Notario Fraud

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With the onset of immigration reform in 2001, types of immigration fraud have grown to an exuberant amount. According to the Office of Immigration Statistics (OIS), immigration fraud rose from 709 in 2004 to 1,065 in 2005, and convictions nearly doubled. The most common fraud plaguing immigrant communities is *notario* fraud. They utilize advertisements to advertise their services all over the community, hoping to lure in the vulnerable. They advertise themselves with suggestive titles such as visa consultants, immigration consultants, and *notaries* (Moore 2004, p.2). Unsuspecting to most, these individuals knowingly misrepresent themselves as qualified legal service providers. In order to further understand the growth of *notario* fraud in the United States, it will be necessary to explore its historical development, the implications of policy or lack thereof, and any current loopholes. In my argument, I will explore the origin of the term *notario*; identify what a non-lawyer is in the United States, how non-lawyers contribute to the issue of notario fraud, and what laws guide this practice. Additionally, consideration is given to the presence of inadequate representation and how it contributes to this issue. Lastly, I will identify and analyze the various loopholes present in federal and state law in order to present some solutions for the problem.

There are several kinds of fraud being committed. The first involves the immigrant, or the person seeking help. Within the Latino community, this fraud manifests itself as *notario públicos*. The importance of the term is key to how the consultants mislead their victims. For many civil law countries, a notary holds the abilities and duties of a lawyer. It is only in America that we have degraded the term to be a superficial certificate of authenticating various documents. Since the position is clerical, it holds no authority to navigate the law. The implications of this can lead to many individuals being deported and losing legal residency in the United States.

In other communities, such as Eastern European immigrant communities, the fraud manifests itself in travel agencies. For many foreigners, a travel agency provides visas for travel. Consultants are presumed to have the authority to aid foreigners in obtaining visas. Notary offices rendering these services are aware of the disparity between the community and the U.S. legal system. Unfortunately, it would be almost impossible for an immigrant to navigate the U.S. legal system without some prior knowledge of its common law tradition and modern American law. For most, they are misled by the very people they trust in their communities. Despite the two community examples, *notario* fraud plagues many immigrant communities including Chinese, Vietnamese, Indian, Bangladeshi, Romanian, Haitian, Jamaican, and Trinidadian immigrants (Unger, 2011).

The second way in which fraud is committed is by filing paperwork that is false or duplicating the same paperwork for multiple persons. This triggers the Department of Homeland Security to deport the person. Inadvertently this harm affects both the client and the immigration administration, which now must keep track of the trail of falsified

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documentation. Due to the volume of cases, the DHS maintains it is often easier to expedite deportations then it is to hold immigrants in detention centers. Both processes are very costly for the U.S. government. Still, this mass system of fraud persists and manifests through various loopholes. It is important to understand that many kinds of fraud are the intentional manipulation of any given system. This is often true of immigration fraud, but there are exceptions.

Take the case of Mr. Gary Ali and his family, who were victims of notario fraud. The family's story begins in 1996 when the family entered the country on a visitors' visa. After months, the visa expired. Mr. Ali did not qualify for work authorization, so the family could not apply for a new visa, and they unlawfully remained in the country. In 2004, Mr. Ali heard from people in his community about Maria Maximo. Supposedly, she could help him obtain legal work authorization in the United States. He paid $2,000 for her services and under her advice signed "legalization papers" which would grant him and his family legal status in the United States. Mr. Ali did not know that he was instead signing asylum applications. He was instructed to go to interviews as they were routine in the green card application process. Mr. Ali soon found out that the wrong paperwork had been filed. He was not able to withdraw the application and instead the DHS had already filed a final order of removal. Mr. Ali reported Ms. Maximo and she was charged in New York state and sentenced to 17.5 years in prison (Shannon, 2009, pp. 584-586).

Mr. Gary Ali and his family are just one of the many victims to fall prey to the scheme of a non-lawyer. In fact, the unauthorized practice of law in many immigrant communities is widely regarded as a reliable source of legal assistance. The problem lies both in the unauthorized practice of law and the authorized practice of law by non-lawyers. Non-lawyers, upon receiving accreditation, can represent individuals in immigration court. They can also render limited legal services. It becomes problematic when bad actors use this practice of law for their own personal gain. It becomes difficult for the individual and the community to decipher who are those in their communities trying to help them and those preying on their vulnerability.

It is estimated that on average 6 million low-income families living in these communities need legal assistance. About 1.3 million will actually be helped by organizations, such as the Legal Services Corporation, who provide legal aid to low-income households (Langford, 2004, p. 118). Unfortunately, organizations do not have the capacity to take all these cases. Most organizations are understaffed and overworked. They do not have the ability to help all those who need their assistance in these affected communities. That is why the immigrant poor are particularly vulnerable. Many are foreign-born and arrive with nothing more than the clothes on their back. Without money in the United States, legal aid is very hard to obtain. There are not many lawyers who are willing to work "pro bono," but that is part of the legal monopoly within the profession.

While many of these cases seem intentionally ill-intended, some of these non-lawyers "possess a genuine desire to help people but have harmed immigration claims inadvertently" (Olsen, 2012). Many *notario públicos* do not start up with the intention to harm the community. Some open practices hoping to aid their peers in obtaining visas and green cards. Unfortunately, due to their misfiling and non-legitimized practice of law, the implications for both the provider and the consumer can be severe.

Origins of notarios

The history and evolution of the *notario* is key to understanding how this type of fraud has manifested in immigrant communities. The discontinuity of the term lies in the differences between two legal traditions, civil law and common law. Most immigrants from Latin American and Eastern European countries migrate to the United States from civil law countries. Many are unaware of the legal functions of a U.S. notary public and how they differ from a *notario público*.

The term *notario* originates from Roman Law, the first source of law to define the functions of a notary. Malavet (1996) explains how the *scribae*, *notarii*, *Zotarii*, and *tabularii* were all public officials. A s*cribas* was responsible for the safekeeping of judicial documents. The *notarius* was skilled in shorthand writing and would take notes from oral dictation or discussions. The notary functions were dispersed among the different public and private officials. However, the role of the *notarii* became extremely important during the Middle Ages in Western Europe, as the *notarii* were instrumental in preserving Roman law in Western Europe: "Notaries drafted written documents as evidence of legal transactions following traditional Roman forms, which continued to influence the Germanic Lombard codes of medieval Italy" (Malavet, 1996, p.425).

The role of a notary was not introduced into common law until the late thirteenth century. Most of Europe had already developed the notary in many public and state sectors. The role of the notary for these countries was defined as a non-litigation, non-advocacy model of legal counseling. For English common law, notaries acted mostly under papal authority as conveyancers until 1533 when the power to appoint was transferred to the crown. The actual profession of a notary in English common law was not developed until the seventeenth century. By then, the profession transitioned into an individual appointed by the crown to oversee, attest, and certify documents for domestic and international trade (Malavet, 1996, pp. 425-426).

The discovery of territories in North America by the British influenced the development of the now modern-day common law tradition. While many common law traditions transferred into American culture, the initial need for a notary did not. Most sale agreements went through the courts and were witnessed by a judge. The colonies devised a system where judges acted as ministerial officials to bind the agreement. As colonies began exporting and importing from Europe, the need to have a notary public emerged. King Louis XIV appointed the first civil code notary in Louisiana in 1717 (Malavet, 1996, p. 427). Even at this point, the notary served a very clerical position. For the rest of American history, the role of a notary evolved into nothing more than a clerical position. The notarial function as a legal advisor was abandoned after the Civil War. Many states now have their own laws that regulate the functions of a notary public. However, the importance lies in the distinction between the two legal traditions.

The distinctions between common law and civil law

The significance of the role of a notary lies in the fundamental differences between two legal traditions—civil and common law. The civil law notary lives by two modern standards. First, they serve as a private legal professional who advises and drafts legal documents for private parties. They must maintain a permanent record of the transaction through the authentication power delegated to them by the state (Malavet, 1996). In the U.S. legal system, this role would resemble that of an attorney.

The importance of the term not only lies in its translation, but in the roles prescribed by the legal system. According to civil law, the role fits with the power of *publica fides,* which certifies that these individuals act with an authentic governmental power (in Latin American countries).

In the civil law tradition, the maintenance of transactions is important to symbolize the meeting of minds, known as the contract. It is what fundamentally adjudicates and legitimizes the power of the notary. This is the difference between a barrister and a solicitor, as Malavet (1996) points out. Another crucial aspect of the civil law legal tradition is that they are dependent on statutory regulations. The legitimate functions of a notary are essential in documenting law. When the Spanish and French colonized the Americas, they brought with them *notarios*. In Latin colonies, they were known as *escribanos reales* or *escribanos público*. The first kind served a sort of clerical role, much like the role developed in the North American colonies. However, the second type was screened and appointed (Malavet, 1996, p. 428).

The functions of a civil law notary are very important for the functioning of that society. Typically, the notary drafts important legal documents, authenticates the documents, and acts as a public records officer. They have the power to copy documents, adjudicating them with the same value as an original. Most serve as public functionaries and can only become a candidate for the position after graduating from law school and serving in an apprenticeship. Many countries even have national exams for such positions. Civil law notaries are expected to have legal specialization. They can render legal advice. In civil law countries, a notary cannot act as both a lawyer and perform works of litigation or advocacy, and render notarial services. They must pick one area of legal specialization and serve that field (Malavet, 1996, p. 454).

In Mexico, attorneys may apply to become notarios, but they must meet the requirements of the state. In Nuevo Leon, the requirements are as follows: must be Mexican by birth; at least 30 years old; have lived in the state for at least 3 years before applying; have served as an attorney for at least five years; not have been convicted of an intentional crime; and must complete an exam (Langford, 2004, p.120). The exam has two components: theoretical and practical. During the practical component, applicants are either required to sit in a mock courtroom with a jury or present an oral exposition. The sole purpose of the jury is to question the applicant and to test the applicant's knowledge of the laws and functions of a *notario*. The purpose of the exposition is to test the applicant's ability to link a scenario with relevant codes and laws. In addition to the formal requirements of the position, each state sets a capacity for how many *notarios* are needed. Therefore, positions are only allowed to be filled once vacant (Langford, 2004, p. 120). For many Latin American countries, notarios are highly respected based on the privilege of fulfilling such requirements.

In many Latin American countries, a *notario* is allowed to "perform quasi-judicial and other functions, including certifying and authenticating legal acts that they witness" (Langford, 2004, p. 116). The quasi-judicial function of a *notario* in civil law is critical. It is a major difference between a common law notary and a civil law notary. Under civil law, *notarios* are allowed to declare contracts and wills legally valid. Under U.S. common law, contracts and wills are normally disputed in court and a judge ultimately decides whether the document is valid or not. Since Latin American *notarios* are recognized as a highly qualified legal profession, they are subject to strict ethical standards. They must comply with all legal regulations within the territory or state in

which they practice. *Notarios* can be held accountable for malpractice and can be subject to professional, civil, and criminal liabilities (Langford, 2004, p.121).

In the United States, the process of becoming a notary is regulated by the states. In comparison to other countries, the process is fairly easy. While each state varies, the main requirements are as follows: application with basic contact information; a fee paid to the notary commission; and taking an oath. States like Iowa require that applicants be at least 18 years old with in-state residency. In Pennsylvania and California, it is required that applicants complete three hours of mandatory training. Under 57 Pa.C.S. § 322(b), Pennsylvania mandates that the course "must cover the statutes, regulations, procedures and ethics relevant to notarial acts, with a core curriculum including the duties and responsibilities of the office of notary public and electronic notarization. The course must either be interactive or classroom." The notarial acts of Pennsylvania state that there must be a physical presence for the document to be notarized; the duties of notaries encompass administering oaths, taking affidavits, taking acknowledgments, and attesting photocopies of certain documents. The statute outlines the kinds of identification acceptable for verification of identity and how to format a notarial certificate. The examination is about state requirements to become a notary, duties of a notary, and the ethical practice of verification.

According to Langford (2004), "the preparation and responsibilities of American notaries public stand in stark contrast to those of Latin American notarios. American notaries serve a 'purely clerical function,' limited primarily to administering oaths and witnessing the signing of documents" (p.122). In the United States, the function of a notary is to certify the identity of the signer of various documents. These documents include deeds, affidavits, and powers of attorney. The signatures on these documents make them legally binding, however, it is not the power of the notary to bind the document. Their duty is to ensure the identity of the signatory. Notarization of a document does not make it true. It simply ensures that the signer acknowledges the documents and attests to its truth.

The difference between a notary public and a *notario público* is incredibly important. First, both words imply two very different legal functions. Second, many individuals knowingly misrepresent themselves as *notarios* in order to attract clientele. Depending on the state, this business can be lucrative as the immigrant population can double or triple yearly. Most immigration providers promise to obtain legal status in the United States for their immigrant clients, although this act is illegal. *Notarios* are often trusted in their communities because of their cultural and linguistic familiarity. Many immigration law practitioners do not have this ability and further disconnect themselves from the immigrant poor. Langford (2004) claims that *notarios* further their credibility by "operating under official-sounding names, such as Greater Lowell Immigration Services Center, Inc., International Law Services, and International Law Offices" (pp. 120-122).

The major concern lies in current legislation and whether it is effective in combatting notario fraud. The U.S. government has a clear definition of the duties and functions of a notary public, but understanding how the U.S. government regulates immigration malpractice is necessary to ultimately combatting *notario* fraud.

Federal law and notario fraud

In the United States, on both federal and state levels, the attempt to respond to notario fraud abuse exists in statutory authority. The federal government uses statutory authority to create regulation which governs certain actions. Specifically, federal law regulates the actions associated with immigration practice and services. Under the Code of Federal Regulation (CFR), Title 8 addresses the regulation of "Aliens and Nationality." The statute begins by defining federal departments who shall enforce immigration practices. Those offices include U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), Department of Homeland Security (DHS), Executive Office for Immigration Review (EOIR), and U.S. Citizenship and Immigration Services (USCIS). It is the duty of these departments to work together to enforce this statute and the Immigration and Nationality Act.

Two important functions lie in the definition of an attorney and the term preparation. Both create the basis for which the federal government attempts to regulate the unauthorized practice of law. According to 8 CFR §1.2:

> Attorney means any person who is eligible to practice law in, and is a member in good standing of the bar of, the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, and is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law.

By defining the qualifications to be recognized as an attorney, the federal government is addressing the issue of the unauthorized practice of law. The importance of an attorney in the U.S. legal system is essential to the misconceptions involving *notario* fraud. The other term of importance is preparation. It is defined by the CFR as

> the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed DHS forms, by one whose remuneration, if any, is nominal and who does not hold himself or herself out as qualified in legal matters or in immigration and naturalization procedure.

It is clear by this definition that the preparation of immigration paperwork is the responsibility of a lawyer, not a notary public. Both definitions address the two fundamental issues with *notario* fraud. They create a clear understanding on the federal level about who a non-lawyer is and who is authorized to render legal services.

While Title 8 of the CFR creates a clear outline of legal immigration service providers, it also contains provisions which are problematic for many immigrant communities. According to 8 C.F.R. § 292.2, there are exceptions to the legal practice of the non-attorney in immigration law. The exception provides that "non-profit religious, charitable, social service, or similar organization" can apply for accreditation from the Board of Immigration Appeals (BIA) to assist immigrants in USCIS proceedings (Langford, 2004, p. 126). Under this provision, law students, accredited representatives, accredited officials, and foreign attorneys are allowed to serve as representatives and

can speak on behalf of the client in the DHS proceedings or EOIR proceedings. The purpose of this law is to set guidelines to prevent non-lawyers from profiting via legal services that they are not authorized to provide (Moore, 2004).

In order for an organization to apply for accreditation, they must first meet the qualifications required by the statute. The qualifications are outlined in 8 CFR §292.2(a) as:

> A non-profit religious, charitable, social service, or similar organization established in the United States and recognized as such by the Board may designate a representative or representatives to practice before the Service alone or the Service and the Board (including practice before the Immigration Court). Such organization must establish to the satisfaction of the Board that: (1) It makes only nominal charges and assesses no excessive membership dues for persons given assistance; and (2) It has at its disposal adequate knowledge, information and experience.

The process of getting an organization accredited also requires that applicants apply by submitting proof of the above-mentioned qualifications to a district director. The director then forwards a recommendation to the BIA. The qualifications set forth in this statute are for the organization and not the individual representatives. The obligation of the organization is to become accredited itself, and then its representatives. The most interesting requirement is that the organization must have at its "disposal adequate knowledge" and experience. As the requirements of individual representatives are explored, it will be seen that the law is vague in terms of the kind of experience and knowledge expected to practice as a non-lawyer.

Some scholars (Langford, 2004) claim that under 8 C.F.R. § 292.2 the federal government has attempted to regulate the practice of non-lawyers. By doing so, the federal government creates a principle that only competent legal service providers can assist with the preparation of all immigration documentation. According to the definitions explored earlier, the importance and necessity of an attorney is reinforced. Lawyers are necessary for the preparation of legal services in an immigration proceeding. This law makes it difficult for the vulnerable population, who cannot afford the legal services provided by attorneys, to obtain adequate representation. Langford argues that this is part of the legal monopoly of the profession. However, the reality is that "prohibitions on non-attorney practice are rarely, if ever, enforced" (p.68).

In order to better understand this issue of the non-lawyer practice, the remainder of 8 CFR §292.2 needs to be explored. Once an organization has been recognized by the Board, they can then apply for the accreditation of individuals as their representatives. These individuals must display good moral character and have both experience and knowledge of immigration and naturalization law. The organization must apply on behalf of the individual. According to section (e) of 8 CFR §1292.12, the representatives must

> [have] the character and fitness to represent clients before the Immigration Courts and the Board, or DHS, or before all three authorities...Is employed by or is a volunteer of the organization; Is not an attorney...Has not resigned

> while a disciplinary investigation or proceeding is pending…Has not been found guilty of, or pleaded guilty or nolo contendere to, a serious crime…in any court of the United States…Possesses broad knowledge and adequate experience in immigration law and procedure. If an organization seeks full accreditation for an individual, it must establish that the individual also possesses skills essential for effective litigation.

As defined by this statute, federal law identifies "character and fitness" as an evaluation of an individual's criminal background to assess prior acts of dishonesty. This can include the neglect of professional, financial, or legal obligations. Overall, the government wants to ensure that those who are appointed this power can be responsible for it. It seems there is an association between power and dishonesty among the practice of non-lawyers. Being appointed this power is a privilege. It is never once stated in the statute that the individual receiving accreditation will undergo an examination to test their knowledge of immigration law. In fact, the statute never mentions how this knowledge will be verified.

What becomes problematic is that under this privilege, those accredited "are immune from state-level prosecution for the practice of immigration law. [While], vast numbers of unaccredited *notarios* are subject to the reach of state legislation" (Langford, 2004, p. 128). Langford suggests that this statute poses unintentional consequences for states to deal with. Some will argue that it promotes the unauthorized practice of law, as it creates the possibility for *notario* fraud to exist. Many states have taken strong stances on the issue in regards to immigration. However, states have some very practical limitations. First, the state attorney general can only prosecute under civil claims/injunctions, and they cannot pursue the individual when the claim becomes default or if the individual flees the state. The shortcoming of the law is problematic for many state departments.

In 2011, under the Obama Administration, the Department of Homeland Security, the Federal Trade Commission, and the Department of Justice created a campaign to stop the unauthorized practice of immigration law (Gietl, 2013, p. 69). The program tried to utilize enforcement and education to reduce various types of immigration fraud. The programs provided information about who to contact with complaints, and where to find trustworthy legal services, including the organizations accredited by the BIA (Gietl, 2013, p. 69). The federal government wanted to create awareness, so the vulnerable population would be better informed on the process of obtaining legal representation before the USCIS. However, immigrants had difficulty in determining persons authorized to practice. Various factors can contribute to this uncertainty. A major barrier is language. While many immigrants speak fluently in their languages, some face challenges of illiteracy. They may not be able to understand the paperwork that is presented to them, and this is a serious concern for those trying to help these individuals, and those trying to harm them.

In June 2013, the U.S. Senate passed a comprehensive immigration reform bill, known as S.744. This bipartisan collaboration had sections aimed at combating fraudulent scams against immigrants (Gietl, 2013, p.70). Under Section 3707, the Congress "amends the federal criminal code…to increase criminal penalties" for immigration fraud, specifically schemes to provide fraudulent services. The repercussions under the criminal code, 8 U.S. Code § 1546, state that the individual shall

be fined or imprisoned for not more than 25 years. The code breaks down the various years of imprisonment depending on the intentions of the crime. For incorrect paperwork, the fine can be up to $10,000. Under Section 3708, Congress authorizes the Attorney General to "commence civil action to enjoin any fraudulent immigration services." It is very clear on a federal level that interfering with the immigration process through the unauthorized practice of the law may have serious repercussions under civil and criminal law. Unfortunately for immigrants, these repercussions also include them, as violating U.S. immigration law calls for their immediate deportation under Section 3709.

In other efforts by the federal government to crack down on notario fraud, the General Assembly of Tennessee adopted Public Chapter Number 665. This chapter prohibits the advertisement of the term "*notario público*" due to possible misinterpretation. The bill was passed by the Tennessee House of Representatives in 2002. Part 4 of the bill serves to define consumer protections in regards to notary publics. The Tennessee House Bill reiterates the definition of a notary public in the context of U.S. law. Following the 2013 initiatives, this document served as an outline for states to create laws defining the duties of notary publics. Under House Bill 2520, Section 8-16-402 states that

> A notary public who is not an attorney licensed to practice law is prohibited from representing or advertising that the notary public is an immigration consultant, immigration paralegal or expert on immigration matters unless the notary public is an accredited representative of an organization recognized by the Board of Immigration Appeals. Pursuant to Title 8, Part 292, Section 2(a-3) of the Code of Federal Regulations (8 CFR § 292.2(a-e)) or any subsequent federal law.

The bill makes it clear that any notary public acting as an immigration consultant is violating the CFR and their duties. Notary publics in the United States are not authorized to practice immigration law. Instead, the CFR creates a guideline for an accreditation process for organizations seeking to provide legal services to immigrants.

While the federal government has attempted to alleviate the financial burden of immigration law, they have also created a fundamental problem for states to deal with. Since states must obey federal law, they must allow for the practice of immigration law by non-lawyers. This automatically makes any individual or organization accredited by the CFR authorized to practice immigration law and exempted from regulation by the state. This creates loopholes for *notario* fraud to exist.

Loopholes

Notario fraud has been an issue that the federal government has tried to mend since 1975. While many important regulations were adopted by the Federal Trade Commission and other offices, these regulations only address two issues -- the unauthorized practice of law and the prohibition of deceptive business practices. However, there are many other issues that allow *notario* fraud to manifest in immigrant communities. These are two significant loopholes that exist on a federal level: non-lawyers and inadequate representation.

Notarios, the unauthorized practice of law, and the non-lawyer

Notario fraud is one of the most underreported types of immigration fraud. There are more statistics on the number of people deported each year than there are for the various types of immigration fraud. One reason *notario* fraud is underreported is because most immigrants are detained before they realize that they were a victim of fraud. In 2012, during President Obama's administration, the United States had one of the highest deportation rates in modern times. Approximately 409,849 people were deported by the ICE and only 35-percent of those deported were caught at the border. Further, 55-percent of the people were removed because of criminal convictions (US ICE, 2016). This data is alarming because violations receiving criminal penalties include overstaying a visa, filing for the wrong visa, or even filing paperwork late. Most of these crimes are committed by the *notario*, but it is the immigrant who faces the consequences.

As a result, victims of *notario* fraud face many irreparable damages. For many, they lose important original documents. If their paperwork stays behind with *notarios,* and they are unable to recover these documents during deportation hearings, their case may be harmed. It can also prevent them from ever filing as an asylum seeker. Additionally, most do not have the money for legal counsel, and illegal aliens do not have a right to legal counsel. Many organizations provide services for free or minimal cost. Even so, they are often swamped with a maximum caseload and cap the amount of cases they work on for a year. The non-lawyer exists to help attorneys file paperwork and to alleviate the financial burden of legal assistance. While many act in good faith, there are those who prey on the immigrant population.

Some of the major issues associated with *notario* fraud stem from the difficulties of determining who is allowed to practice law. On state levels, there are non-lawyers who are authorized to practice law and those who are not. This could be confusing for those who are unaware of this. It also creates a concern for competence. According to Gietl (2013, p. 70), there are problems with the EOIR's recognition and accreditation system. There is not a standardized test or a minimum set of knowledge. A representative may be accredited, but they can still be incompetent in immigration law. That would inadvertently hurt the immigrant and possibly lead to the same consequences of a *notario*.

Even lawyers are not exempt from the unauthorized practice of law. Lawyers acting in good faith can render legal advice or counseling that is unethical and illegal. Many states have adopted policies to protect their citizens from the unauthorized practice of law. These policies are designed specifically to safeguard citizens against persons not trained or licensed for such work. In the case of *Spivak v. Sachs*, 16 N.Y.2d 163 (1965), a California attorney was found guilty of participating in the unauthorized practice of law in New York state. He had counseled clients about important marital rights, jurisdiction and alimony, and custody issues (Shannon, 2009, p. 593). Attorneys acting outside their jurisdictions can mishandle a legal matter. Each state also operates under their own set of laws and statutes. An attorney acting outside of his/her jurisdiction can render incorrect legal advice. This will, in turn, only harm the individual. While attorneys are often regarded as the appropriate counsel for legal matters, they must be accountable for the harm they cause when they are acting unethically.

The issue of the non-lawyer is part of a bigger problem—inadequate access to competent legal counsel. Under federal law, no immigrant is guaranteed representation. For immigration proceedings, there are three options: (1) private immigration attorney, (2) pro bono immigration lawyer, and (3) nonprofit non-lawyer. Since resources are limited and often costly, immigrants resort to cheaper alternatives in their neighborhoods. These bad actors usually do one of two things: collect fees and promise to file paperwork but never do; or file an application for immigration relief, fraudulently claiming that the non-citizen is eligible for immigration relief even though he or she is not eligible.

The existence of the non-lawyer in immigration services seems to harm the immigrant more than help them. Not only is competent representation an issue, but there is confusion between what constitutes legal practice of the law and who is authorized to practice it. Oftentimes, many states have different provisions for what they consider legal practice of law by non-lawyers. Without a clear consensus across the United States, the issue of *notario* fraud continues to exist. As such, state initiatives can be highly ineffective. Most states lack the authority to enforce judgement on certain issues regarding *notario* fraud.

Perhaps the issue goes back to the common law system in general. Under common law, enforcement lies on a doctrinal level, and "'a fundamental problem arises from courts' inherent power to regulate the practice of law, and their exercise of that power to ban the unauthorized practice of law (UPL) by nonlawyers without respect to its quality or cost-effectiveness" (Rhode, 2016, p.431). Common law relied heavily on the judiciary to enforce laws and statutes in the United States. States have to wait for an issue to become a civil injunction before they can act. States are limited to enforcing the issue with harsh penalties. Most of these penalties cannot be implemented until numerous complaints have been filed by consumers and the state conducts their investigation. This is a burden upon the states and makes enforcing the issue unfair.

A non-lawyer becomes an actor as a consequence of inadequate representation. Without adequate and affordable representation, vulnerable immigrants flock to these "bad actors." For many families, the desperation of restoring or gaining legal status in the United States leads to the irreversible consequence of removal. Many cases across the country have dealt with the issue of the unscrupulous "service" provider and the lack of adequate representation.

Addressing issues of inadequate representation

While the presence of a non-lawyer can be problematic, the lack of competent legal representation by a lawyer may also pose a problem. Since lawyers are authorized to practice the law and can counsel their clients, they represent a more competent form of representation. The role of a non-lawyer in immigration services is to file paperwork for the client. It is an unauthorized practice of the law when they begin fixing errors on paperwork or advising on which forms to sign. However, the non-lawyer is a much more affordable option for most immigrants. The fees associated with an attorney can be astronomical. They are not affordable, and the lack of affordable competent legal counsel drives immigrants to their cheaper counterparts. President Jimmy Carter once said the U.S. has "the heaviest concentration of lawyers on earth . . . but no resource of talent and training . . . is more wastefully or unfairly distributed than legal skills. Ninety

percent of our lawyers serve ten percent of our people. We are overlawyered and underrepresented (Rhode, 2016, p.441).

This poses an interesting question in terms of representation. While the U.S. may be "overlawyered," there is a definite lack of immigration representation. In 2016, the total number of lawyers in the U.S. was 1,315,561 (ABA, 2017). On the other hand, the total immigrant population was almost 43.7 million (11.4 million unauthorized immigrants) (Pew, 2015). In comparison to the number of lawyers who may or may not practice immigration law, the United States is clearly under lawyered in respect to its immigration population. This weighs heavily on the immigrant poor. The U.S. legal system caters to those who are knowledgeable of it and those who can afford to navigate it. This is the most important issue with current policy.

Most people who cannot afford legal counsel resort to self-help. There are several factors surrounding the problematic nature of pro-se services. For one, there is not sufficient information available for individuals to navigate the U.S. legal systems. On top of that, the ABA has made numerous attempts to block the publication of self-help books. These books are not in the best interest of the profession. Whether intentional or not, by not providing affordable legal counsel or materials to become informed on legal matters, the ABA promotes the unauthorized practice of law and contributes to hindering the accessibility of adequate representation (Rhode, 2016, pp. 434-435). The goal of states and grassroots organizations should be to protect consumers from incompetence. Providing adequate legal representation can come in many forms and does not need to hurt the law profession. Change must be made to the resources or the kinds of representation available.

Immigrants also have other barriers, like language. Self-help guides cannot accommodate all the different languages. There is also an inherent difference between the common and civil law legal traditions. Unger (2011) reasons that the unmet demand for affordable immigration services has created this "vulnerable population" (p. 432). For many immigrants, the language barrier and the vast differences between the civil and common law traditions create inherent difficulties. These are issues that legal counsel does not account for (Unger, 2011, p. 433). There is often a major language barrier. The natural instinct is to stick with those familiar to the neighborhood, those who have a reputation for helping the community. Those often tend to be "notarios."

Inadequate representation also "involves courts' restrictive standards for determining when court-appointed counsel is available. The result has been to place on unrepresented litigants an unrealistic burden of showing that the absence of a lawyer makes a legal proceeding fundamentally unfair" (Rhode, 2016, p. 431). Unfortunately, this burden falls on those who do not have the choice to hire someone more skilled. More often than not, immigrants cannot find legal counsel for their legal proceedings and are sent back to their home country. There are not enough immigration lawyers for all who need them. Most often the lawyers who do represent clients work for privately funded organizations and cap their clientele for months at a time. Yet many clients do not have the time to wait for adequate legal representation to become readily available. Instead, the solution is to hand the case to a rookie or to go without representation. Both options harm the immigrants and create a disadvantage for them.

It is so easy for fraud to occur since the vulnerable population has no one to turn to but their community. The solution might be more "government training, accreditation, and regulation of immigration consultants, coupled with increased legal

authority and profitability for the profession," which "would result in an influx of competent and accountable individuals to meet the needs of immigrant communities" (Unger, 2011, p. 428).

This could be the beginning of reform for immigration law as a whole. The issue arises in the loopholes that continue to exist. By addressing problems that arise from a non-lawyer presence and the variance between states, *notario* fraud can cease to exist. It can also boost the overall law profession by creating more jobs. Creating a competitive environment will boost the profession financially. Various states have already created initiatives to deal with the problems mentioned above. Some have been successful, while others are still coping with the effects of non-lawyers authorized to practice law.

Initiatives by states

Federal and state laws are crucial to the regulation, prevention, and eradication of *notario* fraud. Immigration fraud is under-reported and under-enforced and has become increasingly more problematic within the last decade. Without any legal reparations, the actions taken by *notarios* seemingly becomes legitimized and profitable. Current enforcement relies heavily on post facto enforcement, or hindsight enforcement (meaning that an offender has already committed an injustice before any legal ramifications will be taken). Enforcement of the law is an important step towards eliminating crime. However, without successful preventative laws, crime will manifest beyond the control of enforcement. Simply, if too many loopholes exist, the law is a failure. In an attempt to crack down on *notario* fraud, many states have taken action by enacting laws to prevent and prohibit the unauthorized practice of law, some more successfully than others.

While federal regulation exists to accredited non-lawyers, states have also created initiatives to better handle their immigration demands. The three states outlined in this chapter have a large immigration population and have made efforts to deal with the lack of representation they face. In dealing with the high demand for immigration needs, some of these states have created non-lawyer positions to aid the immigration process.

California

California was the first state to pass legislation that recognized and regulated the interaction of non-attorney services in 1986 (Moore, 2004, p. 11). California took a very big step towards defining the unauthorized practice of law by first creating provisions limiting the services of a non-lawyer. Under California's Business and Professional Code of 1997, it was outlined that an immigration assistant (an individual authorized under state law to provide services in immigration matters) could complete forms for clients by translating and transcribing their answers. Their services could include securing supporting documents, notarizing signatures, and assisting in the preparation and submission of such paperwork. However, under the law, it was forbidden that any immigration assistant provides legal advice or counsel on an immigration matter or on select forms. This restriction separated immigration assistants from those authorized to practice immigration law. Other states begin to also define permitted roles for these non-lawyers.

Under current legislation, BPC §22440, an immigration assistant, now referred to as an immigration consultant in the state of California must

> ...pass a background check conducted by the Secretary of State [including every person engaged in the business or acting in the capacity of an immigration consultant]...The Secretary of State shall disqualify an individual from acting as an immigration consultant for any of the following reasons: Conviction of a felony; Conviction of a disqualifying misdemeanor where not more than 10 years have passed since the completion of probation...; or Failure to disclose any arrest or conviction in the disclosure form...

The state of California has created a process to become an immigration consultant in order to better regulate the services of a non-lawyer. With the legitimized practice of law by a non-lawyer comes the unauthorized practice of law by non-lawyers. In efforts to create a non-lawyer immigration service provider, states inadvertently created breeding grounds for the unscrupulous service provider. In California's best effort to curb *notario* fraud they created laws that not only limited services provided but the communication involved with immigration assistant. The state required that contracts be created between providers and consumers to outline the services that will be rendered, the cost of the services, as well as the option to terminate the contract after 72 hours of signing (Moore, 2004, p. 13). The contract, according to BPC §22442, shall state

> (1) The services to be performed...(2) The cost of each itemized service to be performed. (3) There shall be printed on the face of the contract...a statement that the immigration consultant is not an attorney and may not perform the legal services that an attorney performs. (4) The written contract shall list the documents to be prepared by the immigration consultant...(5) The written contract shall state the purpose for which the immigration consultant has been hired...(6) The written contract shall include a provision that informs the client that he or she may report complaints relating to immigration consultants to the [EOIR]...

The restrictions concerning communication were created to limit the possibility of fraud. Especially since the terms and conditions of such services are so critical in preventing all kinds of immigration fraud.

Aside from contracts, California has created some interesting statutes to combat *notario* fraud, some of which include signage, advertisements, and notices. For any business operating as, or with immigration consultants it is required that they hang a sign and display notices, in both English and the native language of the clientele, stating the name of the office and a full disclaimer stating that the "immigration consultant is not an attorney." Under state law, it is further required that the letters appear in a height of at least one inch. By creating signs and notices, the client and the immigration consultant are made aware of the services provided and rendered at the business location. In other efforts, the state made it clear that documents and signs are posted in both languages with literal translations to prevent any misinterpretations by non-English speakers. It is prohibited that the immigration consultant publishes any advertisements whether verbal or visual with the intent to mislead their services. Advertisements containing the directed translation or loose translation of "*notario*

público" are prohibited and a violation of state law. Any person who violates this law shall be subject to a civil penalty up to $1,000.

While communication is important in creating an honest environment, so are provisions concerning the fees. It is required that when posting an advertisement, the provider also posts their fees for the services they can legally provide. Under federal law, the fees associated with the services provided by an accredited immigration service provider could not exceed a certain amount. California initiatives allow fees to be charged but they must be reasonable and money on behalf of the client be kept in a retainer fund. This is important in combating the fraud because fees are known and agreed to. It is also required that the fees are reflected in the contract and that the client have a copy of this. Fees cannot be changed after the document is signed (Moore, 2004, p. 13).

The last provision of California's law against the unauthorized practice of law includes the penalties associated with such violations. Under California law BPC §22446.5, "A person claiming to be aggrieved by a violation of this chapter by an immigration consultant may bring a civil action for injunctive relief or damages, or both." If the judge does find that the defendant violated any of the provisions of Chapter 19.5, then actual damages shall be awarded. Unlike many other states, any other party who claims a violation of this chapter may bring a civil action of injunctive relief on behalf of the general public (Moore, 2004, p. 14). Under most state statutes, the first violation is considered a misdemeanor while any subsequent violations can be charged as a felony (Ontiveros-Chavez, 2016, p. 3).

New York

New York, like California, has created initiatives to help combat *notario* fraud. In spring of 2009, the New York Attorney General began an investigation into the American Immigration Federation, Inc. (AIF). The state had found that the "not-for-profit" organization was collecting annual membership dues from about 20,000 customers believing that the annual fee would reduce their legal assistance cost. Instead, the organization was scamming their members by charging an annual membership fee and charging for additional legal services rendered. Some of these "additional services" included advising individuals which immigration forms to complete and the best course of action for their immigration matters (Olsen, 2012, p. 394). What was incredibly concerning was that neither AIF nor their president were licensed to practice law. According to New York Judiciary Law section 478, it is prohibited for any person not admitted as an attorney in the state of New York to render legal services, including the preparation of legal instruments of all kinds, advising clients, and all action taken in connection with the law (Shannon, 2009, p. 590).

Under New York General Business Law Article 28-C, the state outlines the duties and responsibilities of Immigrant Assistance Services. Section 460-A defines a provider as "any person, including but not limited to a corporation, partnership, limited liability company, sole proprietorship or natural person, that provides immigrant assistance services." This article of the law would only apply to these individuals and excludes

> any person duly admitted to practice law in this state and any person working directly under the supervision of the person admitted; any not-for-profit tax exempt organization that provides immigrant assistance without

> a fee or other payment from individuals or at nominal fees as defined by the [BIA], and the employees of such organization when acting within the scope of such employment; any organization recognized by the [BIA] that provides services via representatives accredited by such board to appear before the [USCIS] and/or [EOIR], that does not charge a fee or charges nominal fees as defined by the [BIA]; any authorized agency under subdivision ten of section [371] of the social services law and the employees of such organization when acting within the scope of such employment; or any individual providing representation in an immigration-related proceeding under federal law for which federal law or regulation establishes such individual's authority to appear.

New York State is unique in that it defines the role of an immigration assistant as someone other than a legally recognized person to practice the law. Instead of outlawing "immigration assistants," the state attempts to regulate the practice by setting specific guidelines to safeguard against fraud. States like California and Washington have adopted very similar methods to maintain a balance between non-lawyers and attorneys.

In 2004, with a local ordinance, New York's Consumer Affairs prohibited immigration assistants from implying that they can or will obtain special favors from the USCIS, advertise being a lawyer or another language equivalent, and or give any legal advice to their clientele (Ontiveros-Chavez, 2016, p. 4). Furthermore, it grants the consumer or client rights by ensuring that a contract is drafted in both English and the client's native language. The translation must receive a notarized transcript that it was done accurately. The contract must also state the client's right to cancel the agreement within three business days without penalty. It is the duty of the provider to retain copies of all paperwork, contracts, documents drafted or signed for a minimum of 3 years. These requirements have since been adapted into New York state's General Business Law. Like California, New York does require signs be posted stating

> The individual providing assistance to you under this contract is not an attorney licensed to practice law or accredited by the Board of Immigration Appeals to provide representation to you before the United States Citizenship and Immigration Services, the Department of Homeland Security, the Executive Office for Immigration Review, the Department of Labor, the Department of State or any immigration authorities and may not give legal advice or accept fees for legal advice. For a free legal referral call the Office for New Americans Hotline at (phone number of the Office for New Americans). To file a complaint about an immigrant assistance service provider call the Office for New Americans Hotline at (phone number of the Office for New Americans), the New York State Office of Attorney General at (phone number of the Office of Attorney General), or your local district attorney or prosecutor's office at (phone number of the local district attorney).

This sign must hang outside of the business and be at least 11 inches by 17 inches in a font not less than 60-point type. It must be noted that these requirements only apply to

the individual not legally authorized to practice law. Therefore, this requirement does not apply to not-for-profit organizations offering immigration services. The business must also have a sign that has the fees associated with the services provided and underneath that sign, it must read, “You may cancel any contract within 3 business days and get back your documents and any money you paid.”

New York and California have passed laws to regulate the practice of non-lawyer immigration service providers. The service providers are required to register with the state in order to provide non-legal assistance in immigration matters. These statutes attempt to limit the services provided and the fees associated with the services. Instead of rejecting the role and function of an immigration assistant, the state has maintained ways to regulate and enforce policy to deter *notario* fraud. Under the New York Immigration Service Providers Law, it is illegal for non-legal assistance to give any legal advice. For some states, this includes selecting documents. In New York, the interpretation of the law allows clerical service, including completing forms, translating a document, and mailing them. However, under the law, it does not specify nor include selecting documents as a clerical function. In order to make the issue enforceable, the state has introduced stricter penalties for violators. In 2012, Governor Cuomo signed an executive order making the unlicensed practice of law a felony (Gietl, 2013, pp. 68-69).

Travis B. Olsen, an immigration attorney, claims that “seeking to regulate *notaries* instead of prohibiting their practice demonstrates a failure to capture the realities of their business and the unique circumstances of their immigrant clients” (Olsen, 2012, pp. 400-401). Perhaps by allowing this form of non-legal counsel the states of New York and California are engaging in a slippery slope. Instead of creating exceptions for non-lawyers, perhaps the agenda by states should be to promote the practice of immigration attorneys and advocate for better more qualified legal representation.

Texas

Texas, like many other states, has had to deal with the deceptive practices of non-lawyers. Since 2002, the Texas Office of the Attorney General has used state consumer protection laws to shut down more than 75 unauthorized legal service providers (Fisher Flores, 2015, p. 28). Interestingly enough, consumer protection laws were first enacted in 1973 under the Deceptive Trade Practices Act (DTPA). The Act makes false, misleading, and deceptive acts in trade and commerce unlawful. Under the law consumers who have been wronged can claim economic damages, court costs, and attorney fees. This includes any monetary losses or the cost of repair. Furthermore, the DTPA is a no-fault statute, meaning the consumer does not have to prove the business intended to deceive the consumer or intended to violate the law. However, if consumers can prove the defendant acted intentionally, the consumer may collect up to three times the amount of economic and mental anguish damages (Fisher Flores, 2015, p. 29).

Under Texas State Law § 406.017, it is illegal for a notary public to explicitly state or imply that they are attorneys recognized to practice law in the state. It also prohibits a notary public from advertising or collecting fees for preparing immigration documents, or representing in the interest of another in judicial and administrative proceedings. Section 4 prohibits the use of the term “notario” or “notario *público*” from being used on signs, pamphlets, stationery, or other written communication or by radio or television. Like California and New York, a sign must be hung outside the business stating that the

provider is not attorney and cannot provide legal advice. What makes Texas different is that a non-lawyer cannot accept fees and it is prohibited under the law. It seems like California and New York have adopted the presence of a non-lawyer in immigration filings while Texas has not. Texas uniquely allows the consumer to sue the provider for any damages caused economically and mentally. This is interesting because under current federal law, immigrants have very little rights.

Since the early 2000s Texas has been successful in shutting down businesses conducting notario fraud and participating in the unauthorized practice of the law. The state's first big crackdown was on Yolanda Salazar Perez, the Director of the Nueva Union Biblical Institute/Church in Houston. Perez falsely prepared legal documents for at least 300 members of the Church and claimed to have worked for the U.S. Immigration and Naturalization Service. Earlier in 2005, Perez had been found in violation of Texas state law against the unauthorized practice of law. At the time she was operating multiple businesses serving up to 4,000 clients (Olsen, 2012, p. 395). It was found that Perez and several other accomplices had violated several provisions under the Deceptive Trade Practices Act, including

> False, misleading, or deceptive acts or practices in the conduct of any trade or commerce; Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services; Causing confusion or misunderstanding as connection, or association with, or certification by , another; Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not; Advertising goods or services with intent not to sell them as advertised; Failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed (Olsen, 2012, p. 396).

As already mentioned, in the state of Texas it is illegal for anyone not licensed to practice law in the state. Practicing law includes filing or assisting in immigration forms and providing legal advice.

In *State of Texas v. Just for People* (2013), the court was able to set guidelines for private rights of action against unlawful immigration service providers and laid the groundwork for the Attorney General for private causes of action. Immigrants under the DTPA can sue as a private action case with private representation. The goal is that the financial punishment will discourage and curb *notario* fraud. Often immigrant populations are vulnerable to different kinds of fraud because they lack resources and knowledge to guide them. They also are fearful of the law thinking that they will get sent back to their countries just by seeking information. It is the job of the state and the Attorney General to enforce the law and seek justice for these populations (Fisher Flores, 2015).

Under these statutes, the state is required to prove an unfair trade practice. They must show that the defendant(s) chose immigration forms on behalf of the client, in this

way they may have misled the individual in filing the incorrect form. Sometimes just proving that the defendant claimed to be an attorney or claimed to be qualified to perform the service is enough to qualify as a deceptive practice under these statutes. Most often the state will present evidence that the defendant advertised him/herself as a *notario*. However, if an act is defined a *per se* violation then the prosecution will not have to prove deception since it is understood that the defendant was misleading the consumer (Fisher Flores, 2015).

Conclusion

Notario fraud is an issue that continues to prevail, despite the efforts of state initiatives and federal law. Currently, federal law fails to address some of the serious implications immigration fraud has on the immigrant community. While the law makes attempts to regulate businesses accredited to provide immigration services, it does not set realistic or comprehensive guidelines for determining the qualifications of the individuals providing the services. State laws also fail to distinguish the differences between a non-lawyer and an accredited non-lawyer. Most states mitigate immigration concerns by allowing affordable service providers to serve as immigration consultants.

Most states' initiatives target different issues that contribute to the unauthorized practice of law. All the states explored in this paper have banned the use of term *notario público* or *notario*. This addresses the different meanings of the term under common and civil law. It is an important and critical first step toward combating notario fraud. However, fraud evolves to accommodate any present loopholes. The loopholes that exist both at a federal and state level include non-lawyer regulation, inadequate representation, incompetent representation, and post-facto enforcement. It is important that laws be made to prevent *notario* fraud from manifesting and to curb the temptation of participating in unscrupulous business practices.

Almost 6 million people in immigrant communities need some sort of legal assistance. Unfortunately for them, only a fourth will be helped. The remaining could be taken advantage of by fraudulent service providers. It is our duty as a nation of immigrants to protect the rights of all citizens and all future citizens from the harms of fraud. It should be a basic right that all people are protected by the law from intentional harms that can otherwise be prevented through more legislation. The burden falls on the U.S. government every time a deportation hearing is issued and an immigrant is deported. This process is financially expensive. Instead of trying to deter *notario* fraud, the United States government needs to make clear initiatives on preventing this form of fraud from existing.

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