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Technical Assistance for Immigrant Survivors

Note from the Co-Directors

Dear ASISTA readers:

In this issue you will find three articles that exemplify what we try to do for you. We include practice pointers on a specific VAWA issue, an update on procedural issues, and an in-depth article on a larger practice issue relevant to all attorneys and advocates assisting immigrant survivors with their legal claims.

We asked Lory Rosenberg, a renowned immigration law expert who served on the Board of Immigration Appeals, to elucidate ethical rules and precepts and how they apply to your work. As Lory notes, ethical issues arise in every case, though ethical problems may not. When problems do arise in VAWA cases, however, they can be confusing and daunting. We are grateful to Lory for sharing her time, thoughts, and support for immigrant survivors. Please contact us for technical assistance if you have cases that raise ethical concerns.

Sally Kinoshita's article on extreme cruelty provides helpful practice pointers gleaned from our amicus work for the federal courts and our experience working with CIS VAWA personnel. Part of the relationship with CIS noted below includes meeting with them to provide information on domestic violence, including extreme cruelty, and working together to develop and impart best practices to the field. As with our other "practice" articles, you will find documents on our website enhancing the article.

The information in our update on work authorization procedures comes directly from CIS VAWA personnel, who wanted you to know about the changes as soon as possible. This close communication with CIS is invaluable for you and your clients. Remember that another aspect of this relationship is that we can help resolve issues in your cases before they become crises (see below for how to contact us if you need such help).

We thank CIS officers Laura Dawkins, George Murphy, Michelle Young and Rebecca Story for maintaining this vital link which, as those of you familiar with other aspects of the immigration system know, is rare and remarkable. We are very fortunate to have such dedicated and committed officers implementing the VAWA, U and T program at CIS. If you have clients who would like to thank them, let us know (see below).

In upcoming newsletters we will provide practice pointers on good moral character, best practices in framing self-petitions with a sample "road map" and document index, as well as an article that is essential to our practice, proving domestic violence through your client's personal declaration. Since our goal is to provide information you need, please let us know if there are any "burning" issues we have not addressed. To find our previous editions, go to www.asistaonline.org, and click on "Access our previous newsletters here".

Send your newsletter suggestions, requests for assistance with CIS, and CIS "thank you" queries to question@asistaonline.org, with "Newsletter suggestion," "Request for help with CIS" or "CIS thank you" (as relevant) in the subject matter box.

We hope you find this issue interesting and useful.
Sonia Parras-Konrad and Gail Pendleton

Extreme Cruelty: What It Is and How to Prove It

by Sally Kinoshita

A broad and flexible definition of abuse: The statutory framework and Congressional intent

VAWA requires that a self-petitioner show that she “has been battered or has been the subject of extreme cruelty” by a lawful permanent resident spouse, a U.S. citizen spouse, a lawful permanent resident parent, a U.S. citizen parent, or a U.S. citizen son or daughter. Abusive acts that may not initially appear violent may constitute “extreme cruelty” for the purposes of VAWA. Therefore, a person who has suffered no *physical* abuse may still be eligible to self-petition. As the 9th Circuit said in *Hernandez v. Ashcroft*,

“Extreme cruelty provides an inquiry into an individual’s experience of mental or psychological cruelty, an alternative measure of domestic violence that can also be assessed on the basis of objective standards...extreme cruelty simply provides a way to evaluate whether an individual has suffered psychological abuse that constitutes domestic violence.”¹

The court noted that, in determining extreme cruelty, one must “consider the nature and effects of violence in intimate relationships.” The purpose of the term “extreme cruelty” is to encompass the forms of domestic violence that are not physical. By their very nature as forms of domestic violence they are “extremely cruel.” Thus, the focus of an extreme cruelty inquiry should be whether it’s a form of domestic violence, not whether it’s “extreme” enough.

There is no exhaustive list of acts that constitute “extreme cruelty.” According to the regulations, the definition is a flexible one that includes, but is not limited to, threats of violence, forceful detention, psychological abuse, sexual abuse, exploitation, rape, molestation, incest (if the victim is a minor) and forced prostitution.² Other abusive acts that are not violent may also be acts of “extreme cruelty” under certain circumstances, including acts that are part of an overall pattern of violence. As the 9th Circuit summarized:

Under the INS’s regulation, any act of physical abuse is deemed to constitute domestic violence without further inquiry, while “extreme cruelty” describes all other manifestations of domestic violence. Nonphysical actions rise to the level of domestic violence when “tactics of control are intertwined with the threat of harm in order to maintain the perpetrator’s dominance through fear.” . . . By defining extreme cruelty to encompass “abusive actions” that “may not initially appear violent but that are part of an overall pattern of violence,” 8 C.F.R. § 204.2(c)(1)(vi), . . . protects women against manipulative tactics aimed at ensuring the batterer’s dominance and control. Because every insult or unhealthy interaction in a relationship does not rise to the level of domestic violence, . . . Congress required a showing of extreme cruelty in order to ensure that section 244(a)(3) protected against the extreme concept of domestic violence, rather than mere unkindness.³

¹ *Hernandez v. Ashcroft*, 345 F.3d 824, 834-35 (9th Cir. 2003).

² 8 CFR 204.2(c), (e)

³ *Hernandez*, 345 F.3d at 840.

The VAWA Unit Approach

Determining whether or not a client's experience constitutes "extreme cruelty" largely depends on the independent facts of each individual client's case. However, it is useful to look at CIS Requests for Additional Evidence to analyze the likelihood that the VAWA Unit adjudicators will find that a client was subject to "extreme cruelty." At the National Network to End Violence Against Immigrant Women annual conference Q&A sessions with Vermont Service Center VAWA Unit Staff, Supervisory Adjudicators have indicated that they are looking for acts that are part of a pattern of threatened violence or psychological abuse that are intended to control the victim or substantially diminish her quality of life. The following is a summary of CIS Requests for Evidence that illustrate their definition of extreme cruelty.⁴ These excerpts juxtapose what is extreme cruelty against what isn't:

Extreme cruelty must indicate an intent to control through psychological attacks and/or economic coercion which also includes emotional abuse, humiliation, degradation, and isolation. A pattern of purposeful behavior, directed at achieving compliance from or control over the victim must be demonstrated.

Marital tensions and incompatibilities which serve to place severe strains on a marriage, and in fact may be the root of the marriage disintegration do not by themselves constitute extreme cruelty. The intent of VAWA did not encompass the mental anguish generally associated with marital difficulties, infidelity, separation or abandonment.

Under this flexible definition, examples of abuse that – if part of an overall pattern – may constitute extreme cruelty include but are not limited to: social isolation of the victim, accusations of infidelity, incessantly calling, writing or contacting her, interrogating her friends and family members, threats, economic abuse, not allowing the victim to get a job, controlling all money in the family, and degrading the victim. Violence against another person or thing may be considered abuse if it can be established that the act was deliberately used to perpetrate extreme cruelty against the victim.

The Importance of Credible and Corroborating Evidence

Evidence of "extreme cruelty" may include "any credible evidence." The inclusion of the "any credible evidence" standard in the immigration statute was intended to be flexible enough to reflect the real-world difficulties immigrant abuse survivors face in gathering evidentiary documentation. Nevertheless, it is important for advocates to keep in mind that there is no CIS interview in the self-petitioning process. Therefore, the documents submitted in support of the I-360 must clearly and credibly paint a picture for the VAWA Unit adjudicator to see. While as her attorney you may be able to see clearly the cruelty and abuse your client has suffered just by looking at her face, the VAWA Unit adjudicator will not understand her suffering unless it is clearly documented.

A subjective test

One's perception of "extreme cruelty" is highly subjective and depends not only on the facts of the case, but the self-petitioner's own personal history, vulnerabilities or past experiences with abuse. For that reason, VAWA Unit Supervisory Adjudicators remind advocates that it is not sufficient to merely describe the abusive acts committed by the perpetrator of the "extreme cruelty." It is equally important to describe the self-petitioner's feelings in response to the abuse. The following is a summary of CIS Requests for Evidence that illustrate the level of detail they are seeking in a declaration describing extreme cruelty:

⁴ A sample request for evidence of extreme cruelty appears on the Asista website: www.asistaonline.org.

A finding of extreme cruelty involves the examination of the dynamics of the relationship, the victim's sense of well-being before the abuse, the specific acts during the period of abuse, and the victim's quality of life and ability to function after the abuse. The self-petitioner's own declaration should cover these factors.

If the abuse was verbal: what were the words, names used; what tone of voice was used, how did the incident end, who left the room/residence, did things go back to "normal" or was there a need for apologies, appeasement or "walking on eggshells"?

If the abuse included social isolation: were you socially isolated? If so, please explain the manner and duration of the isolation. What specific actions did your spouse take? What did you do in response? How did you feel as a result of his/her actions?

If the abuse included possessiveness: Please explain the manner of the possessiveness. What did your spouse do? What did you do in response? How did you feel as a result of his/her actions?

If the abuse affected your quality of life: How did your life change? How were you affected by the abuse? What do you feel caused the changes? What did you do to deal with the abuse?

The subjective test is most important when non-physical abuse does not seem like domestic violence, unless one understands the personal context. The subjective test does not mean, of course, that there is no objective test for extreme cruelty. Some forms of non-physical abuse are domestic violence, regardless of how well the survivor can articulate their impact on her.

Since primary evidence of extreme cruelty is rare (acts of extreme cruelty often go unreported to police or medical personnel and happen without witnesses), corroborating declarations from domestic violence counselors are particularly helpful. They should describe both the details of the non-physical (as well as physical) abuse suffered by the applicant and why this was a form of abuse, given the applicant's subjective context.⁵

Avoiding credibility problems

In the self-petitioner's own declaration, it is extremely important that the self-petitioner provides as much detail about the effects of the extreme cruelty on her as possible. She must come across as credible as possible, which means her representative must check the full application to ensure that facts (such as dates, places of residence, etc.) are consistent throughout, including documentation and prior applications on her behalf. If there are inconsistencies, explain them in your cover letter; do not wait for the VAWA unit to notice them and ask you to explain them. Failing to explain inconsistencies from the beginning will raise questions about your client's credibility generally and heighten the level of scrutiny with which the adjudicator examines all your client's statements and documentation.

Remember, any time your client mentions a possible source of corroborating evidence; you MUST either supply information from that source (e.g., a police report, medical examination, protection order) or explain why you can't provide it. For example, if the self-petitioner mentions that her sister witnessed the extreme cruelty, she should provide a declaration or affidavit from that sister. Or if the self-petitioner mentions she sought counseling from a therapist as a result of the extreme cruelty, she should provide a detailed letter from her therapist.

⁵ The Asista website contains an explanation for domestic violence counselors and advocates on how to prepare a corroborating declaration.



DOING THE RIGHT THING IN IMMIGRATION LAW PRACTICE

by Lory Diana Rosenberg

Ethics Concepts

“Ethical” refers to accepted standards of social or professional behavior, motivated by ideas and principles of right and wrong.¹ Attorneys have ethical responsibilities to their clients, to their colleagues, and to the courts. Every case in which an attorney or legal representative interacts with a client or acts on behalf of a client involves ethical *issues*, such as those relating to establishing the attorney-client relationship, client confidentiality, and competent representation. Every case will not necessarily have ethical *problems*. Nevertheless, a practitioner should be familiar with her ethical obligations and be aware of how these responsibilities apply to each stage of a case. Ethical problems may not exist at the outset, but can develop during the course of representation. It may be possible to anticipate potential problems, and take steps to avoid them. In some cases, it may be possible to resolve these problems and undertake or continue with representation; in other cases the circumstances may require termination of representation.

Ethical obligations are spelled out in individual state bar rules or standards of practice, as well as in the *ABA Model Rules of Professional Conduct* (Model Rules or ABA Rules).² If an issue comes up in a case and it is not covered squarely by the applicable state rules, the Model Rules provide an authoritative source of guidance. The preamble to the ABA Model Rules provides that a lawyer, “as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” She “performs various functions,” including that of an advisor, an advocate, a negotiator and an evaluator. In these capacities, a lawyer provides her client with “an informed understanding of the client’s legal rights and obligations . . . [and] their practical implications;” she “zealously asserts the client’s position under the rules of the adversary system. . . [and] seeks a result advantageous to the client” that can be achieved through “honest dealings with others;” and she examines and assesses “a client’s legal affairs and report[s] about them to the client or to others.”³

In general, every attorney must be able to perform her duties competently; she must diligently and promptly carry out her responsibilities; she should advocate zealously on her client’s behalf; she owes her client undivided loyalty; she must keep and may not disclose client confidences; she must disclose misrepresentations or falsehoods, and may not make misrepresentations to courts or tribunals; and she must disclose and resolve any conflicts of interest involving clients’ issues or interests. Importantly, the actions of her staff are attributable to her, so staff’s performance is judged according to these standards as well.

The multifaceted roles and responsibilities of attorneys lead to a multiplicity of ethics rules involving practice and performance directed at different entities and applicable to particular circumstances. Given their scope, it is inevitable that there sometimes will be inherent conflict among the ethical duties and obligations prescribed by the Model Rules. The “Comments” included for each rule

¹ *Disclaimer*: The information in this article is not legal advice and is not a substitute for individual research pertaining to the specific state rules or recommended practices that may apply to a given set of circumstances.

² Available at Cornell Law School, Legal Information Institute, America Legal Ethics Library, http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.HTM.

³ *Id.*’ *ABA Model Rules of Professional Conduct, Preamble: A Lawyers Responsibilities* [2](2002 edition).

can be helpful in distinguishing circumstances and clarifying the intent and preferred application of a rule to a specific situation.⁴ Every effort must be made to balance all the interests and observe each rule to the extent possible. This article looks at two common problem areas: attorney conflicts of interest and client misrepresentation.

Ethics Examples⁵

Dual Representation and Conflict of Interest

Immigration law presents various situations in which two parties appear to have a common interest in a particular process, such as a visa petition, or in a particular outcome, such as the granting of relief from removal. Often, when a married couple is seeking immigrant status for one spouse who will be the beneficiary, the other spouse may be the “sponsor” or petitioner, and the couple may seek out legal representation together. In another case in which one spouse may be eligible for an immigrant visa based on employment and his spouse can benefit by qualifying for an immigrant visa as a derivative applicant, they may retain one lawyer. In another type of case, where one spouse’s eligibility for asylum status may turn on the strength of the other spouse’s claim of persecution, they are likely to have one lawyer representing the principal applicant.

In circumstances where a spouse has caused physical or emotional harm to the other spouse, or to the couple’s child, however, that spouse or the child may be eligible for an immigrant visa or relief from removal under VAWA, and the couple’s interests will diverge. Indeed, the actions of one spouse can have a directly adverse effect on the immigration status of the abuser, if he is a non-citizen. These developments can create a conflict of interest, giving rise to numerous questions.

Suppose that a lawyer represents a citizen husband and his non-citizen wife, who is in removal proceedings. The lawyer has filed a petition to qualify her as eligible to adjust her status as the wife of a citizen and is preparing her application for adjustment of status when she calls and tells the lawyer that her husband is abusing her and she’s left him, but she is worried about her immigration status and she doesn’t want to get him in trouble. She also doesn’t want her husband to know she told the lawyer about his abuse of her. Immediately, numerous ethics questions arise:

- Can the lawyer continue to represent both parties?
- Can the lawyer represent either party?
- Does the lawyer have any duty to investigate the truth of wife’s claims?
- If the lawyer must withdraw, what may he tell each party and the immigration court?
- Can the lawyer advise the wife of her VAWA rights?
- May the lawyer advise the wife to file criminal charges?
- What should the lawyer tell the abuser?
- What can the lawyer tell the immigration court?

A lawyer representing two parties is generally understood to have a lawyer-client relationship with both individuals. If a conflict of interest arises, therefore, the lawyer must consult with the clients

⁴ Comments to ABA Model Rules

⁵ These hypothetical scenarios in this section are drawn from material prepared and presented with Professor Barbara Hines at a seminar sponsored by the National Immigration Project in Austin Texas, October 2006.

and may have to withdraw from representation of both clients if either client cannot or will not agree to waive the conflict. In an abuse situation, it may not be possible for the lawyer to continue to represent the parties knowing of the ongoing abuse, particularly if his duty to one client prevents him from seeking informed consent from each client.

ABA Rule 1.7 addresses conflicts of interest involving current clients. It prohibits dual representation in the face of a conflict unless a lawyer has received “informed consent,”⁶ in writing from each client, and the lawyer believes he can provide competent and diligent representation to both parties, the representation does not involve assertion of claims against each other, and is not barred by law. The Comment to Rule 1.7 recognizes that under some circumstances it may be impossible to make the disclosure necessary to obtain consent. This situation may present such circumstances, as the wife has asked the lawyer not to disclose the information she just gave him. In addition, as the husband remains the lawyer’s client, he cannot advise the wife about the VAWA alternative for obtaining her lawful resident status, because that is likely to entail discussing the advisability of getting a protective order, which would have a potentially adverse result on the husband. Likewise, the lawyer cannot advise her to file a criminal charge, as this obviously is adverse to the husband’s interests.

Similarly, the lawyer cannot disclose to the husband the fact he has this new information, given his duty of confidentiality to the wife. ABA Rule 1.6 governing confidentiality relates to all communications with a client and also provides that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation. The only exception exists in paragraph (b)(1) of the Comment to ABA Rule 1.6, which recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. The Comment provides that such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. This presents a judgment call on dangerousness for the lawyer in a case like this one, and may depend on the specific information given him by the wife.

The lawyer can inform both parties that he cannot continue to represent them due to an irresolvable conflict that has come up, but he cannot discuss the underlying source of the conflict. He may refer the wife to new counsel, assuming she will be advised about VAWA, and he will have to rely on the wife’s getting information on protecting herself from her husband or filing criminal charges against him from new counsel. The lawyer needs to prepare a motion to withdraw as attorney of record for the wife in immigration court and may only indicate that an irreconcilable conflict arose requiring him to withdraw. It is important to understand that the duty of confidentiality continues after the client-lawyer relationship has terminated and using such information to the disadvantage of the former client is prohibited.⁷

⁶ “Informed consent” and other terms used in the ABA Model Rules are defined and explained in ABA Rule 1.0.

⁷ ABA Model Rule 1.9(c).

Duty of Disclosure and Confidentiality

A lawyer must determine the extent of her obligation to disclose misrepresentations, false statements, or false or fabricated evidence presented to a court or tribunal.⁸ When these misrepresentations are made by a client against the lawyer's advice, the lawyer must weigh her duty to disclose any falsehoods and misleading statements against her duties of client confidentiality and loyalty, as well as the duty to advocate zealously for her client. Nonetheless, the duty to disclose is extremely important, as it guards the integrity of the judicial system.

ABA Rule 3.1 calls upon a lawyer to bring only meritorious claims and contentions. This rule prohibits a lawyer from bringing or defending a proceeding, or asserting or arguing an issue "unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." ABA Rule 3.3, "Candor Toward the Tribunal," mandates that a lawyer "(a) . . . shall not knowingly (1) make a false statement or fail to correct a [previously made] false statement of material fact or law. . .". In addition, a lawyer may not "(3) offer evidence that the lawyer knows to be false."⁹

ABA Rule 3.3 applies to conduct during proceedings before a tribunal, which is broadly defined as including courts, arbitrators, and administrative agencies in which an official conducts an adjudication and issues a decision. This definition covers both DHS' and EOIR's administrative, adjudicative processes, such as an approval or denial of a petition or application, or a decision rendered after a hearing before an immigration judge. The Comment to Rule 3.3 explains that, "as officers of the court," lawyers have special duties "to avoid conduct that undermines the integrity of the adjudicative process."

At the same time, ABA Rule 1.6, governing confidentiality, provides that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation. The Comments to APA Rule 1.6 provide that disclosure is permitted only to the extent the lawyer reasonably believes it is necessary to satisfy one of the purposes listed in the exceptions to the confidentiality rule.¹⁰ Moreover, where it is practicable, "the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure."¹¹ A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law and the prohibition against disclosures also applies when a lawyer's disclosure does not in itself reveal protected information, but could reasonably lead to a third person's discovery of such information.

Suppose that a lawyer previously represented a client in filing for naturalization based on lawful resident status acquired through marriage to a U.S. citizen from whom he is now divorced. After the client was naturalized, he remarried and he asked his lawyer to file a petition for a green card for his new wife. The lawyer agrees to meet with his second wife, and she tells the lawyer that her husband's first marriage wasn't "the real thing," raising a number of ethical questions just as the lawyer was about to file a notice of appearance on her behalf. The issues raised include,

- If it wasn't the "real thing," was fraud involved?

⁹ ABA Model Rule 3.3(a).

¹⁰ APA Model Rule 1.0 - Terminology. "Reasonably believes" is defined as: "(i) "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."

¹¹ Comment to Rule 1.6[14].

- Must the lawyer report her (former) client to DHS?
- Can the lawyer file a visa petition for her client's new wife?
- May the lawyer talk to her client's former wife?

The Comment to Rule 3.3 states that the duty to disclose false evidence only applies during the proceeding, and that the termination of the proceeding - which occurs when there is a final decision and review has been waived or exhausted - terminates the disclosure obligation.¹² At the moment the lawyer learns of her former client's possible fraud involving his first wife, she is actually not representing him in any *proceeding*. There should be no duty to report the former client to DHS. If the lawyer files an I-130 petition for the present wife, however, her former client will be the petitioner and she will be representing him in a proceeding once again. This is extremely problematic since an I-130 petition requires information about the petitioner including evidence of divorce if the individual previously was married. Furthermore, the only way that the lawyer learned about the possibility that her former client was involved in a sham marriage was through a statement made by his present wife, who is her client.

Nonetheless, the Comment to APA Rule 3.3 also provides that the duty of candor to the court requires disclosure "even if compliance requires disclosure of information otherwise protected by APA Rule 1.6."¹³ In other words, when a conflict between ethical rules cannot be avoided, the duty of disclosure to a court or tribunal trumps the duty of confidentiality. The comment to Rule 3.3 emphasizes that lawyers have a "special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process."¹⁴ Thus, a lawyer must take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding. The duties of loyalty and confidentiality owed to the client, however, require the lawyer to explore all other reasonable remedial measures before turning to outright disclosure.

Specifically, the lawyer should talk to her former client, and make certain that the first marriage actually was a "sham" as defined under the immigration laws - meaning that it was entered into solely to get an immigration benefit. Perhaps her client's wife was relating an emotional rather than a legal concept. Perhaps she should have a meeting with both spouses, or even contact the ex-wife, to clarify the nature of the prior marriage. If she is not satisfied with the clarification provided, she should explain the potential implications and possible consequences in the event that the former client and his new wife persisted in filing an I-130 petition. Since nothing has been filed and the agency was not relying on any misrepresentation in the present proceeding, she could simply withdraw and terminate her representation of the couple without the obligation of disclosure continuing.

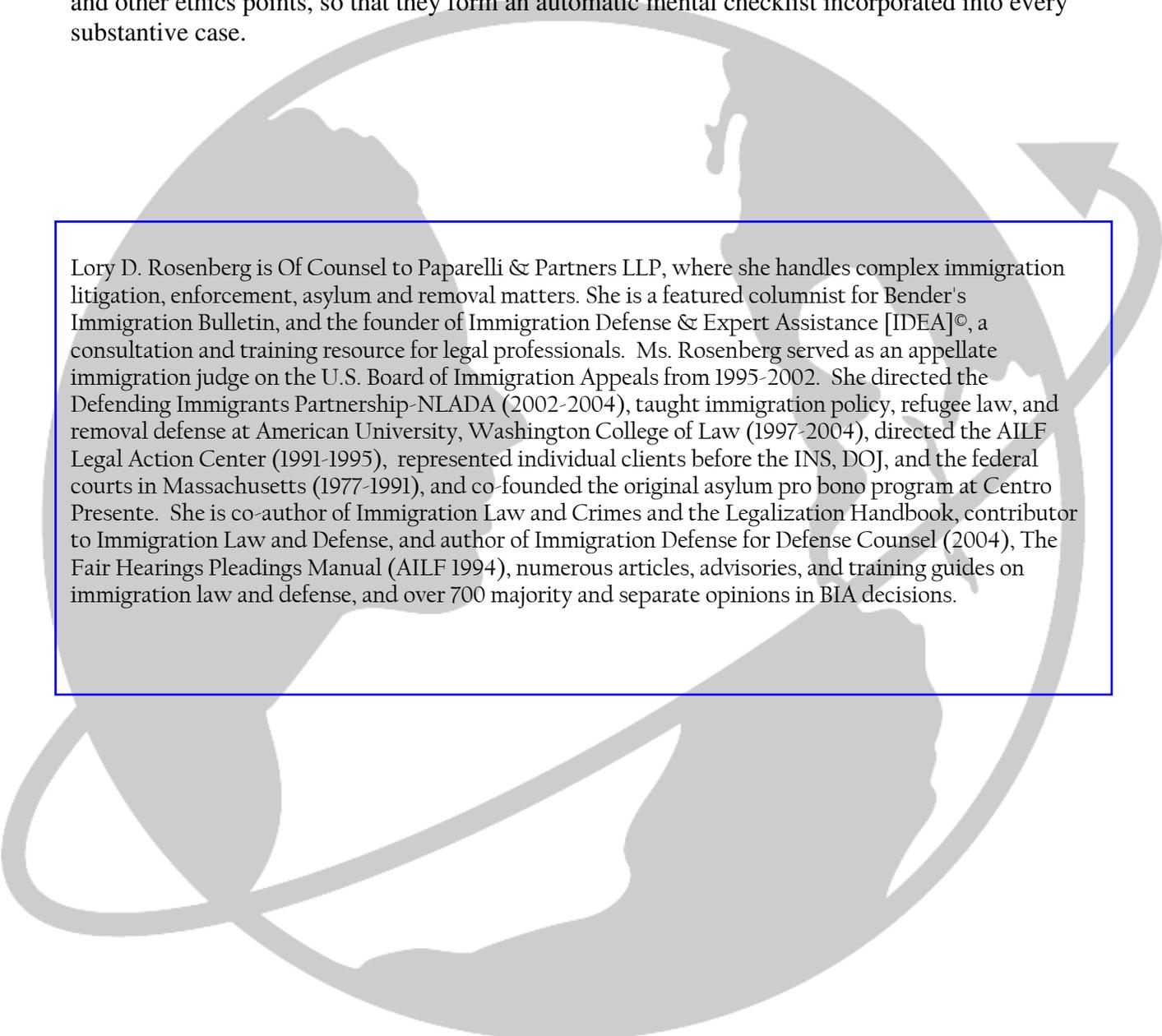
¹² Comment to Rule 3.3[13].

¹³ Comment to APA Rule 3.3[10].

¹⁴ Comment to APA Rule 3.3[12].

Conclusion

Ethical issues very often pose sticky, but interesting questions. Each of the scenarios discussed necessarily involves the duties of disclosure, the duty to keep client confidences, the duty of loyalty, and the duty to be a zealous advocate. Each of these responsibilities is one that will come up again and again in immigration practice. Attorneys should be thinking about these and other ethics points, so that they form an automatic mental checklist incorporated into every substantive case.



Lory D. Rosenberg is Of Counsel to Paparelli & Partners LLP, where she handles complex immigration litigation, enforcement, asylum and removal matters. She is a featured columnist for Bender's Immigration Bulletin, and the founder of Immigration Defense & Expert Assistance [IDEA][®], a consultation and training resource for legal professionals. Ms. Rosenberg served as an appellate immigration judge on the U.S. Board of Immigration Appeals from 1995-2002. She directed the Defending Immigrants Partnership-NLADA (2002-2004), taught immigration policy, refugee law, and removal defense at American University, Washington College of Law (1997-2004), directed the AILF Legal Action Center (1991-1995), represented individual clients before the INS, DOJ, and the federal courts in Massachusetts (1977-1991), and co-founded the original asylum pro bono program at Centro Presente. She is co-author of Immigration Law and Crimes and the Legalization Handbook, contributor to Immigration Law and Defense, and author of Immigration Defense for Defense Counsel (2004), The Fair Hearings Pleadings Manual (AILF 1994), numerous articles, advisories, and training guides on immigration law and defense, and over 700 majority and separate opinions in BIA decisions.

Work Authorization for Self-Petitions and U Interim Relief: Procedural Update

By Gail Pendleton

CIS VAWA personnel contacted ASISTA to convey new information and procedures for work authorization requests for self-petitioners and U interim relief applicants. As you may know, the only written guidance on this issue created a two-step process for most applicants,¹ which reflects the general rule that they must approve the underlying petition before they can grant work authorization. The lone exception to this rule is for those who are immediately eligible to adjust. Although the CIS VAWA unit had allowed all applicants to file for work authorization simultaneously with their self-petitions, they have now been directed to revert to the formal process. In the meantime, the Violence Against Women Act passed in 2005 (VAWA 2005), Congress created immediate access to work authorization for self-petitioners.

For any VAWA or U application, remember to put “VAWA Unit” in big red letters on the outside envelope, the top sheet of the packet, and any other document that someone in the Vermont Service Center (VSC) mailroom might see. This notation should flag that your application should go in the special box for the VAWA unit; without that flag, it may be routed to another division of the facility and, essentially, lost.

We start with U interim relief applicants, since there is only one work authorization option based on this eligibility.²

U Interim Relief and Work Authorization

Because there is no formal form for applying for U interim relief or for its attendant work authorization, ASISTA created a special form, which CIS will consider as an appropriate biographic information sheet for interim relief purposes (see page 17 for the form; you also may download it from www.asistaonline.org). This bio form serves to set up the database information for your client. You need to file it only once, when you file your initial U interim relief application. Here’s the step-by-step process:

¹ Memorandum for All Regional Directors from Michael D. Cronin, Associate Acting Director, Office of Programs, INS, regarding Deferred Action for Self-Petitioning Battered Spouses and Children with Approved I-360 Petitions, [HQ204-P, at 3 \(Dec. 22, 1998\)](#). (available from ASISTA website: www.asistaonline.org).

²Remember that those eligible for both U and self-petition relief may file for both, though you should pick one basis for work authorization. Those eligible to immediately adjust may wish to apply for work authorization through the self-petition, since that does not require a decision on the underlying application before the EAD is issued.

Step 1: Initial U interim relief application

- “Road map” cover letter explaining client’s eligibility for U;

* **NOTE: If your client is in proceedings or has a final removal/deportation order, include in your cover letter the name and phone number of the ICE officer the VAWA unit should contact to initiate the proper procedure for such cases. In such cases, you will not receive an approval notice but, instead, a notice that the VAWA unit has started the process. If you are unfamiliar with this process, please review the DHS memorandum on this subject.³

- U interim relief Biographic Information form;
- Declaration and/or other corroborating documents;
- Your expanded explanation of any more complicated issues, such as inadmissibility and eligibility for the 212(d)(14) waiver, a “similar crime” as opposed to an enumerated crime, or “substantial mental and physical abuse” for a non-violent crime.
- Affidavit/proof of economic necessity (for an example, please see page 18 of this publication; you also may download it from www.asistaonline.org).

Step 2 = Receipt of approval notice from VSC granting deferred action

- Copy of approval notice*
- Work authorization cover letter, citing “U interim relief (c)(14)” as the basis
- Evidence of “economic necessity” for deferred action
- 765 Work Authorization Form

*NOTE: CIS is creating a receipt form for U interim relief applicants, so they will have proof of their status grant. See note above for cases in proceedings or with final removal/deportation orders.

Step 3: Work authorization extensions

Same as step 2. Requests for Employment Authorization Document (EAD) extensions are treated as de facto requests for deferred action extensions.

Self-Petitioners and Work Authorization

There are now three options for work authorization. Pursuant to the Congressional mandate in VAWA 2005, CIS has created a new (c)(31) EAD category for those with approved self-petitions. Applicants married to US citizens or with current priority dates (most likely transferred from prior applications filed by the abuser) may use (c)(9), which may be faster because it does not require adjudication of the

³Interoffice Memorandum from William R. Yates, Associate Director, Operations, USCIS, regarding: Assessment of Deferred Action in Requests for U Interim Relief from U Nonimmigrant Status Eligible Aliens in Removal Proceedings, [HQOPRD 70/6.2 \(May 6, 2004\)](#).

underlying self-petition before the EAD may be issued. Finally, there may still be cases in which you wish to ask for work authorization based on deferred action, citing (c)(14).

The (c)(31) and (c)(14) options are designed, primarily, to help those whose abusers are lawful permanent residents. Under the normal family-based system, spouses of lawful permanent residents are not eligible for work authorization until they become eligible to file to adjust status to lawful permanent residence themselves, typically a wait of five years or more. We start with the option for those immediately eligible to adjust.

Self-petitioners eligible to immediately adjust

Self-petitioners are immediately eligible to adjust if their abusers are US citizens or they can transfer a priority date from a prior application. In both situations you must submit a copy of the 485 adjustment form that either already had been filed or will be filed but **put this in a sealed envelope!** Otherwise the mailroom may think you are seeking adjustment from the Vermont Service Center and route the application to the wrong unit.

For those who are immediately eligible to adjust because they can transfer a priority date, probably based on an I-130 filed by the abuser, include a copy of the prior application's approval notice with the priority date noted and a copy of the Visa Bulletin demonstrating that your client's priority date is current.

Step 1: Initial work authorization and self-petition

- "Road map" cover letter, noting eligibility under "VAWA (c)(9)"
- 765 Work Authorization form
- Evidence of immediate eligibility to adjust (see above for details)
- 360 form
- Detailed explanation of any complicated issues, such as good moral character issues under 101(f) and the VAWA exception
- Index to documents
- Declarations and corroborating documents
- Affidavit/proof of economic necessity (for an example, please see page 18 of this publication; you also may download it from www.asistaonline.org).

Step 2: Work authorization extension

- Copy of approval notice
- Cover letter citing extension under (c)(14)
- 765 form

New category for all self-petitioners = (c)(31)

This eliminates the need to obtain deferred action to show eligibility for work authorization. As of this writing, however, the EAD documents being issued under this provision have words identifying the bearer as "battered" or "abused," which may jeopardize the safety of those who possess them. Until CIS notifies us that this problem

has been fixed⁴, you may wish to continue using the (c)(14) option. If you do wish to pursue this option, here's the process:

Step 1: Initial self-petition

- “Road map” cover letter, noting eligibility under “VAWA (c)(31)”
- 360 form
- Detailed explanation of any complicated issues, such as good moral character issues under 101(f) and the VAWA exception
- Index to documents
- Declarations and corroborating documents

*Step 2: **When you receive the approval notice** = work authorization request*

- Copy of approval notice
- Cover letter requesting EAD under (c)(31)
- 765 form

Step 3: Work authorization extensions
Same as Step 2

Self-petitioners who can't immediately adjust and/or wish deferred action

This is the option that has existed for awhile for those not immediately eligible to adjust. In the past few years, the VAWA unit has allowed applicants in this category to bypass the two-step filing process mandated in the guidance; this is no longer true.

The “new” process is really the old process and will be familiar to those of you have been practicing in this area for awhile.

Caveats: (1) EADs based on deferred action may require consultation with ICE if there's an outstanding order of removal. (2) VSC can't grant work authorization to self-petitioners in this category if they are in proceedings without first communicating with ICE.

Step 1: Initial self-petition

- “Road map” cover letter, explaining will request deferred action
- 360 form
- Detailed explanation of any complicated issues, such as good moral character issues under 101(f) and the VAWA exception
- Index to documents
- Declarations and corroborating documents
- Affidavit/proof of economic necessity (for an example, please see page 18 of this publication; you also may download it from www.asistaonline.org).

⁴ To ensure you receive these updates, join the free VAWA Updates listserve; send an email to questions@asistaonline.org requesting to be added.

Step 2: When you receive the approval notice = deferred action & work authorization requests

- Copy of approval notice
- Cover letter, noting eligibility under “VAWA (c)(14)” and explanation of “economic necessity” for deferred action
- 765 form

Step 3: Work authorization extensions
Same as Step 2

Need help?

If you have questions about how these rules apply to your clients, please send them to questions@asistaonline.org.

ASISTA MEMBER UPDATES AND OFFERINGS

As another year comes to a close, it is not uncommon to take time to reflect on the past year and the changes that it has brought. If you or your agency has experienced changes in your personal or staff information, please take a moment to contact the clearinghouse and advise them of the need to update your membership information. Updates may be provided to questions@asistaonline.org.

General and specific information on VAWA and VAWA related issues can be obtained by going to the ASISTA website located at asistaonline.org. Members of ASISTA may request free technical assistance from its consultants by sending your formatted question to questions@asistaonline.org. To ensure a prompt reply, please provide your full name, organization, title at organization, physical address, state, zip code, phone and fax numbers and e-mail address on your submission. To request an example of how to format your question for technical assistance you may obtain a sample by contacting questions@asistaonline.org. Membership and listserv information may be requested from the clearinghouse by writing to questions@asistaonline.org.

BIOGRAPHICAL INFORMATION
Employment Authorization Based on
U Interim Relief

Initial Application _____
Replacement Application _____
Renewal Application _____

Are you the principal applicant or a derivative applicant? (check one option below)

Principal _____ **Derivative** _____

If derivative, what is your relationship to the principal _____

Principal's Name _____

Principal's Alien Registration Number or I-94 Number, if any _____

| | | | |
|-----------------------|---------|----------|---|
| Family Name (in CAPS) | (First) | (Middle) | Other Names Used (Include Maiden Name) |
|-----------------------|---------|----------|---|

SAFE Address in the United States (Number and Street) (Apt. Number)

Town or City State/country Zip Code

Country of Citizenship or Nationality

Place of Birth (Town or City) (State or Province) (Country)

Date of Birth (mm/dd/yyyy) Gender

U.S. Social Security Number (if any)

Alien Registration Number (A-Number) or I-94 Number (if any)

Date of Last Entry into the U.S. (mm/dd/yyyy) Place of Last Entry into the U.S.

| | |
|--|--|
| Manner of Last Entry (Visitor, Student, etc.) | Current Immigration Status (Visitor, Student, etc.) |
|--|--|

Have you ever applied for employment authorization before?

Yes No Which USCIS office? Results (Granted/Denied) Dates of Approvals

AFFIDAVIT OF NEED FOR EMPLOYMENT AUTHORIZATION

FOR _____

Pursuant to 8 CRF 274a(c)(12), I hereby apply to the U.S. Citizenship and Immigration Services for authorization to accept lawful employment in the United States. I fully understand that any false or misleading information in connection with this application will constitute grounds for revocation of employment authorization.

1. Poverty Guidelines

The Federal Health and Human Services 2005 poverty monthly guidelines are as follows:

| | | | | | | | | |
|-----------------|-------|---------|---------|---------|---------|---------|---------|---------|
| Household Size: | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| Amount: | \$798 | \$1,069 | \$1,341 | \$1,613 | \$1,884 | \$2,156 | \$2,428 | \$2,699 |

2. Dependents:

Citizenship

Relationship

- 1.
- 2.
- 3.

3. Income and Assets:

Child Support \$

4. Expenses per Month:

| | |
|--------------------------|----|
| Rent..... | \$ |
| Telephone..... | \$ |
| Transportation..... | \$ |
| Food..... | \$ |
| Clothing..... | \$ |
| Child Care..... | \$ |
| Personal..... | \$ |
| Total for the Month..... | \$ |

Signature



Technical Assistance for Immigrant Survivors

515 28th Street, Suite 109

Des Moines, IA 50312

