

# Is There a Malpractice Claim for Negligence That Causes the Government to Discover and Deport an Illegal Alien?

A recent New York intermediate appellate court decision considered whether legal advice leading to a client's deportation can state a malpractice claim. The U.S. Supreme Court previously held in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), that it constitutes ineffectiveness of counsel for a criminal defense attorney not to advise a client who is contemplating pleading guilty that the resulting conviction could result in deportation.

In *Delgado v. Bretz & Coven, LLP*, 967 N.Y.S.2d 371 (Sup. Ct., App. Div. 2013), client, an Ecuadorian native, had previously been deported from the United States and then re-entered the country without a visa by crossing the Mexican border. Under the Immigration and Nationality Act, § 212(a)(9)(C)(II), she was deemed "inadmissible." As a result, by statute, she could not apply for readmission until 10 years after she had previously exited the United States.

Also, the 9th Circuit in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 788-789 (9th Cir. 2004) had held that the statutory procedure for adjustment of status to lawful permanent resident could be made without the applicant first having to leave the United States. But this holding was contrary to explicit language in the statute. Moreover, seven sister circuits had rejected the holding and the Bureau of Immigration Appeals (BIA) had abrogated the holding in *Matter of Torres-Garcia*, 23 I. & N. Dec. 866, 873-876, 2006 WL 205417 [BIA 2006]. As a result of the decision in *Torres-Garcia*, the government "[publicly] announced that it would not grant relief to those in [client's] position. ..."

The client in *Delgado* went to see lawyers about seeking legal readmission to the United States. She contended that

the lawyers did not inform her of her inadmissible status and that she would risk reinstatement of the prior removal order if she proceeded with a petition at that time. To the contrary, client alleged that the lawyers "encouraged her to apply ... as soon as possible" and that "there was no risk of her being deported much less detained."

Notwithstanding all of the adverse authority, the lawyers prepared and submitted the petition for adjustment of status to lawful permanent resident and related paperwork to the U.S. Citizenship and Immigration Service (CIS) on their client's behalf. Thereafter client and her husband appeared with one of the lawyers for an interview at CIS, which denied her request that same day based on the proposition that she had re-entered the country "without permission after having been removed." Moreover, CIS found that she also did not qualify "for a waiver of inadmissibility ... because 10 years had not yet passed from the date of her last departure from the United States, and she did not seek permission for readmission before she [re-entered]" the country.

The prosecution of the petition for adjustment of status had the negative impact of placing the immigration authorities on notice that the client was living in the United States illegally. As a result, the authorities arrested her the same day and reinstated her expedited removal order. They then released her from detention "pursuant to an agreement reached with her lawyers. ..." The reinstatement order remained in effect however.



Relying upon *Perez-Gonzalez*, a petition for review of the reinstatement order was filed in the 2nd Circuit. One of the lawyers did the oral argument, the quality of which and the lawyers' briefing the client would question in the subsequent malpractice action. But then the 9th Circuit overruled *Perez-Gonzalez* in *Gonzales v. Dept. of Homeland Sec.*, 508 F.3d 1227, 1242 (9th Cir. 2007), wherein it recognized that the BIA's decision in *Torres-Garcia* was binding precedent.

Client then discharged her lawyers. Thereafter the 2nd Circuit denied her petition for review and upheld the reinstatement order. Client was able to delay deportation for more than another two years by filing an unsuccessful petition for writ of certiorari in the U.S. Supreme Court. In the subsequent malpractice action brought in New York state court, client asserted claims for malpractice,

## Avoiding Liability



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breach of fiduciary duty and breach of contract. The trial court granted defendant lawyers' motion to dismiss the complaint, "noting that the retainer agreements 'clearly identify the difficulty of [plaintiff's] position and warn of a 'harsh' legal environment.'" Because more than four years passed after the lawyers had petitioned CIS, thus triggering reinstatement of the deportation order, and before client was actually deported, the trial court held that "defendants' actions in soliciting [client's] business could not be deemed the 'but for' cause of her deportation." The trial court rejected the claim concerning the lack of quality of the appellate representation in part on the basis that the 2nd Circuit's decision "was consistent with prevailing law." The trial court dismissed the breach of duty claim as duplicative.

On appeal the appellate court agreed with the trial court's reasoning with respect to the claim for the lawyers' conduct in the appeal and with respect to the claim for breach of fiduciary duty. The appellate court, however, rejected the trial court's finding of a lack of "but for" causation for claimant's removal from the United States because, once the authorities discovered that client was illegally in the United States, the "chain of causation" would not have been disrupted except for a change in the law, which never occurred. Moreover, the appellate court agreed that client had "sufficiently alleged proximate cause, because the submission of the application alerted authorities to her status, which led to the issuance of the reinstatement order and ultimately to her removal. ..."

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The court rejected the lawyers' argument that they acted appropriately in submitting the application for reinstatement, an argument they made on appeal, because *Perez-Gonzalez* had not yet been overruled. The appellate court instead characterized *Perez-Gonzalez* as an "anomalous case" and found that the lawyers were not excused for relying upon it because its holding was inconsistent with compelling authority to the contrary. The appellate court also rejected the lawyers' argument that it was client's status as an illegal alien that caused her deportation and not the submission of the application because she would have been discovered anyway. The

appellate court indicated that it remained for discovery to determine whether client would have otherwise come to the attention of the authorities had she not submitted the application.

*Delgado* seems to suggest that there is a cause of action against a lawyer for his or her negligence resulting in the government becoming aware of a client's illegal status. What this court apparently did not consider, however, is whether the doctrine of *in pari delicti*, which is recognized under New York law, should preclude such a claim because of the client's own illegal conduct.