



WHEN GOVERNMENT THREATS COLLIDE WITH THE ETHICS OF ASYLUM REPRESENTATION

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DHS General Counsel James Percival's [September 15, 2026 letter](#) to the American Immigration Lawyers Association is troubling not because it reminds lawyers that fraud and frivolous filings are prohibited. No responsible immigration lawyer disputes that. It is troubling because the letter largely collapses the distinction between fraud, frivolousness, and a claim that the government ultimately finds unpersuasive, while casting immigration lawyers as responsible for the asylum backlog. That accusation demands a clear response.

Immigration lawyers do not need an elementary lesson in asylum law from an administration that has systematically sought to close the courthouse door to asylum seekers. They need the government to administer the law faithfully. Congress made asylum available to a person who is unable or unwilling to return to the country of nationality "because of persecution or a well-founded fear of persecution" on account of a protected ground. The phrase "well-founded fear" is not surplusage, and it does not impose a more-likely-than-not test.

In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court made this point unmistakably clear. The asylum standard is more generous than the clear-probability standard governing withholding of removal. An applicant need not prove that persecution is more likely than not. As the Court explained, even a one-in-ten chance of persecution may establish a well-founded fear in an appropriate case. A lawyer who advances a good-faith claim within that legal framework is not abusing the system merely because DHS disputes the claim or an adjudicator eventually denies it.

The letter also treats broad categories—gang violence, domestic violence,

private-actor persecution, and conditions in countries DHS considers generally safe—as though labels can substitute for individualized adjudication. They cannot. Persecution by a nonstate actor may support asylum when the government is unable or unwilling to control the persecutor. Particular social group claims require careful analysis of the facts, the statute, and governing precedent. Moreover, the BIA's precedents defining "particular social group" are not beyond challenge.

After *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), courts must exercise independent judgment on questions of statutory interpretation and may not defer to an agency merely because the statutory language is ambiguous. Lawyers may therefore challenge in good faith restrictive BIA interpretations of "particular social group," even if Percival believes the underlying claims do not furnish a basis for asylum. Internal relocation likewise must be reasonable, not merely imaginable. These are fact-intensive and legally contestable questions, not grounds for branding counsel unethical before a claim has been heard.

Immigration lawyers already operate under demanding ethical rules that require advocacy, not timidity. ABA Model Rule 1.1 enjoins lawyers to provide competent representation, including the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the matter, while Model Rule 1.3 requires reasonable diligence and promptness. Model Rule 3.1 permits lawyers to advance claims that have a nonfrivolous basis in law and fact, including a good-faith argument for the extension, modification, or reversal of existing law. Lawyers may therefore boldly advance asylum claims for their clients, challenge restrictive precedent, and seek the development of the law so long as their factual representations are truthful and their legal arguments are made in good faith. The ethical boundary is clear: under Model Rule 3.3, a lawyer may not knowingly make a false statement of fact or law to a tribunal or offer evidence the lawyer knows to be false. These duties do not run only in the government's direction. A lawyer also has a duty not to abandon a legally supportable claim out of fear that an enforcement agency may retaliate merely because the issue is contested or the facts are difficult.

That is why Percival's warning is especially pernicious. The threat of fines and discipline, untethered from a careful distinction between knowingly fraudulent conduct and good-faith advocacy, can chill lawyers from representing the very people asylum law was enacted to protect. Asylum seekers often arrive

traumatized, detained, unfamiliar with the legal system, unable to speak English, and without records that can readily corroborate events occurring in repressive or chaotic countries. They are made still more vulnerable when the government portrays their advocates as presumptive participants in wrongdoing.

Nor can DHS fairly lay the asylum backlog at the feet of immigration lawyers. The government has aggravated the very problem it now blames on the bar. At a time when the immigration courts were already overwhelmed, the administration fired or pushed out more than 100 immigration judges and sharply reduced the corps available to adjudicate cases. Backlogs reflect years of congressional underfunding, shifting adjudicatory standards, administrative dysfunction, abrupt policy changes, and a system in which immigration courts remain housed within the prosecuting agency. Removing adjudicators while accusing lawyers of causing delay is not accountability. Lawyers who present applications authorized by statute do not create a backlog simply by insisting that their clients receive the process the law promises.

Percival's suggestion that countries in the Western Hemisphere are generally safe, and that claims from the region therefore lack a basis for asylum, is equally untenable. The Western Hemisphere is not a single country-condition category, and generalized assurances of safety cannot displace evidence concerning a particular applicant, persecutor, locality, or government's ability and willingness to provide protection. The United States itself invaded Venezuela in January 2026, using military force and removing its president—an intervention that produced further political and regional upheaval. An administration that has contributed to instability in Latin America cannot credibly invoke the hemisphere's supposed safety as a reason to prejudge asylum claims arising there. Whether an applicant has a well-founded fear must be decided under the statute on an individualized record, not by geopolitical slogan.

AILA has properly rejected the premise that immigration lawyers are the culprits and reaffirmed the ethical obligation of lawyers to pursue lawful relief for vulnerable clients. Percival's letter is not an isolated attack. In 2017, Attorney General Jeff Sessions denounced "dirty immigration lawyers" who, he claimed, encouraged clients to make false asylum claims by supplying "magic words." In March 2025, the White House issued a memorandum accusing the immigration bar and major law firms' pro bono practices of coaching asylum seekers to

conceal their past or lie about their circumstances, and linked this alleged conduct to fraud and threats to national security. These sweeping accusations stigmatize an entire bar for providing representation that the law permits and professional ethics often require.

Immigration lawyers should not be intimidated. They should continue to represent vulnerable immigrants without fear, guided by the rules of professional conduct: investigate the facts, counsel clients candidly, reject fabrication, and advance every nonfrivolous meritorious argument available under the law. They should also continue to press for interpretations of asylum law that protect asylum seekers and to develop the law through good-faith challenges to restrictive agency precedents. A lawyer who complies with ethical rules while pursuing an asylum claim has nothing to fear or apologize for. That lawyer is not undermining the legal system, but performing noble work essential to its integrity. The asylum system depends not only on truthful applications and ethical lawyers, but also on an executive branch that respects statutory rights, controlling precedent, individualized adjudication, and the essential role of counsel. Let immigration lawyers stand fearless and proud, knowing that every ethical defense of an asylum seeker vindicates the highest promise of our profession—to ensure that every asylum claim receives the fair and searching consideration the law requires.