

Assessing incompetence by immigration practitioners

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Where is incompetence evident?

- Not only on file records
- In the public domain: Lawyer's website & advertising, Google reviews & replies, CBA/RLA listserve questions & requests for advice
- Media coverage: Print and radio including podcasts
- Social media (Twitter, Facebook, LinkedIn)
- Observations by decision-makers (off the record remarks)

Social media commentary leaves permanent record. Be careful what you post.

- Don't engage in conduct unbecoming of a lawyer on social media.
- Don't respond to legal questions on social media no matter how tempting. Even where profile says "tweets not legal advice".
- Know what you say on social media is being watched by others and can leave a record of your knowledge, misunderstanding of law/policy and can be used against you in a complaint.

Examples of incompetence in the public domain

- Lawyer Richard Boraks speaks to media about an immigration pilot program for undocumented workers. Federal and Ontario Ministers confirm no such program. Applications filed with Liberal MP. Lawyer charged \$10K for services to file cases. Complaint to LSO. Lawyer accuses media of portraying him in negative light. Sues Global News. Highly unusual case. Trades + Cash + No Work Permit + Vulnerable.
- <https://globalnews.ca/news/4124185/lawyer-insists-he-took-money-for-real-immigration-program-canadian-government-denies-its-existence/>
- <https://globalnews.ca/news/4323400/toronto-immigration-lawyer-sues-media-government-over-global-news-report/>

Twitter can turn an innocent comment into a judgement on your competence.

YES, Ottawa should stop propping up @ICCRC I agree 100% vote NO to allowing incompetence to continue. Ottawa should take TOTAL control over the regulation of Immigration Consultants.

- <https://www.theglobeandmail.com/opinion/article-ottawa-should-stop-propping-up-immigration-consultants/>

Be careful on listserves. It can taint your reputation.

Q. Pardon the elementary question here. Client been charged with Section 151 (sexual interference with a minor). He previously held a study permit which expired 2 months ago. Client is essentially without status if I'm correct? Client has no family or ties to Canada. Client has a criminal trial for his Section 151 charge coming up next month. One of his bail conditions on the criminal charge is that he cannot carry his original passport on his person, only a photocopy thereof. Client has no intention of remaining in Canada and simply wants return to his home country to be with his wife and children, and wants to know if he can leave CDA before his trial date (essentially, there would be a warrant for X for failure to show up at trial if this were the case); Client has been warned that if he were ever to return to Canada he would be arrested immediately at the border. He is potentially facing a minimum period of incarceration of 6 months if convicted. I expect he will be convicted at trial.

Question - Can I write to CBSA requesting client's original passport and confirm that he intends to leave the country, never to come back to Canada again? Or should I have client book a one way ticket to home country as proof to CBSA?

A. From Senior Practitioner:

Just to re-iterate our colleague's advice. If you know he intends to leave Canada and if you are able to get his original passport and thereafter counsel or assist him to return to his home country and he fails to appear for his criminal trial, you are likely guilty of several criminal offences including but not limited to: aiding and abetting a fugitive; accessory after the fact to his section 151 charge; conspiracy to assist a person to avoid prosecution and probably 3 or 4 other indictable offences. As our senior colleague suggests, speak to his criminal counsel and let him negotiate a plea bargain. As for you, I suggest you run away from this case as fast as possible. Do not write to CBSA and do not get involved in getting him his passport back, knowing what you know. By the way I know a great criminal lawyer in your town that you may want to retain if you ignore the advice the 3 of us have given you.

* ENF 10. A50(b) Imprisonment in Canada A stay of removal applies when a foreign national is sentenced to a term of imprisonment in Canada. Officers must not enforce a removal order if the foreign national is an inmate of a penitentiary, jail, reformatory or prison, or if they are serving a conditional sentence order in the community. The stay of removal is effective until the sentence being served is completed. The sentence is completed when the foreign national is released from imprisonment by reason of expiration of sentence, commencement of statutory release or grant of parole. Unless the parole is suspended, terminated or revoked, the removal can take place.

Registered & ghost immigration consultants

- Encourage clients to report incompetent consultants to ICCRC
- Report ghost consultants to CBSA, IRCC & Visa Offices & MPs as applicable
- Bring information about consultants services to the attention of the MP in the riding where the client resides if party inside Canada. Notify visa office if party outside Canada. They may recognize name and application patterns and have power to initiate investigation and/or to put consultant on Government's radar.
- <https://studentimmigration.ca/dozens-sent-back-china-fake-marriage-scams/>

Recognizing the limits of competence

- Serving the client with a level of knowledge and dedication to acquiring the knowledge required to carry out the services entrusted to perform;
- Knowing when to seek out assistance from more experienced counsel in specialty areas such as:
 - **Security**, including espionage, subversion (attempts to overthrow a government, etc.), violence or terrorism, or membership in an organization involved in any of these
 - **Human rights violations**, including war crimes, crimes against humanity, or being a senior official in a government engaged in gross human rights violations or subject to international sanctions
 - **Criminal charges or convictions**, including DUIs
 - **Organized crime**, including membership in an organization that takes part in organized criminal activity, people smuggling or money laundering
 - **Medical** inadmissibility

What is the test for incompetence? Know your strengths and weaknesses. Legal Test vs. Subjective Assessment.

- Staying in your professional comfort zone is a strength, not a weakness.
- Competence is realizing you cannot know everything well and making the professional decision to refer matter(s) to better equipped legal counsel.
- Knowing that you will be judged by the public and peers and you will be held to account if the outcome would have been different had you served client at a competent level. Has a miscarriage of justice taken place?
- Realizing that your mistake could permanently prejudice lives (including subjecting person to detention, conviction, removal, allegations of misrepresentations, bars from Canada) livelihoods (including financial penalties, loss of business), freedom to travel and ability to reunite with family members, amongst other serious consequences.
- Immigration and Citizenship laws are complicated and learning curve is steep, even for seasoned practitioners. Goal posts always moving.

The latest case: *Yang v Canada* 2019 FC 402

Quebec Selected Investor Application filed with Canadian 3rd party representative (lawyer) on behalf of external agent in China (Globevisa). PA and daughter studying in BC since 2015. Failed to disclose that in IMM 5669 in application. Representative received procedural fairness letter, and failed to forward IRCC correspondence to Applicant and instead sent to "Agent", who acted without instructions. Officer concluded PA inadmissible. Representative claimed acting under limited scope retainer.

Incompetence: Inaccurate/Incomplete information on Application + Failure to notify client of Procedural Fairness letter.

But for omissions in Application, result of decision would have differed.

Ratio: Don't sign an IMM 5476 form and put your name on the application if you are not prepared to act and diligently serve the client.

Policy Issue: IRCC policy to declare any representation vs. full representation

