Ethics for Public Interest Lawyers in These Demanding Times: Panel Discussions on Ethics

May 8, 2019
2 p.m. - 5 p.m.

Fordham University School of Law

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Presenter Bios

Sarah Baldwin, Staff Attorney, Homeowner Defense Project, Legal Services NYC
Sarah Baldwin is a staff attorney in the Homeowner Defense Project. Immediately after law school, she was an Excelsior Service Fellow at the NYS Department of Financial Services. At DFS, she worked on consumer protection issues, including assisting regulatory enforcement actions against banks and non-bank financial services providers, and policy initiatives affecting financial regulation. She graduated from Fordham University School of Law in 2015.

Beth Breslin, Senior Staff Attorney, LegalHealth, New York Legal Assistance Group
Beth Breslin is a Senior Staff Attorney with the LegalHealth Division of the New York Legal Assistance Group. Beth works to further incorporate LegalHealth’s services into various healthcare models by engaging in Medicaid reform efforts, with a current focus on navigating the intricacies of the NY State Delivery System Reform Incentive Payment (DSRIP) Program. Previously, Beth provided legal services at LegalHealth’s clinic at CancerCare, focusing her work on patients with cancer. Prior to joining NYLAG, Beth’s practice focused on litigation and she represented clients in a variety of fields, including complex pharmaceutical litigation, criminal defense, sports law, and employment discrimination matters. Beth received her B.S. from Boston College and her law degree from Syracuse University College of Law, where she was the co-founder and managing editor of Impunity Watch, an online law journal focusing on human rights and impunity issues.

Mary Donahue, LMSW, Program Coordinator, Disability Advocacy Project, SSI Maximization, Legal Aid Society
Mary Donahue is a program coordinator in the Legal Aid Society’s Civil Practice, Disability Advocacy Project. She supervises a team of paralegals who assist clients receiving public assistance in applying for federal disability benefits. Prior to holding this position she worked as a forensic social worker in the Legal Aid Society’s Civil Practice, Brooklyn Office for the Aging. She has been at LAS since 2008. She received her MSW from Fordham University.

Tara Foster, Senior Staff Attorney, Education, Legal Services NYC
Tara Foster is a Senior Attorney in the Education Rights Project of Queens Legal Services. She has litigated in federal and state courts and before numerous administrative bodies. Most recently, she served as co-counsel in T.H. v. Farina, challenging the NYC DOE and the FDNY for policies and practices relating to the treatment of disabled children, including the practice of sending students to hospital emergency rooms for disruptive behavior, and in Patrick v. Success Academy, alleging systemic due process violations and disability discrimination by the charter school. She provides group and individual advice and representation in various areas of education law, including special education and student discipline, and provides training and workshops to parents, students, community-based organizations, members of the bar and others. She previously coordinated the DLA Piper pro bono discipline project for Legal Services NYC and represented New Yorkers with housing and benefits issues in housing court and other forums.
Philip M. Genty, Everett B. Birch Innovative Teaching Clinical Professor in Professional Responsibility, Columbia Law School

Philip Genty is the Everett B. Birch Innovative Teaching Clinical Professor in Professional Responsibility at Columbia Law School. He joined the Columbia faculty in 1989. He teaches professional responsibility, civil procedure, and a civil clinic for low income clients. His research interests are in legal ethics, prisoners’ rights, family law, and clinical education. He has taught and consulted on legal ethics and clinical legal education in Central and Eastern Europe and Israel. He is a member of the Committee on Professional Ethics of the New York City Bar Association. He has developed legal resource materials for incarcerated parents and works with several organizations that assist women who are in prison. He received a Columbia University Presidential Award for Outstanding Teaching in 2014, and Columbia Law School’s Willis L.M. Reese Prize for Excellence in Teaching in 2008. Prior to coming to Columbia, he taught at Brooklyn Law School and worked as an attorney at Prisoners’ Legal Services of New York, the New York City Department of Housing, Preservation and Development, and the Bedford-Stuyvesant Community Legal Services Corporation.

Randal Jeffrey, General Counsel, New York Legal Assistance Group

Randal Jeffrey is NYLAG’s General Counsel. Randal is responsible for professional responsibility and legal ethics matters, and advises on corporate governance and compliance policies. He also oversees legal matters involving NYLAG as a party. Randal served as Director of the General Legal Services Unit from 2003 until 2016, when that Unit was divided into three new Units: the Consumer Law Unit; the Public Benefits Unit; and the Tenants Rights’ Unit. During his tenure, the Unit grew to a staff of 80 attorneys, paralegals, and financial counselors. Randal continues to maintain managerial responsibility over NYLAG’s Financial Counseling Division, SDNY Pro Se Clinic, and Legal Hand work. Randal first joined NYLAG in 1998 as a staff attorney in the Special Litigation Unit, where he was counsel on several major class action cases concerning public assistance, food stamps, and Medicaid. Randal has taught Lawyering and Writing at Cardozo Law School and has published several articles on poverty law issues. He served on the Board of Project FAIR, a collaborative, New York City-based project working towards greater economic justice for low-income and homeless New Yorkers. Prior to coming to NYLAG, Randal was a pro se law clerk with the Second Circuit’s Staff Attorney’s Office and a Georgetown Fellow at the Legal Aid Society of the District of Columbia.

Victoria Neilson, Managing Attorney, Catholic Legal Immigration Network

Victoria Neilson is managing attorney of the Defending Vulnerable Populations Program at the Catholic Legal Immigration Network Inc. (CLINIC). She is the former legal director of Immigrant Justice Corps and Immigration Equality, where her practice focused on the intersection of LGBT issues and immigration law. Ms. Neilson has also worked for the Office of Chief Counsel at U.S. Citizenship and Immigration Services at the New York Asylum Office and is the former legal director of the HIV Law Project. She has taught as an adjunct professor at City University of New York School of Law and at New York University School of Law. She is the current chair of the Immigration and Nationality Law Committee of the New York City Bar Association; the former co-chair of the Ethics Committee of the New York Chapter of the American Immigration Lawyers Association (AILA); and a member of AILA’s national Asylum Committee. Ms. Neilson received her J.D. from the City University of New York School of Law and her B.A. from Harvard University.

Sarah Nolan, Supervising Attorney, LegalHealth, New York Legal Assistance Group

Sarah Nolan is a Supervising Attorney at LegalHealth, a division of NYLAG, where she supervises the delivery of immigration legal services at New York City Health + Hospital facilities at Elmhurst, Gouverneur, and Lincoln. Prior to joining LegalHealth, Sarah was Legal Counsel for ActionNYC, where she advised the Mayor’s Office of Immigrant Affairs and the City University of New York on the launch of a large-scale city-wide immigration legal services program. Previously, Sarah was an immigration staff attorney at Brooklyn Defender Services and associate at Paul, Weiss, Rifkind, Wharton & Garrison.
LLP. Sarah received her J.D. from New York University School of Law and her B.A. from Dartmouth College.

Randye Retkin, Director of LegalHealth, New York Legal Assistance Group
Randye Retkin is the Director and Founder of LegalHealth, a division of the New York Legal Assistance Group. She has been developing and running legal programs that serve low-income individuals for over 25 years. LegalHealth is the largest medical-legal partnership in the nation and provides free legal services in New York City hospitals to individuals with chronic and serious illnesses through partnerships with hospitals and community groups. In addition to providing free legal services, LegalHealth offers an innovative legal education curriculum to doctors, social workers, and other health care professionals. Randye also provides in depth, personalized technical assistance nationally to those developing local medical-legal partnerships.

Prior to joining NYLAG, Randye served as Director of Legal Services for the Gay Men’s Health Crisis. She has provided consulting on projects addressing the needs of people with breast cancer, multiple sclerosis, asthma, and other chronic illnesses. Randye served as a staff attorney with New York Lawyers for the Public Interest and Volunteers of Legal Service (VOLS) where she established the VOLS Immigrants’ Rights Project. She is a founder of the New York Immigration Coalition and the National Network of Cancer Legal Services Providers. She is a co-author of New York’s Standby Guardianship law and New York’s Health-Related Legal Services Program Law. She is a member of the Bar Association’s Ethics Committee.

Hasan Shafiqullah, Attorney-in-Charge, Immigration Law Unit, Legal Aid Society
Hasan Shafiqullah is the Attorney-in-Charge of the Legal Aid Society’s Immigration Law Unit, one of the largest not-for-profit immigration practices in the country. Over the past two decades, he has represented clients in a range of civil legal services matters, and since 2008 has specialized in immigration law. He currently serves on the immigration committees of both the New York State and New York City Bar Associations and on Judge Robert Katzmann’s Second Circuit Study Group on Immigrant Representation. He is a graduate of the University of California Hastings School of Law and of the University of Arizona, and holds a certificate in French to English legal translation from New York University.

Nakeeb Siddique, Director of Housing, Brooklyn Neighborhood Office, Legal Aid Society
Nakeeb Siddique is the Director of Housing for the Brooklyn Neighborhood Office of the Legal Aid Society. He was a Supervising Attorney at the Brooklyn Neighborhood Office until April 2019. Nakeeb joined the Legal Aid Society in 2011 as a Staff Attorney. He previously worked as a litigation associate at Kramer Levin Naftalis & Frankel, LLP and served as a law clerk to The Honorable Deborah A. Batts, United States District Judge in the Southern District of New York. Nakeeb graduated from Fordham University School of Law and Swarthmore College. He grew up in Bay Ridge and Sunset Park, Brooklyn.

Gemma Solimene, Clinical Associate Professor of Law, Fordham University School of Law
Gemma Solimene is a Clinical Associate Professor of Law at Fordham University School of Law. Professor Solimene has over 28 years of experience representing underserved New Yorkers. While at Fordham, Professor Solimene has directed the Immigrant Rights Clinic, through which students primarily represent individuals who are seeking to maintain or obtain legal immigration status in the U.S., and has taught in various other clinics in the Law School’s Clinical Program, including the Social Justice Clinic and the Federal Litigation Clinic. In addition to the clinics, Professor Solimene has taught Immigration Law, a simulation-based skills course, an externship seminar, and an Ethics in Public Interest Law course. Professor Solimene has been a panelist and presenter on numerous topics related to immigration and clinical teaching, and has conducted trial skills trainings for law firms. Prior to joining the Fordham Law faculty in 1999, Professor Solimene spent the bulk of her career working in the public interest. She
litigated cases at the Legal Aid Society’s Civil Division and was the Attorney-in-Charge of the Legal Aid Society’s Immigration Law Unit. Professor Solimene also taught in the NYU School of Law Clinical Program from 1993 to 1996 and was a Pro Se Law Clerk in the Second Circuit Court of Appeals. Professor Solimene received her BA magna cum laude for S.U.N.Y. Stony Brook and her J.D. from NYU School of Law.

**Susan Welber, Staff Attorney, Civil Practice Law Reform Unit, Legal Aid Society**

Susan Welber is a staff attorney in the Legal Aid Society’s Civil Practice Law Reform Unit where she engages in impact litigation, administrative and legislative advocacy on a range of government benefits issues, including immigrant access, disability discrimination and welfare work rules. Susan has also represented clients on government benefits issues in Legal Aid’s Bronx and Brooklyn neighborhood offices. Prior to Legal Aid, Susan was an associate at Paul, Weiss, Rifkind, Wharton & Garrison. Susan is currently the Chair of the New York City Bar Association’s Social Welfare Law Committee. She received her J.D. from Fordham University School of Law where she was a Stein Scholar in Ethics and Public Interest Law and a B.A. from Columbia College.
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Training Outline

Topic I - Limited Scope Representation

A. Introduction to Limited Scope Representation (“LSR”)/Unbundled Civil Legal Services

1. Primary Ethical Rules -

a. Rule 1.2(c) of New York Rules of Professional Conduct (22 N.Y.C.R.R. 1200) [“New York Rules”] - “Scope of Representation and Allocation of Authority Between Lawyer and Client” (“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.”)

b. New York Rule 6.5(c) - “Participation in Limited Pro Bono Legal Services Programs” (proscribing ethical rules that should be followed where “[a] lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter”).

2. Key concepts:

a. Unbundling/limited scope is means to increase access to civil legal services

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1 This event is sponsored jointly by Fordham Law School's Feerick Center for Social Justice and Stein Center for Law and Ethics, Legal Aid Society, Legal Services NYC, New York City Bar Association, Committees on Immigration & Nationality Law, Professional Ethics and Social Welfare Law, and the New York Legal Assistance Group. In addition to the panelists and presenters, the organizers wish to thank Bruce Green, Director, Louis Stein Center for Law and Ethics Fordham University School of Law, Doreen Odom, Acting Project Director, Queens Legal Services, Deidre Delay, Acting Director of Operations, Queens Legal Services, Beth Breslin, Senior Staff Attorney, New York Legal Assistance Group, Randye Retkin, Director of Legal Health, New York Legal Assistance Group and Susan Weber, Staff Attorney, Civil Practice Law Reform Unit, the Legal Aid Society for their large contributions to this event.

b. Limitation on representation must be “reasonable”

c. Attorney must be competent to handle the matter

d. Client must give “informed consent” to limitation

B. Background - Understanding Limited Scope Representation Models

1. Types of Unbundled Services
   a. Non-litigation vs. litigation
   b. Private bar
   c. *Pro bono*
   d. Court-sponsored lawyer for day
   e. Legal services providers
   f. Information/referral hotlines

2. Maximizing Resources - public interest and legal services organizations
   maximizing resources by unbundling services
   a. Family law
   b. Consumer
   c. Housing
   d. Hotlines
   e. Rooted in availability of full legal representation

3. Examples
   a. Legal Aid Society – Housing Help Program
      i. Located in courthouse
      ii. Full litigation services
      iii. Benefits advocacy
      iv. Advice & counsel
      v. Social work resources

   b. NYLAG - Consumer Credit Volunteer Lawyer for the Day
      i. Located in the Bronx, Queens, and Staten Island courthouses
      ii. Relies on volunteers from private law firms, retired attorneys, law
          graduates, etc.
      iii. NYLAG attorneys provide supervision
      iv. Same day, in-court representation only

   c. Legal Services NYC -- Foreclosure defense over several stages of the
      process – assistance to *pro se* borrower in foreclosure, limited appearances
      in court-mandated settlement conferences, and full representation in
      motion practice.
      i. *Pro se* answer clinic located in Supreme Court
C. Common Ethical Issues in the LSR Context - Application of the Rules to LSR Programs

1. Ethical Rules Implicated

a. **Scope of Representation**, New York Rule 1.2(c) – “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstance, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.” *See* New York County Lawyer Association Committee on Professional Ethics, Opinion 742 (April 16, 2010) (finding that “ghostwriting” pleadings is permissible under Rule 1.2(c) even where lawyers will not be representing client); *see also* NYSBA Ethics Opinion 613 (1990); ABA Formal Opinion 07-446.

b. **Conflicts, Informed Consent, and Confidentiality**, New York Rules 6.5(a) & (b), Rule 6.5(d)-(e) & Rule 1.6

   i. Conflicts - 6.5(a) - specifies how a lawyer who provides short-term limited legal services is supposed to comply with ethical rules:

      • Rules on conflicts of interest (1.7), current clients (1.8), duties to former clients (1.9) apply only if lawyer “has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest.”

      • Rule on Imputation of Conflicts of Interest (1.10) applies only if the lawyer has actual knowledge at the time of commencement that another lawyer associated with the lawyer is affected by rules above.

      • 6.5(b) - specifies that other than as provided in 6.5(a) Rules on conflicts (1.7) and duties to former clients (1.9) are inapplicable.

   o **Note**: Per New York Rule 6.5(e), if a lawyer becomes aware of a conflict of interest after representation begins,
conflict rules apply.

ii. Informed Consent - New York Rule 6.5(d) - specifies that a lawyer providing short-term, limited legal services must secure the client's informed consent to the limited scope of representation and that such representation shall be subject to the rules on confidentiality of information (1.6).

iv. Confidentiality of Information - New York Rule 1.6 – Requires a lawyer to preserve the confidentiality of certain information gained during or relating to the representation of a client, as well as information learned in the course of a consultation with a prospective client. Information gained from any source is confidential, unlike attorney client-privilege which does not apply as broadly.

- New York Rule 1.6 applies to all “confidential information,” which is defined to include information protected by the attorney-client privilege as well as other information that is “likely to be embarrassing or detrimental to the client if disclosed” or that the client has requested to be held confidential.

- In general, a lawyer may not disclose a client’s or prospective client’s information to anyone outside the lawyer’s office without the client’s informed consent. See Rule 1.0, Terminology, section (j): defines “informed consent” as denoting the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

- There are also permissive exceptions to the duty to preserve confidentiality, such as when reasonably believed necessary to prevent, among other things, substantial bodily harm or reasonably certain death. See New York Rule 1.6(b)(1)-(6).

C. Competence & Diligence, New York Rules 1.1 & 1.3

i. New York Rule 1.1 - Competence - attorney not providing full representation is still required to act always with competence - threshold question in any case is whether attorney can oblige obligation to act competently in particular

ii. New York Rule 1.3 - Diligence - the rules require a lawyer to act with reasonable diligence and promptness, not to neglect a legal matter, and not intentionally fail to carry out a contract with employment, although withdrawal is permitted. These rules apply in the limited representation context.

d. **Communication**, New York Rule 1.4 - Communication with the client is key in the limited scope representation context to delineate scope of work and expectations. Retainers, as discussed below, can help facilitate clear communication.

2. Key Protocols and Principles to Help Ensure Ethical Limited Scope Representation

a. **Screening & Supervision** – Deciding whether it is reasonable to limit representation under Rule 1.2(c) requires understanding the client’s legal issues, defenses and claims, and goals. Issue spotting and information-gathering at the initial interview and consultation with the client are key. Essential to have appropriate intake/screening forms, checklists of common issues, trained staff, close supervision, continuing training, and periodic review of intake protocols.

b. **Retainer** – A written retainer agreement limiting representation is required for New York State civil court appearances by Office of Court Administration’s Administrative Order AO-285-16 issued in December 2016 (see link in References). A retainer agreement ensures the client’s informed consent to the limitation on representation, as required by Rule 6.5(d) and consistent with Rule 1.4.

c. **Anchored in a full service program** – Having ability to provide full representation helps ensure that the provider of limited representation has the necessary competence to identify circumstances where limited services would be reasonable and appropriate, and to ensure that the provider has the competence to provide the limited services consistent with Rule 1.1. If client’s goals or circumstances change, the provider would also be able to offer full representation in the proceeding.

d. **Location, location, location** – Successfully providing limited scope legal representation and services to large volumes of low-income clients
requires having the ability to screen clients on a walk-in basis, or at regularly-held legal clinics, or through the use of telephone hotlines. In context of eviction defense/tenant representation, having appropriate office space in the courthouse allows legal service providers increased opportunities to reach tenants who would otherwise receive no legal services at all. Courthouse offices can provide benefits advocacy, advice and counsel, and assistance filling-out pro se forms.

D. Hypotheticals - Applying Rules in Practice

Part 1 - You are a housing lawyer at a legal services organization and you are interviewing a potential client at intake. There are various units within your organization's housing practice, and the decision about which unit the client gets assigned to depends on the results of your intake interview.

The potential client shows you a nonpayment petition. Aside from nonpayment of rent, the tenant divulges other issues in your interview, including (1) that there are repairs in the unit that need to be addressed, and the severity of the repair issues may warrant an abatement; (2) that the tenant has a partner who also resides in the apartment, and although the tenant does not know it, the partner has sought our representation previously with respect to issues with the same apartment and regarding a conflict with the tenant; (3) that the tenant just secured a new job but has not started working yet. If and when she starts the job, she may be able to pay the arrears using an emergency rent grant.

a. What questions would you need answers to before you could make a recommendation about the scope of representation appropriate for this tenant?

b. What scope of representation do you think would be reasonable?

c. Under what circumstances would conflict rules apply in this case?

Part 2 - After your questions get answered, the case gets referred to your full representation housing unit. Over the next few weeks, the client starts the job and the landlord decides to finally address the repair issues.

a. How do the changes in the facts impact what scope of representation is reasonable?

b. Can this tenant be transferred to the specific housing unit that serves clients by obtaining emergency rent arrears grants? If so, what would the firm be required to do before this transfer could happen?

Part 3 - You are a lawyer who has a lot of experience with landlord tenant law but you are working in private practice as a solo practitioner, and you meet the same tenant described above, but they are seeking your assistance pro bono. How, if at all, would your response to Part 1, a., b., and c., change?
A. Introduction to Ethical Issues regarding Clients with Diminished Capacity

1. What are the ethical considerations involved when an attorney is working with a person whose capacity is questionable?

2. In analyzing the ethical issues that arise, our primary source of guidance will be the New York Rules of Professional Conduct. We intend to focus much of our discussion on Rule 1.14, which addresses clients with diminished capacity, and also plan to review various other ethical rules relevant to these clients.

B. Attorneys’ Role in Working with People with Diminished Capacity

1. These cases are often complex and require us to walk a fine line – we must balance the importance of autonomy while potentially protecting a vulnerable person from harm.

   a. New York Rule 1.14 states as a general rule, “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” Whenever possible, we are obligated to help the client with supported decision-making and be clear not to overstep our role.

   b. The New York Rules recognize that a lawyer “is a representative of a client and an officer of the legal system with special responsibility for the quality of justice…[E]ach lawyer has a duty to… promote access to the legal system and the administration of justice.” New York Rules pmbl,(2018). The New York Rules address this premise by prohibiting discrimination on the basis of disability or other factors. See, e.g., Rule 8.4.

2. As civil legal services providers, we often work with vulnerable clients who are elderly, have behavioral health concerns, and/or are minors. Therefore we are very likely to come across a client with diminished capacity. With people with disabilities living increasingly independent lives in the community, we may begin to encounter capacity issues with even more frequency.

3. No matter the client’s capacity, it is important to keep in mind that attorneys are in a position to help people who trust us and seek us out for advice regardless of a particular client’s mental state.
C. Common Ethical Issues Working with People with Diminished Capacity - Application of the Rules to Practice

1. Capacity

a. The attorney-client relationship is an agency relationship that is ordinarily created by express or implied agreement between the lawyer and client. Therefore, the client must ordinarily have the capacity to enter into this agreement. New York State Bar Association, Committee on Professional Ethics, Opinion 746 (07/18/01).

i. Where a prospective client’s capacity is in doubt, the lawyer must make a threshold determination of whether she has the capacity to consent to the lawyer’s representation. However, the standard governing whether a person has the capacity to form a client-lawyer relationship under the Rules is not necessarily as stringent as the standard governing a person’s legal capacity to enter into a fee agreement or the standard governing a person’s legal capacity to retain a lawyer to act as an agent on her behalf. Forming a client-lawyer relationship under the Rules for certain purposes, such as for purposes of obtaining legal advice or the lawyer’s help in communicating with others, may require no more than the ability to consent to, or to express a desire for, the lawyer’s help. New York City Bar Association, Formal Opinion 2018-1 (3/12/18).


i. The determination of a client’s capacity to make decisions is central to the lawyer-client relationship. The Rules recognize that there are varying degrees of disability, and that the lawyer’s responsibilities will vary depending on the level of the client’s decision-making capacity. Clients with disabilities should be presumed capable of making decisions and participating in the lawyer-client relationship. Some clients, however, may in fact lack the ability to make judgments in their own interests.

ii. How to Determine if a Client has Capacity

1. New York Rule 1.14, comment 6, directs a lawyer to balance the following factors: (i) the client’s ability to articulate reasoning leading to a decision, (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and (iii) the consistency of a decision with the known long-term
commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

2. Cultural issues are of special concern in capacity assessment. Cultural variables such as language, immigrant status, economical status, perceptions of institutions such as hospitals, as well as perceptions of disability and the role of family in care and decision making, are important.

3. Analysis will largely depend on the case at hand and the special circumstances presented.

   iii. When the capacity to make adequately considered decisions in connection with a representation is diminished, the lawyer must try to maintain a conventional relationship with the client.

   iv. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client, and in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. See Comments 5, 6, 7, 7A to Rule 1.14 (examining meaning of “protective action”).

   v. A lawyer may take reasonably necessary protective action when a prospective client has seriously diminished capacity, cannot adequately act in his or her own interest, and is at risk of substantial physical, financial or other harm unless action is taken. New York City Bar Association, Formal Opinion 2018-1 (3/12/18).

c. New York Rule 1.2, “Scope of Representation and Allocation of Authority Between Client and Lawyer,” section (a): A lawyer must abide by a client’s decisions concerning the objectives of representation and consult with the client as to the means by which they are to be pursued.

d. New York Rule 1.4, “Communication,” section (a): A lawyer must reasonably consult with the client about the means by which the client’s objectives are to be accomplished, keep the client reasonably informed about the status of the matter and promptly comply with a client’s reasonable requests for information.
e. New York Rule 1.1, “Competence”: A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle.

f. New York Rule 2.1, “Advisor”: A lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client’s situation.

g. ABA Information on Capacity:
http://www.americanbar.org/groups/law_aging/resources/capacity_assessment.html

h. What Lawyers Need to Know About Capacity: The Civil Context, Nassau County Bar Association (included in materials).


2. Duties to Prospective Clients

a. New York Rule 1.18, “Duties to Prospective Clients”: States that a person who consults with a lawyer about “the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”

b. New York Rule 1.18, comment 1, notes that a lawyer’s consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further.

c. New York Rule 1.18(b) prohibits an attorney from using or revealing a prospective client’s information (except as permitted by Rule 1.9, which discusses duties to former clients) even if the prospective client or lawyer decides not to proceed with the representation. This duty exists regardless of how brief the initial conference may be.

d. New York Rule 1.18(e) provides for some instances wherein “a prospective client is not a client within the meaning of paragraph (a)” such as when “the person: (1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship”.
3. Confidentiality

a. New York Rule 1.6, “Confidentiality of Information”: Requires a lawyer to preserve the confidentiality of certain information gained during or relating to the representation of a client, as well as information learned in the course of a consultation with a prospective client. Information gained from any source is confidential, unlike attorney client-privilege which does not apply as broadly.

b. New York Rule 1.6 applies to all “confidential information,” which is defined to include information protected by the attorney-client privilege as well as other information that is “likely to be embarrassing or detrimental to the client if disclosed” or that the client has requested to be held confidential.

c. In general, a lawyer may not disclose a client’s or prospective client’s information to anyone outside the lawyer’s office without the client’s informed consent. See Rule 1.0, Terminology, section (j): defines “informed consent” as denoting the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

d. There are also permissive exceptions to the duty to preserve confidentiality, such as when reasonably believed necessary to prevent, among other things, substantial bodily harm or reasonably certain death. See New York Rule 1.6(b)(1)-(6).

D. Hypothetical - Applying Rules in Practice

Part 1 - You are an attorney on a multidisciplinary team of attorneys and social workers working in a legal services housing unit. On your intake line, you receive a call from an elderly woman named Teresa who says she received papers stating that she is going to be evicted. She tells you that she has a walker and cannot come to your office nor can she send you the papers since she doesn’t leave the house. You decide to do a home visit. Your office policy is that no home visit is done alone so the team social worker accompanies you.

When you arrive at Teresa’s home, and after speaking with her, you believe that she may be suffering from some behavioral health issues. Her speech is disorganized and frenzied, her affect is blunted, and she is possibly suffering from paranoid delusions. You are able to discern from her documents that she is being sued in a non-payment case, but it is difficult to assess the case due to her issues communicating and many of the facts of the case seem puzzling. For example, she has been living without electricity for several years because her “landlord stole it and cut it off.” There is in fact no electricity.
Can you help Teresa?
  • Attorney-client relationship requires competency. Does she have capacity?
  • How do you assess capacity?

**Part 2** - Teresa mentions that her partner, who lives with her, is in the other room. She asks you not to share the information regarding the eviction with him, as he is older and she doesn’t want to worry him. Plus, he is not on the lease, so it isn’t his business.

She goes to the kitchen to find some paperwork and her partner comes in the room to see what is going on and say hello. He asks if you are there to help with the electricity problem, and is concerned that if you interfere with the landlord, they will be evicted. He is very nervous about losing their housing, as he has lived there for 15 years with Teresa and has nowhere else to go. When speaking with him, you realize that he may have some cognitive issues as well.

**Given his concern, can you tell Teresa’s partner anything?**
  • Do you have a client? Who is the client?
  • Do you owe a duty of confidentiality to Teresa?

**Part 3** - You take Teresa’s documents back to your office to look into the case and you come across a business card from another legal services attorney. You call Teresa to ask about this, and she states that was her lawyer but she fired her, though you cannot find any paperwork from the court confirming the withdrawal. Again, Teresa is very agitated, is speaking quickly, and what she is saying does not make sense to you. She says something about how the other attorney is working with the landlord and she doesn’t want you to contact her. You also know this attorney as a longtime colleague and respect them professionally.

**Do you contact the attorney in an effort to investigate the case further?**
  • Knowing that her capacity is questionable, should you follow Teresa’s directions?
  • Should protective action be considered given the threat of eviction?
Topic III -- Ethical Rules in Immigration Practice

A. Introduction to Ethical Issues in Immigration Practice

1. Concepts Covered

   a. Dual Representation

   b. Candor to the Tribunal/Withdrawal

   c. Informed Consent

2. Ethical Rules Covered – New York Rules & Executive Office for Immigration Review (EOIR) rules

   a. New York Rule 1.1 – Competence - Generally, the Rule provides that a lawyer should provide “competent” representation to a client which requires “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

   b. New York Rule 1.2(d) – Scope of Representation and Allocation of Authority Between Client and Lawyer - Generally, the Rule provides that a lawyer shall abide by the client's decisions concerning the objectives of representation and consult with the client as to the means by which they are pursued. Subpart (d) provides that a “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with the client.”

   c. New York Rule 1.4 – Communication - This Rule provides what types of information a lawyer shall promptly inform a client of, including any decision or circumstance that requires the client's informed consent, information required by the court to be communicated to the client as well as material developments in the matter, including settlement and plea offers. The Rule provides other parameters for lawyer-client communication.

   d. New York Rule 1.6 – Confidentiality of Information - See description above on page 4 of this outline.

   e. New York Rule 1.7 – Conflict of Interest: Current Clients - This Rule governs the circumstances under which a lawyer shall not represent a client in the case of conflicts, namely: the representation will involve the lawyer in representing different interests or there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other
personal interests. Certain representation is permitted if it meets the conditions for an exception which include the lawyer's reasonable belief that they will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against the other by the lawyer in the same litigation or proceeding and each affected client gives informed consent, confirmed in writing.

f. New York Rule 1.9 – Duties to Former Clients - This Rule pertains to a lawyer's duty to a former client when it comes to agreeing to represent a new person in the same or a substantially related matter in which the person's interests are materially adverse to the former client. This is not permitted unless the former client gives informed consent, confirmed in writing.

g. New York Rule 1.16 – Declining or Terminating Representation - This Rule governs the circumstances in which a lawyer can decline to represent a potential client or terminate representation of a current client. Generally, a lawyer can decline representation when the lawyer knows or reasonably should know that the person wishes to bring a legal action, assert defense or other position merely for the purposes of harassing or maliciously injuring any person or it is not warranted under existing law (unless supported by a good faith argument for an extension, modification or reversal of existing law). The rule specifies when withdrawal is mandatory, e.g., when the lawyer knows that representation will result in violation of the ethical rules or law, among other reasons; and when withdrawal is permitted, specifying thirteen circumstances, including where the lawyer reasonably believes the client is persisting in a course of action that is criminal or fraudulent; the client insists on taking an action with which the lawyer has a fundamental disagreement or the client fails to cooperate with representation, among others. In certain cases, the lawyer must obtain permission from the tribunal. Even where there is withdrawal, the lawyer is required to take steps to avoid foreseeable prejudice to the rights of the client.

h. New York Rule 3.3 – Conduct Before a Tribunal - This Rule applies to attorney conduct before a court or other tribunal and includes prohibitions on making false statements, failing to correct false statements, failing to disclose controlling authority and offering evidence known to be false.

i. Rule 3.3 Comment 10 – Remedial Measures - This comment relates to the remedial measures a lawyer must take when the lawyer has offered or used material evidence that it believed to be true but then subsequently learns is false. The lawyer must advise the client confidentially regarding the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the
withdrawal or correction of false statements of evidence. If that fails, further remedial action is dictated, including what do if withdrawal is not permitted, including the divulgence of confidential information.

i. New York Rule 4.1 – Truthfulness in Statements to Others - This Rule provides that in the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

j. EOIR Professional Conduct for Practitioners – 8 C.F.R. § 1003.102 - This rule sets forth the non-exclusive list of grounds for the board to impose disciplinary sanctions against a practitioner, including categories such as inappropriate receipt of fees; engaging in bribes or coercion; knowingly or with reckless disregard making a false statement of material fact or law or willfully misleading any person concerning any material and relevant matter relating to a case including knowingly or with reckless disregard offering false evidence; falsely certifying a copy of a document as being a true and complete copy of an original and many other grounds.

B. Dual Representation

1. Hypothetical:
Lydia is a citizen of Venezuela who entered the United States with a tourist visa in January 2018. You represented her on an affirmative asylum application based on political opinion and she was referred to immigration court. She is now on the fast track asylum docket. In December 2018, Lydia told you that she married a USC, Ed, and he is willing to petition for a marriage-based green card for Lydia.
• Can you (or should you) represent both Ed and Lydia in the marriage-based case?
• If you do represent both Ed and Lydia, what language should be included in the dual representation retainer?

2. Ethical Rules Implicated – New York Rules


C. **Candor to the Tribunal/Withdrawal**

1. **Hypothetical:**
   You represent Muriel, a citizen of Haiti, in a defensive asylum case based on her involvement in an opposition political party. When you submitted the I-589, Muriel gave a consistent and credible account of her activities, though she did not have much documentary proof to corroborate her story. As her hearing date approaches and you are preparing her testimony, an inconsistency in Muriel’s story emerges, including that she in fact had been traveling outside Haiti during what had been a key event in her story. You ask Muriel about this, and she says she was wrong about the date of the event, even though she had been very consistent about this initially and hadn’t had trouble remembering dates and events.
   - What do you do?

   After you question her further, Muriel admits that her story was based on the story of her friend who had won asylum, and she in fact had not been involved in any political party in Haiti and had fabricated the documents supporting her claim. She is still very afraid to go back to Haiti because of the general country conditions but not because of any political party affiliation.
   - How does this change your obligations?
   - What are your next steps?

2. **Ethical Rules Implicated – New York Rules & EOIR**
   b. EOIR Professional Conduct for Practitioners – 8 C.F.R. § 1003.102 - See grounds for disciplinary action, some of which are described above on page 15.
   d. New York Rule 1.6 – Confidentiality of Information - See description above on page 4.
   e. New York Rule 1.16 – Declining or Terminating Representation - See description above on page 14.
   f. New York Rule 1.2(d) – Scope of Representation and Allocation of Authority Between Client and Lawyer - See description above on page 13.
   g. New York Rule 1.4 – Communication - See description above on page 13.

D. Informed Consent

1. Hypothetical:
Client Hamza comes for a consultation about getting immigration status through her US citizen spouse. She had come to the US from Egypt on a visitor visa last year, but overstayed her visa. She appears to have no other adverse factors, and wants to know if it is safe for her to apply for her green card based on marriage.

- What warnings might you have to give, for Hamza to be able to give informed consent to the filing of such an application?

Upon further discussion, it appears that Hamza has an arrest for NYPL 220.03, criminal possession of a controlled substance.

- Given that all criminal history must be disclosed in an adjustment of status application (and would show up during routine fingerprinting), does this change anything?

Hamza then mentions that about 10 years ago, she had tried to cross the border from Canada into New York without permission, was stopped, and turned away. She doesn’t recall if her fingerprints were taken. She might have an “expedited removal order,” but is not sure. One way to find out is to file a FOIA request the Department of Homeland Security. She wants to know whether it is safe to do so.

- How do you advise Hamza?

2. Ethical Rules Implicated – New York Rules


Supplemental Reference Materials

I. Limited Scope Representation

- Office of Court Administration Administrative Order AO-285-16 (12/16/16) (stating the policy of New York courts to “support and encourage the practice of limited scope legal assistance in appropriate cases” and under specific circumstances), [https://amlawdaily.typepad.com/AO-285-16-Policy%20Statement.pdf](https://amlawdaily.typepad.com/AO-285-16-Policy%20Statement.pdf); see New York State United Court System Request for Public Comment on Proposed Guidelines for Attorneys Providing Limited Scope Legal Assistance to Clients in Civil Matters (6/22/18), [https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/LimitedScopeRepresentation.pdf](https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/LimitedScopeRepresentation.pdf)


- American Bar Association Standing Committee on Ethics and Professional Responsibility, “Communication with Person Receiving Limited-Scope Legal Services,” Formal Opinion 472 (11/30/15), [https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_472.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_472.authcheckdam.pdf)

- New York County Lawyers Association Committee on Professional Ethics Op. 742 (2010), [https://www.nycla.org/siteFiles/Publications/Publications1348_0.pdf](https://www.nycla.org/siteFiles/Publications/Publications1348_0.pdf).


II. Ethical Issues regarding Clients with Diminished Capacity

- ABA Information on Capacity: 
  [http://www.americanbar.org/groups/law_aging/resources/capacity_assessment.html](http://www.americanbar.org/groups/law_aging/resources/capacity_assessment.html)


III. Ethical Issues in Immigration Practice


Legal Ethics Resources
Philip M. Genty, Columbia Law School (4/16/19)


Note that the Rules have been adopted as Joint Rules of the Departments of the Appellate Division (22 N.Y.C.R.R. Part 1200) and are applicable to all NYS attorneys. The comments have not been adopted by the courts, so while they provide guidance, they are not technically binding.

Formal Ethics Opinions:
NYS Bar Association: https://www.nysba.org/Ethics/
NYC Bar Association: https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports///573403eda6a763482d8682b0///1/10

Research resources (information provided by Columbia Law School Reference Librarians, Arthur W. Diamond Law Library):

There is no comprehensive source that includes all ethics opinions from state bars and courts. As a practical matter, detailed research would involve looking at the individual state sources/websites to make sure you weren't missing material not picked up in the selected ethics opinion coverage of the national databases.

That said, the best source for wide reaching coverage is probably the ABA/BNA Lawyers' Manual on Professional Conduct, though it isn't comprehensive. It is available in electronic format via Bloomberg Law.

In Bloomberg Law, type ABA/BNA Lawyers' Manual on Professional Conduct into the main search bar, but do not hit enter or Go. There will be two options in the Go To menu - 1) ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports and 2) ABA/BNA Lawyers' Manual on Professional Conduct Sources. The former is a current awareness tool, with a new newsletter/report published every two weeks and Breaking News in-between. The latter "contains all of Bloomberg BNA's ABA/BNA Lawyers' Manual on Professional Conduct sources, including ABA ethics opinions, model rules and standards, practice guides, state ethics opinions and law reports." If you select it, you can then run keyword searches in just those sources.

Lexis Advance and Westlaw also both have selected coverage of ethics opinions, though far less than their case law coverage. In Lexis Advance, click on Practice Area or Industry, then click on Legal Ethics, then on All Legal Ethics Cases for court decisions or on All Legal Ethics Administrative Materials to search the limited ethics opinion coverage. In Westlaw, click on Administrative Decisions & Guidance (under Content Types), then on Ethics & Disciplinary Opinions to search opinions released by state bar associations or committees on ethics from select states (with varied coverage in even those select states).

Note that, although Bloomberg Law, Lexis Advance, and Westlaw all have select coverage, it isn't the same select coverage, so you may find (for example) material in Bloomberg Law that isn't in Westlaw, or material in Lexis Advance that isn't in Bloomberg Law. Even looking in all 3 may not pick up relevant ethics opinions that are available only from the state source.
Ethics Hotline (NYC Bar Association)
https://www.nycbar.org/member-and-career-services/ethics/hotline:

New York lawyers faced with ethical questions regarding their own prospective conduct can reach the Ethics Hotline through Customer Relations at 212.382.6663.

The Ethics Hotline is operated and staffed by members of the Committee on Professional Ethics (the "Committee"). These volunteers respond to inquiries made by lawyers admitted in New York who face ethical questions regarding their own prospective conduct. The purpose of the Hotline is to provide informal guidance to callers in accordance with the New York Rules of Professional Conduct (the "New York Rules"). Any information provided in response to a Hotline inquiry is merely the opinion of the Committee member answering the call. It is not the opinion of the Committee as a whole. The information provided in response to a Hotline inquiry does not constitute legal advice. If the matter involves complex issues, or implicates a substantive area of law, you may wish to retain professional ethics counsel.

Callers should be aware of the following guidelines before calling the Ethics Hotline:

1. The Hotline only provides guidance to lawyers admitted to practice in New York about the New York Rules.
2. The Hotline only provides guidance concerning the caller's own prospective conduct. We do not answer questions about past conduct or the conduct of other lawyers.
3. The Hotline does not provide legal advice or answer questions of law.
4. The Hotline does not answer questions about the unlicensed practice of law (UPL). UPL is governed by statutory law, not the New York Rules and is, therefore, outside the Committee's jurisdiction.
5. The Hotline provides general guidance. Due to the limited information we can obtain during a brief and informal telephone conversation, we cannot provide a definitive answer to Hotline questions.
6. The Hotline does not answer questions that are the subject of a pending legal proceeding or are before a grievance committee.
7. Although it is the Committee's policy to maintain confidentiality of all Hotline inquiries, callers should be aware that the information is not protected by the attorney-client privilege or RPC 1.6.
8. The Ethics Hotline does not respond to complaints or inquiries regarding unethical conduct of other lawyers. Any such complaints or inquiries should be addressed to the Grievance or Disciplinary Committee for the county in which the lawyer practices (see http://www.nycourts.gov/attorneys/grievance/).
9. Lawyers who call the Ethics Hotline are required to provide their full name and telephone numbers.

Before making a call to the Hotline, a lawyer may wish to refer to the Frequently Asked Ethics Questions section ("FAQs") of the New York City Bar Association Ethic's webpage. Please note that the FAQs are intended to provide general guidance on ethical questions.
ETHICS FOR PUBLIC INTEREST LAWYERS IN THESE DEMANDING TIMES

INTRODUCTION TO ETHICAL ISSUES IN IMMIGRATION PRACTICE

Victoria Neilson, Managing Attorney, CLINIC
Sarah Nolan, Supervising Attorney, NYLAG
Hasan Shafiquallah, Attorney-in Charge, The Legal Aid Society
Gemma Solimene, Clinical Associate Professor of Law, Fordham Law School
DUAL REPRESENTATION
Hypo On Dual Representation

Lydia is a citizen of Venezuela who entered the United States with a tourist visa in January 2018. You represented her on an affirmative asylum application based on political opinion and she was referred to immigration court. She is now on the fast track asylum docket. In December 2018, Lydia told you that she married a USC, Ed, and he is willing to petition for a marriage-based green card for Lydia. Can you (or should you) represent both Ed and Lydia in the marriage-based case? If you do represent both Ed and Lydia, what language should include in the dual representation retainer?
After you have signed a dual representation retainer with Ed and Lydia and filed the I-130 “Petition for Alien Relative” with USCIS, Lydia calls you in tears. She tells you that she spent the night in the hospital because Ed came home drunk and beat her. While this is the first time he’s become physically violent, Lydia confides that Ed drinks heavily and is often emotionally abusive. What are your obligations at this point? Can you continue to represent Lydia on her asylum application?
Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; ... (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.
Rule 1.9 Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
Rule 1.16: Declining Or Terminating Representation

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;
CANDOR TO THE TRIBUNAL/WITHDRAWAL
You represent Muriel, a citizen of Haiti, in a defensive asylum case based on her involvement in an opposition political party. When you submitted the I-589, Muriel gave a consistent and credible account of her activities, though she did not have much documentary proof to corroborate her story. As her hearing date approaches and you are preparing her testimony, an inconsistency in Muriel’s story emerges, including that she in fact had been traveling outside Haiti during what had been a key event in her story. You ask Muriel about this, and she says she was wrong about the date of the event, even though she had been very consistent about this initially and hadn’t had trouble remembering dates and events. What do you do?
After you question her further, Muriel admits that her story was based on the story of her friend who had won asylum, and she in fact had not been involved in any political party in Haiti and had fabricated the documents supporting her claim. She is still very afraid to go back to Haiti because of the general country conditions but not because of any political party affiliation.

How does this change your obligations? What are your next steps?
Rule 3.3: Conduct Before a Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

***

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
Rule 1.0 - Terminology

(w) “Tribunal” denotes a court. . . administrative agency or other body acting in an adjudicative capacity. A[n] . . administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party’s interests in a particular matter.

(k) “Knowingly,” “known,” “know,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.
A practitioner who falls within one of the following categories shall be subject to disciplinary sanctions in the public interest if he or she: ***

(c) Knowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence. If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures.
Rule 3.3 Comment 10 - Remedial Measures

A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. . .

The advocate’s proper course is to remonstrate with the client confidentially, advise the client of the lawyer’s duty of candor to the tribunal, and seek the client’s cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.
Rule 1.6: Confidentiality of Information

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

***

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

***

(6) when permitted or required under these Rules or to comply with other law or court order.
Rule 1.16: Declining or Terminating Representation

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:
(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;
Other Ethical Rules Implicated:

Rule 1.2 (d) - Scope of Representation and Allocation of Authority Between Client and Lawyer: (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

Rule 1.4 - Communication: (a) A lawyer shall:... (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

Rule 4.1 - Truthfulness in Statements to Others: In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law.
INFORMED CONSENT
Client Hamza comes for a consultation about getting immigration status through her US citizen spouse. She had come to the US from Egypt on a visitor visa last year, but overstay her visa. She appears to have no other adverse factors, and wants to know if it is safe for her to apply for her green card based on marriage. What warnings might you have to give, for Hamza to be able to give informed consent to the filing of such an application?
Upon further discussion, it appears that Hamza has an arrest for NYPL 220.03, criminal possession of a controlled substance. Given that all criminal history must be disclosed in an adjustment of status application (and would show up during routine fingerprinting), does this change anything?
Hamza then mentions that about 10 years ago, she had tried to cross the border from Canada into New York without permission, was stopped, and turned away. She doesn’t recall if her fingerprints were taken. She might have an “expedited removal order,” but is not sure. One way to find out is to file a FOIA request the Department of Homeland Security. She wants to know whether it is safe to do so.
Rule 1.0 - Terminology:

(j) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.
Rule 1.4 - Communication:

(a) A lawyer shall:

(1) promptly inform the client of:

   (i) any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(j), is required by these Rules;

   ***

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

   ***

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
Rule 1.1 - Competence:

(c) A lawyer shall not intentionally:
***

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.
ETHICS FOR PUBLIC INTEREST LAWYERS IN THESE DEMANDING TIMES

INTRODUCTION TO ETHICAL ISSUES IN IMMIGRATION PRACTICE

Victoria Neilson, Managing Attorney, CLINIC
Sarah Nolan, Supervising Attorney, NYLAG
Hasan Shafiquallah, Attorney-in-Charge, The Legal Aid Society
Gemma Solimene, Clinical Associate Professor of Law, Fordham Law School