ATTORNEY–CLIENT PRIVILEGE FOR NONLAWYERS? A STUDY OF BOARD OF IMMIGRATION APPEALS–ACCREDITED REPRESENTATIVES, PRIVILEGE, AND CONFIDENTIALITY

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I. INTRODUCTION

This Note attempts to answer one seemingly simple question: Are the communications between clients and nonlawyer Board of Immigration Appeals-accredited (BIA-accredited) representatives protected by attorney–client privilege? As with so many questions of law, the answer is simply not clear. There is no statute, regulation, or caselaw that directly addresses this question.

At first blush, it may seem obvious that what is referred to as “attorney–client privilege” would cover only communications between attorneys and clients. In this case, the word “attorneys” refers to people who graduated from law school and passed a bar examination to become licensed attorneys. Certainly many legal authorities would hold this literal interpretation of attorney–client privilege is correct. However, sometimes the purpose of a concept is not entirely encompassed in the term created to describe it. The purpose of attorney–client privilege in modern day law is to encourage clients to be honest with their legal advisors. This is encouraged because legal advisors need to completely understand their clients’ problems in order to give the best legal advice possible. Society considers informed legal advice important because the assumption is, with such legal advice, clients will more likely obey the law. In this light, the attorney–client privilege is viewed as a way to protect the justice system and ensure people are able to, and will, obey the law. If this is the purpose of attorney–client privilege, it would make sense that attorney–client privilege—or some type of privilege—be allowed to all clients who communicate with legal advisors—not just attorneys—for the purpose of getting legal advice that would allow them to better comply with the law.

2. See Fisher v. United States, 425 U.S. 391, 403 (1976) (“The purpose of the privilege is to encourage clients to make full disclosure to their attorneys.” (citations omitted)).
3. See id. (stating a “client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice” if the client believed the communication to the attorney could be disclosed).
5. See id.
Many lawyers and nonlawyers alike confuse attorney–client privilege with the ability and responsibility to keep their clients’ information confidential. In fact, confidentiality and attorney–client privilege, while closely related, are actually two distinct concepts in the practice of law. Confidentiality is a matter of legal ethics. A lawyer is required to keep certain information that her clients share with her confidential, not because that information is necessarily covered by attorney–client privilege, but because her state legal ethics rules require her to do so. Attorney–client privilege, on the other hand, is a matter of evidence that covers legal proceedings. Attorney–client privilege determines what information a lawyer—or perhaps, as this Note argues, a qualified nonlawyer practitioner—and his client must or may not disclose when called upon to testify or when served with a subpoena for information revealed in the course of representation. Attorney–client privilege does not cover all information a lawyer is required to keep confidential. Therefore, although closely related, confidentiality is not dependent upon attorney–client privilege.

A little known provision of the Administrative Procedures Act (APA), the statute that provides for federal administrative agencies, authorizes administrative agencies to allow parties that appear before them in adjudication proceedings to be legally represented by certain kinds of
nonlawyers.14 While not all agencies have taken advantage of this provision, many do.15 This Note focuses on the Board of Immigration Appeals (BIA), an agency that allows nonlawyer legal representation. According to 8 C.F.R. § 292.1, accredited representatives, who are nonlawyers, may represent clients and give legal counsel.16 Regulations indicate representation is considered the practice of law.17 Thus, nonlawyer, BIA-accredited representatives practice law. Clients consult with BIA-accredited representatives in order to obtain legal advice that will enable them to understand and obey federal immigration laws.18

This Note argues that because the purpose of attorney–client privilege applies equally to attorneys and BIA-accredited representatives, communications between clients and representatives should be covered by attorney–client privilege. Although this Note will refer to the argued privilege between a BIA-accredited representative and his or her client as an “attorney–client privilege,” in fact, any privilege recognized between the accredited representative and his or her client would suffice.19 However,
there is an advantage of having a specifically named attorney–client privilege because there is caselaw and statutory guidance about the scope and extent of attorney–client privilege that would not exist in a newly created privilege between BIA-accredited representatives and their clients. In addition, the work of a BIA-accredited representative is so close to the work of an immigration attorney, as this Note will explain, the privilege given to a BIA-accredited representative would arguably be identical to the privilege given to an immigration attorney.

Whether BIA-accredited representatives have attorney–client privilege could be important for several reasons. On the most immediate level, it is important for BIA-accredited representatives, themselves, and the attorneys who work and consult with them to know the kind of protection they can offer their clients. On a broader level, many federal administrative agencies, as well as some state agencies, allow nonlawyers to practice law before them. Although each agency has markedly different requirements for nonlawyer practitioners to fulfill before being allowed to practice, some of the information and arguments contained in this Note may apply to nonlawyer practitioners who practice before administrative agencies other than the BIA. Finally, because BIA-accredited representatives work primarily with low-income clients, the recognition of attorney–client privilege for BIA-accredited representatives improves the legal counsel available to the poor.

previously been specifically recognized by statute or common law as being the basis for privilege, courts may establish a new privilege. For example, in Jaffee, the Supreme Court faced the question of whether communications between a social worker and her client were privileged. See Jaffee, 518 U.S. at 15. Courts may also broaden an established privilege to include new kinds of parties. Id. (concluding social workers were included in the psychotherapist–patient privilege if they were practicing psychotherapy). In order to ensure communications between an accredited representative and his or her client are protected, courts could either find the communications to be included within the attorney–client privilege—similar to the way the Supreme Court found communications between social workers and their patients fit within the psychotherapist–patient privilege—or they could establish a new “representative–client privilege.” See id. Either way, the communications would be protected.

21. Id. at 158–69.
II. BOARD OF IMMIGRATION APPEALS-ACCREDITED REPRESENTATIVES

The Board of Immigration Appeals is a body within the United States Department of Justice charged with hearing certain immigration case appeals at the highest administrative level. The cases appealed to the BIA generally originate in two agencies of the Department of Homeland Security: the Citizenship and Immigration Services (CIS) or the Immigration and Customs Enforcement (ICE). CIS and ICE together are what was historically known as the Immigration and Naturalization Service (INS). In 2003, after the Department of Homeland Security was created, the INS was divided into separate agencies; the CIS is the service side of immigration that accepts and adjudicates affirmative applications for residency, citizenship, and other immigration benefits, and the ICE is the enforcement side of immigration, which investigates and apprehends persons in violation of federal immigration law. In addition to its appellate function, the BIA is also charged with overseeing the recognition of agencies and the accreditation of certain agency staff members for the purpose of practicing in front of the CIS, Immigration Judges, and the BIA, itself.

The BIA gets its power to approve nonlawyer representation through the APA. The APA, first passed in 1946, is the preeminent statute governing federal agencies in the United States. Buried deep in the text of the APA is a provision allowing federal agencies to permit nonlawyer

practitioners to represent parties in federal agency judicial proceedings.\textsuperscript{31} Over thirty federal agencies permit nonlawyer representation.\textsuperscript{32} Some prominent examples of these agencies, other than the BIA, include the Internal Revenue Service, the National Labor Relations Board, and the Patent and Trademark Office.\textsuperscript{33}

In 1963, the practice of nonlawyers appearing before federal administrative agencies gained additional legitimacy in the Supreme Court decision \textit{Sperry v. Florida}.\textsuperscript{34} In \textit{Sperry}, the Florida Bar Association sought to enjoin a nonlawyer patent agent from practicing patent law in the state of Florida, citing Florida's statute against unauthorized practice of law.\textsuperscript{35} Pursuant to regulations of the United States Patent and Trademark Office (USPTO), patent agents are specifically permitted to practice before the USPTO, provided they are approved to register, and do register, with the USPTO, as Mr. Sperry had done.\textsuperscript{36} The Supreme Court ruled the federal statute that allowed for nonlawyer representation in patent proceedings preempted any state laws prohibiting such practice.\textsuperscript{37} The Court based its decision in \textit{Sperry} on the Supremacy Clause of the Constitution, stating, “A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give ‘the State’s licensing board a virtual power of review over the federal determination.’”\textsuperscript{38} Although \textit{Sperry} was specifically about nonlawyer representation before the USPTO, it is used to justify the practice of nonlawyers in all federal agencies that allow them, regardless of state laws to the contrary.\textsuperscript{39}

In the case of the Board of Immigration Appeals, the accreditation of nonlawyer representatives to assist immigrants in their immigration proceedings has a specific humanitarian purpose—to ensure immigrants of low financial means have access to legal counsel in their legal immigration proceedings.\textsuperscript{40} In order to become a BIA-accredited representative, a person must work for a BIA-recognized agency.\textsuperscript{41} In keeping with the goal

\begin{thebibliography}{9}
\bibitem{31} 5 U.S.C. § 555(b).
\bibitem{32} STASKY, \textit{supra} note 15.
\bibitem{33} \textit{Id}.
\bibitem{35} \textit{Id.} at 381–82.
\bibitem{36} \textit{Id.} at 384.
\bibitem{37} \textit{Id.} at 385.
\bibitem{38} \textit{Id.} (citations omitted).
\bibitem{39} STASKY, \textit{supra} note 15, at 19.
\bibitem{41} 8 C.F.R. § 292.2(a), (d) (2009).
\end{thebibliography}
of providing low-cost legal counsel to low-income immigrants, only nonprofit organizations can become BIA-recognized agencies.\textsuperscript{42} A nonprofit organization obtains its BIA recognition by submitting an application to the BIA.\textsuperscript{43} The organization is required to have access to legal resources—which can include internet access—and a local attorney who can serve as a consultant to the organization’s staff.\textsuperscript{44} The organization is allowed to charge clients for its services, but it is required to submit to the BIA a fee schedule showing the fees are nominal.\textsuperscript{45} Once a nonprofit organization is recognized by the BIA, it may apply for one or more of its workers to become BIA-accredited—thus making them BIA-accredited representatives.\textsuperscript{46} In order to apply, the organization must show the proposed representative is a person of good moral character with immigration experience and training.\textsuperscript{47}

There are two levels of BIA accreditation: partial accreditation and full accreditation.\textsuperscript{48} Partially accredited representatives have permission to practice only in front of the Citizenship and Immigration Service.\textsuperscript{49} This gives them the ability to file immigration forms on behalf of clients, give legal counsel, and represent clients in affirmative adjudications such as applications for citizenship, adjustment of status, and political asylum.\textsuperscript{50} Fully accredited representatives may practice in front of both the CIS and the BIA.\textsuperscript{51} This means, in addition to the services partially accredited representatives can offer, fully accredited representatives can represent clients in deportation hearings before an immigration judge.\textsuperscript{52}

\begin{itemize}
\item \textsuperscript{42} Id. § 292.2(a).
\item \textsuperscript{43} Id. § 292.2(b).
\item \textsuperscript{44} \textit{In re EAC}, 24 I. & N. Dec. at 558.
\item \textsuperscript{45} 8 C.F.R. § 292.2(a)(1).
\item \textsuperscript{46} Id. § 292.2(d).
\item \textsuperscript{47} Id.; see also TIM MCILMAIL, BOARD OF IMMIGRATION APPEALS ACCREDITATION AND ENTERING IMMIGRATION APPEARANCES: A CHECKLIST GUIDE TO 8 C.F.R. § 292, at 24 (Christina DeConcini & Carol Wolchok eds., 1994) (detailing application requirements and procedures); EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, REPRESENTATION OF ALIENS IN IMMIGRATION PROCEEDINGS (2008), available at http://www.justice.gov/eoir/press/08/AccreditationFactSheet102708.pdf (detailing application requirements and procedures).
\item \textsuperscript{48} 8 C.F.R. § 292.2(d); MCILMAIL, \textit{supra} note 47, at 24 (citing \textit{In re Fla. Rural Legal Servs., Inc.}, 20 I. & N. 639, 639 (B.I.A. 1993)).
\item \textsuperscript{49} MCILMAIL, \textit{supra} note 47, at 24.
\item \textsuperscript{50} \textit{See id.} at 34.
\item \textsuperscript{51} \textit{See id.} at 130.
\item \textsuperscript{52} \textit{Id.} at 24.
\end{itemize}
BIA-accredited representatives have permission to practice law only within the narrow confines of the Board of Immigration Appeals.\textsuperscript{53} Their accreditation does not allow them to practice any kind of law outside the BIA.\textsuperscript{54} Although they can represent their clients in CIS interviews and proceedings, defend them in front of an immigration judge in deportation proceedings, and even appeal adverse decisions to the Board, they cannot help their clients through a criminal court proceeding or any kind of litigation outside immigration.\textsuperscript{55}

Over one thousand BIA-accredited representatives practice in the United States today.\textsuperscript{56} Many of these accredited representatives are affiliated with a national nonprofit, Catholic Legal Immigration Network, Inc. (CLINIC), while others are associated with other national or statewide organizations.\textsuperscript{57} Still others are employed by small, unaffiliated nonprofit corporations.\textsuperscript{58}

Within the world of the Board of Immigration Appeals, there is very little difference between attorneys who represent clients before the Board and BIA-accredited representatives.\textsuperscript{59} Throughout parts of BIA regulations, both attorneys and accredited representatives are referred to as “practitioners.”\textsuperscript{60} Both are also permitted to appear in person to

\textsuperscript{53.} See 2 IMMIGRANT LEGAL RES. CTR., supra note 18, § 13.3.
\textsuperscript{54.} Id.
\textsuperscript{55.} Id.
\textsuperscript{59.} 2 IMMIGRANT LEGAL RES. CTR., supra note 18, § 13.3.
\textsuperscript{60.} See, e.g., 8 C.F.R. § 292.3 (2009) (naming the section “Professional conduct for practitioners—Rules and procedures”). Note that in addition to attorneys and BIA-accredited representatives, there are several other categories of practitioners in the regulations, including law students—provided they are working for a law school clinic or nonprofit organization and fulfill other requirements—and even “reputable individuals,” although such individuals cannot represent clients on a regular basis. Id. §
represent another person or client, as well as to file briefs, papers, applications, and petitions on behalf of another person or client. Both are also permitted to study facts and give advice regarding applicable laws.

Both accredited representatives and attorneys practicing before the BIA are subject to ethics rules, called Professional Conduct for Practitioners, contained in BIA regulations. Also, both can be sanctioned by the BIA, which keeps a “List of Currently Disciplined Practitioners” on its website. The Professional Conduct for Practitioners includes rules against charging “grossly excessive fee[s],” “making a false statement,” and “[f]ailing to provide competent representation to a client.” The rules do not contain anything about keeping a client’s information confidential. Attorneys have ethical guidelines regarding confidentiality in their state ethics rules, the majority of which are based on the ABA Model Rules of Professional Conduct. This is one difference between attorneys and representatives—representatives, as nonattorneys, are not subject to any state ethics rules. However, CLINIC, the national organization relating to many of the accredited representatives, has a document entitled Core Standards for Charitable Immigration Programs. Another national organization that trains and provides resources to many BIA-recognized organizations is the Immigrant Legal Resource Center, which has drafted a Model Code of Professional Responsibility for BIA-Accredited Representatives.

292.1(a)(2)–(3).

61. Id. § 1.1(i)–(j).
62. Id. § 1.1(k).
63. Id. § 1003.102.
66. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2009); LERMAN & SCHRAG, supra note 9, at 40 (observing thirty-four states have adopted the current ABA Model Rules of Professional Conduct).
The BIA’s program of using qualified nonlawyers has existed since 1958. Since that year, only seven BIA decisions about accreditation and recognition have been published.

III. ATTORNEY–CLIENT PRIVILEGE: DEFINITION, PURPOSE, AND CASELAW

A. Definition

The attorney–client privilege has existed for centuries and has its roots in English common law. In the United States, the attorney–client privilege has continued to be recognized in both state and federal common law. It has also been codified in many states. In 1975, Congress made the conscious decision not to codify the attorney–client privilege or any other testimonial privilege in federal law; instead, Congress left privilege to
be developed by federal common law.\textsuperscript{74} Thus, the privilege in federal courts—when operating under federal procedure—is continually developing and changing as federal courts face cases that bring novel attorney–client privilege questions to them.\textsuperscript{75} As a result, interpretations of the attorney–client privilege vary among federal jurisdictions.\textsuperscript{76}

Some states have also left attorney–client privilege to be developed by common law, though many have codified their attorney–client privilege provisions.\textsuperscript{77} Each state has its own interpretation of what, exactly, the attorney–client privilege is.

Some commonalities in the definition of attorney–client privilege, however, can be examined. Most federal jurisdictions and some states base their definition of attorney–client privilege on one of three main sources: John Henry Wigmore’s definition of attorney–client privilege in \textit{Evidence in Trials at Common Law},\textsuperscript{78} Judge Wyzanski’s definition in \textit{United States v. United Shoe Machinery Corp.},\textsuperscript{79} or the Proposed Rules for Federal Evidence.\textsuperscript{80}

1. Wigmore

John Henry Wigmore was the dean at Northwestern University Law School when he wrote his most famous work, \textit{Treatise on Evidence}, published in 1904.\textsuperscript{81} In this treatise, he wrote the following definition of attorney–client privilege:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to

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\textsuperscript{74} FED. R. EVID. 501.
\textsuperscript{76} Id.
\textsuperscript{77} \textit{Developments in the Law—Privileged Communications, supra} note 72, at 1458–63.
\textsuperscript{78} 8 JOHN HENRY WIGMORE, \textit{EVIDENCE IN TRIALS AT COMMON LAW} § 2292 (John T. McNaughton ed., 1961).
\textsuperscript{81} WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER 76–77 (1977).
that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.82

A surface reading of Wigmore would not immediately rule out attorney–client privilege for BIA-accredited representatives. After all, Wigmore’s definition does not even refer to an “attorney” or a “lawyer” but instead a “professional legal adviser.”83 Surely a BIA-accredited representative, approved to practice immigration law and able to provide counsel and representation, would qualify as a professional legal adviser. That said, when Wigmore wrote “legal adviser,” he may have meant that term to include only lawyers. One judge found attorney–client privilege developed in England during a time when the only legal advisers who existed “were barristers, attorneys, and solicitors, all of which were lawyers.”84 Therefore, Wigmore’s term “legal adviser” may not be as encompassing as it sounds today. On the other hand, while this study of English history may indicate Wigmore had attorneys in mind when he wrote “professional legal adviser,” it does not specifically rule out nonlawyer practitioners. The fact that BIA-accredited representatives are authorized to give legal advice regarding immigration is certainly support for an argument to include them within Wigmore’s definition.85

2. United Shoe

In United States v. United Shoe Machinery Corp., the United States District Court in Massachusetts considered, among other issues, whether nonlawyer practitioners could have attorney–client privilege.86 In the decision, Judge Wyzanski wrote a definition of attorney–client privilege that has been recognized as precedent in several circuits.87 The definition follows:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the

82. WIGMORE, supra note 78, § 2292.
83. Id.
85. See 8 C.F.R. § 292.1(a)(4) (2009) (accredited representatives may represent persons); § 1.1(i), (k) (defining practice of immigration law).
87. Id. at 358–59; Willi, supra note 75, at 286.
communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.88

The United Shoe definition, by specifically defining a legal advisor as “a member of the bar of a court, or his subordinate,” leaves much less room than Wigmore’s definition for inclusion of nonlawyer practitioners.89 The court specifically considered whether a nonlawyer patent agent can have attorney–client privilege, and it decided he may not.90 Because of the strict definition of “attorney” in United Shoe, even several lawyers who practiced patent law, but were not members of the bar of the state in which they practiced, were found by the court to not have attorney–client privilege.91 Although the decision may actually be limited to denying attorney–client privilege to attorneys in the practice of patent law, jurisdictions that adhere to the United Shoe definition of attorney–client privilege have used it to deny the privilege to nonlawyer practitioners.92

3. Proposed Rules

In 1975, Congress formally enacted the Federal Rules of Evidence (Rules).93 The Rules were intended to be promulgated by the United States Supreme Court but instead became statutory with Congress’s adoption.94 The Supreme Court, in formulating the rules it intended to

89. See id. at 358.
90. Id. at 360.
91. Id. In United Shoe, thirteen lawyers who worked in the patent department of United Shoe Machinery Corporation were found to not have attorney–client privilege because they were not members of the bar in Massachusetts, even though they were members of a bar in other jurisdictions. Id.
92. See Benckiser v. Hygrade Food Prods. Corp., 253 F. Supp. 999, 1001 (D.N.J. 1966) (relying on United Shoe to find “communication between a client and an administrative practitioner who is not an attorney are not privileged” (citation omitted)).
94. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE
adopt, created Article V of the Proposed Rules, in which nine specific testimonial privileges were defined. Among these rules was Proposed Rule 503, which defined the attorney–client privilege. When Congress enacted the Federal Rules of Evidence, it rejected the rules that proposed specific privileges and instead adopted Rule 501, which allows federal courts to develop attorney–client privilege through common law. However, as the attorney–client privilege has developed, courts have often looked to the text of Proposed Federal Rule of Evidence 503 for guidance. Thus, Proposed Rule 503 is influential in current interpretation of attorney–client privilege, and at least one commentator considers it the most useful definition of attorney–client privilege.

Proposed Rule 503 states:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer’s representative, or (2) between his lawyer and the lawyer’s representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Of particular interest for this Note, Proposed Rule 503 defines a lawyer as “a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.”

This definition favors the argument that BIA-accredited representatives would have attorney–client privilege; it does not limit a “lawyer” to a person who graduated from a law school and passed a bar examination. It considers a lawyer to be anyone “authorized . . . to practice 

MANUAL § 1.03 (8th ed. 2007).

95. Id. § 18.01 n.1.
96. Id. § 18.01.
97. See id.
98. See, e.g., In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 915 (8th Cir. 1997) (“We address this question by beginning with Proposed Federal Rule of Evidence 503, which we have described as ‘a useful starting place’ . . . .”).
99. EPSTEIN, supra note 1, at 3.
101. Id.
law in any state or nation.” The BIA-accredited representative authorized to practice law before the CIS or BIA could arguably fit within this definition.

B. Purpose of Attorney–Client Privilege

Many cases addressing attorney–client privilege examine the privilege from the purpose perspective rather than simply considering the literal words defining it.103

Some scholars believe the original purpose of the attorney–client privilege was to preserve a legal advisor’s honor.104 Today the purpose of the attorney–client privilege is to allow clients to be completely honest with their attorneys, thereby allowing attorneys to give their most helpful legal advice.105 Encouraging attorneys to provide the best possible advice, in turn, enables clients to comply with the law.106 Thus, the attorney–client privilege is a tool used to reinforce the rule of law in the United States.107

The tool of attorney–client privilege, however, conflicts with another tool that upholds the American justice system—using all evidence available to solicit the truth to most fairly and adequately convict or acquit a person who stands accused of an offense. Because the attorney–client privilege allows some information that the client and attorney both know prohibits

102. Id. (emphasis added).
103. See, e.g., Fisher v. United States, 425 U.S. 391, 403 (1976); United States v. Goldfarb, 328 F.2d 280, 282 (6th Cir. 1964); Baird v. Koerner, 279 F.2d 623, 629 (9th Cir. 1960); Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956); Modern Woodmen of Am. v. Watkins, 132 F.2d 352, 354 (5th Cir. 1942).
104. Maura I. Strassberg, Privilege Can Be Abused: Exploring the Ethical Obligation to Avoid Frivolous Claims of Attorney–Client Privilege, 37 SETON HALL L. REV. 413, 420 (2007) (“Legal protection of clients’ communications to their attorneys began in the sixteenth and seventeenth centuries as an accommodation to the honor of gentlemen attorneys who would otherwise have been forced to violate their oath of secrecy by being compelled to testify against their clients.” (citing PAUL R. RICE, ATTORNEY–CLIENT PRIVILEGE IN THE UNITED STATES 12–13 & n.24 (2d ed. 1999))).
105. Id. (observing the current rationale for attorney–client privilege is “to obtain effective representation” (citing RICE, supra note 104, at 12–13)).
use of evidence in a trial, it impedes the justice system’s search for truth.\textsuperscript{108}
Because of this conflict, the attorney–client privilege—and all privileges—are generally interpreted as narrowly as possible.\textsuperscript{109} The goal of interpreting the privilege narrowly is apparently to continue to encourage clients to be candid with their attorneys, while maintaining the understanding their attorneys are balancing the tension between privilege, law, and the need to get important evidence to the fact-finders in a trial.

Narrowly interpreting attorney–client privilege has led some courts to exclude nonlawyer practitioners from any semblance of the privilege;\textsuperscript{110} however, this logic defeats the purpose of the attorney–client privilege and does not adequately balance the need for privileged communications against the need for evidence. BIA-accredited representatives are approved to practice law, and they give important legal advice to their clients.\textsuperscript{111} Immigration law is one of the most complicated areas of law in the United States.\textsuperscript{112} In fact, many lawyers who attempt to practice immigration law find themselves overwhelmed by the system.\textsuperscript{113} Further, most immigrants, like most American citizens, are not lawyers and are often further disadvantaged by language and cultural differences; they desperately need good legal advice in order to understand and obey immigration laws.\textsuperscript{114} Inadequate legal advice to an immigrant can often mean the difference between United States citizenship and deportation.\textsuperscript{115}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{108.} See Fisher, 425 U.S. at 403 (“[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.”).
\item \textsuperscript{109.} See id.
\item \textsuperscript{110.} See, e.g., United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 361 (D. Mass. 1950) (ruling attorney–client privilege is not available to nonlawyer patent agents as the relationship “is not that of attorney and client”).
\item \textsuperscript{111.} 8 C.F.R. § 292.1(a)(4) (2009) (authorizing accredited representatives, including those practicing immigration law).
\item \textsuperscript{112.} Michael Maggio, \textit{Matter of Ethics . . ., in Ethics in a Brave New World} 1, 2 (John L. Pinnix ed., 2004) (calling immigration law “without question one of the most complicated areas of law”).
\item \textsuperscript{113.} Janet Greathouse & Angelo A. Paparelli, \textit{Imagining the Improbable: Extraordinary Immigration Solutions for the Hapless and Homeless}, 1698 PRACTISING L. INST. 239, 244 (2008).
\item \textsuperscript{114.} See generally Robert A. Katzmann, \textit{The Legal Profession and the Unmet Needs of the Immigrant Poor}, 21 GEO. J. LEGAL ETHICS 3 (2008) (assessing the plight of immigrants and the responsibilities and efforts of the legal community in addressing those needs, from the perspective of a judge on the United States Court of Appeals for the Second Circuit).
\item \textsuperscript{115.} Greathouse & Paparelli, \textit{supra} note 113, at 244.
\end{itemize}
\end{footnotesize}
Therefore, it is extremely important BIA-accredited representatives be in a position to give the best advice possible, and to do this, they must be able to get the truth from their clients. The very purpose of attorney–client privilege is clearly embodied in the work of the BIA-accredited representative.

BIA-accredited representatives work for nonprofit organizations, charge nominal fees, and promise to serve all immigrants regardless of their ability to pay. 116 Because of these requirements, it is likely the vast majority of immigrants who are served by BIA-accredited representatives have low incomes. Allowing a BIA-accredited representative to have attorney–client privilege protects the justice system for both the wealthy, who can afford private lawyers, and the poor, who cannot.

C. Caselaw

There is no caselaw directly addressing the question of whether a BIA-accredited representative may exercise attorney–client privilege. There is, however, some caselaw examining attorney–client privilege for other types of nonlawyer practitioners who are approved to practice law in front of administrative agencies. 117


The area of law in which the question of attorney–client privilege for nonlawyer practitioners has arisen most often is that of patent law. 118 Just as the BIA allows nonlawyer-accredited representatives to practice before it, the USPTO allows nonlawyers to represent clients in patent proceedings. 119 These nonlawyer practitioners are called patent agents. 120

In Sperry v. Florida—the case that determined patent agents actually practice law—the Supreme Court established the ability of nonlawyer practitioners to practice law in spite of state laws that found them to be committing unauthorized practice of law, so long as they were approved to practice in front of administrative agencies. 121 Unfortunately, Sperry did not

116. 8 C.F.R. § 292.2.
118. See Willi, supra note 75, at 282.
119. Id.
120. Id.
make any ruling about attorney–client privilege for patent agents. Some scholars believe the natural extension of Sperry is the notion that the clients of patent agents should be allowed attorney–client privilege.

However, the first patent agent cases after Sperry found patent agents did not have the privilege. In 1966, the federal district court in New Jersey found “attorney–client privilege has not been extended to non-attorney practitioners who engage in administrative representation short of actual litigation in the courts.” Nine years later, in Vernitron Medical Products, Inc. v. Baxter Laboratories, Inc., a court in the same district reversed course and found patent agents would have attorney–client privilege, explaining:

[A]ll of the considerations which support the basis for the privilege between a client and a general practitioner [in other legal proceedings] apply with equal force to an . . . applicant for a patent and the representative engaged to handle the matter for him, whether he be a “patent attorney” or a “patent agent” . . . .

Vernitron held the privilege would only be available to patent agents who were properly registered with the USPTO. The court observed these agents met the same requirements patent attorneys were required to meet, were required to take and pass an exam to show they were qualified, and were subject to the same ethical standards as patent attorneys.

In 1978, the district court in the District of Columbia followed Vernitron’s lead and held attorney–client privilege was available to patent agents registered with the USPTO. In Ampicillin, the court explained Congress had specifically allowed for nonlawyer patent agents, as well as attorneys, to represent patent applicants before the Patent Office. Depriving agents of attorney–client privilege, the court reasoned, would

122. Willi, supra note 75, at 297 (“Sperry did not directly address the issue of attorney–client privilege for U.S. patent attorneys and patent agents . . . .”).
123. See id. at 283.
124. Id. at 298–99.
127. Id.
128. Id.
130. Id. at 393.
create an inequality between agents and patent attorneys that would “frustrate this congressional scheme.”\textsuperscript{131} \textit{Ampicillin} limited the privilege to agents registered with the USPTO, as opposed to patent agents who have not registered. The court explained this limitation complied with the “congressional scheme” to allow patent agent representation because registered patent agents were subject to the same professional and ethical standards—applicable to attorneys in all courts—set by the Patent Office. By limiting privilege to registered agents, there would be “a clearly-defined test so that all parties will know beforehand whether the privilege is available.”\textsuperscript{132}

The issue, however, has not died. No case deciding whether patent agents have attorney–client privilege has gone beyond the district court level, leaving plenty of room for different rulings from district to district. In 2002, the district court in Massachusetts found, in \textit{Agfa Corp. v. Creo Products, Inc.}, “communications to a patent agent who is authorized to practice before the [USPTO] but who is not an attorney licensed to practice before any state or federal court is not protected by the attorney–client privilege unless the purpose of the communication is to obtain legal advice from an attorney.”\textsuperscript{133} The courts in both \textit{Ampicillin} and \textit{Vernitron} stressed the function of the attorney–client privilege over a literal reading of the word “attorney” in “attorney–client privilege” to determine agents have privilege available to them.\textsuperscript{134} However, the court in \textit{Agfa} dismissed this functional interpretation with the statement:

\begin{quote}
The “looks like a duck, walks like a duck” analysis relied on by cases such as \textit{Ampicillin} and \textit{Vernitron} works only if it regards as insignificant the fact that privilege is rooted, both historically and philosophically, in the special role that lawyers have, by dint of their qualifications and license, to give legal advice.\textsuperscript{135}
\end{quote}

In its criticism of the reasoning in \textit{Ampicillin} and \textit{Vernitron}, the court in \textit{Agfa} pointed out that patent agents are like other “non-lawyer advocates,” with the clear implication those “non-lawyer advocates” would

\begin{itemize}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.} at 393–94, n.32.
\item \textsuperscript{133} \textit{Agfa Corp. v. Creo Prods., Inc.}, No. 00-10836-GAO, 2002 WL 1787534, at *2 (D. Mass. Aug. 1, 2002) (requiring the agent to be working under an attorney).
\item \textsuperscript{135} \textit{Agfa Corp.}, 2002 WL 1787534, at *2.
\end{itemize}
not have attorney–client privilege, either.136

In fact, such a comparison of patent agents to other nonlawyer advocates under the functional reasoning of *Ampicillin* and *Vernitron* does work well for the argument that BIA-accredited representatives should also have attorney–client privilege. *Ampicillin* described the purpose of attorney–client privilege as “to encourage the complete disclosure of information between an attorney and the client and to further the interests of justice.”137 Without a doubt, immigrants, who are often undocumented or may be violating their specific immigration status in any number of ways, need to be completely honest with their attorney or representative.138 It is not unusual for an immigration practitioner to do a great deal of work on a case, only to discover an important fact his or her client had not shared, which may change the entire outcome of the case.139 In addition, because immigration law is complicated, the need for immigrants to have accurate advice is imperative for them to be able to comply with the law.140

Like the “congressional scheme” that allows patent agents to practice before the USPTO,141 accredited representatives are specifically allowed by the BIA to represent immigrants in immigration proceedings.142 Similar to patent agents, who are required to pass an exam to show they are qualified to adequately represent patent applicants,143 accredited immigration representatives must show they have “adequate knowledge, information

136.  *Id.* (observing that although nonlawyer patent agents may be considered “professional legal adviser[s],” so are other nonlawyers who practice before “tribunal[s]”).

137.  *In re Ampicillin Antitrust Litig.*, 81 F.R.D. at 383.

138.  See Patricia Gittelson, *Wearing the White Hat: Legal Representation of Immigration Clients*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 109, 111 (2009) ("[T]he key is to know everything about the case up front and from the client . . . .").

139.  See, e.g., Lauren Gilbert, *Facing Justice: Ethical Choices in Representing Immigrant Clients*, 20 GEO. J. LEGAL ETHICS 219, 230–48 (2007) (telling a story involving an immigration attorney who was deep into the defense of his client before realizing facts that made the case nearly impossible to win).

140.  Gittelson, *supra* note 138, at 113 (“Make no mistake: in many cases, you will have nothing less than the future lives of the client and family members in your hands, and this is an awesome challenge and responsibility.”).


143.  37 C.F.R. § 11.1(ii)(b).
and experience” in immigration law and procedure. Like registered
patent agents who are bound by the same professional and ethical
restrictions as patent attorneys, accredited immigration representatives
are required to follow the same code of professional conduct in the BIA
regulations that attorneys follow.

2. Attorney–Client Privilege for Lay Advocates in Education Law

The reasoning in Ampicillin and Vernitron has been successfully
extended to another area of administrative law in the federal district court
of New Jersey—education law. In Woods v. New Jersey Department of
Education, the district court of New Jersey found communications between
a lay advocate and a family suing a school district under the Individuals
with Disabilities Education Act were “privileged to the extent allowed
under the attorney–client privilege.”

Woods summarized precedent for nonlawyer attorney–client privilege in administrative proceedings into a three-step test:

(1) [W]hether the law expressly authorizes lay advocates to provide
the same representation provided by licensed attorneys, [(2)] whether
lay advocates are subject to an extensive system of regulation requiring
individual application, proof of expertise, compliance with ethical
standards, and direct control by the adjudicative tribunal, and [(3)]
whether the purposes of the privilege are fully applicable to this kind
of representation.

BIA accreditation fits comfortably into the Woods test. Federal law
expressly authorizes accredited representatives to represent immigrants in
the same manner attorneys represent them before the CIS and BIA.
BIA-accredited representatives are subject to an “extensive system of
regulation” as required in Woods. The sponsoring organization must file

144. 8 C.F.R. § 1292.2(a)(2) (describing an accredited representative, as
referred to in 8 C.F.R. § 1291.1(a)(4)).
145. See 37 C.F.R. §§ 10.21, 10.23.
146. See 8 C.F.R. § 1003.102 (containing rules for professional conduct for both
attorneys and accredited representatives).
148. Id. at 55.
149. Id. at 54–55 (citing Vernitron Med. Prods., Inc. v. Baxter Labs., Inc., 186
U.S.P.Q. 324, 324 (D.N.J. 1975)).
150. 8 C.F.R. § 292.1(a)(4).
Attorney–Client Privilege for Nonlawyers

on behalf of the proposed representative. The application must detail “the nature and extent of the proposed representative’s experience and knowledge of immigration and naturalization law and procedure.” The application must also comply with the BIA’s ethical standards, and it is subject to BIA sanctions. Finally, the purpose of attorney–client privilege is applicable to the work of BIA-accredited representatives because “[t]he substance of this relationship is one of an attorney and client” necessitating “full and frank communications.”

3. Attorney–Client Privilege for Lay Advocates in State Welfare Systems

Welfare Rights Organization v. Crisan, a California Supreme Court case, is another important ruling as it examined legal advocacy in a state administrative proceeding context. In this case, two welfare recipients asserted lay representative–client privilege for communications made to a lay advocate—a nonlawyer employee of the Welfare Rights Organization. The court relied heavily on a seminal administrative law case, Goldberg v. Kelly, which held that people in federal administrative law proceedings have a right to due process, including “a meaningful opportunity to be heard” and the right to attain counsel. The Crisan Court pointed out state regulations, in compliance with federal mandate, allowed nonlawyer advocates to serve as counsel in welfare proceedings. “This broad right of representation apparently is based upon recognition of the practical limitations on the ability of welfare recipients to obtain counsel. Generally, they cannot afford to pay an attorney, and legal service organizations have never been able to meet all of the needs for free legal services.” Because attorney–client privilege in California is statutory, the court chose to interpret the California statute that allowed for lay advocate representation in welfare proceedings as impliedly allowing a privilege for lay advocates like that of the attorney–client privilege.

152. 8 C.F.R. § 292.2(d).
153. Id.
154. 8 C.F.R. § 1003.102.
155. 8 C.F.R. § 292.3(a)(2).
158. Id. at 1074.
159. See id. at 1075 (citing Goldberg v. Kelly, 397 U.S. 254, 270 (1970)).
160. Id. at 1076.
161. Id. at 1075.
162. Id. at 1076–77.
In a dissenting opinion, one justice pointed out lay advocates in welfare proceedings do not fit the requirements set out in *Ampicillin* for nonlawyer representatives. The patent agents in *Ampicillin* were registered, had shown their qualifications by passing an exam, and were subject to the same ethics rules as patent attorneys. Lay advocates in California welfare proceedings were not required to register with any agency, were never required to prove they had any specific qualifications, and were subject to no specific ethics rules. A welfare claimant could authorize anyone he wanted to represent him. On this issue, one scholar interpreted the *Crisan* Court’s decision to actually distinguish the privilege of welfare lay advocates from some patent agents: Because most welfare recipients could not afford a private attorney, the requirements for their lay advocates could be less than patent agents who generally serve clients who are more likely to be able to afford private attorneys.

Although this Note has already argued BIA-accredited representatives do fulfill the requirements set out in *Ampicillin*, *Crisan* highlights the additional argument accredited representatives have, even over patent agents: BIA-accredited representatives specifically exist to serve the legal needs of the poor. Denying accredited representatives’ clients attorney–client privilege can be likened to denying the poor a privilege available to the wealthy. This raises concerns under the Equal Protection Clause of the Fourteenth Amendment. Although the United States Supreme Court has specifically found the economically poor are not a protected class, and therefore would not use strict scrutiny in an equal protection suit, the Court has taken poverty into consideration in some cases.

163. *Id.* at 1080 (Richardson, J., dissenting).
165. *Crisan*, 661 P.2d at 1080 (Richardson, J., dissenting).
166. *Id.*
168. See *In re EAC*, Inc., 24 I. & N. Dec. 556, 557 (B.I.A. 2008) (“[A]creditation of representatives . . . was established to provide low-income aliens with access to representation . . . .”).
169. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24–28 (1973) (holding poverty is not a protected class and is therefore subject to rationality review in an equal protection suit).
170. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (establishing a right to appointed counsel for the indigent in felony cases, and explaining “any person
4. *The Extension of a Different Kind of Privilege in Jaffee*

Although the Supreme Court has never heard a case arguing for attorney–client privilege for nonlawyer representatives in administrative proceedings, in *Jaffee v. Redmond*, the Court did hear an important case regarding another kind of privilege, that of a psychotherapist, which the Court decided to recognize as a privilege in federal court. In its decision, the Court referred to Rule 501 of the Federal Rules of Evidence, which “authorizes federal courts to define new privileges by interpreting ‘common law principles . . . in the light of reason and experience.’” The Rule thus did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to “continue the evolutionary development of testimonial privileges.” The fact the Court based its decision on reason and experience suggests a policy-based decision, and indeed, the Court held the psychotherapist privilege is based upon private and public interests in having quality mental health services, which depend upon confidentiality. Of particular interest to this Note is the fact that once it had established the psychotherapist–patient privilege, the majority had “no hesitation in concluding . . . the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy.” Again, in this conclusion, the Court chose a functional approach, explaining, “The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker.”

Such an argument could clearly be made for BIA-accredited representatives as well: “The reasons for recognizing a privilege” for communications between immigration attorneys and their clients “apply with equal force to” communications between BIA-accredited

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172. *Id.* at 8 (quoting FED. R. EVID. 501).
173. *Id.* at 8–9 (citations omitted).
174. *See id.* at 13–15 (stating because “a psychotherapist–patient privilege will serve a ‘public good,’” the Court will recognize such a privilege).
175. *Id.* at 15.
176. *Id.*
representatives and their clients.

This functional approach, and its possible ramifications, did not escape the attention of constructionist justices who prefer to interpret language more literally. In his dissent, Justice Scalia argued a psychotherapist–client privilege, if it has to exist, should be limited to professional psychiatrists and clinical psychologists, both of whom are doctors.\textsuperscript{177} It should not include social workers.\textsuperscript{178} He compared the majority’s broad reading of the psychotherapist–patient privilege to the attorney–client privilege, reframing it as a “legal advisor” privilege that might open the door to privileged communications between clients and nonlawyer legal advisors, a suggestion he appeared to find extremely unlikely and distasteful, calling it an “illusion.”\textsuperscript{179}

5. \textit{Caselaw from Immigration Law}

Finally, turning to immigration law cases themselves, there appears to be only one case in which the subject of attorney–client privilege was raised in relation to communications between a client and a BIA-accredited representative. In \textit{United States v. Arango-Chairez}, a BIA-accredited representative gave testimony during a 1994 hearing about a previous deportation hearing in 1987, during which he had temporarily represented Mr. Arango-Chairez.\textsuperscript{180} During the 1994 hearing, Mr. Arango-Chairez’s attorney objected to the accredited representative’s testimony, claiming attorney–client privilege for the 1987 communications between Mr. Arango-Chairez and the accredited representative.\textsuperscript{181} The court overruled the objection, finding Arango-Chairez “subjectively believed that he was not represented by an attorney at the 1987 hearing.”\textsuperscript{182} The court went on to note, “[E]ven assuming, \textit{arguendo}, that [the accredited representative’s] testimony was within the scope of privilege, the testimony is not protected.”\textsuperscript{183} The 1987 deportation hearing was a mass hearing in which the accredited representative represented thirty-five to forty detainees, and in which the representative gave legal advice to the group as a whole—hardly the confidential environment in which privileged communications

\begin{flushright}
177. \textit{See} \textit{id.} at 28–29 (Scalia, J., dissenting).
178. \textit{See id.}
179. \textit{Id.} at 20.
181. \textit{Id.} at 612–13 n.3.
182. \textit{Id.}
183. \textit{Id.}
\end{flushright}
are made.\textsuperscript{184} In addition, the accredited representative and Mr. Arango-Chairez did not remember ever meeting each other.\textsuperscript{185} The representative’s 1994 testimony was about the judge’s statements at the mass hearing, not anything specifically in relation to Mr. Arango-Chairez’s case in 1987.\textsuperscript{186} In addition, Mr. Arango-Chairez had earlier testified he was not represented at the 1987 hearing.\textsuperscript{187} While \textit{Arango-Chairez} certainly does not establish any privilege for communications between accredited representatives and clients, the case does not rule out the possibility of such privilege.

There are several immigration cases regarding a different question related to whether an attorney-related legal argument should apply to accredited representatives—the often-used claim of ineffective assistance of counsel. In virtually every case in which ineffective assistance of counsel claims have been raised in relation to legal counsel provided by accredited representatives, the courts have either accepted, or at least not disputed, that such claims could be raised in spite of the fact that “counsel” in such cases were accredited representatives.

In \textit{Ramirez-Durazo v. INS}, for example, the Ninth Circuit heard an appeal from a BIA decision in which one of the several claims was the ineffective assistance of Ramirez’s accredited representative.\textsuperscript{188} The court fully considered the ineffective assistance of counsel claim without questioning whether such a claim could be raised against an accredited representative and found there was no evidence the accredited representative in this case had provided ineffective assistance of counsel.\textsuperscript{189} While \textit{Ramirez-Durazo} appears to be the only published case in which an ineffective assistance of counsel claim against the work of an accredited representative was considered without question, there are numerous unpublished cases that make the same assumption, or at least do not dispute that accredited representatives can be the subject of an ineffective assistance of counsel claim.\textsuperscript{190} More directly, in \textit{Paljusaj v. Ashcroft}, a

\begin{flushright}
\textsuperscript{184.} \textit{Id.} \\
\textsuperscript{185.} \textit{Id.} \\
\textsuperscript{186.} \textit{Id.} \\
\textsuperscript{187.} \textit{Id.} \\
\textsuperscript{188.} \textit{Ramirez-Durazo} v. \textit{INS}, 794 F.2d 491, 499–501 (9th Cir. 1986). \\
\textsuperscript{189.} \textit{Id.} \\
\textsuperscript{190.} \textit{See, e.g.}, Al Roumy v. \textit{Mukasey}, 290 F. App’x 856, 861–62 (6th Cir. 2008); Jaber v. \textit{Mukasey}, 274 F. App’x 469, 475–76 (6th Cir. 2008); Feldman v. \textit{Gonzales}, No. 04-3784, 2005 WL 3113488, at *2–3 (6th Cir. Nov. 21, 2005); Kalaj v. \textit{Gonzales}, 137 F. App’x 851, 856 (6th Cir. 2005); Chandara v. \textit{INS}, No. 95-70484, 1997 WL 67699, at *2–3 (9th Cir. Feb. 14, 1997); \textit{Ramirez-Durazo}, 794 F.2d at 499–501; \textit{In re Zmirowska}, 24 I. \
\end{flushright}
district court specifically stated, “The Second Circuit has recognized such [ineffective assistance of counsel] claims against ‘non-attorney representative[s] at deportation hearings.’”

There is one recent unpublished case, Nakaranurack v. Holder, in which a court found an accredited representative could not be the subject of an ineffective assistance of counsel claim. However, in making this finding, the court cited Hernandez v. Mukasey as its authority. Hernandez includes the seemingly clear statement: “We hold that knowing reliance upon the advice of a non-attorney cannot support a claim for ineffective assistance of counsel in a removal proceeding.” However, a closer reading of Hernandez reveals the subject of the ineffective assistance of counsel claim in the case was not an accredited representative, but instead was an “immigration consultant.” The practice of immigration law in the United States is rife with unlicensed practitioners, including so-called “immigration consultants” and “notarios,” who are clearly violating many states’ rules prohibiting the unauthorized practice of law. Such “immigration consultants” should not be confused with BIA-accredited representatives, who in fact are certified by the United States government to provide immigration counsel and assistance. In fact, the court in Hernandez distinguished the consultant in question from accredited representatives. The court explained unlicensed consultants should not be the bases of ineffective assistance of counsel claims, in part because immigration consultants have no formal legal training and are not subject to testing or licensing requirements that set and maintain standards of competence. There are no professional rules or statutes that impose ethical duties on a non-attorney consultant. Accordingly,


192. Nakaranurack v. Holder, 312 F. App’x 982, 984 (9th Cir. 2009).
193. Id. (citing Hernandez v. Mukasey, 524 F.3d 1014, 1015–16 (9th Cir. 2008)).
194. See Hernandez, 524 F.3d at 1015–16.
195. Id. at 1016.
198. See Hernandez, 524 F.3d at 1019 & n.3.
the law has never presumed that their participation is necessary or desirable to ensure fairness in removal proceedings; indeed, they are specifically barred from representing individuals in removal proceedings.199

The court then goes on to distinguish such consultants from accredited representatives by noting:

Federal regulations do permit individuals other than licensed attorneys to represent individuals in certain matters in immigration courts and before the BIA. However, they generally must meet certain standards, including demonstrating that they are being supervised by an attorney or otherwise have access to “adequate knowledge, information and experience” to provide competent representation.200

Although Hernandez does not specify that accredited representatives would be able to be the subject of ineffective assistance of counsel claims, the court’s distinction between accredited representatives and the immigration consultant at issue in the case can certainly be interpreted to mean the Hernandez decision was meant to apply only to unlicensed immigration consultants, and thus, it did not overturn Ramirez-Durazo. The fact Nakaranurack based its finding that accredited representatives cannot be the subject of ineffective assistance of counsel claims on Hernandez appears to be a misreading of Hernandez and an aberration in the face of the many decisions—albeit also unpublished—that have permitted ineffective assistance of counsel claims against accredited representatives.201 As noted, Nakaranurack is unpublished and, in and of itself, would not overrule Ramirez-Durazo.

In cases subsequent to Nakaranurack, courts have continued to hear ineffective assistance of counsel claims against accredited representatives.202 In Wang v. Holder, in response to the Government’s argument Hernandez held nonattorneys could not be the subject of an ineffective assistance of counsel claim, the court specifically stated, “Although we have yet to address this issue directly, we have suggested that claims regarding non-attorney assistance may not be barred—at least

199. Id. at 1019 (citing 8 C.F.R. § 1292.1(a)(3)(iv)).
200. Id. at 1019 n.3 (citing 8 C.F.R. §§ 1292.1–2).
201. At least one immigration law expert suggests this finding may have been simple error. E-mail from Kathy Brady, Senior Staff Attorney, Immigrant Legal Res. Ctr., to author (Jan. 16, 2010, 13:49 PST) (on file with author).
202. See, e.g., Santos v. Holder, 369 F. App’x 922, 926–27 (10th Cir. 2010).
for accredited representatives.”

The issue of whether accredited representatives can be the subject of ineffective assistance of counsel claims is still an open question; however, except for the unpublished Nakaranurack, the vast majority of cases faced with the question have accepted at least the possibility they can be. This lends support to the idea accredited representatives may be enough like attorneys that client communications with them would be protected by attorney–client privilege.

IV. BIA-ACCREDITED REPRESENTATIVES CAN OFFER CONFIDENTIALITY

A. The Difference Between Attorney–Client Privilege and Confidentiality

The Supreme Court in Jaffee wrote, “An uncertain privilege . . . is little better than no privilege at all.” But for the present time, “uncertain” is exactly what any privilege between a BIA-accredited representative and his or her client is. This Note argues, however, that BIA-accredited representatives can still offer their clients a promise of confidentiality, often perhaps to the same extent an immigration attorney would be able to offer.

The concept of confidentiality in the world of lawyers is not a statutory issue, rather it is one of professional ethics. Lawyers’ professional ethics rules are enforced by each state’s legal ethics committee or similar group. The concept of attorney–client privilege, on the other hand, is an issue under the law of evidence, which determines what evidence—such as testimony or documents—can be admitted into a trial. “The privilege is far narrower in scope and in application than are the myriad matters confided to lawyers, which many lawyers and their clients assume, incorrectly, to be privileged.” Many states base their ethics rules on the American Bar Association’s Model Rules of Professional

205. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2009).
206. See LERMAN & SCHRAG, supra note 9, at 20–38 (describing the various institutions that regulate lawyers and enforce ethics rules).
207. Id. at 217.
208. EPSTEIN, supra note 1, at 3.
Conduct.\textsuperscript{209} Model Rule 1.6 states confidentiality covers all “information relating to the representation of a client,” including information the attorney may have received while not in a confidential setting.\textsuperscript{210} Attorney–client privilege, on the other hand, covers only information directly related to the service the attorney is offering and information given to the attorney in strict confidence.\textsuperscript{211}

The confidentiality rule in the Model Rules has several exceptions. The most important exception to this discussion requires attorneys to reveal their clients’ confidential information—unless it is specifically covered by the narrower attorney–client privilege—if ordered to do so by a court or by law.\textsuperscript{212} This means even attorneys will have to reveal confidential information if ordered to do so by a court, just as BIA-accredited representatives would have to do.\textsuperscript{213} While clients may not like the fact that information they share with attorneys is not absolutely confidential—as many clients assume it is\textsuperscript{214}—there is nothing to stop BIA-accredited representatives from offering the same level of confidentiality attorneys can offer.

B. Problems with Attorney–Client Privilege in Immigration Law

Of course, for the narrower category of information relating to legal advice relayed to attorneys in private, attorneys are ethically required to make a claim of attorney–client privilege.\textsuperscript{215} Attorneys, however, tend to assert attorney–client privilege far more often than they should actually be granted that privilege.\textsuperscript{216} In the practice of immigration law, in particular, there are many reasons confidential communications between an immigration practitioner—even if the practitioner is a lawyer—and his or

\begin{itemize}
\item \textsuperscript{209} L\textsc{erman} \& S\textsc{chrag}, supra note 9, at 15.
\item \textsuperscript{210} See R. 1.6 \& cmt. 3.
\item \textsuperscript{211} See E\textsc{pstein}, supra note 1, at 3.
\item \textsuperscript{212} R. 1.6(b)(6).
\item \textsuperscript{213} See id. R. 1.6 cmt. 13.
\item \textsuperscript{214} See Fred C. Zacharias, \textit{Rethinking Confidentiality}, 74 I\textsc{o}wa L. Rev. 351, 383–84 (1989) (reporting forty-two percent of clients surveyed thought confidentiality with their attorneys was absolute, but concluding “that confidentiality and what clients believe about its scope are far less important to clients than professional codes presume”).
\item \textsuperscript{215} See R. 1.6 cmt. 13.
\item \textsuperscript{216} See generally Strassberg, supra note 104, at 432–90 (outlining the various ways attorneys abuse attorney–client privilege and the need for greater ethical standards to self-regulate claims).
\end{itemize}
her client would not be granted attorney–client privilege. The following outlines some of those scenarios.

1. **Name and Address**

   Many immigration practitioners, and perhaps especially BIA-accredited representatives, represent low-income immigrants by offering legal counsel to the undocumented. Many undocumented immigrants do not have any legal remedy for their immigration status; that is, there are often no immigration laws to assist the undocumented in securing legal status in the United States. Yet, there is still legal counsel to be given. The undocumented have a certain degree of civil rights to be protected, and they can comply with some laws—tax laws, for instance—even though they are undocumented. The communication undocumented clients have with their representatives can definitely be for the purpose of obtaining legal counsel. In such cases, the main information these immigrants would most likely want kept confidential is their names, addresses, and immigration status. But, in fact, names and addresses, as a rule, are not considered to be privileged information. There is a narrow exception to this rule that states if revealing the identity of a client would be the “last link” in connecting the client with a crime, or the identity of a client itself would lead to the revealing of confidential information, the client’s name

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219. See 1 IMMIGRANT LEGAL RES. CTR., A GUIDE FOR IMMIGRATION ADVOCATES § 1.18 (2006) (giving an example of an undocumented immigrant who does not qualify for immigration benefits but still has legal questions that can be answered).

220. See id.

221. See, e.g., General ITIN Information, IRS.GOV http://www.irs.gov/individuals/article/0, id=222209,00.html (last visited Feb. 7, 2011) (explaining nonresident aliens who are required to file income taxes may apply for an Individual Taxpayer Identification Number).

can be privileged information.223 In United States v. Rivera, a special master was asked to review files seized from an immigration services legal office found to be committing fraud.224 “The special master concluded that this could be one of those cases where the client's identity was protected by the attorney–client privilege.”225 However, because the government dropped its request for certain files, the matter was never conclusively decided.226

2. Information Intended for Immigration Applications Is Not Privileged

For clients of immigration practitioners who either have legal status or are able to apply for legal status, there is another barrier to attorney–client privilege: the information clients communicate to their representatives is almost always intended by the client to be shared with the CIS, Immigration Judge, or BIA in order to obtain the benefit for which the immigrant is applying.227 Courts interpret this to mean the information is not communicated with the intention of being confidential and therefore is not subject to attorney–client privilege.228

3. Presence of Third Parties in Communications Precludes Privilege

A third barrier to attorney–client privilege in immigration law—because of the cultural and language differences involved in working with immigrants—is the need for a representative and client to consult with third parties present.229 Having a third party present, often a family

223. Legal Servs. for N.Y.C., 100 F. Supp. 2d at 45 n.3.
225. Id. at 568 (citations omitted).
226. Id.
227. Id. at 570.

[Information contained in the client files was provided by the client with the intention that it be revealed to the INS in connection with an application for amnesty, . . . Accordingly, it was not communicated with the intention that it remain confidential, but with an eye towards disclosure to a third party. As such, it is not protected by the attorney–client privilege.

228. See id.; see also United States v. Cooper, No. 96-CR-484-B, 1997 WL 129306, at *3 (D. Colo. Mar. 19, 1997) (“Clearly, much of the information communicated to Cooper by his immigration clients was not privileged because they expected that information to be passed along to the appropriate agencies.”).
229. See, e.g., Gittelson, supra note 138, at 110 (observing that “[m]any folks come with a family member or friend” to the author’s immigration practice for assistance).
member or friend, may help with interpretation, assisting the client in remembering what he or she is trying to consult about, and in explaining the cultural mores with which the attorney may not be familiar. Often, third parties may be children, younger siblings, or other family members for whom the client may be responsible and for whom the client could not or did not find childcare prior to the consultation. Most courts find, when a third party is present in a consultation, the consultation is not made in confidence and therefore is not covered by attorney–client privilege. There is an exception to the third-party rule when the third party is present specifically “‘to improve the comprehension of the communications between attorney and client.’” This would almost always apply in cases in which the client actually speaks a language the practitioner does not understand and the third party is interpreting. It is less clear whether it would apply when the client and attorney speak the same language but a third party is involved to help explain the cultural details or to help the client remember facts. While one would hope a judge would not let third-party children be the impetus for denying attorney–client privilege, at least one court has found that although “‘[t]he client-protected circle generally embraces . . . family and friends,’” their presence in a

230. See id. (noting family members also serve as interpreters and are able to provide other information).


232. See Epstein, supra note 1, at 261–62 (“Generally, any presence of third parties . . . destroys the confidentiality which is a prerequisite for the attachment of the privilege . . . .”); see also United States v. Gann, 732 F.2d 714, 714, 723 (9th Cir. 1984) (holding a client’s admissions made to his attorney were admissible because the client should have known they would be overheard by police inspecting the house).


234. See Epstein, supra note 1, at 267 (arguing “the presence of a family member” as a language interpreter should not waive attorney–client privilege).

235. At least one scholar claims the privilege should extend to any third party present during confidential communications if that third party can help explain the client’s situation. See Gittelsohn, supra note 138, at 110 n.1 (stating communications with a third party present are privileged if “the third person served as an intermediary, necessary to interpret or explain the client’s condition”). But see Epstein, supra note 1, at 267) (explaining that unless the family member is serving as a non-English language interpreter or is assisting an elderly client with “some type of age infirmity,” attorney–client privilege will not be extended to communications with that family member present, and observing that the presence of any friend “may be fatal to any subsequent assertion of the privilege”).
consultation is protected by attorney–client privilege only “‘so long as their involvement is necessary or at least reasonably useful.’”236

4. **Dual Representation**

A fourth possible barrier is the common practice of dual representation in immigration law. Dual representation is the representation of two separate parties in the same legal matter.237 Most areas of law practice discourage, or sometimes prohibit, dual representation.238 For instance, many states have ethics rules forbidding an attorney to represent both husband and wife in a divorce proceeding.239 In immigration law, dual representation is an extremely common occurrence.240 Most immigration cases involve either an employer filing a petition for a certain employee to obtain or change the employee’s immigration status or a family member who is filing a petition for another qualified family member.241 There is an attorney–client privilege-related rule about “joint representation,” which allows protection over communications between the attorney and all joint clients involved against anyone who is not one of the clients, but it does not allow protection of communication of one client from the others.242 A corollary to this is that any one of the clients can waive attorney–client privilege for the entire group of clients.243 So, for instance, if one family member would confide something to the practitioner in the process of filing a family-based petition, and the other family member involved later waived attorney–client privilege and asked the practitioner to testify about the confidential information, the practitioner would be required to testify. More concerning is the fact some judges will not recognize dual representation in immigration law and will find only one of the joint clients to actually be a

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236. *In re de Mayolo*, No. 06-MC-64-LRR, 2007 WL 1121303, at *6 (N.D. Iowa Apr. 16, 2007) (quoting GRAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 465 (3d ed. 1996)).


238. See id. at 30.

239. *Id.*

240. *Id.*

241. *Id.*


243. See id. at 323–24 (citing United States v. Agnello, 135 F. Supp. 2d 380, 384 (E.D.N.Y.), aff’d, 16 F. App’x. 57 (2d Cir. 2001)). Epstein also notes the existence of cases that hold the opposite. *Id.*
client, ruling out privilege for any information from the other client.244

5. Crime-Fraud Exception to Attorney–Client Privilege

Finally, a fifth potential barrier to attorney–client privilege in immigration practice is the crime–fraud exception to attorney–client privilege. The crime–fraud exception states, “[A]ttorney–client privilege ‘does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.’”245 The crime–fraud exception has been used in obvious cases in which a practitioner committed fraud in the preparation of immigration applications.246 However, it can also be used in closer questions of fraud. For instance, in In re Grand Jury Subpoena (Legal Services Center), the INS requested confidential information from the Legal Services Center about clients the Center had represented in a marriage petition.247 Because an INS officer believed the marriage was fraudulent, his counsel argued any information the married couple shared with the Center was not privileged under the crime–fraud exception.248 However, the court found the INS had not made its prima facie case and held the information protected.249

Would-be clients in an employment-based case regarding the crime–fraud exception were not as lucky.250 It is not uncommon for an employer to ask an attorney for assistance in obtaining legal status for an employee who is presently undocumented.251 After the consultation, the attorney knows the employer is illegally employing undocumented workers, and as long as the employment continues, any work the attorney does for the

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244. See In re de Mayolo, No. 06-MC-64-LRR, 2007 WL 1121303, *8 (N.D. Iowa 2007) (discussing appellants’ argument for a dual representation exception to the attorney–client privilege confidentiality element for immigration matters and ruling against it).

245. Id. at *10 (quoting In re BankAmerica Corp. Secs. Litig., 270 F.3d 639, 641 (8th Cir. 2001)).


248. Id. at *965–66.

249. Id. at 969.


251. See Panteha Abdollahi, Note, The Labor Certification Process: Complex Ethical Issues for Immigration Lawyers, 17 GEO. IMMIGR. L.J. 707, 717 (2003) (“In many employment-based immigration scenarios, an unauthorized alien has been working illegally for an employer, then either the alien or the employer seeks to stabilize the alien’s immigration status . . . .”).
employer can be interpreted as furthering the fraud or crime on the part of the employer.252

If an attorney is furthering fraud or crime by assisting an employer petition his undocumented workers, then is the attorney also furthering fraud or crime by assisting a family member petition an undocumented family member who is currently unlawfully present in the United States? At least one attorney argues that as long as the attorney’s actions—filling out a petition—are moving toward legality, he would not be furthering the crime or fraud of the undocumented person’s unlawful presence in the United States.253 There may be an argument that unlawful presence is not a crime or fraud, but should it be found to be such? At least one court observed, “A communication between client and attorney can be ‘in furtherance of’ the client’s criminal conduct even if the attorney does nothing after the communication to assist the client’s commissions of a crime . . . .”254 This also brings into question whether any consultations with clients who are undocumented, or working without authorization, can possibly be considered privileged because the very substance of the consultation is probably about how the client can continue to work in the United States.

Whether undocumented persons have any degree of attorney–client privilege in communications with immigration practitioners is beyond the scope of this Note. This Note suggests there are many possible barriers to attorney–client privilege in immigration law. Although it is unsettled whether a BIA-accredited representative can offer attorney–client privilege, the potential lack of attorney–client privilege for accredited representatives may not produce the great difference in legal services offered by accredited representatives compared to those offered by attorneys that one might imagine at first glance.

V. CONCLUSION

Neither statutes nor caselaw have made any definite ruling on whether communications between BIA-accredited representatives and their clients are protected by attorney–client privilege. Although a functional reading of attorney–client privilege supports the proposition that such a privilege would exist, a more literal interpretation of the

253. Interview with James A. Benzoni, Attorney, Benzoni Law Office, P.L.C., in Des Moines, Iowa (Jan. 11, 2010).
attorney–client privilege may rule out even a “representative–client” privilege. Even so, BIA-accredited representatives can offer confidentiality to their clients, often to the same extent attorneys are able to offer. Although BIA-accredited representatives should have their communications with clients protected by the attorney–client privilege, the uncertainty surrounding that issue should not prevent accredited representatives from offering the same limited confidentiality attorneys can offer to their clients.

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