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# “Strong Words, Gentle Deeds”: Evaluating the Effectiveness of the Maryland Immigration Consultant Act Five Years On

Cori Alonso-Marsden

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“STRONG WORDS, GENTLE DEEDS<sup>1</sup>”: EVALUATING THE  
EFFECTIVENESS OF THE MARYLAND IMMIGRATION  
CONSULTANT ACT FIVE YEARS ON

CORI ALONSO-MARSDEN\*

INTRODUCTION .....	76
I. UNDERSTANDING THE PARAMETERS OF AUTHORIZED IMMIGRATION LEGAL REPRESENTATION AND THE EMERGENCE OF THE NOTARIO PUBLICO .....	80
A. THE LIMITATIONS OF FEDERAL IMMIGRATION LAW.....	80
B. THE RISE OF THE NOTARIO PÚBLICO .....	82
1. LINGUISTIC AND CULTURAL MISUNDERSTANDINGS REGARDING THE ROLE OF THE “NOTARIO PÚBLICO” .....	82
2. LACK OF ECONOMICALLY, LINGUISTICALLY, AND CULTURALLY ACCESSIBLE LEGAL SERVICE PROVIDERS.....	84
II. PROPOSALS FOR PREVENTING FRAUD WHILE MEETING THE LEGAL NEEDS OF THE IMMIGRANT POOR.....	86
A. STATES SHOULD NOT PURSUE IMMIGRATION CONSULTANTS AND NOTARIOS FOR UNAUTHORIZED PRACTICE OF LAW .....	86
1. UPL PROSECUTIONS DO NOT PROTECT IMMIGRANT CONSUMERS .....	86
2. RESTRICTIONS ON UPL DO NOT PROTECT THE INTEGRITY OF THE LEGAL PROFESSION IN AN IMMIGRATION LEGAL CONTEXT .....	89
a. IMMIGRATION LAW ALREADY PERMITS PRACTICE BY UNLICENSED LAYPEOPLE .....	89
b. LICENSED ATTORNEYS ARE OFTEN RESPONSIBLE FOR FRAUD & INCOMPETENCE IN THE PRACTICE OF IMMIGRATION LAW .....	91
B. STATES SHOULD FOCUS ON THE PROBLEM OF PREDATORY IMMIGRATION CONSULTANTS AS A MATTER OF CONSUMER PROTECTION LAW .....	92
1. CONSUMER PROTECTION PROVISIONS PREVENTING UNFAIR AND DECEPTIVE ACTS AND PRACTICES .....	93
2. CONSUMER PROTECTION PROVISIONS REGULATING IMMIGRATION CONSULTANTS.....	94

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<sup>1</sup> Maryland’s motto, “*fatti maschii parole femine*” comes from the Italian language. Although there is controversy as to its literal meaning, the state recognizes “strong deeds, gentle words,” as the most accurate translation. Maryland Office of the Secretary of State, <http://www.msa.md.gov/msa/mdmanual/01glance/html/symbols/reverse.html> (last visited July 18, 2010). By inverting this motto, I found in the phrase an apt metaphor for the Maryland Immigration Consultant Act. Despite the state’s dramatic move to incorporate this legislation into its code, little has been done to implement the law and it has proven to be promising, but toothless legislation.

3. HOW USING CONSUMER PROTECTION PROVISIONS BENEFITS IMMIGRANT CONSUMERS .....	95
C. STATES SHOULD PROVIDE THE IMMIGRANT PUBLIC WITH THE APPROPRIATE RESOURCES TO FILE A COMPLAINT AGAINST AN UNSCRUPULOUS IMMIGRATION CONSULTANT AND PURSUE AN ACTION AGAINST THE CONSULTANT IN SMALL CLAIMS COURT .....	96
1. PROMOTING ACCESS TO THE COURTS .....	97
2. REMOVING LANGUAGE AS A BARRIER .....	97
D. STATE ATTORNEYS GENERAL SHOULD USE THEIR AUTHORITY TO PROSECUTE CONSULTANTS WHO PERPETRATE WIDESPREAD INCOMPETENCE, FRAUD, OR SCAM THE IMMIGRANT PUBLIC OUT OF LARGE SUMS OF MONEY .....	98
III. HOW MARYLAND'S IMMIGRATION CONSULTANT ACT LIVES UP TO THESE PROPOSALS .....	99
A. FEDERAL LIMITATIONS, NOT SO LIMITING .....	100
B. THE DECLINE OF THE NOTARIO PÚBLICO .....	100
C. MICA AND ACCESSIBILITY OF LEGAL SERVICES .....	101
D. MICA AND UPL PROSECUTIONS .....	101
E. MICA AND CONSUMER PROTECTION .....	102
1. CIVIL PENALTIES .....	102
2. CRIMINAL PENALTIES .....	104
3. POTENTIAL FOR PRO SE REPRESENTATION .....	105
a. MEDIATION AND ARBITRATION .....	106
b. SMALL CLAIMS COURT .....	108
c. LANGUAGE AS A BARRIER .....	109
F. THE MARYLAND ATTORNEY GENERAL AND EFFORTS TO PROTECT IMMIGRANT CONSUMERS .....	110
1. NEED TO PROSECUTE IMMIGRATION CONSULTANTS .....	111
2. NEED TO EDUCATE IMMIGRANT CONSUMERS .....	111
3. NEED TO PROVIDE APPROPRIATE CONSUMER RESOURCES ..	112
G. RECOMMENDATIONS TO THE STATE OF MARYLAND FOR EXTENDING MICA INTO THE NEXT FIVE YEARS .....	113
CONCLUSION .....	114
ADDENDUM .....	116

## INTRODUCTION

In the winter of 2006, a man came into my office with stacks of neatly organized immigration paperwork. At this time, I worked as a paralegal at Ayuda, a nonprofit legal aid organization.<sup>2</sup> When I

<sup>2</sup> Ayuda provides multilingual legal and social services to foreign born clients in the national capital region in the areas of immigration, domestic violence, sexual assault, and human trafficking. Ayuda is an organization recognized under 8 C.F.R. § 292.2. This recognition allows the organization to apply for its staff to become accredited to practice immigration law before the

asked the reason for his visit, Mr. Rodriguez<sup>3</sup> responded that he had paid a “notario”<sup>4</sup> to file green card<sup>5</sup> applications for his wife and four children. He was concerned, however, because all of the application packages were returned to his home with letters from the United States Citizenship and Immigration Services (USCIS).

Illiterate in English, Mr. Rodriguez did not understand the reason for the rejection letters, and he first sought assistance from the immigration consulting agency that prepared the filings. To his dismay, the agency informed him that the woman who was responsible for his family’s papers no longer worked there. He then spoke with the woman’s supervisor who refused to provide any additional assistance. In fact, the supervisor laughed at Mr. Rodriguez when he asked for reimbursement of the \$1,860 that he paid for the preparation of the applications. This amount of money did not include the hundreds of dollars in nonrefundable fees paid for unnecessary immigration medical examinations and service-filing fees that the family had spent based on the consultant’s advice.

A quick review of Mr. Rodriguez’s paperwork confirmed the reason for the Service’s rejection: the applications had been filed for the Rodriguez family prematurely. As citizens of Mexico, their places in the visa queue would not be available for many months to come.<sup>6</sup>

I assisted the Rodriguez family to renew their temporary visas in anticipation of the time when they would be eligible to apply for their green cards. Apart from this, the family’s primary concern was attempting to recoup some of the money they had paid the immigration consultant. The family lived in Maryland and I recalled hearing of a special form of legislation recently enacted in that state to curtail immigration consultant fraud.<sup>7</sup>

On February 7, 2005, legislators introduced in the Maryland General Assembly a bill entitled “Consumer Protection–Immigration Consulting United States Citizenship and Immigration Service and the Board of Immigration Appeals. See 8 C.F.R. § 292.2 (2003).

<sup>3</sup> Name changed to protect client confidentiality.

<sup>4</sup> Throughout this article, I will use the terms “notario,” “notario público,” and “immigration consultant” interchangeably. I use these terms to refer to a person providing an immigration legal service who is not a licensed attorney or other service provider authorized under federal immigration law.

<sup>5</sup> See AUSTIN T. FRAGOMEN, JR. ET AL., *IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE* § 2:10.3 (4th ed. 2009) (explaining that “green card” is the colloquial term used to refer to a document showing the immigration status of legal permanent residence, which allows a non-citizen to live and work in the United States permanently).

<sup>6</sup> See U.S. DEP’T OF STATE, PUB. NO. 9514 CA/VO, *VISA BULLETIN* (Aug. 2011), [http://travel.state.gov/visa/bulletin/bulletin\\_5518.html](http://travel.state.gov/visa/bulletin/bulletin_5518.html) (last visited Aug. 21, 2011) (listing the visa priority dates currently eligible to apply for admission to the United States as a permanent resident) (showing separate visa queues for nationals of India, China, and Mexico, resulting in a longer wait for the available visa number necessary to immigrate due to the high levels of immigration from those countries).

<sup>7</sup> Krissah Williams, *For Immigrants, Help Can Be Risky, Maryland Lawmakers Move to Rein In Consultants Who Overreach and Sometimes Get Clients Deported*, WASH. POST, Apr. 23, 2005, at E01.

Services."<sup>8</sup> Designated as House Bill 691, the legislation sought to protect Maryland consumers through a series of civil and criminal provisions targeting consultants for unauthorized immigration legal practice. Primarily, House Bill 691 limited the types of services an immigration consultant could offer and the claims she could make regarding those services. In addition, the law required that the consultant provide the client with a posted disclaimer regarding the scope of the service, and a written contract prior to the provision of any assistance.<sup>9</sup> The proposed legislation also provided for criminal and civil penalties resulting from violation of any of its provisions. The civil penalties included fees paid to the consultant, attorney's fees, and other damages.<sup>10</sup>

During the bill's hearings, Maryland legislators listened to testimony on the consequences for families who entrust their immigration cases to unscrupulous immigration consultants. One woman testified that her husband had been deported to Mexico after heeding the advice of an immigration consultant.<sup>11</sup> Following these hearings, the House passed the bill 121 to 5 and the Senate passed it unanimously.<sup>12</sup> On May 26, 2005, then-Governor Robert Ehrlich signed the Immigration Consultant Act into law.<sup>13</sup> The Washington Post hailed the legislation as a move "that would give people who use immigration consultants more protection"<sup>14</sup> and immigrant advocates viewed the Act as responding to "one of the biggest legal issues in our community."<sup>15</sup>

As the Rodriguez family's one connection to the U.S. legal system, I felt obligated to provide them some direction on getting their money back from the notario who defrauded them. I armed them with a copy of the Immigration Consultant Act and encouraged them to contact the consumer protection division of the Maryland Attorney General's Office. Feeling unqualified to provide much assistance beyond this, I then focused on correcting the family's immigration paperwork.

We were able to successfully navigate the immigration process, and after several years the family eventually became legal permanent residents of the U.S. Despite this victory, Mr. Rodriguez later told me that he had been unable to obtain a satisfactory outcome in recovering the family's money from the immigration consultant agency. Although Maryland had passed legislation to assist consumers like Mr. Rodriguez, he was unable to find help in pursuing his claim.

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<sup>8</sup> H.B. 691, 2005 Leg., 420th Sess. (Md. 2005) [hereinafter *House Bill 691*].

<sup>9</sup> See Md. Code Ann. Com. Law, §§ 14-3303-3306.

<sup>10</sup> *Id.* § 14-3306.

<sup>11</sup> Williams, *supra* note 7 (referring to the testimony of Amy Nunez who testified that the immigration consultant charged her husband \$3,000 for faulty immigration advice and fled).

<sup>12</sup> *Id.*

<sup>13</sup> *House Bill 691, supra* note 8.

<sup>14</sup> Williams, *supra* note 7.

<sup>15</sup> *Id.* (quoting Kimberly Propeack, director of advocacy for Maryland nonprofit Casa de Maryland).

Fortunately for the Rodriguez family, the only adverse consequence of the consultant's advice was the loss of a substantial amount of money. Their immigration status and eligibility to apply for residence benefits at a later point had not been affected by the erroneous filing. Other families have not been as lucky, as the hearings leading up to the passage of the Immigration Consultant Act revealed.<sup>16</sup> Loss of vital paperwork, employment opportunities, and deportation are all consequences of inadequate immigration legal service.<sup>17</sup> This article evaluates how the Maryland Immigration Consultant Act has succeeded and failed in staunching the flow of consultants' botched immigration practices.

Part I of this article examines the phenomenon of so-called "notario fraud" and its causes. While many authors have commented on the preconceived cultural and linguistic notions that lead recent arrivals to seek of the advice of notarios,<sup>18</sup> I suggest that cultural misconceptions alone do not account for the rise of these service providers. Instead, many immigrants turn to notarios and immigration consultants fully knowing that they lack the formal legal training of an attorney. The immigrants do so because these consultants often represent the most accessible source of assistance available to the many low-income immigrant consumers who are largely isolated from authorized legal providers.

Part II evaluates and proposes solutions for dealing with the problem of notario legal representation through state legislation. Many legal scholars and practitioners have pointed to the importance of unauthorized practice of law regulations in limiting notario representation. By contrast, this Part argues that immigrant advocates should follow in Maryland's footsteps and harness the stronger legal protections available in state consumer protection and criminal law to curb abuses. Like unauthorized practice of law regulations, this approach will work to discourage fraud, but will also more effectively target and weed out bad practice. While the unauthorized practice of law serves as a blanket prohibition on unlicensed practice regardless of the practitioner's effectiveness, the enforcement of consumer and criminal laws will permit competent notarios to continue their vital work in a vastly underserved community. Finally, this Part suggests practices by which states can implement criminal and consumer protection laws, including legislation that specifically targets notarios, to best protect and serve immigrant consumers.

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<sup>16</sup> *Hearing on House Bill 691 Before the Maryland Economics Matters Committee*, 2005 Leg., 420th Sess. (Md. 2005) (testimony of Amy Nunez, describing how her husband was deported after a consultant improperly filed immigration paperwork on his behalf) (on file with the Maryland Department of Legislative Services).

<sup>17</sup> *Id.* (testimony of Patricia Chiriboga-Roby, Board Member of the Maryland Hispanic Bar, explaining how faulty immigration work can lead to deportation and separation from family and how improper filing can harm non-citizens' opportunity to obtain or extend legal status).

<sup>18</sup> See, e.g., Anne E. Langford, *What's in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115 (2004); see also Milagros Cisneros, *Notorious Notaries-How Arizona is Curbing Notario Fraud in the Immigrant Community*, 32 ARIZ. ST. L.J. 287 (2000).

Part III assesses the Maryland Immigration Consultant Act's fulfillment of Part II's proposals and the relative success of the law in responding to these abuses. Investigation of the Act reveals that while it was thoughtfully crafted to allow for easy and effective targeting of harmful practice, ineffective implementation has robbed the legislation of realizing its full potential. The Maryland Immigration Consultant Act uses principles of consumer protection –including provisions for a private consumer right of action and criminal penalties for violation of the act – yet consumers have received little relief from unscrupulous consultants despite the existence of this promising legislation. This is because a legislative scheme created to address the havoc wrought by consumer isolation from adequate legal processes necessarily requires aggressive state enforcement and outreach to overcome that isolation and ensure effective implementation. As of yet, the state of Maryland has not taken necessary measures to ensure the Maryland Immigration Consultant Act fulfills its consumer protection mandate.

Part IV concludes with suggestions for reform on the federal level and with projections for the fate of Maryland's Immigration Consultant Act, now in its fifth year. The Act represents a relatively novel form of legislation and there are a limited number of jurisdictions that have adopted laws regulating immigration consultants. This Article offers the Maryland law as an instructive example to states considering implementing similar statutes.

## I. UNDERSTANDING THE PARAMETERS OF AUTHORIZED IMMIGRATION LEGAL REPRESENTATION AND THE EMERGENCE OF THE NOTARIO PÚBLICO

### A. THE LIMITATIONS OF FEDERAL IMMIGRATION LAW

Federal limitations on the entities authorized to practice immigration law prohibit a notario from providing immigration legal assistance.<sup>19</sup> The Code of Federal Regulations (C.F.R.) states that the following categories of non-lawyers may represent<sup>20</sup> a person in an immigration

<sup>19</sup> See 8 C.F.R. § 292.1 (2003).

<sup>20</sup> The code defines "representation" of an individual as encompassing both "practice" and "preparation." *Id.* § 1.1(m). "Practice" is defined as:

"the act or act of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with the Service, or any officer of the Service, or the Board." *Id.* § 1.1(i).

"Preparation" is defined 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 Service Forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedure." *Id.* § 1.1(k).

matter: 1) law students and law graduates not yet admitted to the bar;<sup>21</sup> 2) accredited officials of foreign governments in the United States;<sup>22</sup> 3) accredited representatives;<sup>23</sup> 4) and reputable individuals.<sup>24</sup>

Notarios do not fall into any of these categories. They are clearly precluded from the first two categories as they are not law students or law graduates, and are not representatives of foreign governments. They are also precluded from the third category. “Accredited representatives” must be associated with a Board of Immigration Appeals (BIA) recognized organization that “makes only nominal charges” and has “adequate knowledge, information, and experience.”<sup>25</sup> Many notarios would not qualify for accreditation because they work for-profit<sup>26</sup> and are not associated with a recognized organization.

Lastly, the category of reputable individuals also precludes notario representation because it only allows a person of “good moral character” to represent an individual in an immigration matter if he is appearing on an individual case basis, has a pre-existing relationship with the person he is representing, and does not regularly engage in immigration and naturalization practice or preparation.<sup>27</sup> Notarios do not satisfy these requirements.

There are two broad effects of the regulations in section 292.1. The first is to prohibit for-profit non-lawyer representation, regardless of the provider’s level of competence.<sup>28</sup> The second effect is to authorize the provision of low-cost representation of untested, and at times clearly doubtful, quality.<sup>29</sup>

Despite the existence of these regulations, federal authorities have done little to ensure the competent representation of persons appearing

<sup>21</sup> *Id.* § 292.1(a)(2).

<sup>22</sup> *Id.* § 292.1(a)(5).

<sup>23</sup> *Id.* § 292.1(a)(4).

<sup>24</sup> *Id.* § 292.1(a)(3).

<sup>25</sup> *Id.* §§ 292.1(a)(4), 292.2(a).

<sup>26</sup> See Robert L. Bach, INSTITUTE FOR MULTICULTURALISM AND INTERNATIONAL LABOR, BINGHAMTON UNIVERSITY, BECOMING AMERICAN, SEEKING JUSTICE, THE IMMIGRANTS’ LEGAL NEEDS STUDY 54 (1996) (finding that 97.7 percent of the immigrant clients of notarios paid for their services).

<sup>27</sup> 8 C.F.R. § 292.1(a)(3).

<sup>28</sup> The regulations for non-lawyer representation state that law students, law graduates, and reputable individuals are only authorized to represent individuals if they appear without “direct or indirect remuneration” from the individuals they represent. Accredited representatives must be associated with a non-profit organization as defined in 8 C.F.R. § 292.2. Only the non-lawyer category of accredited officials does not directly address the question of compensation for representation. *Id.* §§ 292.1(a)(2)-(5).

<sup>29</sup> See Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 *FORDHAM L. REV.* 883, 885-90 (2004) (citing to studies showing that a provider’s level of specialization and substantive knowledge of the area of law are the primary factors in competent representation). The regulations for representation permit appearances by reputable individuals, who appear on an “individual basis” and share a “pre-existing relationship” with the individuals represented. 8 C.F.R. § 292.1(a)(3). These restrictions mean reputable individuals are unlikely to have the specialization and knowledge which are the hallmarks of competent representation.



before the immigration service or courts.<sup>30</sup> There is no procedure or requirement for assessing the competence of the providers who are federally-authorized to represent immigration legal matters.<sup>31</sup> There is likewise no federal sanction for those who operate outside of the authorized representation. Section 292.3(a)(2) limits its sanction authority only to those practitioners authorized under the regulations.<sup>32</sup> Thus, this Section references two forms of federal limitation. The first is the federal limitation on practice which prohibits unauthorized notario representation. The second is the federal government's limited ability to enforce its own regulatory scheme in weeding-out notario practice.<sup>33</sup> In the wake of federal abandonment of immigration representation enforcement, many states have stepped in to create legislation regulating immigration consultants.<sup>34</sup>

## B. THE RISE OF THE NOTARIO PÚBLICO

### 1. LINGUISTIC AND CULTURAL MISUNDERSTANDINGS REGARDING THE ROLE OF THE "NOTARIO PÚBLICO"

The problem of immigration consultants providing noncitizens<sup>35</sup> and their sponsors with unsound advice has been ongoing in the United States. Beginning in the 1980s, several jurisdictions moved to regulate the work of consultants and so-called notarios.<sup>36</sup>

Many of these laws recognize that noncitizens may be misled by businesses or individuals advertising themselves as "notarios públicos" and have enacted statutory provisions prohibiting the use of this term.<sup>37</sup> These provisions demonstrate that the states are cognizant of the cultural phenomenon that leads many noncitizens from Latin

<sup>30</sup> See generally, 8 C.F.R. § 292 (the section regulating representation and appearances in federal immigration law makes no mention of a minimum competency requirement for appearances before the immigration service, immigration courts, or Board of Immigration Appeals).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* § 292.3(a)(2) (providing that persons subject to sanction include any attorney as defined in C.F.R. 1.1(f) or any representative as defined in 8 C.F.R. 1.1(j)).

<sup>33</sup> See Andrew F. Moore, *Fraud, The Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1, 25 (2004) ("[T]he INS demonstrated an unwillingness to investigate and enforce the limitations on who may serve as a representative. Its successor agencies, located in the DHS, do not seem to have any particular agenda to increase enforcement.").

<sup>34</sup> See, e.g., ARIZ. REV. STAT. ANN. §§ 12-2701-2704 (2009); CAL. GOV'T CODE § 8219.5(c) (West 2005); TEX. GOV'T CODE ANN. § 406.017(a)(4) (Vernon 2005).

<sup>35</sup> Throughout this article, I will use the terms noncitizen and immigrant interchangeably. But it is important to note that persons ranging from undocumented, to naturalized or native-born United States Citizens may turn to immigration consultants for legal assistance.

<sup>36</sup> See Moore, *supra* note 33 at 11-12 (noting that California was the first state to pass this type of legislation in 1986 and that other states including Washington, Illinois, Minnesota, New Jersey, Michigan and New York all have state laws that address providers of immigration-related services).

<sup>37</sup> See, e.g., CAL. GOV'T CODE § 8219.5(c) (West 2005); TEX. GOV'T CODE ANN. § 406.017(a)(4) (Vernon 2005).

American countries to turn to the services of notarios when seeking legal assistance.<sup>38</sup>

In Latin America, the notario público is a state-appointed legal professional with training equivalent to an attorney in the United States.<sup>39</sup> In the Mexican state of Nuevo León, the requirements for an individual to obtain the title notario público include: Mexican nationality; being at least thirty-years old; residing in the state continuously for a minimum of three years before applying; having served as an attorney for at least five years; not being convicted of an intentional crime; and passing a rigorous examination before the president of the state notario bar and members of the state government.<sup>40</sup>

Even on meeting these requirements, a notario applicant is still not guaranteed the right to practice the profession. There are often a limited number of notarial positions, which are only vacated on the death or retirement of the seated notario.<sup>41</sup> Upon appointment as a notario público, the Mexican notary will draft legal documents that carry with them the presumption of legal validity.<sup>42</sup> The Mexican notary is also subject to strict ethical standards and may be sanctioned with professional, civil, and criminal liability for improper execution of her office.

Based on this cultural understanding of the notario público's role and training, many Latin American immigrants view businesses advertising notary services as possessing a higher degree of skill and professional training than U.S. notary laws in fact require. Compare the Mexican requirements above to the Maryland notary application process where the applicant need only: be 18 years of age; be a person of "good moral character and integrity" (as declared by the applicant and attested to by three references); live or work in the state; and pay a non-refundable \$20.00 fee.<sup>43</sup> Thus, not only is a notary in the state of Maryland not a practicing attorney, she is also not subject to any examination of her knowledge of notary duties.

Commentators have pointed to this cultural disparity as a principal factor in the defrauding of noncitizens who consult with unlicensed

<sup>38</sup> While commentators have noted that immigration consultants operate in various immigrant communities, the discussion in this article will focus on Latino immigrant communities and the unique way the language and culture of Latin American countries have allowed consultants in the U.S. to expand their reach. See, e.g., Moore *supra* note 33 at 6 (noting confusion in the Eastern European community regarding the immigration legal authority of travel agents and the presence of immigration service agencies in the Chinese community that operate as part of organized human smuggling rings).

<sup>39</sup> See Cisneros, *supra* note 18 at 297 (citing Pedro Malavet, *Counsel for the Situation: The Latin Notary, a Historical and Comparative Model*, 19 HASTINGS INT'L & COMP. L. REV. 389 (1996)).

<sup>40</sup> See Langford, *supra* note 18 at 120.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See MD. CODE ANN., STATE GOV'T § 18-102 (West 1997); see also, *New Notary Application Information*, MARYLAND OFFICE OF THE SECRETARY OF STATE, <http://www.sos.state.md.us/Notary/NotaryAppInfo.aspx> (last visited Nov. 21, 2009).

immigration consultants that advertise their services as those of a notario público.<sup>44</sup> This misunderstanding results in many noncitizens expecting legal expertise from a person who is in fact only authorized to witness signatures and to authenticate documents.<sup>45</sup>

While it is true that the disparate qualifications of individuals operating under the same title explains a great deal about why many noncitizens find themselves using the services of providers otherwise unqualified to provide this assistance, the notario issue is something of a red herring. Portraying notarios as deceptive profiteers oversimplifies the problem. The rise of immigration consultants is actually symptomatic of the larger issue of the lack of accessible legal services available to immigrants.<sup>46</sup>

## 2. LACK OF ECONOMICALLY, LINGUISTICALLY, AND CULTURALLY ACCESSIBLE LEGAL SERVICE PROVIDERS

Although it is undoubtedly true that many individuals looking for immigration assistance turn to notaries based on a cultural misconception, many others who use these services do so fully aware that the notario is not a licensed attorney. Even with the expanded categories of persons authorized to represent immigration legal matters, there is still a dearth of accessible legal service providers.<sup>47</sup> With the scarcity of affordable legal assistance, some immigrants may find turning to an unlicensed notario a rational alternative to going it alone.

There are an estimated thirty-nine million documented and undocumented foreign-born residents living in the United States.<sup>48</sup> In Maryland, the number of foreign-born residents is approximately 700,000.<sup>49</sup> Of this number, around fifty-four percent of Maryland's foreign-born are not naturalized citizens.<sup>50</sup> Despite the high demand for immigration legal service this large number of foreign-born residents suggests, the capacity of many immigration legal aid attorneys remains

<sup>44</sup> See generally, Langford and Cisneros, *supra* note 18.

<sup>45</sup> Cisneros, *supra* note 18 at 295 (quoting Pedro Malavet's comparison of the Latin notary to the notary in the Anglo-American system noting that for the English, "the notary developed into a purely clerical position.").

<sup>46</sup> Moore, *supra* note 33 at 30 (arguing that state laws regulating immigration consultants are only a "stopgap approach" to the underlying problem of unmet legal needs and that the Federal Government could get to the heart of the problem by expanding the number of service providers authorized under federal law).

<sup>47</sup> *Id.*

<sup>48</sup> JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW, Oct. 2, 2008, available at <http://pewhispanic.org/reports/report.php?ReportID=94> (last visited Nov. 21, 2009).

<sup>49</sup> MARYLAND DEP'T OF PLANNING, PLANNING DATA SERVICES, FOREIGN-BORN IN MARYLAND, WHAT WE KNOW FROM THE AMERICAN COMMUNITY SURVEY 3 (Mar. 18, 2009), <http://www.newamericans.maryland.gov/documentsNA/MDPForeignBorn.pdf> [hereinafter *Foreign-Born in Maryland*].

<sup>50</sup> *Id.* at 27.

limited.<sup>51</sup> A survey of legal service providers in the Washington, DC area, including many Maryland-based organizations, shows that the attorney capacity of most organizations is very small.<sup>52</sup> In addition to the limited capacity of legal service organizations, federal funding restrictions prohibiting assistance to undocumented immigrants further limit the ability of many noncitizens to access legal services.<sup>53</sup> When these agencies are unable to provide the required service, a noncitizen must choose between seeking counsel from a private attorney, going unrepresented, or turning to a notario.

Foreign-born residents of the United States are disproportionately more susceptible to poverty than native-born residents.<sup>54</sup> This higher rate of poverty means that without access to low-cost legal aid providers, many immigrants have no economically viable alternative for retaining the representation of an attorney.<sup>55</sup> With economic considerations eliminating the option of private representation, the immigrant consumer may well determine that the limited expertise of the immigration consultant is still better than no assistance at all.

In addition to these economic considerations, many immigrants may in fact opt for the services of a linguistically and culturally-competent notario or immigration consultant. In the mid-1990s, the Institute for Research on Multiculturalism and International Labor at Binghamton University conducted a survey of immigrant consumption of legal services.<sup>56</sup> Called the Immigrant Legal Needs Study (ILNS), it is currently the most comprehensive study of the ways in which immigrants access and use the services of immigration consultants.<sup>57</sup> The ILNS showed that the two-thirds of immigrants who sought

<sup>51</sup> TAHIRIH JUSTICE CENTER, SURVEY OF IMMIGRANT LEGAL SERVICE PROVIDERS IN THE WASHINGTON, DC AREA 7 (May 16, 2006), <http://www.tahirih.org/site/wpcontent/uploads/2009/02/legalservicessurveyreport.pdf>.

<sup>52</sup> *Id.*

<sup>53</sup> Alan W. Houseman & Linda E. Perle, Center for Law and Social Policy, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States* 29 (2007), <http://www.clasp.org/admin/site/publications/files/0158.pdf> (in fiscal years 1980 and 1983, riders were attached to the Legal Service Corporation appropriations bill preventing LSC-funded legal service programs from representing undocumented immigrants).

<sup>54</sup> CENTER FOR AMERICAN PROGRESS TASK FORCE ON POVERTY, FROM POVERTY TO PROSPERITY: A NATIONAL STRATEGY TO CUT POVERTY IN HALF 9 (2007), available at [http://www.americanprogress.org/issues/2007/04/poverty\\_report.html](http://www.americanprogress.org/issues/2007/04/poverty_report.html) (showing that the rate of poverty among foreign-born residents of the U.S. is 16.5 percent compared to the 12.1 percent for U.S. natives).

<sup>55</sup> See Langford, *supra* note 18 at 118 (commenting that, “[s]ince ‘money talks’ in the market for attorneys’ services” their high rate of poverty means “many Latino immigrants remain voiceless”).

<sup>56</sup> See generally, Bach, *supra* note 26 at 4 (describing the study design wherein researchers carried out 2,500 telephone interviews with low-income immigrants in Houston, Chicago, Miami, Los Angeles, and New York).

<sup>57</sup> See *Petition to Take Enforcement Action, and Promulgate Industry Guidance, and Consumer Education Concerning Deceptive Acts and Practices in the Immigration Consulting Industry* 11 n.29, <http://www.abanet.org/publicserv/immigration/notario/petition.pdf> (petition of Catholic Charities of the Archdiocese of Washington, D.C. to the Federal Trade Commission); see also, Moore, *supra* note 33 at 7 (citing the ILNS extensively and describing it as “one of the very few studies conducted on the legal needs of non-citizens.”).

assistance from notarios were less fluent in English than those using the services of an attorney.<sup>58</sup>

The ILNS also found that nearly seventy percent of immigrants who turned to notarios learned of those services through a friend or relative, or already personally knew the notarios.<sup>59</sup> This data demonstrates that the notario operates within the culture of the immigrant community. Like language considerations, this cultural fluency also factors into many noncitizens decisions to seek the assistance of a notario over that of an attorney.

In sum, while it may be true that the false cognate, notario público, leads many to turn to a notario under false or misleading pretenses, there are also legitimate and rational reasons why a noncitizen would knowingly rely on an unlicensed notario when seeking legal assistance. Because these immigration consultants serve a need in the community that may not otherwise be met by other service providers, regulation of their industry should be done in a way that targets bad actors while allowing those who provide a genuine service to continue to provide assistance. What follows are proposals for meeting these dual goals and an evaluation of how the Maryland Immigration Consultant Act reflects these recommendations.

## **II. PROPOSALS FOR PREVENTING FRAUD WHILE MEETING THE LEGAL NEEDS OF THE IMMIGRANT POOR**

### **A. STATES SHOULD NOT PURSUE IMMIGRATION CONSULTANTS AND NOTARIOS FOR UNAUTHORIZED PRACTICE OF LAW**

One of the major ways in which state laws may prevent notario fraud is through statutes preventing the unauthorized practice of law (UPL). State bar associations and attorneys general are usually the entities responsible for preventing UPL.<sup>60</sup> In general, these laws prevent lay people from performing legal work.<sup>61</sup> Rules against UPL are generally premised on the justifications that they protect the public from harm and that they ensure maintenance of the integrity of the legal profession.<sup>62</sup> Both of these arguments prove unavailing in applying UPL rules to the immigration context.

#### **1. UPL PROSECUTIONS DO NOT PROTECT IMMIGRANT CONSUMERS**

<sup>58</sup> Bach, *supra* note 26 at 47.

<sup>59</sup> *Id.* at 54 (discussing study results that close social networks played an important role in decisions to use notarios for legal help, with 43 percent of immigrants learning of the notario from a friend or relative and 24.7 percent previously personally acquainted with the notario).

<sup>60</sup> Moore, *supra* note 33 at 8.

<sup>61</sup> Md. Code Ann. Bus. Occ. & Prof. § 10-601.

<sup>62</sup> Alexandra M. Ashbrook, *The Unauthorized Practice of Law in Immigration: Examining the Propriety of Non-Lawyer Representation*, 5 GEO. J. LEGAL ETHICS 237, 243-44 (1991).

The argument that rules preventing UPL protect the public from harm is unconvincing when applied to unlicensed immigration consultants' provision of legal assistance. This is because UPL restrictions prevent even well-meaning and competent immigration consultants from engaging in immigration practice and these restrictions make immigration representation even more inaccessible and costly for a population whose ability to access legal services is already severely limited.

Under UPL restrictions, an unauthorized immigration consultant could be prosecuted for helping an individual obtain immigration benefits even where the consultant did not defraud or harm her customer.<sup>63</sup> In a situation where an estimated fifty to eighty percent of immigrants have unmet needs for legal services,<sup>64</sup> using UPL to shut down consultants who are able to deliver the service requested without causing harm or perpetrating fraud is harmful to the needs of the immigrant community.

It is clear that although the problem of notario fraud is widespread, there are many immigration consultants who provide their customers with a valuable service. In fact, the ILNS documented that over seventy percent of immigrants who had consulted with a notario were satisfied with their service.<sup>65</sup> This was a higher recorded rate of satisfaction than reported with any service provider, including attorneys.<sup>66</sup>

UPL enforcement further harms many immigrant consumers by concentrating the authority for legal representation in the hands of attorneys. This monopoly on service increases costs and reduces the number of practitioners authorized to assist clients.<sup>67</sup> These are particularly potent arguments in the immigrant legal services context where affordable legal resources are already scarce.<sup>68</sup> Proponents of UPL restrictions argue that the complexity of legal matters in which a licensed attorney is uniquely qualified to assist justifies the limitation on practice.<sup>69</sup> But, this may not always be accurate.

Studies comparing the performance of lawyer and non-lawyer advocates in other legal settings have shown that lay people provide service of a comparable quality to that offered by licensed attorneys.<sup>70</sup>

<sup>63</sup> Moore, *supra* note 33 at 8.

<sup>64</sup> Langford, *supra* note 18 at 7.

<sup>65</sup> See Moore, *supra* note 33 at 10 (citing to Bach, *supra* note 26 at 59).

<sup>66</sup> *Id.*

<sup>67</sup> Ashbrook, *supra* note 62 at 246.

<sup>68</sup> Langford, *supra* note 18 at 7.

<sup>69</sup> See Cantrell, *supra* note 29 at 884 (citing to DEBORAH L. RHODE, ACCESS TO JUSTICE 83 (2004)).

<sup>70</sup> See Cantrell, *supra* note 29 at 885-90 (2004) (citing data gathered by researchers in the areas of divorce law, unemployment compensation appeals, state tax commission appeals, social security disability appeals, and labor grievance arbitrations). Cantrell also notes similar results in a study in the U.K. of non-lawyers success rates in the areas of welfare benefits, debt collection, housing, and employment – areas of law that commonly affect people of low to modest incomes who are least able to access attorneys. *Id.*

In an article calling for a complete abolishment of all UPL restrictions, Deborah J. Cantrell finds support in the data collected on the success of non-lawyer practitioners in various areas of law.<sup>71</sup> She notes that in such studies, researchers have concluded that specialization and substantive knowledge of the area of law, not the practitioner's possession of a law degree, are the true predictors of a quality service.<sup>72</sup>

Empirical data regarding UPL complaints and their use further refute the notion that UPL regulations are used to protect consumers.<sup>73</sup> A 1981 study deigned to assess the type and extent of UPL prosecution found that injured consumers initiated only two percent of the UPL complaints reviewed.<sup>74</sup> In addition, only eleven percent of these complaints involved allegations of specific harm by non-lawyers.<sup>75</sup>

Moreover, there is little evidence that UPL prosecutions are an effective tool for consumer protection.<sup>76</sup> Using the example of predatory notarios as an instance where unauthorized practice should be prevented in the interest of consumer protection, Cantrell notes that states have opted not to prosecute these unscrupulous individuals for infringing on UPL restrictions.<sup>77</sup> Instead, she points to the development of state legislation providing more potent criminal sanctions or statutes barring the use of the term "notario," as evidence of the inadequacy of UPL restrictions.<sup>78</sup> Consumers and their advocates are less likely to use UPL prosecutions than other methods because remedies in UPL are generally weaker than those available in criminal or civil law.<sup>79</sup> Unlike UPL provisions, state consumer protection statutes often provide for minimum damages or attorney's fees.<sup>80</sup> The desire to maintain control over litigation is an additional factor motivating consumers to choose civil action over UPL prosecution.<sup>81</sup> In UPL, litigation control is exercised not by the consumer, but by the state agency charged with prosecuting unauthorized practice.<sup>82</sup>

UPL prosecutions do not benefit immigrant legal consumers because they create a *per se* restriction on non-attorney provision of legal service. This prohibition applies even where the lay person's assistance is competent and honest. UPL restrictions also preserve the attorney's monopoly thereby diminishing the availability of service

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 892-94.

<sup>74</sup> *Id.* at 892 (citing to study in Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981)).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 893.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 893-94.

<sup>82</sup> *Id.*

and increasing legal costs to the immigrant consumer. Prosecution under UPL statutes also represents a less effective legal strategy for consumers as those laws provide for weaker remedies and remove the injured immigrant from litigation.

## **2. RESTRICTIONS ON UPL DO NOT PROTECT THE INTEGRITY OF THE LEGAL PROFESSION IN AN IMMIGRATION LEGAL CONTEXT**

If UPL rules do not operate to protect immigrant consumers, what is the true justification for applying those restrictions to the provision of immigration legal service? An additional explanation given for the provision of rules preventing UPL is to maintain the integrity of the legal system by restricting the practice of law to licensed attorneys.<sup>83</sup> Many commentators have noted that this justification is suspect and in fact amounts to little more than a protection of the lawyers' monopoly on legal service.<sup>84</sup> Critics of UPL limitations further argue that the restrictions compound existing problems of high legal costs, lack of access to legal services, and restricted choice.<sup>85</sup> Inquiries reveal that the public shares this suspicion and feels that these regulations do far more to protect lawyers from competition than they do to help prevent harm to consumers.<sup>86</sup>

Despite this, at least one commentator has argued that the emergence of fraudulent notarios and a vulnerable immigrant community present special concerns negating the traditional arguments against UPL enforcement.<sup>87</sup> While this unique dynamic undoubtedly heightens the potential for abuse, it is hardly justification for increased enforcement based on a discredited and ineffective legal theory. If anything, these special concerns demonstrate the need for an aggressive response that uses legal concepts tailored to the realities of immigration representation instead of a broad, unwieldy solution. Again, UPL restrictions fail when applied to the immigration legal framework. Scrutiny of the entities authorized to practice immigration law demonstrates why the use of UPL as a means to protect immigrant legal consumers is ineffective.

### **a. IMMIGRATION LAW ALREADY PERMITS PRACTICE BY UNLICENSED LAYPEOPLE**

The fact that immigration regulations already authorize

<sup>83</sup> Ashbrook, *supra* note 62, at 243-44.

<sup>84</sup> See Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2581 (1999) (commenting how UPL restrictions lead to a lawyer's monopoly that "overwhelmingly affects people of limited means"); see also, Moore, *supra* note 33 at 10-11 (noting that UPL rules limit competition and keep attorneys fees artificially high).

<sup>85</sup> Ashbrook, *supra* note 62, at 246.

<sup>86</sup> Cantrell, *supra* note 29, at 893.

<sup>87</sup> Ashbrook, *supra* note 62, at 246.



representation by many categories of non-attorneys undercuts the applicability of UPL rules to the prevention of non-lawyer fraud in this area. In the 1986 legalization program under the Immigration Reform and Control Act (IRCA),<sup>88</sup> the federal government trained lay-practitioners to provide immigration assistance to the non-citizen masses eligible under the program.<sup>89</sup> In order to fully implement the legalization, the federal government found it necessary to also subsidize the non-attorney practice of certain Qualified Designated Entities (QDEs).<sup>90</sup> These were often community-based organizations staffed by laypeople.<sup>91</sup> As legalization work dried up, many of the employees of QDEs continued in immigration practice, increasing the spread of unauthorized assistance.<sup>92</sup>

As noted before, the Code of Federal Regulations permits immigration legal representation by non-attorneys including law students and law graduates not yet admitted to the bar, reputable individuals, accredited officials, and accredited representatives.<sup>93</sup> These individuals are protected from state prosecution of UPL because state restrictions are preempted by the federal government's authorization of these entities to practice federal law.<sup>94</sup>

Despite the federal designation of these categories of representatives, there is no data or analysis to confirm that these parties are as qualified as licensed attorneys. It is also not clear that they are more qualified to represent immigration legal matters than for-profit immigration consultants. The category of "reputable individual" is particularly troublesome with regard to competency in the area of immigration law. For authorization to practice, this classification explicitly requires that the representative "appear on an individual case basis"<sup>95</sup> and that the presiding official withhold permission for this appearance "with respect to any individual who regularly engages in immigration and naturalization practice or preparation."<sup>96</sup>

In light of the studies showing repeat exposure and specialization in an area of law as key to competence,<sup>97</sup> this discrete representation by persons inexperienced in immigration legal matters would tend to encourage unqualified legal service. There is thus little incentive

<sup>88</sup> See generally, The Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1255a (West 2011).

<sup>89</sup> Cisneros, *supra* note 18 at 305-06.

<sup>90</sup> *Id.* at 305-06, n.115 (noting the INS paid QDEs fifteen dollars for each application they sent on behalf of a noncitizen applicant).

<sup>91</sup> *Id.* at 305.

<sup>92</sup> *Id.*

<sup>93</sup> 8 C.F.R. §§ 292.1(a)(2)-(5) (2003).

<sup>94</sup> See *Sperry v. Florida*, 373 U.S. 379, 384 (1963) (holding that where federal statute permits a non-attorney to practice federal patent law, the state's unauthorized practice of law statute must yield under the doctrine of federal supremacy).

<sup>95</sup> 8 C.F.R. § 292.1(a)(3)(i).

<sup>96</sup> *Id.* § 292.1(a)(3)(iv).

<sup>97</sup> See Cantrell, *supra* note 29, at 885-90.

to exclude notarios and immigration consultants from practicing immigration law on the theory that their inclusion would harm the integrity of the legal profession. The already widespread infiltration of unqualified lay representatives vitiates the argument against exclusion of non-lawyers in the practice of immigration law.

The federal regulations on representation show that the unlicensed and potentially incompetent practice of law is blessed in immigration law. Ambivalence in federal immigration law toward UPL is yet another justification for abandoning UPL prosecutions for the prevention of notario fraud.

### **B. LICENSED ATTORNEYS ARE OFTEN RESPONSIBLE FOR FRAUD & INCOMPETENCE IN THE PRACTICE OF IMMIGRATION LAW**

From a theoretical standpoint, the prevention of unqualified and fraudulent immigration legal services through the use of UPL prosecutions tends to deemphasize these forms of misconduct on the part of licensed attorneys. While some argue that rules of professional conduct and the possibility of sanctions removing the attorney from practice are powerful deterrents to irresponsible practice,<sup>98</sup> attorney misconduct is likely to flourish where the client occupies a vulnerable position in society.<sup>99</sup> Judge Robert A. Katzmann references the near impossibility for a client who has been deported as a result of attorney incompetence to pursue an action against his representative: “unlike a person in the United States who can sue a lawyer for malpractice, or file a bar complaint, a deported immigrant is unlikely to pursue such recourse because of financial, geographic, or other constraints.”<sup>100</sup>

Officers of the court have remarked on the rampant problem of unqualified immigration representation by licensed attorneys<sup>101</sup> and their substandard practice has recently earned increased attention from the Executive Office for Immigration Review. In December 2008, the Executive Office for Immigration Review (EOIR) published a final rule regarding standards of representation and professional conduct

<sup>98</sup> See Langford, *supra* note 18 at 124.

<sup>99</sup> See generally, Richard L. Abel, *Practicing Law in Filene’s Basement*, 84 N.C. L. REV. 1449 (2006) (examining incidences of lawyer misconduct in immigration practice and explaining how clients of these lawyers are particularly vulnerable).

<sup>100</sup> Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, Orison S. Marden Lecture of the Association of the Bar of the City of New York (Feb. 28, 2007), in 21 GEO. J. LEGAL ETHICS 3, 9 (2008).

<sup>101</sup> See *id.* (referring to the problem of incompetent “stall” lawyers who “undermine trust in the American legal system, with damaging consequences for the immigrants’ lives.”); see also, Jennifer Barnes, Bar Counsel for the Executive Office for Immigration Review, *The Lawyer-Client Relationship in Immigration Law*, Ethics Symposium, Practice Contexts, in 52 EMORY L.J. 1215, 1217 (2003) (relating the story of a California lawyer in disciplinary proceedings that didn’t, “know who his client was, had never met his client before, hadn’t prepared him for his hearing before the immigration judge because the notario had done all the paperwork and probably had done little to no preparation”).

for practitioners appearing before the immigration court.<sup>102</sup> These rules mirror the ABA Model Rules of Professional Conduct and increase the grounds for which the court may discipline an attorney or non-attorney who engages in unethical behavior.<sup>103</sup> In addition to the revamped rules of conduct for practitioners, the EOIR administers a program on practitioner ethics that includes a list of Currently Disciplined Practitioners.<sup>104</sup> Of the 436 practitioners on this list, only one non-attorney was cited for disciplinary action.<sup>105</sup> Tellingly, the EOIR calls this project the Attorney Discipline Program.<sup>106</sup>

These agency actions show that the problem of incompetent, fraudulent immigration representation is widespread even among authorized practitioners. Framing the problem of inadequate legal service as rectifiable through application of unauthorized practice of law restrictions not only misunderstands the extent of the issue, it also contributes to a potentially harmful misconception: that obtaining a law license is sufficient for the provision of responsible representation.

### **B. STATES SHOULD FOCUS ON THE PROBLEM OF PREDATORY IMMIGRATION CONSULTANTS AS A MATTER OF CONSUMER PROTECTION LAW**

In order to address the problem of consultant fraud nationwide, many jurisdictions have increasingly turned to consumer protection and criminal law as a means for curtailing these abuses. Section 1 explores how statutory prohibitions against unfair and deceptive acts and practices (UDAP) are applied to prevent the harmful practice of immigration consultants. This Section further explains how limitations within state UDAP laws may hinder their effectiveness against notarios and immigration consultants and suggests these limitations may account for the rise of recent legislation that specifically targets the unauthorized practice of immigration law. Section 2 outlines the variety of laws nationwide that address practice by notarios and immigration consultants and explores the strategies they employ to curb abuses. Finally, Section 3 highlights the aspects of the laws prohibiting UDAP and regulating immigration consultants that make those provisions

<sup>102</sup> 73 Fed. Reg. 76,914 (Dec. 18, 2008) (codified at 8 C.F.R. pts. 1001, 1003, 1292) (effective Jan. 20, 2009).

<sup>103</sup> Careen B. Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 *FORDHAM L. REV.* 577, 605 (2009).

<sup>104</sup> OFFICE OF THE GENERAL COUNSEL, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, LIST OF CURRENTLY DISCIPLINED PRACTITIONERS, available at <http://www.justice.gov/eoir/profcond/chart.htm> (last visited Aug. 27, 2011).

<sup>105</sup> *Id.* Effective February 2, 2006 the Board of Immigration Appeals expelled Accredited Representative Virginia Gago from practice before the Board, the Immigration Courts, and the Department of Homeland Security upon her conviction for the crime of petit larceny.

<sup>106</sup> *Id.*; see also, News Release, U.S. Department of Justice, Executive Office for Immigration Review, EOIR Implements Regulations to Enhance Attorney Discipline Program (Jan. 6, 2009) <http://www.justice.gov/eoir/press/09/AttyDiscReg010609.pdf>.

more effective tools for the prevention of notario fraud than their UPL counterparts.

### 1. CONSUMER PROTECTION PROVISIONS PREVENTING UNFAIR AND DECEPTIVE ACTS AND PRACTICES

All states and the District of Columbia have enacted consumer protection laws prohibiting unfair and deceptive acts and practices (UDAP).<sup>107</sup> In many states these laws are effective tools for the prosecution of notarios and immigration consultants who mislead customers as to the nature of the service they provide and their qualifications or experience in conducting immigration legal matters.<sup>108</sup> Using these statutes to prosecute notario misconduct will allow competent immigration consultants to continue to operate in the immigrant community while ensuring the availability of civil actions against deceptive notarios who defraud vulnerable noncitizens.

UDAP restrictions are premised on the harm to consumers caused by a fraudulent or unconscionable act.<sup>109</sup> The professional licensing status of the perpetrator is irrelevant.<sup>110</sup> The UDAP statutes often provide that consumers may bring private actions and need not cede the prosecution of these violations to an authorized state agency.<sup>111</sup> In this way, injured consumers are able to control litigation in a way unavailable under UPL statutes that turn those prosecutions over to the state attorney grievance committee, or similar entity tasked with monitoring unauthorized practice. The option of private enforcement is a particularly important consideration for undocumented individuals who may fear reporting abusive practices to government agencies.<sup>112</sup>

In addition, many of the state UDAP statutes provide that injured consumers may be entitled to restitution, equitable relief, attorney's fees, as well as treble and punitive damages.<sup>113</sup> UDAP laws thus promote protection of consumer interests by providing for compensation to injured customers who have been harmed by a deceptive or fraudulent practice.

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<sup>107</sup> See generally, NATIONAL CONSUMER LAW CENTER, *Consumer Protection in the States*, Appendix B, State-by-State Summaries of State UDAP Statutes (Jan. 10, 2009), available at <http://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf>.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See Moore, *supra* note 33 at 26-27 (noting that despite the importance of private remedies in encouraging undocumented victims to come forward, fears of removal persist and that in some actions parties have agreed to permit that plaintiffs proceed anonymously).

<sup>113</sup> *Id.*

## 2. CONSUMER PROTECTION PROVISIONS REGULATING IMMIGRATION CONSULTANTS

The greatest difficulty posed by existing UDAP rules is that they vary widely and may have varying levels of effectiveness combating the problem of immigration consultant fraud.<sup>114</sup> State provisions on UDAP differ with regard to the scope of protection, the enforcement authority, the penalties authorized, and the private actions and remedies available to victims of fraud.<sup>115</sup> State court decisions limiting the application of UDAP statutes have further hindered the use of these laws to prevent harmful notario practice.<sup>116</sup>

It is in this context that many states have supplemented existing UDAP statutes with laws specifically addressing the provision of immigration assistance. Beginning in the mid-1980s and continuing to the present, states have enacted legislation to address the problem of immigration consultant fraud and incompetence.<sup>117</sup> Some states have chosen to address the issue by amending existing statutes regulating the commission of notaries public.<sup>118</sup> One major feature of these amendments is the prohibition on the use of a literal translation of the title "notary public" into another language when such translation would imply that the notary is an attorney.<sup>119</sup> Another common provision requires notaries to publish or display disclaimers stating that they are not attorneys, not licensed to practice law, or are unable to provide advice about immigration or other legal matters.<sup>120</sup>

Perhaps in recognition of the fact that faulty immigration assistance often inhabits forms besides the bad actions of a notary public who acts outside her expertise, some states have opted for legislation that goes beyond the provisions governing notaries.<sup>121</sup> These states have approved statutory structures that seek to regulate the conduct of

<sup>114</sup> See MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., LEGAL ETHICS IN IMMIGRATION MATTERS: LEGAL REPRESENTATION AND UNAUTHORIZED PRACTICE OF LAW 13 (Sept. 18, 2009).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Moore, *supra* note 33 at 11 (noting that California was the first state to pass a law regulating immigration consultants in 1986); Shannon, *supra* note 103, at 600 (explaining that a couple of the most recent additions to this group include Georgia and South Carolina who both passed legislation regulating immigration assistance in 2008); see also, Arizona's Immigration and Nationality Law Practice Act, ARIZ. REV. STAT. ANN. §§ 12-2701-2704 (2009) (providing that a violation of the chapter is punishable as a class 6 felony and authorizing civil remedies for persons whose interests are adversely affected by unauthorized immigration representatives).

<sup>118</sup> Cisneros, *supra* note 18 at 311 (discussing amendments to Arizona's notary statute to address notario fraud).

<sup>119</sup> See e.g., TEX. GOV'T CODE ANN. § 406.017(a)(4) (Vernon 2005); UTAH CODE ANN. § 46-1-11(c) (West 2007).

<sup>120</sup> See e.g. ARIZ. REV. STAT. ANN. § 41-329(A) (West 1999); NEV. REV. STAT. ANN. § 240.085(1) (West 2005); TEX. GOV'T CODE ANN. § 406.017(b); UTAH CODE ANN. § 46-1-11(2)(a) [hereinafter *State Codes*].

<sup>121</sup> See e.g. CAL. BUS. & PROF. CODE § 22440-22447 (West 2005) (Business and Professions Code – Chapter 19.5: Immigration Consultants); see also, MICH. COMP. LAWS § 338.3451-71 (2004) (Michigan Immigration Clerical Assistant Act).

individuals offering immigration assistance.<sup>122</sup> Generally these laws share five common provisions: 1) provisions limiting the immigration-related services in which an individual may engage; 2) provisions concerning fees; 3) provisions for civil and criminal penalties; and 4) provisions exempting attorneys and other representatives federally-authorized to practice immigration law.<sup>123</sup>

### 3. HOW USING CONSUMER PROTECTION PROVISIONS BENEFITS IMMIGRANT CONSUMERS

First, a favorable feature of the laws that regulate immigration consultants is that they create space for non-lawyers to continue to serve the community so long as they follow the established regulations. This ensures that noncitizens will not be deprived of a valuable service in an area where they are likely unable to secure other forms of legal assistance. Ironically, some of these statutes are even more extensive and provide for more exhaustive practice requirements than the Code of Federal Regulations provisions governing entities eligible to practice immigration law.<sup>124</sup> The overall effect is to promote ethical service to an underserved population by announcing to the community what constitutes permissible practice. Furthermore, the specificity of these laws provides clear delineations of the services a consultant is permitted to provide<sup>125</sup> and those from which she must refrain.<sup>126</sup> These straightforward commandments also allow the consumer to more easily recognize when a violation has occurred. The ability to readily identify violations is an advantage to consumers unavailable in UPL prosecutions given the frequently unclear understanding of what constitutes “practice of law.”<sup>127</sup>

Second, the injured party’s ability to control litigation through private action is another one of the major advantages of laws protecting immigrant consumers lacking in state UPL provisions. As noted above, prosecution of UPL violations is generally ceded to the state agency in

<sup>122</sup> *Id.*

<sup>123</sup> Moore, *supra* note 33 at 11-15.

<sup>124</sup> Compare CAL. BUS. & PROF. CODE §§ 22442.4(a), 22443.1(a)(1) (requiring the immigration consultant undergo a criminal fingerprint check with the Department of Justice and pay a \$50,000 bond payable in case of malpractice) with 8 C.F.R. 292.1(3) (authorizing “reputable individuals of good moral character” to represent immigration legal matters if the individual: does not receive payment, has a pre-existing relationship with the person entitled to representation, and does not regularly engage in immigration and naturalization practice).

<sup>125</sup> See, e.g., CAL. BUS. & PROF. CODE § 22441(a) (listing activities in which immigration consultants may engage).

<sup>126</sup> See *id.* § 22440 (prohibiting individuals from acting as an immigration consultant except as provided within the code).

<sup>127</sup> See Shannon, *supra* note 103, at 588 (noting that each state’s attorney’s bar and legislature determine the specific parameters of what constitutes the unauthorized practice of law within that jurisdiction).

charge of preventing unauthorized practice.<sup>128</sup> While the state's interest in preventing unauthorized practice is protected, the individual consumer is afforded no action to vindicate her private interest.<sup>129</sup> Consumer protection laws, by contrast, provide private rights of action for consumers who have been injured by consultants' unfair and deceptive practices<sup>130</sup> or by their failure to adhere to authorized practice.<sup>131</sup>

Third, criminal penalties within consumer law provide additional protection to immigrant consumers by further deterring illegal and exploitative behavior. Provisions allowing injured consumers to recover attorney's fees and treble damages<sup>132</sup> and that criminalize subsequent violations as felonies,<sup>133</sup> further strengthen the potential for these provisions to lessen the plight of vulnerable immigrant consumers.

For immigrants seeking immigration legal assistance, the crisis is one of incompetent and fraudulent legal service, not unauthorized legal service. This, along with the other practical and conceptual limitations on sanctioning immigration consultants under statutes regulating UPL, signals that states should focus on the relief and deterrence available in consumer protection civil and criminal statutes.

**C. STATES SHOULD PROVIDE THE IMMIGRANT PUBLIC WITH THE APPROPRIATE RESOURCES TO FILE A COMPLAINT AGAINST AN UNSCRUPULOUS IMMIGRATION CONSULTANT AND PURSUE AN ACTION AGAINST THE CONSULTANT IN SMALL CLAIMS COURT**

One difficulty with consultant regulating devices is that they presume a level of access to legal resources and understanding of the law that may be lacking in many immigrant communities – especially given the novelty of such legislation. The key to effective enforcement of these forms of legislation is the involvement of immigrant consumers. Without consumer complaints denouncing harmful practices, these laws essentially find themselves all-dressed up with nowhere to go. Furthermore, legislators created and enacted these laws in response to many immigrants' inability to access competent legal services.<sup>134</sup> But, to fashion a remedy that requires the collaboration of an attorney is to ignore the root issue. Therefore, states must provide a supportive

<sup>128</sup> Cantrell, *supra* note 29, at 893-94.

<sup>129</sup> *Id.*

<sup>130</sup> See, e.g. MD. CODE ANN. COMM. LAW §§ 13-101 to -105.

<sup>131</sup> See, e.g. MD. CODE ANN. COMM. LAW §§ 14-3301 to -3306.

<sup>132</sup> MD. CODE ANN. COMM. LAW §§ 14-3306(b)-(c) (West 2005).

<sup>133</sup> CAL. BUS. & PROF. CODE § 22445(c).

<sup>134</sup> *Hearing on House Bill 691 Before the Maryland Economics Matters Committee*, 2005 Leg., 420th Sess. (Md. 2005) (testimony of Sheila Sprague, Montgomery County Intergovernmental Relations, noting the damage caused by incompetent non-attorney representatives as part of the rationale for the agency's support of House Bill 691) (on file with the Maryland Department of Legislative Services).

framework that allows injured immigrant consumers to utilize the law without the assistance of a lawyer.

### 1. PROMOTING ACCESS TO THE COURTS

Many commentators have recognized that a major factor in immigrants' lack of access to legal resources is the community's isolation from the legal process.<sup>135</sup> While many of these barriers are beyond the scope of state statutory authority, limitations posed by ignorance of the legal system and the English language may be effectively addressed through targeted implementation efforts.

Furthermore, like other forms of consumer protection laws, immigrant consumers of immigration legal services would most effectively recover through suits filed in small claims courts.<sup>136</sup> In situations where a notario scams an individual customer out of a few thousand dollars or less, the amount in controversy would likely often meet the maximum monetary claim requirement to bring a case in these forums.<sup>137</sup> In general, these courts have been designed in such a way as to promote involvement from unrepresented laypeople that possess no specialized knowledge of the legal system.<sup>138</sup> In order to provide effective access to this legal resource, state courts should provide technical support to *pro se* litigants who file actions against notarios in small claims court. Specifically, state courts should offer detailed self-help materials and consumer protection *pro se* clinics to assist immigrants in the filing of their claims. Many states already provide many such resources in English. State courts should adapt the information available to English-speaking small claims litigants and provide identical materials in Spanish.

### 2. REMOVING LANGUAGE AS A BARRIER

A principal cause of many immigrants' isolation from many kinds of vital services is their limited English proficiency.<sup>139</sup> Many government

<sup>135</sup> See Moore, *supra* note 33 at 3 (noting the lack of accessible legal services available to immigrants); see also, Langford *supra* note 18, at 119 (commenting how high levels of immigration, poverty, and lack of accessible legal services prevent immigrants from being represented by an attorney).

<sup>136</sup> See generally, EVELYN H. CRUZ & KATHY BRADY, IMMIGRANT LEGAL RESOURCE CENTER, *How to Sue an Immigration Consultant in Small Claims Court*, <http://www.ilrc.org/resources/anti-fraud/Small%20Claim%20Court-English.pdf> (describing process for suing in California small claims). The same report is available in Spanish at [http://www.ilrc.org/anti-fraud/pdf/Small\\_Claim\\_Court-Spanish.pdf](http://www.ilrc.org/anti-fraud/pdf/Small_Claim_Court-Spanish.pdf).

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g. California Courts Self-Help Center – Small Claims, available at <http://www.courtinfo.ca.gov/selfhelp/smallclaims/> (last visited Dec. 4, 2009).

<sup>139</sup> See Brief for Asian Pacific American Legal Resource Center et. al. as Amici Curiae Supporting Appellant, Nonceeya v. Lone Star Steakhouse, 981 A.2d 1233 (2009), available at <http://www.apalrc.org/media/FINAL%20NONCEEYA%20AMICUS%20BRIEF%205%2028%2009.pdf> ("While health and legal systems are difficult to understand for most laypeople, navigating even the most basic services and systems for LEP Marylanders can be particularly daunting and nearly impossible without language access.").



agencies have recognized this fundamental limitation and have moved to promote linguistically accessible services and materials.<sup>140</sup> Some jurisdictions have even enacted legislation requiring that government agencies provide resources in multiple languages to limited English proficient (LEP) individuals.<sup>141</sup> These moves represent government acknowledgement that linguistically accessible resources are central to civic inclusion of the LEP community. Legislation that benefits immigrant consumers, a population that is overwhelmingly limited in English proficiency, is subject to a particularly compelling need to provide language appropriate materials and resources. Therefore, to effectively combat malfeasance committed by immigration service providers, states should also ensure that immigrants wishing to file complaints to denounce consumer protection violations have the generally accessible, linguistically adequate resources to do so.

**D. STATE ATTORNEYS GENERAL SHOULD USE THEIR AUTHORITY  
TO PROSECUTE CONSULTANTS WHO PERPETRATE WIDESPREAD  
INCOMPETENCE, FRAUD, OR SCAM THE IMMIGRANT PUBLIC OUT OF  
LARGE SUMS OF MONEY**

The filing of a small claim is an effective way to encourage redress of a discrete injury to an individual consumer where the damages do not exceed a maximum statutory amount. These actions are likely best applied to isolated incidents of immigration consultant incompetence. For situations involving rampant malpractice, fraud, or where the disputed payment exceeds the sum designated a small claim, the states' attorneys general should use their civil and criminal enforcement power to address and dismantle such schemes.

In Arizona,<sup>142</sup> California,<sup>143</sup> New York,<sup>144</sup> and Texas<sup>145</sup> the offices of

<sup>140</sup> See, e.g., Servicio de Ciudadanía e Inmigración de Estados Unidos [United States Citizenship and Immigration Services], <http://www.uscis.gov/portal/site/uscis-es> (Home Page for United States and Citizenship Services in Spanish) (last visited Dec. 3, 2011).

<sup>141</sup> See, e.g., D.C. CODE §§ 2-1931 to -1937 (2007).

<sup>142</sup> See, e.g., Press Release, Office of State Attorney General Terry Goddard, *Terry Goddard Warns Immigrant Community to Beware Of Companies Advertising "Servicios de Notarios"* (Sept. 7, 2005) (cautioning consumers to the deceptive practices of notarios and publicizing civil cases brought against notarios).

<sup>143</sup> See, e.g., Patrick McGreevy, *18 Charged in Sting Targeting Immigrant Fraud, City prosecutor seeks to crack down on those who pose as attorneys or consultants to take thousands of dollars from victims*, L.A. TIMES, May 14, 2003, at 3 (reporting on the criminal indictment of eighteen immigration consultants).

<sup>144</sup> See, e.g., Press Release, Office of the Attorney Gen., *Attorney General Cuomo Shuts Down Three New York Companies Providing Fraudulent Legal Services to Immigrant Communities Across NYC and Long Island* (Aug. 20, 2009), available at [http://www.oag.state.ny.us/media\\_center/2009/aug/aug20a\\_09.html](http://www.oag.state.ny.us/media_center/2009/aug/aug20a_09.html) (last visited Dec. 4, 2009) (announcing enforcement efforts including an agreement between the Attorney General and three companies permanently barring the companies from providing immigration-related services and requiring them to collectively pay approximately \$118,000 in penalties).

<sup>145</sup> See, e.g., News Release, Attorney Gen. of Tex., *Attorney General Abbot Files Criminal Complaint Against Operator of Midland Immigration Services Scam* (Mar. 7, 2006), available at <http://www.oag.state.tx.us/oagNews/release.php?id=1485> (last visited Dec. 4, 2009) (the Attorney General

the attorney generals have already taken steps to prosecute fraudulent immigration businesses. The wide publicity surrounding these actions serves to inform the public of their rights and of steps for reporting abuses. These actions also deter fraud by putting bad actors on notice of the consequences for deceptive practice.

In a recent memo, the National State Attorneys General Program at Columbia Law School urged further intervention of attorneys generals nationwide to protect vulnerable immigrant consumers from fraud.<sup>146</sup> Citing successful enforcement efforts nationwide, this memo also stressed the importance of increasing the visibility and accessibility of the office of attorney general by offering translated information to consumers.<sup>147</sup> In addition, the memo highlighted the importance of hiring staff with language skills and specified the need for Spanish language-dedicated extensions or operators in states that offer consumer protection hotlines.<sup>148</sup>

### **III. HOW MARYLAND'S IMMIGRATION CONSULTANT ACT LIVES UP TO THESE PROPOSALS**

The Maryland Immigration Consultant Act (MICA) is an example of legislation that prohibits non-lawyers who have not been federally authorized to practice immigration law from providing certain immigration legal services.<sup>149</sup> Located under the state code's Miscellaneous Consumer Protection Provisions, the law is divided into six main parts:

- 1) A standard provision defining terms used in the statute;<sup>150</sup>
- 2) A provision exempting licensed attorneys, clinics affiliated with in-state law schools, nonprofits recognized under 8 C.F.R. § 292.2, and individuals authorized under 8 C.F.R. § 292.1 from the law's scope;<sup>151</sup>
- 3) A provision describing the acts prohibited under the law, including giving legal advice and making a false statement to encourage a client to use the consultant's service;<sup>152</sup>
- 4) A provision specifying required items for written service contracts and requiring the immigration consultant to return

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of Texas filed a criminal complaint against Hilda Armendariz charging her with four Class A misdemeanors under the state's notary public statute and Deceptive Trade Practices Act).

<sup>146</sup> See generally, Memorandum from Nat'l State Attorneys Gen. Program at Columbia Law Sch. (Jan. 12, 2007) [http://www.law.columbia.edu/null?exclusive=filemgr.download&file\\_id=12259](http://www.law.columbia.edu/null?exclusive=filemgr.download&file_id=12259) [hereinafter *National State Attorneys General Memo*].

<sup>147</sup> *Id.* at 4-6.

<sup>148</sup> *Id.* at 5.

<sup>149</sup> MD. CODE ANN. COM. LAW, §§ 14-3301 to -3306 (West 2005).

<sup>150</sup> *Id.* § 14-3301.

<sup>151</sup> *Id.* § 14-3302.

<sup>152</sup> *Id.* § 14-3303.

client documents;<sup>153</sup>

- 5) A provision requiring a posting at the place of business announcing that the provider is not an attorney licensed in Maryland and not able to provide legal services;<sup>154</sup> and
- 6) A provision that sets forth criminal and civil penalties for violation of the Act, including a maximum \$1000 fine, one year term of imprisonment, and restitution, attorney's fees, and treble damages for an injured client.<sup>155</sup>

As a preliminary matter, I begin with MICA's interesting responses to some of the major issues introduced in Part I of this Article.

### A. FEDERAL LIMITATIONS, NOT SO LIMITING

Like similar forms of legislation regulating immigration consultants,<sup>156</sup> MICA provides specific exemptions from its provisions regulating immigration legal service.<sup>157</sup> While many of these exempted entities have been directly lifted from the C.F.R., MICA provides additional exclusions for clinics affiliated with state law schools and representatives of nonprofit organizations.<sup>158</sup> These exemptions go beyond the "law students and law graduates"<sup>159</sup> and "recognized"<sup>160</sup> nonprofit organizations specified in C.F.R. While at least one commentator has noted the risk of preemption for immigration regulating statutes that fail to accord with federal regulations,<sup>161</sup> it is unclear that exemption from the act amounts to state authorization of these entities to provide immigration legal service. Nothing in the law states that these groups are authorized or able to provide immigration legal advice.

### B. THE DECLINE OF THE NOTARIO PÚBLICO

Conspicuously absent from the legislation is any prohibition or limitation on use of the term "notario público." Indeed, the act never mentions the words notario or notary at all. Maryland has also chosen to decline the path forged by other state statutes<sup>162</sup> that have amended the state notary law to address notario fraud. The Maryland statute governing notaries does not prohibit notaries from using the translated phrase notario público nor does the statute expressly prohibit notaries

<sup>153</sup> *Id.* § 14-3304.

<sup>154</sup> *Id.* § 14-3305.

<sup>155</sup> *Id.* § 14-3306.

<sup>156</sup> *See, e.g.,* CAL. BUS. & PROF. CODE § 22440; MINN. STAT. § 325E.031(5) (1998).

<sup>157</sup> MD. CODE ANN. COM. LAW, §§ 14-3302.

<sup>158</sup> *Id.* § 14-3302.

<sup>159</sup> 8 C.F.R. § 292.1(a)(2) (2003).

<sup>160</sup> 8 C.F.R. § 292.2 (2003).

<sup>161</sup> *See generally,* Moore, *supra* note 33 at 18-26 (arguing that state laws regulating immigration consultants establish a parallel scheme to the federal regulations regarding authorized immigration practice and may be preempted in cases where the federal and state laws conflict).

<sup>162</sup> *See* State Codes, *supra* note 120 (*e.g.* Arizona, Nevada, Texas, and Utah).

from engaging in the provision of legal services.<sup>163</sup>

### C. MICA AND ACCESSIBILITY OF LEGAL SERVICES

As noted above, MICA includes additional exceptions for entities not federally authorized to represent immigration legal matters.<sup>164</sup> The categories of a law-school-affiliated-law clinic and a representative of a nonprofit organization both contemplate provision of legal service by persons who have not obtained the federally required standing for representation. In testimony leading up to the passage of House Bill 691, Jonathan Green, the DC-Maryland-Virginia Chapter Chair-Elect for the American Immigration Lawyers Association (AILA) called the exemption for unaccredited representatives of nonprofit organizations, “a Chesapeake Bay sized loophole for individuals who are unscrupulous about immigration matters.”<sup>165</sup> Objecting to the exemption as an outlet for abusive practice and as inconsistent with federal regulation, Greene proposed an amendment to the bill to eliminate the exclusion.<sup>166</sup>

Despite this appeal, lawmakers ultimately retained the nonprofit exemption without amendment or alteration.<sup>167</sup> Exemptions for nonprofits and law school clinics signal the state’s desire to untie the hands of service providers who are as likely to provide competent service as those entities authorized in federal law. Exempting entities that generally offer free or low-cost legal services indicates a willingness on the part of Maryland legislators to avoid prosecution of groups offering economically accessible legal assistance.

### D. MICA AND UPL PROSECUTIONS

MICA is set forth at Title 14, Chapter 33 of the Maryland Commercial Law governing Miscellaneous Consumer Protection Provisions.<sup>168</sup> While Maryland has a statute prohibiting UPL,<sup>169</sup> state legislators moved to pass MICA’s specialized legislation outside that provision, as a matter of consumer protection law. This action suggests that the state found the law’s existing provision against unauthorized practice inadequate for prosecution of unscrupulous immigration consultants. And although the law states that an immigration consultant may not

<sup>163</sup> See MD. CODE ANN., STATE GOV’T §§ 18-101 to -114.

<sup>164</sup> MD. CODE ANN. COM. LAW, §§ 14-3302.

<sup>165</sup> *Hearing on House Bill 691 Before the Maryland Economics Matters Committee*, 2005 Leg., 420th Sess. (Md. 2005) (testimony of Jonathan Green, Chair-Elect of the Washington, DC, Maryland, and Virginia Chapter of AILA)(on file with the Maryland Department of Legislative Services).

<sup>166</sup> *Id.*

<sup>167</sup> See MD. CODE ANN. COM. LAW, § 14-3302(4) (West 2005). It appears, however, that legislators did not completely disregard Mr. Greene’s testimony. His suggestion for a separate amendment, changing the language of §§ 14-3302(3) and (4) to specify “recognized” organizations under 8 C.F.R. § 292.2 was adopted in the final version of the bill.

<sup>168</sup> MD. CODE ANN. COM. LAW, Tit. 14, Ch. 33.

<sup>169</sup> MD. CODE ANN. BUS. OCC. & PROF. § 10-601 (West 1989).

provide legal advice or services,<sup>170</sup> the exemptions of § 14-3302 exclude a variety of non-lawyer individuals from that prohibition.<sup>171</sup> These features indicate the state's rejection of general UPL prosecution as an effective means for preventing fraud to immigrant legal consumers.

## E. MICA AND CONSUMER PROTECTION

### 1. CIVIL PENALTIES

The Maryland Immigration Consultant Act (MICA) is a piece of consumer protection legislation. Unlike the Maryland UPL statute,<sup>172</sup> MICA provides a private cause of action for a client injured by an immigration consultant's violation of the Act.<sup>173</sup> In civil litigation, its provisions may be invoked in conjunction with the state's consumer protection statute against unfair and deceptive acts and practices.<sup>174</sup> Filed in 2008, *Argueta v. Mejia* was the first case to claim relief under the MICA.<sup>175</sup> The plaintiffs prevailed against an immigration consultant based in Prince George's County by alleging various violations of MICA and the Maryland Consumer Protection Act (CPA).<sup>176</sup> This action resulted in a \$100,000 settlement for plaintiffs Marco Julio Garcia Argueta, Maria Asucena Hernandez, Rosa Lidia Luna, and Jose Francisco Campos Reyes against defendant Maria Filomena Mejia.<sup>177</sup> Mejia was a consultant who represented herself as having a "court license," being a "notario público," and providing "attorneys" to represent individuals in immigration matters.<sup>178</sup>

Believing her to be an attorney, the plaintiffs paid Mejia \$1,950 for the filing of various forms for immigration benefits.<sup>179</sup> With the forms selected by Mejia, the plaintiffs also sent non-refundable immigration filing fees totaling \$2,290.<sup>180</sup> The forms that Mejia filed on the plaintiffs'

<sup>170</sup> MD. CODE ANN. COM. LAW, § 14-3303(1) (West 2005).

<sup>171</sup> *Id.* § 14-3302.

<sup>172</sup> MD. CODE ANN., BUS. OCC. & PROF. § 10-406 (West 1989) (limiting authority to the Maryland Attorney General or Bar Counsel to seek injunctive relief against persons engaging in the unauthorized practice of law).

<sup>173</sup> MD. CODE ANN. COM. LAW, § 14-3306(b) (West 2005).

<sup>174</sup> See Complaint and Settlement and Release Agreement, *Argueta v. Mejia*, Case No. CAL08-2204 (Md. Cir.Ct. 2008), available at [http://apps.americanbar.org/publicserv/immigration/notario/argueta\\_v\\_mejia.pdf](http://apps.americanbar.org/publicserv/immigration/notario/argueta_v_mejia.pdf) [hereinafter *Argueta Complaint & Settlement*].

<sup>175</sup> News Release, Bryan Cave LLP, Defrauding of Immigrants Ends Through Landmark Pro Bono Litigation (Apr. 15, 2009), <http://www.bryancave.com/newsevents/news/Detail.aspx?news=3113>; see also, Interview with David Zetoony, Associate, Bryan Cave LLP, in D.C. (Nov. 24, 2009) [hereinafter *Zetoony Interview*].

<sup>176</sup> *Argueta Complaint & Settlement supra* note 174 at ¶¶ 94-177 of the Complaint (the complaint also alleged damage as a result of tortious fraud).

<sup>177</sup> *Id.* at ¶ 5.1 of Release and Settlement Agreement.

<sup>178</sup> *Id.* at ¶ 3.1(a) of Release and Settlement Agreement.

<sup>179</sup> *Argueta Complaint & Settlement, supra* at note 174 ¶ 185 of Complaint.

<sup>180</sup> *Id.* at ¶ 186 of Complaint.

behalf were eventually denied by immigration officials.<sup>181</sup> In one of its denials, the immigration service based its decision on the five year expiration of the provision under which Mejia had filed for relief.<sup>182</sup> In their complaint, plaintiffs petitioned the court for monetary relief and injunctive action preventing Mejia from providing or advertising similar services in the future.<sup>183</sup>

David Zetoony, lead counsel for the *Argueta* plaintiffs, explained that by pursuing simultaneous actions under the CPA, MICA, and for common law fraud, the plaintiffs were able to claim various forms of relief.<sup>184</sup> Specifically, they could invoke the benefit of the treble damages provision of MICA with the remedies for award of attorney's fees, punitive damages, and injunctive relief available under the CPA and tortious fraud causes of action.<sup>185</sup>

The plaintiffs' attorneys chose this litigation strategy partially as a result of a deficiency in the MICA statute. Zetoony points out that although MICA provides for attorney's fees, § 14-3306(b)(2) limits the amount recoverable to the greater of:

- (i) \$2,000;
- (ii) one-third of the amount obtained as fees or compensation paid to the immigration consultant; or
- (iii) one-third of the amount obtained by the court's trebling of the fees paid to the consultant.<sup>186</sup>

In the *Argueta* case, this formula would have limited attorney's fees to the greater of: \$2,000, \$650 (one-third of Mejia's \$1,950 fee), or \$5,850 (the trebled value of the \$1,950 fee). For a case in which he and his firm invested well beyond \$2,000 worth of time and resources, Zetoony wonders how any potential plaintiff could entice an attorney to accept such a case outside the pro bono context.<sup>187</sup> He also notes the difficulty he has had in recruiting immigration legal aid attorneys, who understand little about civil litigation outside the immigration court.<sup>188</sup>

Since *Argueta*, only one other case has successfully used MICA to obtain relief for an injured immigrant consumer. On September 20, 2010, the University of Maryland School of Law's Consumer Protection Clinic filed a complaint against consultant Loreta Paligutan on behalf

<sup>181</sup> *Id.* at ¶¶ 59, 81 of Complaint.

<sup>182</sup> *Id.* at ¶ 81 of Complaint.

<sup>183</sup> *Id.* at ¶¶ 185-190 of Complaint.

<sup>184</sup> Zetoony Interview, *supra* note 175.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* (citing MD. CODE ANN. COM. LAW, § 14-3306(b)(2)(i)-(iii)).

<sup>187</sup> Zetoony Interview, *supra* note 175.

<sup>188</sup> *Id.*

of plaintiff Maribeth Quitariano.<sup>189</sup> Unlike *Argueta*, the *Quitoriano* complaint relied purely on allegations of various violations of MICA for its causes of action.<sup>190</sup> Using this strategy, Quitariano was able to recover the \$1,800 fee paid to Paligutan as well as treble damages and \$2,000 in attorney's fees.<sup>191</sup>

Peter A. Holland, Assistant Professor with the Maryland School of Law Consumer Protection Clinic, explains that proving the elements for violation of MICA is a far more straightforward process than showing a violation of the Maryland CPA.<sup>192</sup> While the CPA requires a showing that the defendant engaged in an "unfair," "unconscionable," or "deceptive" act, MICA presumes that a violation of its provisions (i.e., failure to provide a written contract, collection of payment in advance of service provision, etc.<sup>193</sup>) amounts to an unfair and deceptive act.<sup>194</sup> Thus, while successful allegation of a CPA violation often requires an extensive showing of facts to establish an unfair or deceptive practice, Holland describes MICA's provisions as a simpler "checklist" for establishing a cause of action.<sup>195</sup>

While he agrees that MICA's cap on attorney's fees may deter members of the private bar from bringing these causes of action, he counters that MICA's checklist of elements makes the action much less cost and time intensive to represent than traditional CPA actions.<sup>196</sup> Instead, Holland believes that more complaints have not been presented due to lawyers' ignorance of MICA's existence, not due to a lack of financial incentives.<sup>197</sup>

## 2. CRIMINAL PENALTIES

Section 14-3306(a) of the MICA specifies criminal penalties for violation of the Act's provisions. These penalties provide for misdemeanor charges subject to a maximum fine of \$1,000, imprisonment not exceeding one year, or both.<sup>198</sup> These criminal penalties are in addition to any civil penalties imposed.<sup>199</sup>

Despite the state of Maryland's professed interest in preventing immigration consultant fraud as expressed through MICA's passage,

<sup>189</sup> Maryland Judiciary Case Search (Case No: 010100279772010), available at <http://casesearch.courts.state.md.us/inquiry/inquiryDetail.js?caseId=010100279772010&loc=1&detailLoc=DSCIV IL> (last visited Aug. 27, 2011); see also, *Quitoriano v. Paligutan* complaint (on file with author) [hereinafter *Quitoriano Complaint*].

<sup>190</sup> *Quitoriano Complaint*, *supra* note 189, at ¶¶ 21-6.

<sup>191</sup> E-mail from Peter A. Holland, Visiting Assistant Professor, Consumer Protection Clinic, University of Maryland School of Law to author (Jan. 11, 2011, 16:32:00 EST) (on file with author).

<sup>192</sup> Telephone Interview with Peter A. Holland, Visiting Assistant Professor, Consumer Protection Clinic, University of Maryland School of Law (Aug. 10, 2011) [hereinafter *Holland Interview*].

<sup>193</sup> See MD. CODE ANN. COM. LAW, § 14-3303.

<sup>194</sup> *Holland Interview*, *supra* note 192.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> MD. CODE ANN. COM. LAW, § 14-3306(a).

<sup>199</sup> *Id.*

the legislation lingered for more than five years without any public enforcement action.<sup>200</sup> To its credit, the Office of the Maryland Attorney General very recently brought suit against the Baltimore-based consulting business Latin Service LLC which it publicized in June of 2011.<sup>201</sup> Although this action did use MICA's civil provisions to obtain a cease and desist order preventing the company from offering immigration services, it did not involve any criminal prosecution of the defendants Sinia Zelaya and Gelmin Arlis Portillo.<sup>202</sup> Unlike other states where officials have aggressively and publicly prosecuted fraudulent notarios,<sup>203</sup> the state of Maryland has yet to file a single prosecution under the legislature's bold effort to criminalize consultant fraud.<sup>204</sup> While MICA's provision for criminal penalties offers strong potential for deterring consumer fraud, the state is the only litigant able to present a charge for a criminal violation. The state's apparent lack of interest in criminal enforcement provides little disincentive to would-be scam artists.

### 3. POTENTIAL FOR PRO SE REPRESENTATION

As discussed above, MICA's enforcement through private litigation has been frustrated by provisions limiting attorney's fees, by private lawyers' ignorance of the law, and by the already limited resources of legal service providers. The state's limited civil and criminal enforcement efforts further detract from the law's overall effectiveness. What then is the possibility for an injured party to seek redress using the *pro se* representation proposed in Part II of this Article? As proposed in that Section, the lack of attorney involvement in these cases is unsurprising given the victim's general isolation from legal processes and resources. That MICA's provisions may affirmatively deter private representation is extremely problematic,<sup>205</sup> but would not be fatal were the law administered in such a way as to promote meaningful *pro se* representation. A review of the resources currently available to potential *pro se* plaintiffs confirms that implementation of MICA has failed to adequately provide for this possibility as well.<sup>206</sup>

<sup>200</sup> See generally, Maryland Attorney General, Consumer Protection Division News Releases, <http://www.oag.state.md.us/Consumer/pressrel.htm> (showing no mention of immigration consultant fraud in the news releases covering the years since MICA's enactment on May 26, 2005 until June of 2011) (last visited Aug. 27, 2011) [hereinafter *Consumer Protection News Releases*].

<sup>201</sup> Press Release, Office of the Attorney Gen., Attorney General Gansler Takes Action Against Deceptive Immigration Consultants (June 9, 2011), available at <http://www.oag.state.md.us/Press/2011/060911.html> (last visited Aug. 27, 2011) [hereinafter *Latin Service Press Release*].

<sup>202</sup> *Id.*

<sup>203</sup> See e.g., Press Release, *supra* note 144; News Release, *supra* note 145.

<sup>204</sup> See generally, *Consumer Protection News Releases*, *supra* note 200 (showing no mention of a criminal prosecution for immigration consultant fraud in the years since MICA's enactment).

<sup>205</sup> See Zetoon Interview, *supra* note 175 (noting MICA's provision limiting award of attorney's fees).

<sup>206</sup> See generally, CONSUMER PROTECTION DIVISION, MARYLAND ATTORNEY GENERAL, <http://www.oag.state.md.us/Consumer/index.htm> (last visited Dec. 5, 2009) [hereinafter *Consumer Protection Website*]; see also, *About the Complaint Mediation Process*, CONSUMER PROTECTION DIVISION,



### a. MEDIATION AND ARBITRATION

The Office of the Maryland Attorney General is responsible for the state's Consumer Protection Division.<sup>207</sup> For consumers who wish to seek action against a business for a faulty product or service, the Consumer Protection Division promotes three primary options: mediation, arbitration, and small claims court.<sup>208</sup> According to the Consumer Protection Division, the first step for an immigrant consumer should be to contact the mediation division through the filing of a general complaint via the division's website online or by calling the consumer hotline.<sup>209</sup>

While the lack of language resources for immigrant consumers means the process likely stalls here even before it starts, the complaint process is worth examining in full. Indeed, even for the immigrant who is able to make it beyond the division's surprising lack of Spanish-language resources, the procedure for complaint threatens additional pitfalls along the way. Upon filing, the complaint is reviewed and assigned to a volunteer mediator on a first come, first served basis.<sup>210</sup> It may take several weeks for a case to be assigned to a mediator.<sup>211</sup> The mediation process can also be drawn out depending on the parties' willingness to cooperate in the process.<sup>212</sup>

If mediation fails to resolve the complaint, the Consumer Protection Division recommends the consumer pursue his claim through the state's free binding arbitration. Because both parties must agree to be bound by arbitration at the outset of the arbitration process,<sup>213</sup> it is unlikely to be an option for two parties freshly emerged from unresolved mediation negotiations. While more than 1,000 Maryland businesses have pre-committed to having disputes heard in arbitration that have failed to resolve through mediation,<sup>214</sup> it is unlikely that immigration consultant businesses are among those pre-committed. Many consultants, like Maria Mejia, are sole proprietorships or small-scale operations that operate on the margins of society. That predatory businesses may in fact depend on their clientele's lack of access to consumer protection resources is further reason to doubt that they have pre-committed, or are likely to commit, to binding arbitration with the state Consumer Protection Division.

MARYLAND ATTORNEY GENERAL, <http://www.oag.state.md.us/Consumer/complaintmediation.htm> (last visited Aug. 31, 2011) [hereinafter *Mediation Process*].

<sup>207</sup> See generally, *Consumer Protection Website*, *supra* note 206.

<sup>208</sup> See *Mediation Process*, *supra* note 206.

<sup>209</sup> See *id.*; see also, E-mail from Karen S. Straughn, Assistant Attorney General & Mediation Direction, Maryland Consumer Protection Division, to Claire R. Trickler-McNulty, Staff Attorney, ABA Commission on Immigration (Dec. 2, 2009, 5:27 PM EST) (instructing the ABA to refer Maryland victims of notary fraud to the Consumer Protection Division Mediation Unit by filing a consumer complaint) (on file with author) [hereinafter *Straughn E-mail*].

<sup>210</sup> *Mediation Process*, *supra* note 206.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

Where either party does not consent to binding arbitration, the Consumer Protection Division will provide the complainant information for bringing a case in Small Claims Court.<sup>215</sup> At this point, the Consumer Protection Division has completely failed to assist the injured immigrant consumer. Given the likelihood of failure at nearly every step in the process, an immigrant complainant could potentially lose months waiting for this process to play out. And this assumes a persistent consumer. Many reasonable people would withdraw from this onerous process in desperation or frustration. There is also the possibility that immigrant consumers who have been injured by faulty legal service may find themselves in immigration removal proceedings as a result. These individuals have even less time to spare on a drawn-out and doomed procedure.

Happily, it seems the Consumer Protection Division process may not be a complete loss given the Attorney General's recent efforts to use these complaints to pursue organizations such as Latin Service LLC.<sup>216</sup> But as noted previously, the Office of the Attorney General has only recently begun to demonstrate interest in preventing fraud against immigrants and the specific resources available to victims still consist of little more than the agency's June 2011 press release.<sup>217</sup>

While navigating the mediation process through the Consumer Protection Division is not required for filing in small claims court, the division's website does not explicitly state or clearly indicate that a consumer may decide to bypass the process and file a suit directly in court. Approaching the state's Consumer Protection Division is likely the first natural step a consumer would take to investigate his possible legal rights. It is regrettable that such a resource would lead the immigrant consumer down a path paved with frustration and likely failure given the possible damage such a delay could work on the consumer's civil claim. The Maryland statute of limitations for civil complaints is three years from the date the action accrues.<sup>218</sup> An immigrant consumer that loses weeks and months in fruitless mediation may ultimately forfeit any potential civil claim by exceeding the statutory limitation. This is a troubling possibility considering the claims of many immigrant consumers would likely qualify for treatment in Maryland's small claims courts.

## **b. SMALL CLAIMS COURT**

For a suit to be resolvable in Maryland's District Court as a small claim, it must be for an amount not exceeding \$5,000 in monetary

<sup>215</sup> *Id.*

<sup>216</sup> See *Latin Service Press Release supra*, note 201.

<sup>217</sup> See generally, *Consumer Protection News Releases, supra*, note 200; but see, *Latin Service Press Release, supra*, note 201 (showing a recent effort in the Office of Attorney General to pursue civil complaints).

<sup>218</sup> MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (West 1989).

relief.<sup>219</sup> Injunctive action is also unavailable in small claims.<sup>220</sup> In addition, the filing party must be willing to proceed without pre-trial discovery.<sup>221</sup> If the claim meets these conditions, the plaintiff may file his case in small claims court, using the detailed instructions available on the court's website and other self-help materials.

Like the Consumer Protection Division, the website of the District Court of Maryland emphasizes that a would-be plaintiff should consider resolving his dispute through mediation before proceeding to court.<sup>222</sup> But unlike the Consumer Protection website, the court labels mediation "an *alternative* to going to court."<sup>223</sup> Compare this characterization to the Consumer Protection Division's description of court as a final option available when "mediation doesn't resolve [the] claim."<sup>224</sup>

If a consumer decides to forego mediation for direct filing with the small claims court, the court's website offers detailed instructions for filing a complaint.<sup>225</sup> These instructions include a section by section description of how to fill out the complaint form and options for serving process on the defendant.<sup>226</sup> To file a small claim, the plaintiff must pay a modest twenty dollar court fee.<sup>227</sup> To serve the defendant, the court offers fees for process of service done by a sheriff,<sup>228</sup> but explains that a notice sent to the defendant by certified mail is sufficient to show service.<sup>229</sup> The court also offers tips on responses the plaintiff can expect from the defendant and suggestions for proceeding when the defendant attempts to negotiate a settlement, files a counterclaim, or ignores the plaintiff's complaint, among other possibilities.<sup>230</sup>

Although much of the information the court offers is quite detailed and practical, the section describing the procedure for appearing in small claims court is remarkably vague. With regard to preparing for trial, the court's self-help brochure merely states: "Next Steps: Once you have filed your small claim, and you are waiting for your trial date, it is time to begin preparing for your day in court. This will involve preparing an opening and closing statement, selecting and preparing

<sup>219</sup> *How to File a Small Claim*, DISTRICT COURT OF MARYLAND, <http://www.courts.state.md.us/district/forms/civil/dccv001br.html> (last visited Dec. 6, 2009) [hereinafter *How to File a Small Claim*].

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* (referring complainants to the state's Alternate Dispute Resolution Program through a hyperlink, <http://www.courts.state.md.us/district/adr/home.html>).

<sup>223</sup> *Id.* (emphasis added).

<sup>224</sup> *Mediation Process*, *supra* note 206.

<sup>225</sup> *How to File a Small Claim*, *supra* note 219.

<sup>226</sup> *Id.*

<sup>227</sup> *District Court of Maryland Cost Schedule*, DISTRICT COURT OF MARYLAND (May 2011), <http://www.courts.state.md.us/district/forms/acct/dca109.pdf> [hereinafter *District Court of Maryland Cost Schedule*].

<sup>228</sup> *Id.*

<sup>229</sup> *How to File a Small Claim*, *supra* note 219.

<sup>230</sup> *Id.*

witnesses, and organizing your exhibits and presentation.”<sup>231</sup> With that, the court’s small claims information abruptly concludes, suggesting that the reader call the District Court Clerk with any questions.<sup>232</sup>

Many immigrant claimants likely experience extreme anxiety at the possibility of appearing in civil court, a condition that may be even more pronounced depending on the claimant’s legal status. In order to better prepare the claimant for court generally, and to give an anxious claimant a better idea of what to expect, the court should offer more detailed information regarding appearing in and preparing for court. A PDF brochure offered through the Consumer Protection Division website does offer a bit more information on appearing in small claims court.<sup>233</sup> This information should be incorporated into all self-help materials including the instructions available on the District Court’s small claims website.

Another notable deficiency in the information available to *pro se* small court plaintiffs is any approximation of the time commitment required to pursue such action. While the time required for court proceedings is notoriously difficult to predict, an estimation of time, or suggestion for learning the court’s current processing time for cases, would be helpful. As discussed above, some immigrants injured by notary fraud may find themselves on borrowed time, pending the resolution of immigration proceedings.

### C. LANGUAGE AS A BARRIER

While both the Consumer Protection mediation process and the District Court small claims proceeding do offer a degree of public accessibility, the ability of an immigrant consumer to use these options depends on the availability of language resources. For a Spanish-speaker determined to bring a suit in small claims, the court offers a variety of Spanish self-help resources.<sup>234</sup> In addition, Maryland is obligated by state<sup>235</sup> and federal<sup>236</sup> laws to provide interpreters at

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> See District Court of Maryland Small Claims Court Brochure, available at <http://www.oag.state.md.us/Consumer/smallclaims.pdf>.

<sup>234</sup> *District Court of Maryland, Self-Help Information and Brochures*, DISTRICT COURT OF MARYLAND, [http://www.courts.state.md.us/district/public\\_brochures.html#civil](http://www.courts.state.md.us/district/public_brochures.html#civil) (offering information in Spanish on how to file a small claim, among other resources) (last visited Dec. 9, 2009).

<sup>235</sup> See MD. R. CTS. J. AND ATTYS. RULE 16-819(c)(2)(A) (providing that the court shall appoint an interpreter to allow a party or witness to fully participate in proceedings, assist counsel, and be understood by counsel, the court, and the jury); see also, MD. CODE ANN., CTS. & JUD. PROC. § 9-114 (allowing a party to apply to the court for appointment of a qualified interpreter).

<sup>236</sup> See 42 U.S.C. § 2000d (2008) (legislation arising from Title VI of the 1964 Civil Rights Act providing in pertinent part that no person in the United States shall be excluded based on national origin from any program receiving Federal financial assistance); see also, *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (holding that Title VI prohibits discrimination based on LEP status under the rubric of national origin and ordering California public schools to provide education to all students regardless of language spoken); see also, Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2001) (Improving Access to Services for Persons With Limited English Proficiency).

trial. These accommodations give a practical effect to the individual's right to seek redress for the personal harm caused by an incompetent consultant. The Maryland court thus offers a potentially effective means for individuals with a "minor" injury to obtain compensation as a small claim.

But, as posited in Section II, a comprehensive response to the problem requires both the possibility of compensation for an individual's small claim as well as a method for addressing larger violations. For purposes of deterrence and mass prosecution of MICA violators,<sup>237</sup> the Maryland Office of Attorney General must support the efforts of immigrant complainants. As explored above, the Attorney General's Mediation Division offers a frustrating process for addressing consumer complaints.<sup>238</sup> Unfortunately, the Division's complete lack of language resources further discourages its use as a meaningful resource for injured immigrant consumers. Of the state consumer protection resources cited above, not a single item is available in Spanish.<sup>239</sup> This absence of language resources is emblematic of the Attorney General's failure to more effectively protect immigrant consumers against consultant fraud.

#### F. THE MARYLAND ATTORNEY GENERAL AND EFFORTS TO PROTECT IMMIGRANT CONSUMERS

As noted in different parts of this article, state consumer protection agencies play a vital role in the prevention of notario fraud.<sup>240</sup> Although *pro se* small-claims litigation may be a viable option, without cooperation from the Consumer Protection Division the consumer may never learn of the possibility for a small-claims suit. Moreover, MICA complaints ineligible for small-claims treatment are unlikely to be resolved through other means given the difficulty in obtaining private legal representation for such cases.<sup>241</sup> Deterrence of these abuses and handling of large-scale violations both require the collaboration of the Attorney General's Division of Consumer Protection.

In general, the state's Office of Attorney General (OAG) assists consumers by prosecuting bad actors in the public interest, educating the public about fraud, and providing needed resources for the consumer complainant. An evaluation of the efforts of the Maryland

<sup>237</sup> See *National State Attorneys General Memo*, *supra* note 146 (urging Attorneys General nationwide to take action to protect vulnerable immigrant consumers).

<sup>238</sup> See generally, *Mediation Process*, *supra* note 206.

<sup>239</sup> See generally, *Consumer Protection Website*, *supra* note 206.

<sup>240</sup> See *National State Attorneys General Memo*, *supra* note 146.

<sup>241</sup> See *Zetoony Interview*, *supra* note 175 (relating his experience that many legal aid attorneys working with immigrant clients are hesitant to represent civil claims against consultants and how members of the private bar are unlikely to represent the claims outside of the pro bono context); see also, *Holland Interview*, *supra* note 192 (citing lawyers' ignorance of MICA as the reason for so few complaints having been filed).

Attorney General's Office demonstrates a broad failure in each of these important categories with regard to addressing notario fraud during the first five years since MICA's passage.

### 1. NEED TO PROSECUTE IMMIGRATION CONSULTANTS

As detailed in an earlier Section, the Maryland OAG has failed to conduct any criminal enforcement against fraudulent immigration consultants despite the agencies power to do so under the criminal provisions of the CPA and MICA.<sup>242</sup> This failure to prosecute represents an abrogation of the Attorney General's responsibility to prosecute businesses operating without regard for the public interest. However, the agency's recent civil action against Latin Service LLC could indicate that criminal prosecutions may not be far behind.<sup>243</sup> In the meantime, little information has been made available to immigrant consumers aside from the OAG's June 2011 Latin Service Press Release. The Release indicates that the office intends to conduct "a statewide campaign to educate Maryland consumers about immigration scams and point them to resources available to assist with immigration matters."<sup>244</sup> Months after this announcement, still no outreach campaign regarding immigration consultants has been presented to the public.

### 2. NEED TO EDUCATE IMMIGRANT CONSUMERS

The website for the Maryland OAG does not mention the existence of the MICA. The website does provide hyperlinks to other topic areas codified under the Miscellaneous Consumer Protection Provisions chapter that houses MICA, including an entire page devoted to information on kosher and halal food products.<sup>245</sup> As mentioned previously, the OAG has recently posted a June news release regarding immigration consultant fraud.<sup>246</sup> This promising announcement publicized the Attorney General's participation in a nationwide effort to address immigration fraud in collaboration with the Federal Trade Commission, the Department of Justice Executive Office for Immigration Review, United States Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and other states' attorney generals.<sup>247</sup> Unfortunately this notice was available only in English and thus inaccessible to many potential victims of notary fraud. This lack

<sup>242</sup> See generally, *Consumer Protection News Releases*, *supra* note 200.

<sup>243</sup> See *Latin Service Press Release*, *supra* note 201.

<sup>244</sup> *Id.*

<sup>245</sup> See MD. CODE ANN. COM. LAW §§ 14-902 to -904, §§14-3601 to -3604 (consumer protection provisions for kosher and halal foods, respectively); see also, *Kosher and Halal Food Products*, MARYLAND ATTORNEY GENERAL, CONSUMER PROTECTION DIVISION, <http://www.oag.state.md.us/Consumer/kosher/index.htm> (last visited Dec. 6, 2009).

<sup>246</sup> See *Consumer Protection News Releases*, *supra* note 200.

<sup>247</sup> *Id.*

of information discourages consumers from recognizing the issue's existence and from protecting themselves from possible harm.

Even assuming that more information was made available, it would likely fail to educate vulnerable immigrant consumers. The information on the website, including consumer protection warnings and news releases, is currently available in English only.<sup>248</sup>

### 3. NEED TO PROVIDE APPROPRIATE CONSUMER RESOURCES

A recent call to the Maryland Attorney General's Consumer Hotline confirms the absence of linguistically accessible services. The Hotline operator stated that the office does not provide complaint forms in Spanish and that the Hotline staffs only "occasional" bilingual volunteer operators who operate the line at uncertain and variable times throughout the week.<sup>249</sup> There is no guarantee that one of these volunteers will be available when a Spanish-speaking consumer calls for assistance.<sup>250</sup>

That states with historically high levels of immigration such as California<sup>251</sup> and New York<sup>252</sup> offer Spanish language public resources is less remarkable than the resources available in states where large scale immigration is a relatively new phenomenon. In Colorado, a state with a current estimated immigrant population of 500,000,<sup>253</sup> the Office of the Attorney General recently hired a consumer intake specialist fluent in Spanish.<sup>254</sup> The Attorney General for Iowa also recently hired a bilingual investigator<sup>255</sup> to better serve that state's approximately 100,000 foreign-born residents.<sup>256</sup> With an estimated 700,000 foreign-born residents,<sup>257</sup> it is clear that Maryland lags behind the efforts of other states in adequately serving the state's immigrant consumers. The state's population of more than 150,000 native Spanish-speakers who speak English "less than very well,"<sup>258</sup> is further indication of the need for publicly available Spanish-language resources.

If raw numbers are insufficient to convince the Maryland OAG of

<sup>248</sup> *Id.*

<sup>249</sup> Telephone Call to Maryland Attorney General, Consumer Protection Division, Consumer Hotline (Nov. 19, 2009, 3:00 PM EST).

<sup>250</sup> *Id.*

<sup>251</sup> See e.g., Departamento de Asuntos del Consumidor de California ¡Su Voz Tiene Poder! Auto-Ayuda Para Los Consumidores [California Department of Consumer Affairs. Your voice has power! Self-help for Consumers], [http://www.dca.ca.gov/publications/consumer-selfhelp\\_spanish.pdf](http://www.dca.ca.gov/publications/consumer-selfhelp_spanish.pdf).

<sup>252</sup> See e.g., State of New York, Office of the Attorney General, Formulario de Queja [Consumer Complaint Form], [http://www.oag.state.ny.us/resource\\_center/complaints/pdfs/cns001web\\_consumer\\_spanish.pdf](http://www.oag.state.ny.us/resource_center/complaints/pdfs/cns001web_consumer_spanish.pdf).

<sup>253</sup> *National State Attorneys General Memo, supra* note 146, at 1.

<sup>254</sup> *Id.* at 5.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 1.

<sup>257</sup> *Foreign-Born in Maryland, supra* note 49 at 3.

<sup>258</sup> *Id.* at 21.

the need for accessible services, the Attorney General should at least demonstrate an interest in enforcing the laws of the state of Maryland. If the significance of the OAG's role in effectively administering MICA has been lost on the agency, one would expect the office to be aware of state legislators' provision of public policy guidance promoting language access. In 2002, the Maryland legislature issued legislative findings and policy recognizing the importance of state involvement in alleviating the burden on Maryland's LEP residents:

The General Assembly finds that the inability to speak, understand, or read the English language is a barrier that prevents access to public services provided by State departments, agencies, and programs, and that the public services available through these entities are essential to the welfare of Maryland residents. It is the policy of the State that State departments, agencies, and programs shall provide equal access to public services for individuals with limited English proficiency.<sup>259</sup>

The Office of Attorney General should provide linguistically accessible consumer services to comply with state policy regarding language access and to promote enforcement of consumer protection through criminal prosecution, and civil action under the CPA and MICA.

#### **G. RECOMMENDATIONS TO THE STATE OF MARYLAND FOR EXTENDING MICA INTO THE NEXT FIVE YEARS**

The harm caused by notario fraud is in large part the result of isolating immigrant communities from the societal resources of legal and civic access. While the problem of legal access may be difficult for states like Maryland to fully address, it is within the state's authority to confront the resulting harm through the expansion of state resources to immigrants. Although MICA's passage as a means to combat this problem is encouraging, the state's failure to meaningfully implement the law has frustrated the Act's intent. Following are recommendations to ensure MICA's effectiveness in the future:

1. **Amending MICA to remove the cap on attorney's fees that can be sought from MICA violators.** This will encourage private attorneys to accept representation in MICA-related litigation

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<sup>259</sup> MD. CODE ANN., STATE GOV'T § 10-1101 (West 2002).



2. **Expanding the availability of publicly and linguistically accessible consumer protection and civil court information.** Accessible information will allow consumers to recognize MICA violations and report bad actors to the Maryland Attorney General's Office. This includes providing linguistically competent staff to respond to the concerns and complaints of LEP consumers.
3. **Using consumer complaints and other forms of community outreach to identify potential MICA violators.** Through the proper collection of consumer complaints, the State Attorney General can identify and investigate MICA violators.
4. **Enforcing civil and criminal prosecution of MICA violators through the Maryland Attorney General's Office.** In order to deter and publicize violations, the OAG should pursue aggressive civil and criminal enforcement against the most egregious MICA violators.
5. **Promoting widespread publicity of the OAG's prosecution actions.** These measures will help limit the problem by educating and empowering consumers to be aware of their rights. Publicity will also further encourage reporting of MICA violations.

## CONCLUSION

State laws regulating immigration consultants, like MICA, are a necessarily temporary measure to address the larger problem of inadequate immigration legal service. Meaningful reform will come only from multi-layered societal change improving general legal access for immigrants and reforming existing federal immigration law. The President has signaled a desire for change in the immigration system.<sup>260</sup> With an estimated twelve million undocumented<sup>261</sup> persons in this country, any sweeping reform or amnesty would require federal expansion of authorized legal service providers. That attorneys alone would be unable to meet the demand is a near certainty regardless of the path chosen for reform. As with the QDEs that arose from the IRCA legalization of the 1980s, the Federal Government would likely have to authorize non-attorneys to assist in the process. And while immigration reform seems unlikely given recent gridlock in Washington, notarios are still able to adapt and profit from the confusion created by the Obama

<sup>260</sup> See, e.g. Laura Meckler, *Obama Makes Pitch for Immigration Overhaul*, WALL ST. J. ONLINE, July 2, 2010, available at [http://online.wsj.com/article/SB10001424052748703571704575340941607651032.html?mod=WSJ\\_hps\\_MIDDLETopStories](http://online.wsj.com/article/SB10001424052748703571704575340941607651032.html?mod=WSJ_hps_MIDDLETopStories) (reporting on the President's speech calling for immigration reform).

<sup>261</sup> Stephen Olemacher, *Estimate: Illegal immigrant population in country hits 12 million*, The Associated Press State & Local Wire, Mar. 7, 2006, 6:58 PM GMT.

administration's strong words regarding stopgap immigration policies.<sup>262</sup>

In the absence of comprehensive immigration reform, the Federal Government could still do much to address inadequate immigration representation. Developing licensing based on a competency exam for both attorneys and non-attorneys would help ensure that providers meet a minimum level of proficiency. Extending federal authorization to permit representation by competent non-attorneys, regardless of whether those representatives operate for-profit, would also expand competent immigration representation.

Until such sweeping reform is realized at the federal level, the states may still work to minimize the harm caused to immigrants as a result of inadequate representation. As discussed in depth above, states can use their authority under existing consumer protection law or can develop new legislation to target those who defraud immigrant consumers.

While Maryland has both old and new legislation, in the forms of the MICA, it has failed to effectively use these resources to protect consumers. While moves like Governor Martin O'Malley's expansion of the Commission on Hispanic Affairs<sup>263</sup> and the recent unanimous approval of Federal Comprehensive Immigration Reform in the Baltimore City Council<sup>264</sup> demonstrate a willingness to tackle issues affecting the immigrant community, expressions of goodwill alone are insufficient to protect immigrant consumers. Such expressions have also been countered by the deeds of anti-immigrant activists as demonstrated by the failure of initiatives such as Maryland's Dream Act, a measure which would have provided in-state tuition benefits to undocumented students.<sup>265</sup>

In the years since MICA's passage in 2005, Maryland has found itself gripped by recurring state budget crises.<sup>266</sup> With the salaries of

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<sup>262</sup> See American Immigration Lawyers Association Consumer Advisory, available at <http://www.aila.org/content/default.aspx?docid=36705> (warning consumers that the Obama administration's August 18, 2011 announcement regarding lowered priority for deportation cases is not an amnesty program and urging consumers not to be fooled by consultants who promise to obtain immigration benefits under the policy).

<sup>263</sup> Md. Gov. Exec. Order No. 01.01.2007.21 (Oct. 11, 2007), available at <http://www.hispanic.maryland.gov/documents/Hispanic/ExecOrder.pdf>.

<sup>264</sup> Elianne Ramos, *Unanimous Baltimore City Council Support for Immigration Reform*, [www.examiner.com](http://www.examiner.com) Aug. 11, 2009, available at <http://www.examiner.com/examiner/x-13375-Baltimore-Hispanic-Business-Examiner-y2009m8d11-Latinos-Celebrate-Unanimous-City-Council-Support-for-Immigration-Reform>.

<sup>265</sup> David Hill, *Petition Against Dream Act Gains Support*, [www.washingtontimes.com](http://www.washingtontimes.com) May 24, 2011, available at <http://www.washingtontimes.com/news/2011/may/24/petition-against-maryland-dream-act-gains-support/>.

<sup>266</sup> David Hill, *O'Malley: Biggest Variable in State Budget is Congress*, [www.washingtontimes.com](http://www.washingtontimes.com) Aug. 24 2011, available at <http://www.washingtontimes.com/news/2011/aug/24/omalley-biggest-variable-in-state-budget-is-congre/>; see also Elizabeth McNichol et al., *States Continue to Feel Recession's Impact*, CENTER ON BUDGET AND POLICY PRIORITIES, June 17, 2011, available at <http://www.cbpp.org/files/9-8-08sfp.pdf> (projecting a Maryland state budget shortfall of \$1.4 billion in fiscal year 2012).

state employees,<sup>267</sup> student tuition benefits,<sup>268</sup> and expenditures to local emergency response and police<sup>269</sup> recently on the chopping block, proposals to greatly increase resources to protect immigrants are likely to be politically unpopular. Despite the ill political winds, there are signs that Maryland is making incremental steps toward providing some resources to help victims of consultant fraud.<sup>270</sup> The Attorney General's summer 2011 action against Latin Service LLC and accompanying promise of community outreach are both laudable efforts that signal a desire to more effectively implement the MICA legislation.<sup>271</sup> However, at the time of this publication outreach resources remain promises only.<sup>272</sup> Currently, the lack of collaboration between state agencies, legal service providers, and consumers has prevented MICA from reaching its full potential. In the absence of an aggressive implementation effort, families like the Rodriguezes continue to lose money and faith in the legal system, while notarios find that wagering on the state's lack of interest in applying its own laws makes good business sense. Until Maryland raises the political will and resources necessary to effectively implement MICA, the law remains a case of strong words, gentle deeds.

#### ADDENDUM

Just before the time of publication for this Article, the Maryland Attorney General unveiled a new public awareness campaign to protect consumers from immigration consultant fraud.<sup>273</sup> This public initiative is laudable and bodes well for the usefulness and efficacy of the Maryland Immigration Consultant Act.

Thus far, the campaign has consisted of the provision of English and Spanish-language materials on immigration fraud, a phone number to the Consumer Protection Division for Spanish speakers, and a PowerPoint presentation available in English and Spanish to

<sup>267</sup> Laura Smitherman, *State Workers To Face Pay Cuts, 70,000 Would Lose 3 Days' To 2 Weeks' Pay Under Furlough Proposal To Save \$75 Million*, BALT. SUN, Aug. 25, 2009, at 1A.

<sup>268</sup> Julie Bykowicz, *Md. Budget Crisis Could End O'Malley Tuition Freeze*, BALT. SUN, July 23, 2009, at 1A.

<sup>269</sup> Editorial, *No Sacred Cows, Our View: Mayor Dixon and Gov. O'Malley Have Tried To Avoid Budget Cuts To Police, Firefighters and Schools, But It Is No Longer Possible To Hold Them Out Of The Equation*, BALT. SUN, Oct. 25, 2009, at 20A.

<sup>270</sup> See *Latin Service Press Release*, *supra* at note 201 (discussing the Attorney General's plan to provide: "printed materials; an OAG webpage for consumers detailing immigration consulting services; a series of presentations to be made to community organizations throughout the State; and planned Public Service Announcements").

<sup>271</sup> *Id.*

<sup>272</sup> Telephone Interview with David Paulson, Media Contact, Maryland Attorney General (Aug. 31, 2011) (confirming that while community outreach materials are being crafted, no such materials have been made available to the public and no community outreach partnerships have been confirmed).

<sup>273</sup> Press Release, Office of the Attorney General, Attorney General Gansler Unveils Campaign Against Immigration Consulting Fraud (Oct. 24, 2011) available at <http://www.oag.state.md.us/Press/2011/102411.html>.

educate consumers.<sup>274</sup> Attorney General Douglas F. Gansler introduced this PowerPoint presentation on October 24, 2011 in cooperation with community organizations CASA de Maryland, Catholic Charities of Baltimore, and the League of United Latin American Citizens Maryland.<sup>275</sup>

Though this type of community outreach is precisely the action needed to combat immigration consultant fraud, the Attorney General must make a sustained effort to ensure the campaign ultimately protects consumers. Currently, the online schedule of community information sessions consists of only one scheduled event— the initial presentation in which the Attorney General introduced the campaign.<sup>276</sup> Further, the Consumer Protection Division still has no consumer complaint form available in Spanish.<sup>277</sup> While the Division now has a dedicated Spanish phone number, a call during business hours led to a message recorded in Spanish notifying callers of the lack of Spanish-speaking staff and encouraging them to hang up and dial the main Consumer Protection Division Hotline to speak with “someone who can help translate in English.”<sup>278</sup>

This campaign is without a doubt a step in the right direction, but only time will tell whether this rhetoric will translate into stronger action.

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> Maryland Attorney General, Beware of Immigration Fraud webpage, Information Sessions, [http://www.oag.state.md.us/Consumer/immFraud/immFraud\\_session.html](http://www.oag.state.md.us/Consumer/immFraud/immFraud_session.html).

<sup>277</sup> Maryland Attorney General, Cómo Presentar Una Queja y Obtener Ayuda [How To Present a Complaint and Obtain Legal Aid], [http://www.oag.state.md.us/consumer/immFraud/esp\\_immFraud\\_complaint.html](http://www.oag.state.md.us/consumer/immFraud/esp_immFraud_complaint.html) (last visited Nov. 6, 2011) (directing Spanish-speaking consumers to the Division’s general complaint form and lamenting the lack of a Spanish-language equivalent).

<sup>278</sup> Telephone Call to Maryland Attorney General, Consumer Protection Division (Nov. 4, 2011, 1:15 PM EST).