

# NOTES

## WHO IS PATROLLING THE BORDER OF ETHICAL CONDUCT?: THE CONVERGENCE OF FEDERAL IMMIGRATION ATTORNEYS, BENEFIT FRAUD, AND MODEL RULE 4.2

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## INTRODUCTION

“If they catch a fraud—they are beasts from the pits of hell. You *do not* want to do this.”<sup>1</sup> As demonstrated by this advice from one immigration lawyer to a prospective client considering using a “pretend” marriage to get a green card,<sup>2</sup> federal immigration authorities do not take fraud lightly. Incendiary rhetoric of rampant immigration benefit fraud litters governmental publications and testimony<sup>3</sup> as well as the mainstream media.<sup>4</sup> Without looking at the evidence, people may easily believe that aliens<sup>5</sup> use fraudulent

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1. Joshua Daley Paulin, *Fraudulent Marriages in Immigration Cases*, 27 GPSOLO 1, 40, 43 (2010).

2. *Id.*

3. See *Aftermath of Fraud by Immigration Attorneys: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 25 (2012) [hereinafter *Hearings*] (statement of Chris Crane, President, Nat'l Immigration & Customs Enforcement Council 118) (“CIS supervisors are aware that fraud occurs daily, but no action is taken.”); *Oversight of U.S. Citizenship and Immigration Services: Hearing Before the Comm. on the Judiciary*, 111th Cong. 7 (2010) [hereinafter *Oversight*] (statement of Sen. Orrin Hatch) (“I continue to have concerns about the prevalent abuses in our country’s marriage-based green card program. Now, it could easily be called the soft underbelly of our country’s visa program.”); DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-08-09, REVIEW OF THE USCIS BENEFIT FRAUD REFERRAL PROCESS 4 (2008) (“[A]ccording to ICE, ‘benefit fraud is an extremely lucrative form of white-collar crime that is complex and challenging to investigate, often ... tak[ing] years to investigate and prosecute.’”); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-259, IMMIGRATION BENEFITS: ADDITIONAL CONTROLS AND A SANCTIONS STRATEGY COULD ENHANCE DHS’S ABILITY TO CONTROL BENEFIT FRAUD, “Highlights” (2006) (“Although the full extent of benefit fraud is unknown, available evidence suggests that it is a serious problem.”).

4. See Paulin, *supra* note 1, at 41 (“We hear from U.S. citizens who complain about the fact that they’ve been lured into a marriage by someone seeking the opportunity to obtain a green card, and then splitting.... You don’t have any idea how much fraud is going on undetected.”) (quoting Jack Martin of the Federation for American Immigration Reform); Michelle Malkin, *The Jihadis’ Marriage-Fraud Scam*, FOX NEWS (May 5, 2010), <http://www.foxnews.com/opinion/2010/05/05/michelle-malkin-times-square-bomb-plot-jihadis-marriage-scam/> (“Jihadists have been gaming the sham-marriage racket for years.... Marriage fraud remains a treacherous path of least resistance.”).

5. Throughout this Note, any references to “aliens” or “immigrants” should be taken to mean those persons who are either overstayers (persons who enter the country with a legal temporary or student visa, or legally without a visa, and remain in the country past their “authorized periods of admission”) or those with provisional green cards, and not immigrants who have illegally entered the country. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-411, OVERSTAY ENFORCEMENT: ADDITIONAL MECHANISMS FOR COLLECTING, ASSESSING, AND SHARING DATA COULD STRENGTHEN DHS’S EFFORTS BUT WOULD HAVE COSTS 1 (2011).

marriages to pilfer green cards left and right, or that finding a bona fide marriage between a U.S. citizen and an immigrant would be tantamount to finding the Holy Grail. However, the evidence shows a much different picture of marriage fraud than the bombast suggests.<sup>6</sup>

Department of Homeland Security (DHS) Secretary Janet Napolitano herself remarked on this dichotomy between the fictional and factual in a Senate hearing, stating that although “there is a perception that marriage fraud is ... rampant, ... most marriages coming before [United States Citizenship and Immigration Services (USCIS)] are bona fide.”<sup>7</sup> Statistics corroborate Secretary Napolitano’s statement.<sup>8</sup> Marriage fraud and, more generally, immigration benefit fraud are actually quite elusive.<sup>9</sup> For example, take data from 2006: out of the approximately 5 million applications for immigration benefits, denials for fraud constituted less than 3 percent.<sup>10</sup> Further evidence indicates the number of applications denied for marriage fraud actually may be lower than the number of applications denied for fraud generally.<sup>11</sup>

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6. See Nina Bernstein, *Do You Take This Immigrant?*, N.Y. TIMES (June 11, 2010), [http://www.nytimes.com/2010/06/13/nyregion/13fraud.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/06/13/nyregion/13fraud.html?pagewanted=all&_r=0) (“[E]xaggerated estimates of marriage fraud over the years have created a bureaucratic monster, thwarting legitimate, if unconventional, couples and spurring unconstitutional intrusion into their lives.”).

7. *Oversight*, *supra* note 3, at 8.

8. See DEP’T OF HOMELAND SEC., *supra* note 3, at 11; Bernstein, *supra* note 6 (“Nationwide, the number of such petitions denied for fraud is tiny: 506 of the 241,154 filed by citizens in the last fiscal year, or two-tenths of 1 percent.”).

9. See DEP’T OF HOMELAND SEC., *supra* note 3, at 15 (“Congress has been told by [Fraud Detection and National Security (FDNS)] that there is a bunch of fraud, so Congress is asking for the proof. HQ FDNS is asking the field to find the fraud so it can be shown to Congress. And I sense HQ FDNS’ [sic] frustration with the field because we aren’t finding it.”).

10. *Id.* at 11.

11. Erica Pearson, *Proving Love to the Feds: Inside the Unit That Makes Sure Green Card Marriages Are Real*, N.Y. DAILY NEWS (May 27, 2012), <http://www.nydailynews.com/new-york/immigration-fraud-agency-green-card-marriages-real-article-1.1064417#ixzz29rnCEPEd> (stating that of the 270,761 “applications for marriage-based green cards, nationwide” in 2011, only 3924 cases, or 1.4 percent, were found to be fraudulent). The government’s statistics concerning marriage fraud are obscure at best. For example, USCIS completed an audit of marriage fraud in 2007, but never released the results. Bernstein, *supra* note 6. *The New York Times*, when trying to investigate the actual prevalence of marriage fraud, requested the 2007 audit from USCIS and was constructively denied the information. *Id.* (“An agency audit of marriage fraud, conducted in 2007, has never been released. When *The New York Times* filed a request for such data under the Freedom of Information Act, the agency identified 656

Regardless of the evidence indicating that benefit fraud occurs less often than assumed, the federal government has only increased its emphasis on cracking down on this kind of fraud.<sup>12</sup> However, as resources continue to pour into governmental agencies designed specifically to combat benefit fraud, such as the Fraud Detection and National Security Directorate (FDNS),<sup>13</sup> fraud remains difficult to uncover.<sup>14</sup> This pressure from above to find the fraud, combined with the public's strong interest in illegal immigration,<sup>15</sup> could conceivably incentivize FDNS to cut corners in order to bolster its fraud detection statistics.

One area in which the conduct of FDNS might raise cause for concern is its policy of conducting unannounced visits to the homes of couples applying for marriage-based immigration benefits.<sup>16</sup> The administration uses "dawn bed checks" to catch the applicants

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relevant pages, but blacked out 655, saying the information would disclose the deliberative process or law enforcement techniques. *The Times* has appealed.").

12. See *Hearings*, *supra* note 3, at 13 (statement of Sarah Kendall, Assoc. Dir., FDNS) ("USCIS has undertaken significant steps to protect the integrity of the Nation's immigration system and to help safeguard our Nation's security.... This allows us to strengthen our standard operating procedures and reduce program vulnerabilities."); *Oversight*, *supra* note 3, at 7 (statement of Alejandro Mayorkas, Dir., USCIS) ("As part of the elevation of the Fraud Detection and National Security Directorate earlier this year, one of the things that we are doing is bringing increased attention to our Benefit Fraud Compliance Assessment Program. One of the areas that we will be focused upon in that renewed assessment and review process is on the marriage fraud issue."); *Fraud Detection and National Security Directorate*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Nov. 18, 2011), <http://www.uscis.gov> (search "FDNS"; then follow "Fraud Detection and National Security Directorate" link) ("[USCIS] created FDNS in 2004 in order to strengthen USCIS's efforts to ensure immigration benefits are not granted to individuals who pose a threat to national security or public safety, or who seek to defraud our immigration system. In 2010, FDNS was promoted to a Directorate which elevated the profile of this work within USCIS, brought about operational improvements, and enhanced the integration of the FDNS mission in all facets of the agency's work.").

13. *Fraud Detection and National Security Directorate*, *supra* note 12.

14. See *supra* note 11 and accompanying text.

15. In a 2012 Presidential Election Poll, 5 percent of voters stated that immigration, over choices such as "jobs" and the "deficit," was the issue that mattered the most to them in deciding for whom to cast their votes. *Problems and Priorities*, POLLINGREPORT.COM, <http://www.pollingreport.com/prioriti.htm> (last visited Mar. 29, 2014).

16. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE FRAUD DETECTION AND NATIONAL SECURITY DATA SYSTEM 3 (2008), available at [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_cis\\_fdns.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cis_fdns.pdf); *Administrative Site Visit and Verification Program*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program> (last updated Aug. 18, 2010).

unaware, in the hopes of exposing fraudulent couples.<sup>17</sup> In allowing FDNS to capitalize on the element of surprise, however, immigration attorneys who supervise FDNS agents are arguably violating Model Rule of Professional Conduct 4.2.<sup>18</sup> Model Rule 4.2 prohibits attorney, or attorney-supervised, contact with represented persons—here the applicants applying for marriage-based immigration benefits.<sup>19</sup>

This Note seeks to explore whether federal immigration attorneys engage in unethical conduct by permitting government personnel to overreach in their investigation of atypical fraud. First, this Note will examine the structure of the federal government's regulation of marriage fraud, especially in the context of FDNS home visits. Second, this Note will outline Model Rule 4.2 and its applicability to federal immigration lawyers. Then, this Note will discuss the question of whether these attorneys are violating Model Rule 4.2, and, if so, what constitutes the proper remedy for such a violation. The conclusion contends that FDNS attorneys are in violation of Model Rule 4.2 and that the proper remedy for such violations is the suppression of any evidence obtained through these unethical home visits.

This Note is novel in both its argument and conclusion. The lack of scholarship on this particular topic is surprising given the high volume of applications for immigration benefits<sup>20</sup> and the important consequences of a denial. In crafting this Note, the author was able to find only one case with any allusion to the potentially unethical behavior by FDNS and USCIS attorneys.<sup>21</sup> Why immigration practitioners have not raised a Model Rule 4.2 defense to evidence obtained through FDNS home visits remains a mystery.<sup>22</sup> The answer to that question—why immigration attorneys do not appeal

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17. Bernstein, *supra* note 6 (“Someone shows up at your house with a badge and a gun, unannounced,” said Laura Lichter, an immigration lawyer in Denver. “Hi, we’re here from immigration. Do you mind if we come in to look and see if two towels are wet?”).

18. MODEL RULES OF PROF’L CONDUCT R. 4.2 (2013).

19. *Id.*

20. See DEP’T OF HOMELAND SEC., *supra* note 3, at 4, 11.

21. See *Berrios v. Holder*, 502 F. App’x 100, 103 n.2 (2d Cir. 2012) (holding that USCIS disclaimed any reliance on evidence obtained by the government’s visit to the petitioner’s home). The fact that the government disavowed probative evidence found at the petitioner’s home suggests the possibility that the government doubted the admissibility of the evidence.

22. E-mail from Glenn Formica, Esq., to author (on file with author).

to this defense more often—likely falls somewhere between the novelty of the argument and the uncertainty of the assumptions underlying this Note’s conclusion.<sup>23</sup> But novelty of argument should not be mistaken for incorrectness; this argument is meritorious and should be utilized by immigration attorneys whenever possible. The pressure for federal officials to find fraud continues to mount, but is engaging in unethical conduct the answer?

### I. FEDERAL REGULATION OF MARRIAGE FRAUD

Federal regulation of immigration spans many years and has involved different administrative agencies. From 1903 to 1940, the Department of Labor (DOL) regulated immigration<sup>24</sup> until the Executive branch transferred authority over immigration and naturalization to the Department of Justice (DOJ) in 1940.<sup>25</sup> The DOJ continued to regulate immigration until 2003 when, in response to the September 11, 2001 terrorist attacks, Congress created the Department of Homeland Security (DHS).<sup>26</sup> In creating DHS, Congress amalgamated twenty-two different federal organizations, either in their entirety or in part, in the hopes of creating a “unified, integrated Department.”<sup>27</sup> DHS divides its control over immigration and naturalization in a tripartite fashion; the three relevant components are Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and USCIS.<sup>28</sup> USCIS is responsible for adjudicating immigration benefits, including those stemming from an alien’s marriage to a U.S. citizen.<sup>29</sup>

Marriage to a U.S. citizen confers on an alien spouse the ability to file for a green card, entitling the holder to the right to live and

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23. *Id.*

24. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 239-40 (7th ed. 2012).

25. *Id.*

26. *Creation of the Department of Homeland Security*, U.S. DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/creation-department-homeland-security> (last visited Mar. 29, 2014).

27. *Who Joined DHS*, U.S. DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/who-joined-dhs> (last visited Mar. 29, 2014); *see also* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

28. ALEINIKOFF, *supra* note 24, at 240, 242, 244, 246-47.

29. *Id.* at 247, 306-07.

work in the United States.<sup>30</sup> The first step for an alien spouse to obtain a green card is for the citizen spouse to file an I-130 Petition for Alien Relative.<sup>31</sup> Under American law, visas for immediate relatives are so favored that the government does not impose numerical limitations on their issuance.<sup>32</sup> Of the different subcategories of “immediate relatives”<sup>33</sup> encompassed by I-130 petitions, spouses are by far the most common.<sup>34</sup> However, an approved I-130 does not in and of itself bestow upon the alien spouse a green card; rather, the approved petition simply establishes the legal and genuine relationship between the citizen and alien necessary for a green card.<sup>35</sup>

Each year, almost one-third of all immigrants who receive immigration benefits do so by reason of marriage to an American citizen.<sup>36</sup> However, not every marriage to an American citizen provides a *carte blanche* for alien beneficiaries. Federal agents must deem the marriage *bona fide* or legitimate for the alien to receive, and also to keep, immigration benefits.<sup>37</sup> Specifically, federal authorities seek to keep at bay “sham marriages”—marriages entered into solely for the purpose of conferring immigration benefits on the alien partner.<sup>38</sup> USCIS can deny any petition if it

30. *Id.* at 316.

31. See 8 U.S.C. § 1154(a)(1)(A)(i) (2012) (“[A]ny citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in ... this title or to an immediate relative status ... may file a petition with the Attorney General for such classification.”).

32. *Id.* § 1151(b) (“Aliens described in this subsection, who are not subject to the worldwide levels or numerical limitations of subsection (a) of this section [include] ... immediate relatives.”); *id.* § 1151 (b)(2)(A)(i) (defining “immediate relatives”).

33. *Id.* § 1151(b)(2)(A)(i) (“[T]he term ‘immediate relatives’ means the children, spouses, and parents of a citizen of the United States.”).

34. In 2011, of the 453,158 green cards awarded to immediate relatives of U.S. citizens, more than half (258,320) were to spouses. U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2011 YEARBOOK OF IMMIGRATION STATISTICS 18 (2012), available at [http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois\\_yb\\_2011.pdf](http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf).

35. *Park v. Gonzales*, 450 F. Supp. 2d 1153, 1156 (D. Or. 2006).

36. ALEINIKOFF, *supra* note 24, at 306.

37. See 8 U.S.C. § 1186a(b)(1).

38. See *id.* §§ 1154(c), 1186a(b)(1); *Stokes v. INS*, 393 F. Supp. 24, 32 (S.D.N.Y. 1975) (“[The federal regulations are] designed to discourage marriages of convenience, entered into with both eyes on the statute, and designed solely to confer the riches of preferential immigration status as a dowry.”).

determines the marriage is fraudulent, and it may review an I-130 petition of a conditional permanent alien resident for up to two years after the petition is granted.<sup>39</sup> Furthermore, even in the case of nonconditional permanent residents, the government may deport the alien if the Attorney General believes the marriage underlying the alien's procurement of a visa is or was fraudulent.<sup>40</sup>

USCIS was so concerned about marriage fraud, and immigration benefit fraud generally, that in 2004 it created FDNS, which in 2010 was raised to a Directorate.<sup>41</sup> Directorates are generally more powerful "director led departments in charge of multiple divisions."<sup>42</sup> FDNS is charged with "detecting and removing known and suspected fraud from the application process."<sup>43</sup> In an effort to effectuate its mission, FDNS regularly subjects alien petitioners to background checks and other "[a]dministrative inquiries," which include "[t]argeted site visits ... where fraud is suspected."<sup>44</sup>

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39. See 8 U.S.C. § 1186a(b)(1). Section 1186a(b)(1) allows DHS two years from when it grants the alien lawful permanent residency to revoke such residency if the qualifying marriage is terminated, annulled, or determined fraudulent. *Id.* ("In the case of an alien with permanent resident status on a conditional basis[,] ... if the Secretary of Homeland Security determines, before the second anniversary of the alien's obtaining the status of lawful admission for permanent residence, that—(A) the qualifying marriage—(i) was entered into for the purpose of procuring an alien's admission as an immigrant, or (ii) has been judicially annulled or terminated, other than through the death of a spouse[,] ... the Secretary of Homeland Security shall so notify the parties involved and ... shall terminate the permanent resident status of the alien (or aliens) involved as of the date of the determination."). Conditional permanent resident status is conferred only on those applicants who receive a green card by reason of a marriage that is less than two years old. See *id.* § 1186(a)(1), (b)(1).

However, since USCIS may take years in adjudicating an I-130 petition, the actual time-period in which an alien must remain married in order to receive or keep their benefits may be much longer. See *Berrios v. Holder*, 502 F. App'x 100, 101 (2d Cir. 2012) (determining USCIS took almost a year to deny applicant's I-130 petition, and it was not until the applicant filed a writ of mandamus that a denial was issued).

40. See 8 U.S.C. § 1227(a)(1)(G).

41. See *Fraud Detection and National Security Directorate*, *supra* note 12.

42. *Directorates and Program Offices*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/> (click "About Us"; then "Directorates and Program Offices" on the left side of the screen) (last updated July 28, 2010).

43. *Fraud Detection and National Security Directorate*, *supra* note 12.

44. *Id.*



A. *Guess Who's Coming to Dinner? Home Visits in Cases of Suspected Marriage Fraud*

One area in which FDNS utilizes site or home visits is the marriage fraud context. If the immigration official has doubts after the standard initial I-130 interview in which USCIS questions the couple about their marriage, the official can take subsequent measures including a follow-up “fraud” interview with the applicants or an investigative, surprise home visit.<sup>45</sup> Although FDNS has not published any data on how often it performs home visits, one practitioner estimated that in 90 percent of his cases in which FDNS was involved, FDNS visited either the residence or place of employment listed on the application for benefits.<sup>46</sup> Additionally, in 30 percent of those visits, FDNS conducted an *ex parte* interview with the represented applicant without counsel present.<sup>47</sup>

Even though immigration authorities claim that these subsequent investigations are “designed to give couples the benefit of the doubt,” in that those couples that did poorly in the initial interview are given a second chance,<sup>48</sup> these subsequent investigations are usually very judgmental of, and intrusive into, the couple’s relationship.<sup>49</sup> For all the embarrassment and scrutiny these couples are forced to undergo, a very small amount of fraud is detected.<sup>50</sup>

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45. See ILONA BRAY, *FIANCÉ AND MARRIAGE VISAS: A COUPLE’S GUIDE TO U.S. IMMIGRATION* 308 (7th ed. 2012); Bernstein, *supra* note 6. Typically the applicant, if represented, is allowed to bring their attorney or similar party to any subsequent formal “fraud” interview. BRAY, *supra*. This Note focuses on only the unannounced home visits in which the applicant’s representative may not be present.

46. E-mail from Glenn Formica, Esq., to author, *supra* note 22.

47. *Id.*

48. Pearson, *supra* note 11.

49. See BRAY, *supra* note 45, at 309, 312; Bernstein, *supra* note 6; Pearson, *supra* note 11. Sample questions from fraud interviews include everything from the routine (“What did the two of you do last New Year’s Eve?”) to the intimately personal (“What form of contraception (birth control) do you use?”). BRAY, *supra* note 45, at 312.

50. See *supra* notes 8-11 and accompanying text. Although federal authorities have had success in uncovering “nuptial scam rings” in major cities like Chicago and Seattle, the overall number of I-130s denied for fraud is very small: only 0.2 of 1 percent of all petitions filed by citizens in the fiscal year of 2011. Bernstein, *supra* note 6; Melissa Naan Burke, *To Have and to Hold a Green Card*, LEGAL AFF., Jan./Feb. 2006, available at [http://www.legalaffairs.org/issues/January-February-2006/scene\\_burke\\_janfeb06.msp](http://www.legalaffairs.org/issues/January-February-2006/scene_burke_janfeb06.msp).

In addition to being a waste of resources, these subsequent investigations may also represent unethical behavior on behalf of attorneys in the Office of the Chief Counsel (OCC) of USCIS or the Office of the General Counsel (OGC) of DHS. OCC is the legal entity directly responsible for supervising USCIS and its components, such as FDNS, in the day-to-day operations of the agency.<sup>51</sup> Because USCIS and FDNS are subcomponents of DHS, OGC provides additional supervision as to the legality of the actions taken by USCIS and FDNS.<sup>52</sup> Hence, OCC and OGC share responsibility for the actions of USCIS and its agents, and for ensuring those actions are in compliance with the law. However, the “law” in this context does not refer only to statutes and the Constitution but also includes certain ethical guidelines. These ethics laws, known as the Model Rules of Professional Conduct, are promulgated through the American Bar Association’s Center for Professional Responsibility<sup>53</sup> and are applicable to federal government attorneys.<sup>54</sup> Of special relevance to the investigations by FDNS is Model Rule 4.2, which

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51. U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE FRAUD DETECTION AND NATIONAL SECURITY DIRECTORATE (2012), *available at* [http://www.dhs.gov/sites/default/files/publications/privacy/PIAs/privacy\\_pia\\_uscis\\_fdns\\_july2012.pdf](http://www.dhs.gov/sites/default/files/publications/privacy/PIAs/privacy_pia_uscis_fdns_july2012.pdf) (“[T]he USCIS ... Office of the Chief Counsel [OCC] advise[s] FDNS on the ... legal considerations of policies and initiatives.”).

52. *Office of the General Counsel (OGC) Overview*, U.S. DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/office-general-counsel> (last visited Mar. 29, 2014) (“[General Counsel of DHS] is ultimately responsible for all of the Department’s legal determinations and for overseeing all of its attorneys.”).

53. MODEL RULES OF PROF’L CONDUCT (2013), *available at* [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) (last visited Mar. 29, 2014).

54. In 1998, Congress passed 28 U.S.C. § 530B, the McDade Amendment, which explicitly states that “[a]n attorney for the Government” is “subject to State laws and rules ... in each State where such attorney engages in that attorney’s duties.” 28 U.S.C. § 530B (2006). Additionally, DHS and USCIS recognize that their attorneys are bound by state bar ethics rules. *See* Memorandum from Jeff Conklin, Chief Info. Officer, USCIS, to Katherine Astrich, Desk Officer, USCIS (July 15, 2008), *available at* <http://bit.ly/pG80HI>. Every state except California, which has its own professional rules of conduct, has adopted some version of the Model Rules of Professional Conduct. *State Adoption of the ABA Model Rules of Professional Conduct*, AM. BAR ASS’N, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html) (last visited Mar. 29, 2014). Because every state imposes ethical obligations on attorneys that practice within its borders, federal government attorneys nationwide are bound to some form of the Model Rules of Professional Conduct.

deals with attorney communications with opposing represented persons.<sup>55</sup>

## II. MODEL RULE 4.2: CONTACT WITH REPRESENTED PERSONS

The text of Model Rule 4.2 is as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.<sup>56</sup>

Model Rule 4.2 ensures that, for the most part, the opposing party may not contact represented persons without the consent of the represented person's counsel. The Rule is designed to protect those persons who sought out, or whom the court has assigned, representation from "overreaching" by opposing counsel.<sup>57</sup> Because the common client likely is not as legally sophisticated as a savvy lawyer, the Rule seeks to level the playing field by forcing attorneys to seek out their opposing counterparts, as opposed to their clients, before and during litigation.<sup>58</sup> The Rule also seeks to preserve the legal system by both protecting the attorney-client privilege and allowing for effective representation of clients.<sup>59</sup>

It is important to note that the Model Rules cover not just ethical violations of the lawyer, but also ethical violations of any nonlawyer that the lawyer supervises.<sup>60</sup> Under Model Rule 5.3, a lawyer is

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55. MODEL RULES OF PROF'L CONDUCT R. 4.2.

56. *Id.*

57. *Id.*

58. *See Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625-27 (S.D.N.Y. 1990) (holding that Rule 4.2 both prevents lawyers from prompting "unwise statements" from opposing parties and protects the attorney-client privilege); MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 1 ("This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.").

59. *Polycast Tech. Corp.*, 129 F.R.D. at 625-27; MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 1; *see supra* note 47 and accompanying text (noting the high instance of ex parte communication in the I-130 context).

60. MODEL RULES OF PROF'L CONDUCT R. 5.3.

responsible for unethical conduct of another if the lawyer “orders, or with the knowledge of the specific conduct, ratifies the conduct” of the other person.<sup>61</sup> Because OCC and OGC oversee the legality of the conduct of FDNS<sup>62</sup> and therefore have or should have actual knowledge of the activities of FDNS,<sup>63</sup> the Model Rules would likely hold OCC and OGC lawyers liable if home visits by FDNS are unethical and if OCC and OGC have made no discernable efforts to stop those visits.

#### A. Model Rule 4.2’s “Authorized by Law” Exception

There are some important caveats, however, to the Rule’s application. As the text of the Rule indicates, some communications with represented persons without the consent of their counsel may be “authorized by law.” This exception usually pertains to governmental officers engaged in “investigative activities prior to the commencement of criminal or civil enforcement.”<sup>64</sup> Although this exemption seems to encompass the activities of FDNS—government investigations conducted before commencement of immigration enforcement proceedings, assuming enforcement proceedings refer to deportation or removal<sup>65</sup>—in actuality such agent contact with represented persons without the consent of their attorney runs

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61. *Id.* (“(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.”). Model Rule 5.3 does not appear to be limited to a lawyer’s supervision of a nonlawyer’s purely legal work; rather the Rule refers to the nonlawyer’s “conduct.” *Id.* “Conduct” could then encompass even FDNS’s purely investigatory actions.

62. *See supra* notes 51-52 and accompanying text.

63. *See supra* notes 51-52 and accompanying text.

64. MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 5 (“Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.”).

65. If instead “enforcement” proceedings mean the determination of an alien’s I-130 petition, however, this exception most certainly does not apply to visits by FDNS because these visits usually occur after the initial interview, once USCIS has commenced their decision-making process. Burke, *supra* note 50. Additionally, these visits could conceivably extend up to two years after the I-130 petition is approved because, under the Immigration Fraud Amendments, there is a two-year window after approval of the petition in which the Attorney General can determine whether the qualifying marriage was in fact fraudulent. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. § 1186a (2006)).

contrary to the federal regulations controlling immigration proceedings.<sup>66</sup> The pertinent regulation states, “Whenever an examination is provided for in this chapter [regarding the Department of Homeland Security], the person involved shall have the right to be represented by an attorney or representative.”<sup>67</sup> Because the on-point federal regulation does not allow DHS to “examine”—or in other words, to interview—immigrants in DHS proceedings without affording them the right to representation or to have their representative present,<sup>68</sup> home visits conducted without regard to that right cannot be “authorized by law.” If the law does not authorize FDNS to attempt to interview represented persons purposely without the knowledge or consent of their attorneys, then, by definition, such interviews are not covered under Model Rule 4.2’s exemption for “communications authorized by law.”

#### *B. Model Rule 4.2’s “Actual Knowledge” Requirement*

Another important caveat to Model Rule 4.2 is that the lawyer contacting the represented person must have “actual knowledge” of their representation.<sup>69</sup> This means that if a lawyer does not know the client is represented, the court cannot discipline him. OCC and OGC lawyers might argue that because FDNS is the agency contacting and interviewing these applicants, they have no knowledge of which applicants FDNS talks to or whether those persons are represented. However, as previously discussed, OGC and OCC are tasked with overseeing the actions of FDNS and therefore should not be allowed to assert a defense of ignorance.<sup>70</sup> Furthermore, actual knowledge of representation can be inferred from the circumstances.<sup>71</sup> In the case of applicants for immigration benefits,

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66. 8 C.F.R. § 292.5 (2013).

67. *Id.*

68. *Id.*

69. MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 8 (“The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of representation; but such actual knowledge may be inferred from the circumstances.”).

70. *See supra* notes 51-52 and accompanying text.

71. U.S. DEPT OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, FACT SHEET: WHO CAN REPRESENT ALIENS IN IMMIGRATION PROCEEDINGS (Oct. 2, 2009), available at <http://www.justice.gov/eoir/press/09/WhoCanRepresentAliensFactSheet10022009.pdf>; G-28, Notice of

there should be no question that OCC and OGC lawyers have actual, or inferred, knowledge of an applicant's represented status because counsel for alien petitioners must file notice of their entry of appearance either through a G-28, G-28I, EOIR-27, or EOIR-28.<sup>72</sup> Because OCC and OGC either know or should know that an applicant is represented, the court should not excuse their subsequent contact with a represented person under a claim of ignorance.

As Model Rule 4.2 applies to attorneys who work for the federal government and Model Rule 5.3 extends responsibility to supervising attorneys for nonlawyers' conduct, OCC and OGC are responsible under the Model Rules for the actions of FDNS agents under their supervision. Furthermore, because neither of the relevant exceptions to the Rule apply to OCC's or OGC's conduct in authorizing FDNS home visits, OCC and OGC must act in conformity with Model Rule 4.2 and ensure FDNS agents do the same.

### III. GOVERNMENT'S VIOLATION OF MODEL RULE 4.2

Home visits by FDNS are strategically unannounced.<sup>73</sup> Because these visits are a surprise to the applicants, it follows that these visits are also a surprise to their counsel. Looking at the plain text of Model Rule 4.2, these visits are communications "about the subject of the representation" with an applicant whom OCC or OGC knows is represented, without the "consent of the other lawyer."<sup>74</sup> Accordingly, OCC and OGC attorneys are in violation of Model 4.2 in authorizing these visits.

On the other hand, there is no evidence that FDNS would object if the applicant called his attorney at the time FDNS showed up at his home.<sup>75</sup> Even if it were the case that FDNS would not object to

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*Entry of Appearance*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/g-28> (last updated June 11, 2013); *G-28I, Notice of Entry of Appearance*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/g-28i> (last updated May 2, 2013).

72. See *supra* note 71.

73. See Bernstein, *supra* note 6.

74. MODEL RULES OF PROF'L CONDUCT R. 4.2.

75. For example, in the H1-B work visa context, in which FDNS conducts site visits to the employer to ensure the petition is accurate and not fraudulent, immigration advocates promote such phone calls as steps an employer should take if FDNS appears. See Alan Seagrave, *H-1B Compliance: The FDNS Site Visit*, LAB. & EMP. L. PERSP. (Aug. 30, 2010), <http://www.laboremploymentperspectives.com/2010/08/30/h-1b-compliance-the-fdns-site-visit/>; *On-Site H-1B Fraud Investigations on the Rise*, IMMIGR. L. ASSOCIATES P.C.,

an applicant calling his counsel and suspending its investigation until counsel gave consent or came to the site, this USCIS safety valve comes with its own set of problems.

First, FDNS agents might be able to observe or obtain evidence while waiting for counsel's consent or appearance. Second, there is no guarantee that the applicant would know to call counsel or be able to reach counsel, or that counsel would be available to come and supervise the visit. Although an applicant could refuse to allow the officers into his home without counsel, that seems unlikely given the power dynamics at play. Marriage fraud interviews are "high-stakes"<sup>76</sup> contests with USCIS holding all the cards.<sup>77</sup> Because applicants try their hardest to please immigration authorities,<sup>78</sup> it seems unlikely that, given the serious consequences of a denial,<sup>79</sup> they would risk annoying or displeasing FDNS officials by calling counsel or asking to postpone the interview.

Finally, language barriers play a large role in USCIS proceedings; in 2011, 82 percent of immigration hearings were completed in one of 299 non-English languages.<sup>80</sup> The high probability that the applicant's first language is not English, or that the applicant is not competent enough in English to understand what FDNS is doing at

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<http://www.immig-chicago.com/articles/on-site-h-1b-fraud-investigations-on-the-rise/> (last visited Mar. 29, 2014) ("The H-1B employer can request the presence of their immigration attorney during the site visit; if he/she cannot be physically present, the attorney may be present via teleconference while the site visit is conducted.")

76. Pearson, *supra* note 11.

77. See Bernstein, *supra* note 6 ("While Stokes makes such home visits off-limits in New York State, lawyers and immigrant advocates complain that, at its worst, the process is a Kafkaesque version of 'The Newlywed Game,' with dire consequences: those who fail can be put on a path to deportation. Couples' futures together depend on proving separately to a skeptical bureaucrat that, as the law states, they did not marry 'solely' for a green card.... The questions [from immigration officials] can be arbitrary and very detailed, and [the applicants are] on the firing line right now.... If a certain number of questions are answered incorrectly ... they can stop the interview right there.") (internal quotations omitted).

78. See Pearson, *supra* note 11 ("[One couple] brought two rolling suitcases with them. I said, 'Oh, sir are you traveling?'" [the USCIS interviewer] recalled. "And the guy unzips this — zip zip zip. It was like, photo albums, statements from friends, college stuff, they went to the same college. Two suitcases with evidence.")

79. *Id.* ("[W]hen a pair crosses the line into clear fraud, the beneficiary is sent packing and the petitioner could face criminal prosecution."). Perhaps the most important consequence of USCIS denying an applicant's I-130 petition for fraud is that any subsequent I-130 petitions the applicant files must be summarily denied. 8 U.S.C. § 1154(c) (2012).

80. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2011 STATISTICAL YEAR BOOK, at F1 (2012), available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf>.

their home or what they are asking, means that applicants are likely incapable of either determining that they need their lawyer present or asking FDNS to let them call their lawyer. Given the myriad of potential problems with FDNS relying on applicants asking for counsel during site visits, FDNS should not assume that affording applicants that option precludes any potential violations of Model Rule 4.2.

#### *A. OCC's and OGC's Escape Clauses*

Although there is a case that OCC and OGC are acting in violation of Model Rule 4.2, the offices might still be able to perform unannounced home visits if one of two things is true: (1) the relevant court distinguishes between lawyer and nonlawyer representation for applicants, or (2) the court deems that applicants, in signing their petition for an immediate relative visa, gave consent to FDNS to perform these unannounced home visits, knowing their counsel might not be present.

##### *1. Differentiating Representation by Nonlawyers*

One possible defense USCIS might invoke is that Model Rule 4.2 does not apply in situations when, although the applicant is represented, that representation is by a layperson as opposed to an actual lawyer. In immigration proceedings only about half of applicants are represented.<sup>81</sup> However, not all represented applicants are represented by “lawyers” in the traditional understanding of the word.<sup>82</sup> Representation in immigration court can come in a

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81. EOIR estimates that for the fiscal year of 2011, 51 percent of individuals in removal proceedings were represented. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 80, at G1. Although 51 percent may seem like a small percentage, when considered in light of the 202,479 relatives of citizens who applied for immediate relative visas, 51 percent becomes a much more significant 103,264 people. U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., FORM I-130-FIELD OFFICE ALIEN RELATIVE PETITIONS: RECEIPTS, COMPLETIONS, AND PENDING: FISCAL YEAR 2010-FISCAL YEAR 2012, 3RD QUARTER 3 (2012), available at [http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Family-Based/I130-performancedata\\_fy12\\_qtr3.pdf](http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Family-Based/I130-performancedata_fy12_qtr3.pdf).

82. Although nationwide statistics are not available on the type of representation that persons seeking immigration benefits receive, smaller, more localized studies help shed some light on the likely breakdowns. For example, over an almost ten-month period in New York, only about 7 percent of the individuals represented in immigration court did not hire private



variety of forms: private attorneys, pro bono attorneys, law school clinics, and nonprofit legal services organizations.<sup>83</sup> Of these various options, private attorneys are by far the most common choice, as 93 percent of the applicants who are represented hire a private attorney.<sup>84</sup> According to one survey completed in New York, about 6.5 percent of represented defendants in immigration courts choose to be represented by nonprofit organizations or law school clinics,<sup>85</sup> which includes a number of nonlawyers. Given that hundreds of thousands of persons filter through immigration court each year,<sup>86</sup> this means that a rather significant number may be represented by nonattorneys. If the protections of Model Rule 4.2 do not apply to the applicants represented by nonlawyers in this sizeable group, it is possible they could be the targets of potentially unethical conduct by federal immigration agents.

However, the Model Rules of Professional Conduct do not explicitly state that they apply a different ethical standard to a person represented by nonlawyers.<sup>87</sup> In fact, the Model Rules and the federal regulations on immigration proceedings only lend support to an argument for applying the same standard of protection for either category of represented persons.<sup>88</sup> For example, although the text of Model Rule 4.2 refers only to persons represented by “another lawyer,”<sup>89</sup> the comments to the Rule do not distinguish between different categories of “represented persons,”<sup>90</sup> indicating the possibility that all represented persons are protected from contact lacking consent under the Rule.

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attorneys. *Steering Comm. of the N.Y. Immigration Representation Study Report, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 381 (2011).

83. *Id.* The study found that of represented immigrants, the breakdown of who supplied the representation was as follows: 93 percent private attorneys, 1 percent pro bono attorneys, 0.5 percent law school clinics, and 6 percent nonprofit legal service organizations. *Id.*

84. *Id.*

85. *Id.* As a caveat, some nonprofit organizations employ licensed attorneys. Additionally, law school clinics generally have a supervising attorney.

86. In the fiscal year of 2011, EOIR recorded 430,574 cases brought in immigration court. See U.S. DEPT OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 80, at B2.

87. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (2013) (making no explicit distinction between protections for people represented by lawyers and those represented by nonlawyers).

88. See 8 C.F.R. §§ 292.1, 292.5 (2013); MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 2.

89. MODEL RULES OF PROF'L CONDUCT R. 4.2.

90. See *id.* R. 4.2 cmt. 2.

Additionally, the federal regulations standardizing immigration proceedings specifically allow for persons in immigration court to be represented by nonlawyers.<sup>91</sup> Further regulations do not differentiate between the various categories of possible representation, treating all representatives the same.<sup>92</sup> Because the federal regulations do not distinguish between lawyer and nonlawyer representation, the ambiguity in the Model Rules should be resolved in favor of equal protection among the various classes of representation.<sup>93</sup> However, even if a court determines that Model Rule 4.2 does not apply to situations in which an applicant is represented by a nonlawyer, there should be nothing barring application of the Rule in the cases in which represented applicants are represented by lawyers.

## 2. *The Question of Consent*

The other main stumbling block for applicants alleging unethical behavior by OCC and OCG is the question of whether they have already consented to unannounced visits by FDNS and, therefore; waived their right to challenge such visits as unethical.

As an initial matter, Comment 3 to Model Rule 4.2 clearly states that the Rule “applies even though the represented person initiates or consents to the communication.”<sup>94</sup> This means that in the forty

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91. 8 C.F.R. § 292.1(a) (“A person entitled to representation may be represented by any of the following ... (1) Attorneys in the United States[,] (2) Law students and law graduates not yet admitted to the bar[,] ... [3] Any reputable individual of good moral character[,] ... [4] A person representing an organization who has been accredited by the Board[,] ... [5] Accredited officials. An accredited official, in the United States, of the government to which an alien owes allegiance, if the official appears solely in his official capacity and with the alien’s consent[,] (6) Attorneys outside the United States.”).

92. *Id.* § 292.5 (“Whenever a person is required by any of the provisions of this chapter to give or be given notice; to serve or be served with any paper other than a warrant of arrest or a subpoena; to make a motion; to file or submit an application or other document; or to perform or waive the performance of any act, such notice, service, motion, filing, submission, performance, or waiver shall be given by or to, served by or upon, made by, or requested of the attorney or representative of record.”).

93. *See* MODEL RULES OF PROF’L CONDUCT Preamble and Scope cmt. 15 (“The Rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.”).

94. MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 3 (2013).

states that have adopted the Model Rules and the Comments,<sup>95</sup> whether or not an applicant consented to an FDNS home visit or to an interview is irrelevant in determining whether or not OCC and OGC have violated Model Rule 4.2. However, as of 2011, ten states have adopted *only* the Model Rules, forgoing adoption of the Comments.<sup>96</sup> For applicants alleging ethical violations under Rule 4.2 in those states, a more searching analysis is needed to determine if those immigrants have consented to FDNS intrusion, waiving their rights to challenge the governmental action.

The only evidence of an applicant's potential consent is their signature on the I-130 Form used to apply for a Petition for Alien Relative.<sup>97</sup> The I-130 Form warns, "USCIS investigates claimed relationships and verifies the validity of documents."<sup>98</sup> However, because the U.S. citizen is the one who must file the I-130, any consent conveyed through signing the Form would be applicable only to interviews with the citizen spouse and not the alien beneficiary.<sup>99</sup>

Assuming consent is a defense to a violation of Model Rule 4.2,<sup>100</sup> the only sort of defense of consent that the Rules recognize—albeit in terms of the lawyer-client relationship—is "informed consent."<sup>101</sup> As recognized by the Rules, "informed consent" requires that a client "be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse

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95. ABA CPR POLICY IMPLEMENTATION COMM., STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS (May 23, 2011), *available at* <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf>.

96. *Id.*

97. See U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., FORM I-130: PETITION FOR ALIEN RELATIVE (2012), *available at* <http://www.uscis.gov/files/form/I-130.pdf>.

98. *Id.*

99. U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., I-130, PETITION FOR ALIEN RELATIVE (2013), *available at* <http://www.uscis.gov/portal/site/uscis> (click on "Forms," then scroll down to Form I-130 and click "Petition for Alien Relative") ("Purpose of Form: For citizen or lawful permanent resident of the United States to establish the relationship to certain alien relatives who wish to immigrate to the United States.").

100. Compare MODEL RULES OF PROF'L CONDUCT R. 4.2 (2013) (failing to state that consent waives the protection of the Rule), *with id.* R. 1.7 (expressly stating that if "each affected client gives informed consent, confirmed in writing," that waives a conflict of interest under the Rules).

101. See *id.* R. 1.7-1.9 (dealing with concurrent and successive attorney-client conflicts of interest).

effects on the interests of that client.”<sup>102</sup> At a minimum, informed consent under the Rules requires some level of “adequate information and explanation”<sup>103</sup> conveyed to the client as to what they are consenting to.<sup>104</sup>

In determining whether or not an applicant made an informed waiver, courts have usually undertaken fact-specific inquiries of the circumstances surrounding the waiver.<sup>105</sup> Relevant factors in the determination include the following: breadth of the waiver, scope of the waiver, specificity of the waiver, and the sophistication of the client.<sup>106</sup> In evaluating the I-130 waiver under these factors, the waiver’s biggest issue might be its lack of specificity.

The indefinite language of the I-130 Form—“USCIS investigates ... relationships and verifies ... documents”<sup>107</sup>—makes it difficult to argue that the applicant knowingly consented to unannounced FDNS visits to his home without the consent of his attorney,<sup>108</sup> or to waiving a future claim under Model Rule 4.2.<sup>109</sup> The vagueness of the I-130 form is made particularly apparent when compared with USCIS’s I-129 Form, which is used to apply for H1-B work visas.<sup>110</sup> Similar to immediate-relative visas and the I-130 Form, FDNS sporadically verifies the information submitted in the I-129 Form through unannounced site visits.<sup>111</sup>

However, unlike the I-130 Form, the I-129 Form is explicit in its disclosure of the possibility of FDNS’s verification of the submitted data. The “signature” section of the I-129 Form reads, “I also recognize that supporting evidence may be verified by USCIS through

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102. *Id.* R. 1.7 cmt. 18; *see also id.* R. 1.0 (“‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”).

103. *Id.* R. 1.0.

104. *Id.* (“‘Informed consent’ denotes the agreement by a person to a proposed course of conduct.”).

105. *See, e.g.,* *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1106 (N.D. Cal. 2003).

106. *Id.*

107. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 99.

108. *See* Bernstein, *supra* note 6.

109. MODEL RULES OF PROF’L CONDUCT R. 4.2.

110. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEPT OF HOMELAND SEC., FORM I-129: PETITION FOR A NONIMMIGRANT WORKER (2012), *available at* <http://www.uscis.gov/files/form/i-129.pdf>.

111. *Id.*

any means determined appropriate by USCIS, including but not limited to, on-site compliance reviews.”<sup>112</sup> Given the increased specificity of the I-129’s language, it is more plausible that that provision, as opposed to the more vague disclaimer in the I-130 Form, might support a claim of informed consent. However, because the I-130 Form lacks any similar specific language, the government might be unable to meet its burden of “informed consent.”

The other judge-made factors in determining “informed consent” do not appear to help the government’s case. For the same reason the waiver lacks specificity—it is so vague as to give the applicant little idea of what she consented to—the waiver also lacks breadth and scope. Further, the sophistication of most applicants—especially given language barriers<sup>113</sup>—is likely low, rendering their proffered consent less meaningful. Because a fact-specific analysis of the circumstances surrounding an I-130 applicant’s consent likely would not indicate that the ramifications of signing the waiver were fully disclosed or communicated to the applicant, it seems unlikely that a court would find that an applicant gave their informed consent to any *ex parte* interviews without their counsel present.

Additionally, Model Rule 4.2 requires “the consent of the other lawyer”<sup>114</sup> and makes no mention of the consent of the represented person,<sup>115</sup> leaving open the interpretation that the represented person’s consent, if actually deemed given in this situation, would be irrelevant to the court’s determination of whether OCC and OGC breached the Rule. The question of consent is an unclear one, but due to the vague language in the I-130 Form<sup>116</sup> and the possible irrelevance under Model Rule 4.2 of the client’s consent,<sup>117</sup> it seems unlikely that a court would hold that an applicant, by signing the I-130 Form, has consented to the possibility of a surprise FDNS visit to their home without the presence of their counsel.

The above discussion leads to the conclusion that OCC and OGC are likely violating Model Rule 4.2 by authorizing FDNS to conduct

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112. *Id.*

113. *See supra* note 80 and accompanying text.

114. MODEL RULES OF PROF’L CONDUCT R. 4.2.

115. *Id.* (making no mention of the consent of the represented person). *But see id.* (referencing specifically the consent of the “other lawyer” as being a waiver of the ethical boundaries dictating communications with the represented person).

116. *See supra* notes 107-11 and accompanying text.

117. *See supra* note 115 and accompanying text.

home visits to represented I-130 applicants' homes without the prior approval of the applicants' counsel. That these visits are in violation of the Model Rules raises the interesting question of whether conduct by federal attorneys in other contexts is likewise unethical.<sup>118</sup> However, determining that the conduct of the OCC and OGC is unethical is not the end of the analysis. The appropriate remedy for this ethical violation must be determined.

#### IV. RIGHTING THE WRONG: WHAT REMEDY BEST RECTIFIES THE HARM?

In discussing potential remedies, the most basic question is what court would have jurisdiction over an appeal of a denied I-130 petition; the two most likely contenders are the Board of Immigration Affairs (BIA)<sup>119</sup> or a federal district court.<sup>120</sup> Discipline for attorney misconduct, including ethical violations, in the BIA is governed under federal regulations and subject to DHS attorney discipline procedures.<sup>121</sup>

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118. First and foremost, other site visits by FDNS, including in the context of both the H1-B visa program and religious workers visa program, may also be unethical under the same reasoning as applied in the marriage-fraud context. *See supra* notes 113-15 and accompanying text (discussing similar on-site visits for I-129 visits); *see also* GAO-06-259, *supra* note 3, at 16 (finding FDNS investigated religious worker applications as part of a series of "fraud assessments"); *Questions & Answers: USCIS Publishes Final Rule for Religious Worker Visa Classifications*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov> (search "final rule religious"; then follow "Questions & Answers: USCIS Publishes ..." link) (last updated Nov. 21, 2008); *supra* note 75 (explaining H1-B work visa site visits). IRS agents also may be implicated when, once they have begun an audit, they conduct a surprise visit on the person being audited. *See Surprise Visit by IRS Likely Trouble*, WASH. TIMES (July 13, 2009), [http://www.washingtontimes.com/news/2009/jul/13/surprise-visit-by-irs-is-likely-to-be-trouble/?feat=article\\_related\\_stories](http://www.washingtontimes.com/news/2009/jul/13/surprise-visit-by-irs-is-likely-to-be-trouble/?feat=article_related_stories).

119. Once an alien's I-130 is denied, the applicant can appeal the USCIS decision to the Board of Immigration Appeals (BIA). *Questions and Answers: Appeals and Motions*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov> (search "questions and answers: appeals and motions"; then click on first link) (last updated Dec. 31, 2013).

120. A BIA decision is reviewable in federal court under the Administrative Procedure Act (APA). U.S. DEPT OF JUSTICE, BOARD OF IMMIGRATION APPEALS (2011), *available at* <http://www.justice.gov/eoir/biainfo.htm>. For more information about the APA, see generally 5 U.S.C. § 551 (2012) and ENVTL. PROT. AGENCY, SUMMARY OF THE ADMINISTRATIVE PROCEDURE ACT (2014), *available at* <http://www2.epa.gov/laws-regulations/summary-administrative-procedure-act>.

121. *See* 8 C.F.R. § 292.3(i) (2013).

In federal court, including the district courts in which aliens can appeal a denied I-130 petition,<sup>122</sup> the “appropriate remedy for the breach of an ethical rule must be based on the facts of each case.”<sup>123</sup> Potential sanctions for an ethical violation include the following: monetary sanctions like attorney fees,<sup>124</sup> disqualification<sup>125</sup> or disbarment<sup>126</sup> of the offending attorney, dismissal of the pending litigation,<sup>127</sup> reprimand or admonition,<sup>128</sup> probation,<sup>129</sup> or exclusion of the tainted evidence from the proceeding.<sup>130</sup> In determining which sanction is most appropriate in any given case, the court can look at a variety of factors.<sup>131</sup>

#### A. *The ABA’s Recommended Sanction*

In addition to judge-made factors, the ABA has developed a model to help courts determine which sanctions are appropriate for unethical conduct.<sup>132</sup> The ABA recommends that a court considering sanctions first answer four questions: “(1) What ethical duty did the lawyer violate?[,] (2) What was the lawyer’s mental state?[,] (3) What was the extent of the ... injury caused by the lawyer’s misconduct?[,] and (4) Are there any aggravating or mitigating circumstances?”<sup>133</sup> A violation of Model Rule 4.2 is considered a breach of the lawyer’s duty to the legal system,<sup>134</sup> and the ABA’s

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122. See *supra* note 120 and accompanying text.

123. *Faison v. Thorton*, 863 F. Supp. 1204, 1215 (D. Nev. 1993).

124. *In re Air Crash Disaster Near Roselawn, Indiana* on October 31, 1994, 909 F. Supp. 1116, 1124 (N.D. Ill. 1995). Monetary sanctions can include the court awarding the applicant all reasonable attorney fees and costs related to the litigation. *Id.*

125. *Faison*, 863 F. Supp. at 1216.

126. AMERICAN BAR ASS’N, STANDARDS FOR IMPOSING LAWYER SANCTIONS 14 (2005).

127. *Faison*, 863 F. Supp. at 1217.

128. AMERICAN BAR ASS’N, *supra* note 126, at 15.

129. *Id.*

130. *United States v. Grass*, 239 F. Supp. 2d 535, 546 (M.D. Pa. 2003).

131. These factors include: (1) the severity of the violation, (2) whether the attorney acted intentionally, (3) any prejudice the parties have suffered or will suffer due to the violation, and (4) the right of any party to be represented by counsel of their choice. *Faison*, 863 F. Supp. at 1215; *In re Air Crash Disaster Near Roselawn, Indiana* on October 31, 1994, 909 F. Supp. 1116, 1124 (N.D. Ill. 1995).

132. AMERICAN BAR ASS’N, *supra* note 126, at 9.

133. *Id.*

134. *Id.* at 10 (“Lawyers are officers of the court, and must abide by the rules of substance and procedure which shape the administration of justice. Lawyers must always operate within the bounds of the law, and cannot create or use false evidence, or engage in any other illegal

model would likely categorize the mental state of OCC and OGC in violating that rule as either intentional, the most culpable mental state,<sup>135</sup> or knowledgeable.<sup>136</sup> A finding of an “intentional” mental state would be appropriate if OCC or OGC knew that FDNS was breaking Model Rule 4.2 and still permitted FDNS to perform visits. However, if OCC or OGC sent FDNS on home visits, which they knew involved contacting a represented person, but did not know was in violation of Model Rule 4.2, then they would likely have acted only “knowingly.”

Assuming there are no aggravating or mitigating factors present,<sup>137</sup> under § 6.3 of the ABA’s model, “Improper Communications with Individuals in the Legal System,”<sup>138</sup> the recommended sanction for OCC and OGC attorneys would likely be suspension.<sup>139</sup> Given the severity of the ABA’s suggested penalty, OCC and OGC attorneys should think twice about letting FDNS agents conduct unannounced home visits.

### *B. Suppression of Evidence*

If a court found DHS attorneys had violated Model Rule 4.2, however, the attorneys would not be the only ones in danger of being thrown out of court; so too could the evidence that FDNS agents had collected. Court-ordered suppression of evidence has a

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or improper conduct.”).

135. *Id.* (“The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result.”).

136. *Id.* at 10 (“The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result.”).

137. However, if a government attorney had been sanctioned before for any offense, that might be an aggravating factor; if the attorney had a clean record, that could be considered a mitigating factor. *See id.* at 26-28.

138. *Id.* at 23 (“The following sanctions are generally appropriate in cases involving attempts to influence a judge, juror, prospective juror, or other official by means prohibited by law.”). Although this description is not completely analogous to the marriage-fraud home visit context, § 6.3 does reference communications to “an individual in the legal system,” which would include any party in a case, such as an alien petitioner. *Id.*

139. *Id.* (“Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.”).



fabled history in American jurisprudence,<sup>140</sup> and courts still retain their “inherent supervisory power” to exclude evidence when warranted by the circumstances.<sup>141</sup> In a court’s determination whether to exercise its supervisory power, it should look to see if such an exercise would accord with the underlying purposes of the power.<sup>142</sup> If the government’s right to present the evidence it collected from the applicant’s home outweighs any of the exclusionary rule’s three purposes, suppressing the evidence would be improper.<sup>143</sup>

In immigration proceedings, however, use of the exclusionary rule has been historically different.<sup>144</sup> In *INS v. Lopez-Mendoza*,<sup>145</sup> the Supreme Court held that the exclusionary rule was not to be applied in INS civil deportation hearings.<sup>146</sup> The Court came to this conclusion after weighing the social costs and benefits of excluding illegally obtained evidence in civil deportation hearings.<sup>147</sup> The Court found that there was no real social benefit to applying the exclusionary rule because applying the rule would have little deterrent effect on government officers, due to the low evidentiary burden faced by the government in proving that an alien was unlawfully present and the high likelihood that the alien would

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140. The Supreme Court, in *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Weeks v. United States*, 232 U.S. 383 (1914), first elucidated the idea that a court’s decision to exclude “otherwise relevant and probative evidence” could be a proper remedy to police misconduct that violates the Constitution. *United States v. Grass*, 239 F. Supp. 2d 535, 546 (M.D. Pa. 2003). The purpose behind the exclusionary rule is to deter future police misconduct while still preserving the role of the jury or judge in determining the ultimate issue. *Id.* Consequently, “the exclusion of otherwise admissible evidence is sanctioned only where the need to curb Government misconduct outweighs the public’s very substantial right to every man’s evidence.” *Id.* (citing *Elkins v. United States*, 364 U.S. 206, 216 (1960)). Suppression of evidence, as a judicial remedy, is not limited to constitutional violations. *Id.* Courts have an “inherent supervisory power,” which allows them to suppress evidence garnered through illegal conduct. *Id.*

141. *Grass*, 239 F. Supp. 2d at 546; see *United States v. Hasting*, 461 U.S. 499, 505 (1983).

142. *Hasting*, 461 U.S. at 505. The underlying purposes of the supervisory powers “are threefold: to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate consideration validly before the jury; and finally, as a remedy designed to deter illegal conduct.” *Id.* (citations omitted).

143. *Grass*, 239 F. Supp. 2d at 546.

144. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

145. *Id.*

146. *Id.*

147. *Id.* at 1041.

voluntarily agree to departure.<sup>148</sup> In contrast, the Court found that applying the exclusionary rule would result in a high social cost because releasing aliens unlawfully in the country due to an unreasonable search would allow them to further their offense of unlawfully being in the country.<sup>149</sup>

But *Lopez-Mendoza* has never been held to apply to all civil immigration proceedings—just to civil deportation hearings. Further, the justifications that led the Court to find the exclusionary rule not warranted in *Lopez-Mendoza* are not applicable to an APA-based review of an I-130 denial. First, in marriage-fraud cases, unethically obtained evidence could constitute either the entirety, or a substantial part of, the government's proof against the applicant.<sup>150</sup> Second, unlike unlawfully present aliens soon to be deported, there is no data to suggest that denied I-130 applicants would depart on their own voluntarily.<sup>151</sup> Therefore, unlike in the case of deportation hearings, the harm faced by the I-130 applicant from evidence obtained from home visits would be substantial.

In the marriage-fraud context, as distinct from deportation hearings, suppressing evidence would produce minimal social costs. Because most I-130 applicants are legally in the country and merely lack permanent residency status,<sup>152</sup> suppressing evidence in I-130 hearings would not further the crime cited in *Lopez-Mendoza* of allowing a defendant to remain unlawfully in the country. However, proponents of applying the *Lopez-Mendoza* rule to the marriage-fraud context could argue that a different offense, fraud, is being furthered through the suppression of evidence, and that, therefore, there is a social cost to suppressing the evidence obtained through home visits. Given the arguments on both sides of the debate, it is difficult to predict whether a court would apply the *Lopez-Mendoza* rule to I-130 home visits. Because courts could plausibly come down either way on the issue, it is worth exploring the possibility of a court applying the exclusionary rule in the context of I-130 applications.

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148. *Id.* at 1043-47.

149. *Id.* at 1047-50.

150. *See supra* Part I.A.

151. Frequently, I-130 applicants have bona fide connections to the United States—most commonly through marriage with a U.S. citizen. Accordingly, it is increasingly unlikely that denied applicants would sever all ties within the United States and voluntarily leave the country. *See supra* notes 30-36 and accompanying text.

152. *See id.*

Assuming *Lopez-Mendoza* does not apply, exclusion of the unethically obtained evidence would best serve the three goals underlying the exclusionary rule.<sup>153</sup> First, suppressing the evidence would provide applicants a remedy for the government's violation of Model Rule 4.2. Second, suppression would preserve judicial integrity by ensuring that the administrative record is free of unethically obtained evidence. Third, suppression would deter future unethical governmental conduct because government attorneys and officers would reconsider spending FDNS resources on investigations that would be ultimately excluded from judicial consideration. Furthermore, because the government's evidence as obtained has little probative value,<sup>154</sup> the government's right to present such evidence does not outweigh the goals of exclusion. However, nothing in this Note is meant to suggest that the government should not retain the right to present evidence from a home visit that complies with Rule 4.2. The restriction on the government is only this: act ethically.

If the government's evidence were suppressed, it would likely be of some benefit to I-130 applicants. During appeals of I-130 denials, the reviewing court is limited to only reviewing the evidence contained in the administrative record;<sup>155</sup> removal of home visits from the record could have a noticeable impact.<sup>156</sup> Excluding prejudicial evidence obtained from the home visits likely would weaken the government's case: predicating a higher probability of a court finding that the agency action was "arbitrary, capricious, an

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153. *See supra* note 142.

154. As explained earlier, due to the language barriers and inability of applicants to interact with investigators in productive fashion, these surprise home visits may be no more indicative of marriage fraud than evidence obtained through a standard fraud interview. *See supra* note 80 and accompanying text.

155. 5 U.S.C. § 706 (2012) ("To the extent necessary ... the reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.... In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.").

156. For an example of a court discussing USCIS reliance on evidence obtained through USCIS home inspections, see generally *Berrios v. Holder*, 502 F. App'x 100, 103 (2d Cir. 2012) ("USCIS relied on this fact of [alien petitioner's] presence at his ex-wife's home [as observed by USCIS agents on a surprise inspection of his home] on one occasion to deny the petition.").

abuse of discretion, or otherwise not in accordance with law.”<sup>157</sup> However, because Congress has delegated to USCIS the responsibility for enforcing the immigration laws of this country, the courts must afford the agency “[a]ppropriate deference”;<sup>158</sup> with that tough standard to overcome, it is still an uphill battle for immigrants to win an appeal of an I-130 denial.

### *C. Policy as Relevant to the Remedy*

Determining the appropriate remedial measure for an ethical violation necessarily requires some sort of policy determination.<sup>159</sup> Courts have flexibility in deciding what, if any, sanctions are appropriate in a given case.<sup>160</sup> Given that flexibility, policy can play a role in swinging a court one way or another on a particular issue.<sup>161</sup> In the case of FDNS visits to applicants’ homes, policy arguments can be made to support both sides of the issue.

In one sense, the potential remedies and sanctions a court could impose on USCIS attorneys could be a victory for immigrants. First, immigrants will be judged only by evidence that is collected ethically.<sup>162</sup> Additionally, interviews for which the applicant’s attorney is present should produce the “best” evidence since those applicants who appear suspicious due to nerves or language barriers will have a third party there to assist them in the interview. Finally, OCC and OGC will have an incentive to engage in ethical behavior. Considering that ethical rules are promulgated to ensure lawyers, as professionals, meet a certain industry standard to protect the

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157. 5 U.S.C. § 706(2)(A); *see also Berrios*, 502 F. App’x at 103 (removing governmental reliance on the USCIS home visit predicated the Second Circuit’s reversal of denial of I-130 petition).

158. *INS v. Miranda*, 459 U.S. 14, 19 (1982).

159. *See, e.g., supra* notes 140-43, 153 and accompanying text (explaining the underlying policy rationale for the exclusionary rule).

160. *See Faison v. Thornton*, 863 F. Supp. 1204, 1215 (D. Nev. 1993).

161. Policy and the law go hand-in-hand in a variety of legal subject matters. For an example of policy playing a role in a contracts case, *see A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000) (“It is well-established that courts will not enforce contracts that violate public policy. While courts are hesitant to invalidate contracts on these public policy grounds, the public interest in freedom of contract is sometimes outweighed by other public policy considerations; in those cases the contract will not be enforced.”) (citations omitted).

162. *See supra* notes 157-58 and accompanying text.

integrity and reputation of the profession,<sup>163</sup> and that government lawyers set an example for the rest of the country, OCC should be encouraged in every way possible to conform to the ethical standards.<sup>164</sup>

From the perspective of USCIS, however, discontinuing surprise marriage-fraud home visits would be a societal loss. Removing these surprise visits very likely would allow some instances of marriage fraud to escape notice. Keeping those immigrants who do not legally belong in the United States out of the United States is a legitimate public interest.<sup>165</sup> Admitting non-law-abiding residents does not benefit the country, and, once in the country, such residents may negatively impact public and national security.<sup>166</sup> The federal government always has an interest in ensuring compliance with established law.<sup>167</sup> However, because society expects the government to also abide by those laws, the government must balance its enforcement of the laws with society's expectation of a lawful government.

Even having only briefly considered both perspectives, it seems USCIS is better served by abandoning its practice of conducting unannounced home visits. Assuming that the relatively small number of fraudulent marriages are uncovered after the fraud interview,<sup>168</sup> there is little reason the government should engage in unethical conduct when it has legitimate investigative tools at its disposal.<sup>169</sup> The benefit of home visits is outweighed by the sanctions

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163. AMERICAN BAR ASS'N, *supra* note 126, at 9 (“In the legal profession, the community has allowed the profession the right of self-regulation. As stated in the Preamble to the ABA Model Rules of Professional Conduct[,] “[t]he legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”).

164. See LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 5 (3d ed. 2012).

165. See *Fraud Detection and National Security Directorate*, *supra* note 12.

166. *Id.*

167. See, e.g., *Mo., Kan. & Tex. Ry. Co. v. Hickman*, 183 U.S. 53, 59 (1901) (explaining that there is a “governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with its laws”).

168. See Burke, *supra* note 50. Because FDNS does not release data on the success rate of its site visits in uncovering marriage fraud, it is impossible to definitively say how useful these visits are in uncovering fraud missed during the initial interview. See *supra* note 11 and accompanying text.

169. For the powers afforded immigration officers, see generally 8 C.F.R. § 287.5 (2011).

a court could impose on the government, the loss of credibility of government attorneys in front of various tribunals, and the threat to legitimately married immigrants going through the process of becoming legal residents.<sup>170</sup>

#### CONCLUSION: MOVING FORWARD IN INVESTIGATING BENEFIT FRAUD

By authorizing unannounced home visits by FDNS, USCIS attorneys are violating Model Rule 4.2. Regardless of whether an I-130 applicant is represented by a lawyer or a layperson, USCIS is purposefully circumventing its legal channel of communication with the applicant via the representing party in order to “surprise” the applicant into revealing incriminating evidence. This practice is both unproductive and unethical, and USCIS must either modify or eliminate it. Until these home visits are discontinued, or performed with the consent of the applicant’s counsel or representative, USCIS is engaging in the same sort of deceitful behavior it seeks to prevent in applicants.

If this study of marriage fraud shows anything, it is that USCIS is going to great lengths, perhaps even greater than it knows, to catch fraud. While USCIS, FDNS, and the OCC and OGC lawyers that oversee USCIS cannot be criticized for a lack of diligence, that does not change the fact that the government appears to be wasting time and effort aggressively searching for something that only rarely can be found. Although there is no denying that those who perpetuate fraud should be held accountable for such deceitful acts, it does not follow that government attorneys should act unethically to ferret out the wrongdoers.

It should not be forgotten that there are ethical measures USCIS can take to investigate potential marriage fraud. Perhaps the simplest solution would be just informing the applicant’s counsel of an impending visit by FDNS before the fact; although FDNS would lose the “element of surprise,” those couples who do not actually live together will still have a difficult time in altering their purported home to project the idea that a married couple is living there. Alternatively, FDNS could use the home visit, once consented to, to

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170. See Nina Bernstein, *Wed in 1993, but Stuck in Immigration Limbo*, N.Y. TIMES (June 13, 2010), <http://www.nytimes.com/2010/06/14/nyregion/14marriage.html?pagewanted=all>.

gather valuable information for use by USCIS in subsequent interviews of the couple. Instead of using the home visit to “surprise” fraudulent couples and “catch” them in the act of lying, the home visits could be a way to gather valuable information for USCIS. FDNS could make a note of something as simple as what shampoo the couple uses and then convey that information to USCIS to use in questioning the couple individually about it in a subsequent interview. Such precise questioning would be difficult indeed for sham couples. As the situation presently stands, USCIS is only shooting itself in the proverbial foot: it is engaging in unethical conduct while learning very little, and whatever it does learn could potentially be suppressed or its attorneys will face the possibility of sanctions for such conduct. Right now the situation is lose-lose.

John F. Kennedy, quoting John Winthrop, once remarked that, as Americans, “[w]e must always consider that ... the eyes of all people are upon us.”<sup>171</sup> Kennedy continued, “[O]ur governments, in every branch, at every level, national, state and local, must be as a city upon a hill—constructed and inhabited by men aware of their great trust and their great responsibilities.”<sup>172</sup> The federal government, and its agents, should be models for the rest of the country. They should not engage in unethical conduct, especially not to combat a threat that is more myth than reality. Marriage fraud and, more generally, benefit fraud exist. But the price OCC and OGC are paying to uncover such fraud is not worth the cost.

*Erin E. Barrett\**

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171. President John F. Kennedy, Address at the Massachusetts General Court (Jan. 9, 1961), available at <http://www.jfklibrary.org/Asset-Viewer/OYhUZE2Qo0-ogdV7ok900A.aspx>; Governor John Winthrop, City Upon a Hill Sermon (1630), available at <https://www.mtholyoke.edu/acad/intrel/winthrop.htm>.

172. Kennedy, *supra* note 171.

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