Conduct provides, in part:

a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without association with a lawyer who is competent to handle it.

Since a lawyer "should" rather than "shall" provide competent representation in Rule 1.1(a), the rule does not require a lawyer to be perfect. Otherwise, a lawyer would be disciplined even for an isolated mistake. This would encourage lawyers to spend a lot of time striving for perfection rather than the more realistic standard of competency, and, thus, there is a policy reason for not punishing lawyers who are not perfect. On the other hand, a lawyer who demonstrates a pattern of incompetence will likely be disciplined under Rule 1.1 even though the rule does not require perfection from a lawyer. As many lawyers are attracted to the field of immigration law, it is worth noting that an inexperienced lawyer is not prohibited from handling a novel matter if he or she can gain competence through necessary study or by associating with a lawyer of established competence in the field.[1]

There is also a parallel disciplinary ground applicable to lawyers who practice before the U.S. Department of Homeland Security (DHS) or the Executive Office of Immigration Review (EOIR) at 8 CFR §1003.102(o), which seems to be less forgiving than the New York rule, as it provides that a lawyer shall be disciplined who:

> Fails to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.

INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *MATTER OF LOZADA*

Immigration practitioners are also more likely to face disciplinary complaints than other lawyers due to the requirement for establishing ineffective assistance of counsel under *Matter of Lozada*.[2] In order to demonstrate that the prior counsel was ineffective and move to reopen an adverse decision, a *Lozada* motion must: 1) be supported by an affidavit setting forth the agreement and representation by counsel; 2) inform counsel against whom the claim is made and provide counsel with an opportunity to respond; and 3) reflect in the motion whether a disciplinary complaint has been filed and if not, why not.[3] While immigration practitioners must safeguard against a disciplinary complaint under *Lozada*, many grievance committees tend to treat such a complaint less seriously, since the motivation behind the complaint is essentially to comply with the third prong of *Lozada*.

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[1] *See* Comment 2 to Rule 1.1.

[2] *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

[3] The third *Lozada* requirement regarding a disciplinary complaint need not be met if it can be shown why it was not filed. Thus, in the U.S. Court of Appeals for the Third Circuit, for example, an affidavit from current counsel that he spoke to former counsel was sufficient; *Rranci v. AG*, 540 F.3d 165 (3d Cir. 2008), or when the prior counsel confessed error and submitted a detailed affidavit regarding his ineffectiveness, *Fadiga v. AG*, 488 F.3d 142 (3d Cir. 2007).

LEGAL MALPRACTICE LIABILITY

On the other hand, a lawyer is likely also to face malpractice liability, even for an isolated mistake, rather than professional discipline. To establish that a lawyer was negligent in a malpractice case, the plaintiff must: 1) prove that an attorney client relationship existed; 2) establish the standard of care in the community (which is established through expert witness testimony); and 3) provide that the client would have succeeded in the underlying matter "but for" the defendant attorney's negligence.[4] While it may not always be clear when the attorney client relationship was established (and indeed the perception of the "client" may conflict with that of the attorney) the "but for" standard is a high bar and should put the brakes on frivolous law suits.

SOME EXAMPLES OF COMMON MISTAKES IN IMMIGRATION PRACTICE

While a comprehensive catalogue of every potential mistake that can occur in immigration practice is beyond the scope of this article, we discuss below some commonly encountered mistakes in order to make readers aware of them and, thus, endeavor to prevent them from happening.

Removal Defense Cases

When representing clients in removal proceedings, the most common mistake, which often results in a *Lozada*[5] motion along with an accompanying disciplinary complaint, is the missing of a filing deadline.[6] Missing filing deadlines such as an appeal to the Board of Immigration Appeals (BIA) within 30 days or failing to file a motion to reopen or reconsider within the specified time frame can be fatal to the client's ability to seek a remedy and remain in the country. One often also finds that an attorney may inadvertently fail to inform a client about a hearing date before an immigration judge, and the "no show" on the part of both the attorney and client may result in an *in absentia* removal order. Often, if the client refuses to pay, an attorney may stop working on a case by not filing an appeal, or not filing a brief following an appeal. Under such circumstances, the attorney may still be treated as the attorney of record, and be sanctioned for failing to file the brief, unless he or she withdraws from the case and receives permission to do so.[7]

Business Immigration Cases

In the business immigration arena, the potential for mistakes is immense. Indeed, the PERM labor certification process is so hyper-technical and time sensitive that even the best of attorneys can commit errors. If the attorney neglects to file the PERM within 180 days from the first

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[4] *See Ambase Corp. v. Davis Polk & Wardwell*, 8 N.Y.3d 428 (2007).
[5] *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).
[6] Although beyond the scope of this advisory, the practitioner must carefully review INA § 240(c)(6) and (c)(7), along with the accompanying regulations and decisions, regarding deadlines for filing motions to reconsider or reopen removal orders.
[7] For the procedure to withdraw as counsel before the EOIR, s*ee* chapter 2.3 of the *Immigration Court Practice Manual*, available at www.justice.gov/eoir/vll/OCJPracManual/ocij_page1.htm. See also chapter 2.3 of the *Board of Immigration Appeals Practice Manual*, available at www.justice.gov/eoir/vll/qapracmanual/apptmtn4.htm.

advertisement, or within 30 days of an advertisement (except one of the three for professional positions), then that will result in a certain denial of the application.[8] Such a denial may have devastating effects for a foreign national who is about to enter into the sixth year of his or her H-1B status, as the filing of a new PERM in the sixth year will preclude the extension of the H-1B status beyond the sixth year under §106(a) of the American Competitiveness in the 21st Century Act.[9] In other business areas, the filing of an H-1B petition before the cap is reached for the fiscal year can be a high stakes game. If there is any error in the filing, such as an unsigned form or incorrect payment, it can result in a rejection and the petitioner will not be counted in the H-1B cap for the relevant fiscal year, and will have to wait for the following year.

Family Immigration Cases

In family immigration, the attorney must understand and advise on the consequences of a beneficiary's priority number and the consequences of unauthorized presence. Even immediate relatives must be counseled on the consequences of criminal issues, and in particular those involving controlled substances, as well as other grounds of inadmissibility and exclusion. For these types of matters, a competent attorney must be aware of the beneficiary's background before a petition is filed, otherwise the attorney can be blamed for advising the client to leave the United States and not being able to return because of a ground of inadmissibility that was not made known to the client.

Finally, under Immigration and Nationality Act (INA)[10] §203(h)(1)(A), in order to project the age of the child under the Child Status Protection Act (CSPA)[11] (which applies to both employment and family petitions), a child must seek to apply for permanent residency within one year of visa availability. An attorney's error in failing to file within one year could be used as a basis to demonstrate that the child still complied with this requirement. In *Matter of O. Vasquez*,[12] the BIA held that one way to show that an applicant met the requirement, even if the application was not filed within one year, was that he or she paid an attorney to prepare an application prior to the one year deadline, but the attorney then failed to take the ministerial step of actually filing the application, thus effectively depriving the aged-out child from the protection of the CSPA through no fault of its own.

Mistakes can occur even if the attorney handles the case correctly, but it may not be clear to all parties if the attorney has continuing obligation to the client. In the practice of immigration law, a lawyer generally represents two or more clients, and there is a potential for conflict. In the event of a conflict, the lawyer must be clear about whether he or she is continuing with the representation of the client or no longer representing the client. While the handling of conflicts is beyond the scope of this article, attorneys must be mindful about dealing with clients

[8] 20 CFR §656.17(e).
[9] Pub. L. No. 106-313, §§101–16, 114 Stat. 1251, 1251–62.
[10] Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq*.).
[11] Pub. L. No. 107-208, 116 Stat. 927 (2002).
[12] *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012).

appropriately in the event of a conflict of interest, especially with respect to withdrawal of representation and ensuring that the client is fully informed about the attorney's actions.[13]

Finally, it is also worth noting that if an attorney adopts a risky strategy, where the filing of an application could potentially result in the client's removal but if successful can also allow the client to receive the benefit, the attorney must fully inform the client about the risks and rewards of such a strategy, as well as obtain the client's written consent. In a recent malpractice action, a New York appellate court allowed a malpractice case to proceed even though the client was subject to reinstatement of removal when the attorney filed an adjustment of status application, despite the fact that the client faced a bar under INA §212(a)(9)(C)(i)(II).[14] In this case, the client's prior removal order was reinstated after the filing of the application upon the advice of the attorney. The decision is extremely troubling, as it may dissuade attorneys from taking risks on behalf of clients even if there is presently an adverse administrative precedent, since there may be ongoing litigation, or the potential for litigation, in a federal circuit court to overturn the adverse administrative precedent. The court also misunderstood that the client could apply for a waiver of the bar under INA §212(a)(9)(C)(i)(II) within the United States after 10 years, which is clearly not the case. This case reminds us that a civil court not specialized in immigration issues may misunderstand the complexity of the immigration matter in ruling in favor of the plaintiff, who is seeking damages for an adverse action taken by the government.

HOW TO AVOID MISTAKES

Here are some common sense tips based on our experience on how to avoid mistakes:

- A lawyer must always exercise diligence and promptness in representing a client, and shall not neglect a matter entrusted to him or her.[15]
- It is always important to keep updated of the latest developments in your practice area within the immigration field.
- Train staff regularly or send them for trainings/CLEs.
- Maintain your own up-to-date resources on the immigration practice areas in your own firm (treatises, Westlaw, etc.) and use the wealth of information and resources available through AILA.
- Set forth a standard operating procedure (SOP) for handling a case such as an H-1B or I-130 petition, and ensure that all members of your staff adhere to the SOP. Comprehensive questionnaires and model letters may assist in keeping everyone on the same page and ensuring details do not fall through the cracks.
- Develop multilevel layers of review of applications and procedures as even you, the supervising attorney, can make a mistake. [16]

[13] See C. Mehta, "Finding the Golden Mean in Dual Representation," *published on* AILA InfoNet at Doc. No. 07081769 (*posted* Aug. 17, 2007); B. Hake, "Dual Representation in Immigration Practice," *published on* AILA InfoNet at Doc. No. 05060724 (*posted* Jun. 7, 2005).

[14] See *Delgado v. Bretz & Coven*, LLP, 2013 Slip Op 04720 (decided Jun. 20, 2013), Appellate Division, First Department Manzanet-Daniels, J.J.

[15] This is also enshrined in New York Rules of Professional Conduct 1.3. Also, a lawyer must promptly communicate with the client regarding keeping the client informed about developments on the matter. See New York Rules of Professional Conduct 1.4. The authors also recommend that attorneys review the immigration rules regarding diligence and communication at 8 CFR §10003.102(q) and (r).

- Always warn client of possibility of a negative decision ideally in writing, and always manage your client's expectations.
- Set forth how you will handle the representation if there is a conflict of interest between co-clients from the outset of the case.

HOW TO HANDLE MISTAKES

If you discover that you have made a good faith mistake, do not procrastinate in trying to correct it. Develop a strategy on how you can remedy the mistake, and then communicate with the client and your supervisor, if applicable. Many minor mistakes may be corrected using informal methods, or by refilling. If the client trusts you and has appreciated your work in the past, the client will most likely also appreciate that you have communicated the error in a timely fashion and will continue to trust you to fix the mistake. It is also prudent that you do not charge fees for work you will perform as a result of your error.

There may be situations that the client is unhappy, and may want to move to another lawyer. In such a situation, if the client terminates your services, do not hold onto the file, as it will make matters worse for you. In the event that a disciplinary complaint is filed against you, the grievance committee will look at you more favorably if you did not conceal anything from the client, did not procrastinate in trying to correct the error, and fully cooperated with the client and the new attorney. Finally, also inform your malpractice carrier if you think a claim will be made against you, as that's what they are there for—to vigorously defend your interests in the event of a malpractice action.

This is obviously a worst case scenario. Generally, if you follow all the ethical rules regarding competence, diligence, and communications with clients, you will be able to avoid mistakes, and if a mistake does occur, you should be able to remedy the situation while your client continues to have confidence in you.

[16] Note that a lawyer is responsible for the conduct of subordinate lawyers and non-lawyers under New York Rules of Professional Conduct 5.1 and 5.3 respectively.