PURPOSE OF THIS WORKING PAPER AND THE SRLAC PROCESS

During the spring 2006 informal discussions within the joint NGO-UNHCR Working Group on Legal Aid, there was general agreement that NGOs providing legal aid in the context of UNHCR refugee status determination procedures (UNHCR RSD) should develop a code of ethics and a means of self-regulation in order to ensure responsible, professional service to refugees.

This working paper was circulated to NGOs and UNHCR in January 2007 in order to provide a basis for discussions during the 2007 Southern Refugee Legal Aid Conference (SRLAC) in Nairobi. It provides an overview of key issues and makes specific draft proposals which, while not final, were used starting point.

During SRLAC, a drafting committee debated and revised the texts proposed here, and on 1 February 2007 the plenary session of 15 NGO representatives approved a final text, known as the Nairobi Code: Model Rules of Ethics for Legal Advisors in Refugee Cases. Among other changes, the conferees decided to expand the scope of the rules to cover all forms of refugee legal aid, not only UNHCR RSD contexts.

The Nairobi Code is not a binding document. As its title suggests, it is a body of model standards that individual NGOs are urged to adopt voluntarily. It is hoped that over time the model standards adopted in Nairobi will acquire weight as a model of best practice.
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1) The need for standards

In all contexts, the work of lawyers should be and in most cases is regulated. This regulation is necessitated by the fact that clients need to be able to rely on their lawyers for advice and representation, and tribunals, courts and other authorities need to be able to rely on lawyers’ integrity. Most jurisdictions have established systems for regulating the work of lawyers.

Refugee legal aid organizations cannot replace these established domestic regulatory frameworks. But legal aid in the context of UNHCR refugee status determination (UNHCR RSD) often falls outside normal systems of regulating legal practice because it involves an international adjudicative body, and often involves non-lawyers or foreign lawyers. Some scholars have noted that much practice of international law falls outside the scope of standard ethical codes, thus leaving many lawyers in an ethical no-man’s land when they engage in international practice.1

There is a need to supplement domestic regulations of legal practice in order to provide specific guidance for legal aid in UNHCR RSD procedures. The nature of UNHCR RSD creates unique circumstances that call for specialized supplemental rules. These unique circumstances include the following:

- Client populations that are especially vulnerable
- The non-adversarial nature of UNHCR RSD procedures
- Low burdens of proof and evidence required in RSD
- UNHCR RSD operates outside the jurisdiction of domestic judiciaries, often working in a foreign language
- Acceptance (by both UNHCR and NGOs) of the role of non-lawyers as advisers in UNHCR RSD
- Frequent reliance on foreign lawyers in legal aid programs

1 M. McCary, Bridging Ethical Concerns: International Legal Ethics With An Islamic Perspective, 35 TEX. INT’L L.J. 289 (2000) ("Presently, a lawyer or law student will have a difficult time locating adequate ethical guidance for transnational practice issues. A proliferation of unilateral and bilateral agreements has created a complex web of ethical strictures that makes the search for unambiguous guidance difficult. Although national regulations and corporate business ethics codes do provide some additional direction, they cannot fill the gaps existing from legal inconsistencies and a lack of uniformity at the international level. Thus, international practitioners are largely left to their own moral conscience in applying various codes of ethical conduct.").
• Scarcity of legal aid compared to the size of the asylum-seeker population

To fill this gap, NGOs need to address three related needs. The first is the need to develop ethical standards to guide the conduct of legal aid personnel involved in UNHCR RSD. The second are competency standards, to set minimum levels of qualifications to define who can provide legal aid in the UNHCR RSD context. The third is the need for an accountability mechanism, to actually implement and enforce the ethical and competency standards.

2) **Ethical principles and rules**

Annex 1 of this working paper proposes a set of model rules to govern legal aid in UNHCR RSD. Many of the proposed rules are common principles of legal ethics, but some of them deal with ethical dilemmas that have generated controversy and debate. This discussion will focus on these more challenging issues.

The draft proposed rules are the result of a review of current ethical codes used by UNHCR and by legal aid NGOs already working in the UNHCR RSD field, many of which were circulated in 2006 as part of the Legal Aid Working Group. Applicable ethical codes used in immigration and asylum in Australia, New Zealand and Canada were similarly reviewed. The model rules that have been promulgated by the American Bar Association and the Code of Conduct for Lawyers in the European Union were key sources for general principles of legal ethics. The International Bar Association's International Code of Ethics (1988) was consulted as well, though in many respects it appears rooted in the context of commercial law and litigation, rather than human rights practice.

This working paper benefited from analysis of literature and model codes on major ethical issues in the United States.² The paper thus can be criticized for being American-centric. Nevertheless, at several key points the proposed rules differ from the American models, for reasons explained in this paper.

The remainder of this section will provide commentary on the ethical considerations behind each of the proposed rules. The draft in the Annexes is just that, an attempt to provide the basis for discussion and amendment.

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² Sandra Lee was instrumental in preparing useful summaries of the vast literature and material in this area.
It is hoped that this working paper will help to inform these discussions, and may help in the future to apply the eventual Code.

**Limited scope (Rule 1)**

These rules are directed at the narrow context of UNHCR RSD procedures (Rule 1.1). They supplement but do not replace any existing systems for regulating the work of lawyers, and are a response to the reality that legal aid in the UNHCR RSD context often falls in a regulatory gap. In the event of a conflict, the normal systems of regulating lawyers established in different jurisdictions would be superior to these rules (Rule 1.2). The International Bar Association’s *International Code of Ethics* states that lawyers practicing internationally remain bound to the ethical standards of both the jurisdiction where they are licensed and where they are working.3

One of the dangers of establishing a system for regulating legal aid is that it would impair the expansion of programs designed to provide general information to refugees and asylum-seekers. Rule 1.3 therefore states that these rules do not apply to the provision of general information to refugees. Providing individualized advice to a person about how the law applies to their individual circumstances requires specialized expertise. But this expertise is not necessary to dispense more general information that would be applicable to all. Such general information could include basic advice about UNHCR procedures, or general advice about the importance of telling the truth.

**Defining advisor-client relationships (Rules 2 and 3)**

Understanding a legal advisor's obligations requires an understanding of his/her relationship with clients. Some obligations (especially confidentiality) extend to any person who merely seeks representation (prospective clients, Rule 2.4) and former clients, while others (the duties of diligence and integrity) usually apply only to current clients.

Advisor-client relationships must be consensual. A client gives an advisor substantial power by revealing personal information and by allowing another person to act on his/her behalf. In exchange, the client should be able to expect confidentiality and diligent service. In order to facilitate the seeking of legal advice, the duty of confidentiality applies as soon as a prospective client communicates with an adviser for the purpose of seeking legal advice. But advisors should not be obligated to assist everyone who

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seeks their services; most legal aid programs are in some way selective. As
the International Bar Association advises, "Lawyers shall at any time be
free to refuse to handle a case, unless it is assigned by a competent
body." The proposed rules allow for substantial flexibility on the part of
legal advisers to decide who they want to assist (Rules 3.2 and 3.3), so
long as they are not discriminatory (Rule 3.4).

In view of the many types of legal aid programs that exist, the proposed
rules allow legal advisors to offer limited services, for instance preparing
testimonies but not legal arguments, or declining to accompany some
clients to RSD interviews. The proposed rules allow for such limitations
(Rules 3.1, 3.2), but require that advisers and clients reach an explicit
agreement about the objectives of the service and the types of services that
will be provide (Rule 3.1).

Legal advisers are agents of their clients. There is no basis upon which a
legal advisor can keep information related to a client confidential from the
client; clients are therefore entitled to copies of all information in their files
(Rule 3.6). However, legal advisers should keep records of their work with
clients, both as a normal professional practice and because legal advisers
can be liable for their conduct on a particular case. Therefore, once a client
seeks assistance from a legal adviser, the adviser may keep records of the
case even if the client objects (Rule 3.6).

No duty of diligence is owed to the client once the relationship ends, though
the duty of confidentiality continues. Advisor-client relationships usually
end either when the client retracts consent, or when refugee status
determination ends (unless otherwise agreed by the advisor and client).

**Diligence (Rule 4)**

The duty of diligence is essentially the responsibility of a legal advisor to
work responsibly to carry out the services promised to a client. Included in
this is the responsibility to complete work thoroughly, and in a timely
manner, and to maintain professional records of clients' cases (Rule 4.4),
and to maintain access to essential research resources necessary to
provide competent service in RSD cases (Rule 4.3). This includes access
to UNHCR guidelines and policies and country of origin information. Access
to the Internet or to the most recent edition of the RefWorld CD would in
most cases be sufficient to comply with this standard.

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5 See Temple D. Trueblood, *Where to Draw the Line: The Scope and Longevity of the
Conflicts of Interest (Rule 5)

Because clients rely on their advisors to work diligently on their cases, to provide objective and reliable advice, to keep confidences and to serve their best interests, it is a serious problem if a legal advisor has incentives that are against the interests of a client. The Code of Conduct for Lawyers in the European Union advises:

> The many duties to which a lawyer is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. … Advice given by a lawyer to his client has no value if it is given only to ingratiate himself, to serve his personal interests or in response to outside pressure.

General guidance on legal ethics define conflicts of interest broadly to include any situation in which there is a "substantial risk" that a lawyer's services to one client will be "materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another client." While this is a potentially very broad category, normal rules completely prohibit serving clients in a much more narrow class of cases. In the U.S., only three categories of conflicts lead to complete bans on representation:

- Representations prohibited by law
- Situations where one client will assert a claim against another
- Situations where "it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients."

In other conflict situations, a lawyer can represent a client(s) despite a conflict of interest, so long as the affected clients give their informed consent.

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6 See generally American Law Institute, Restatement (Third) of the Law Governing Lawyers, Ch. 8 ("The prohibition is derived in part from the law of agency. Lawyers are required to avoid divided loyalties that would harm their principals, their clients. … Influences that interfere with a lawyer's devotion to a client's welfare constitute conflicts with that client's interest.").


8 American Law Institute, Restatement (Third) of the Law Governing Lawyers, Sec. 121.

9 Id. at sec. 122(2).

10 Id. at Sec. 122(1).
The proposed rules for UNHCR RSD follow this general framework, defining two broad categories of conflicts of interest. In the first category, an advisor has direct interests that are opposed to a client's interests. In this situation, the proposed rules prohibit providing services to the client (Rules 5.1 and 5.2). In a second category, the proposed rules do not completely prohibit serving a client, but seek to avoid advisors doing so.

However, in view of the unique vulnerabilities of asylum-seekers and refugees, there is good reason to be cautious about the degree to which clients will be able to give informed consent. Therefore, the proposed rules attempt to give somewhat more specificity to guide legal advisers about the types of situations where it is not reasonably likely that they will be able to provide adequate representation. The proposed rules are stricter (i.e., they prohibit representation in more cases) than do general rules of legal ethics.

The proposed rules prohibit providing services if the advisor has personal interests that would for some reason make him/her potentially adverse to the client succeeding in an RSD application (Rule 5.1). The proposed rules prohibit representation where two different refugees have a personal dispute or make accusations against each other that could affect either of their claims to refugee status. This situation could call upon the legal advisor to attack the credibility of one refugee in order to defend the credibility of another; this will obviously be problematic if the legal advisor owes duties of diligence to both. For this reason, the proposed rules prohibit offering services to a prospective client where the advisor already represents another client with adverse interests (Rule 5.2).

Nevertheless, there are situations where a conflict of interest exists to some degree, but where the proposed rules would not prohibit representation entirely. One situation where this can occur is where an advisor has a pre-existing personal relationship, such as a personal friendship or employment relationship, that could make it more difficult for the advisor to exercise objective judgment. This situation does not present a direct conflict of interest, but it does present a risk that an advisor's capacities will be compromised to some degree (Rule 5.4).

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11 Cf. Alice E. Brown, *Advance Waivers of Conflicts of Interest: Are the ABA Formal Ethics Opinions Advanced Enough Themselves?*, 19 GEO. J. LEGAL ETHICS 567, 2006. ("If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective.").

12 Compare American Law Institute, *Restatement (Third) of the Law Governing Lawyers* Sec. 125, 126 (allowing such representation if clients give their informed consent).

13 Compare American Law Institute, *Restatement (Third) of the Law Governing Lawyers* Sec. 128 (allowing such representation if all clients give their informed consent).
A complicated problem arises when an advisor already represents two clients who develop a direct conflict with each other after the representation has already begun (Rule 5.3). This could happen, for instance, if an advisor jointly represents a married couple who begin to disagree and make accusations against each other. This creates a situation just like that described in Rule 5.2, except that here the advisor has an obligation to both clients. The conflict thus cannot be avoided by simply declining to serve a prospective client. Making matters more complicated, in this situation a lawyer may come to know confidential information from one party that is damaging to the other.

In this second category of conflicts, some ethical codes require lawyers to cease services to both clients.\(^{14}\) The proposed rules require advisors to seek alternative legal aid providers for the clients, and thus prohibit providing services in most cases. However, because an obligation to the clients already exists (in Rule 5.3), the proposed rules allow an advisor to continue providing some services in circumstances where no alternative advisors are available (Rule 5.5). Advisors should, however, interpret this exception narrowly, and should do everything possible to minimize conflicts by limiting the scope of their representation. Advisors should seek to limit the objectives of their services in order to minimize the conflict, and should err on the side of keeping information confidential.

A final note should be made regarding a unique form of conflicting interests in human rights litigation. Many principled cases promoting the rights of the vulnerable are brought by activist NGOs. Lawyers (often employed by the NGO) thus may formally represent a victim/client, but also have interests aligned with the NGO. The NGO's interests may not be identical to the client's.\(^{15}\) Since UNHCR RSD procedures do not allow for precedent-setting litigation, this potential conflict may be only hypothetical in this context. Nevertheless, it reflects the importance of advisors being open and explicit with their clients before reaching an agreement on the objectives and services associated with any legal representation.

Confidentiality (Rule 6)

Confidentiality is one of the bedrocks of legal advice and representation. The basic rationale for confidentiality between lawyers and clients is that people need their communications to be privileged in order for them to be


confident enough to seek advice about their circumstances. As the American Law Institute explains:

The law is molded on the premise that a greater good inheres in encouraging all clients, most of whom incline toward complying with the law, to consult freely with their lawyers under the protection of confidentiality in order to gain the benefit of frank communication.¹⁶

Confidentiality should extend not just to the information that a client gives to the advisor, but to all of the information about the client that the advisor learns through the course of the case (Rule 6.2). On the other hand, an advisor need not keep confidential information that the client has put in the public domain voluntarily (for instance, where a client publishes a book or internet article that reveals the information).¹⁷ But the advisor should still keep confidential information that has entered the public domain without the client’s consent (for instance if another party violates the client's confidentiality) (Rule 6.3).

The most important exceptions to confidentiality relate to the duty of candor and integrity, which is dealt with separately. There are other exceptions to confidentiality, however. The moral obligation to prevent bodily arm to other people outweighs the rationale for confidentiality, for example (Rule 6.5). Confidentiality may also be breached in limited ways in order to ensure the smooth operation of a legal aid system, for instance where advisors seek each other’s counsel on a case or where an advisor needs to reveal client confidences in order to defend him or herself against an accusation of ethical impropriety (Rules 6.4 and 6.6).¹⁸

In all cases, it is important to remember that confidentiality is "owned" by the client and exists mainly to protect the client. Where clients knowingly and voluntarily waive their confidentiality, advisors should respect their wishes (Rule 6.1).

One of the most common ethical dilemmas for refugee legal aid organizations concerns the question of whether information obtained in legal aid cases can be published in reports and other writings designed to promote policy reform. The proposed rules include a measure that would allow such publication only if all identifying details have been removed

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¹⁶ American Law Institute, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, Ch. 5.
¹⁷ See American Law Institute, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, Sec. 59 (exempting "information that is generally known" from the definition of confidentiality.).
¹⁸ See American Law Institute, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, Sec. 64 (allowing breach of confidentiality for the lawyer's self-defense); Sec 61 (allowing a lawyer to disclose information where the lawyer reasonably believes the disclosure to be in the client's best interests).
(Rule 6.7). This would include not just the person’s name, but also (in most cases) his or her place of origin, and unique features of the person's case that would allow an interested person to identify the client and to thus learn confidential information about him or her.

**Duty of integrity (Rule 7)**

One of the most common ethical dilemmas facing legal advisers, especially in the RSD context, concerns situations where an adviser either becomes aware or suspicious that a client may be committing fraud or may be lying in his or her application to UNHCR. This situation puts principles of confidentiality and loyalty to a client in conflict with a lawyer’s duty of candor. As one writer has explained:

> The attorney-client privilege does not seek to encourage attorney-client communication at any price. Rather, scholars and courts adjudicating privilege issues have long struggled with the tension between the need for the privilege and the substantial cost of shielding relevant evidence from the fact finder.19

American ethical canons normally speak of the "duty of candor," which extends from a lawyer's position as an officer of the court. They are part of a system aimed at making accurate, just decisions that will be seen as legitimate.

In this working paper and in the attached proposed code I have used the term "duty of integrity" rather than duty of candor. The reason for this is that, as I read applicable commentary and codes, the duty in question is a reflection of lawyers' obligations to the overall purposes of justice. It is thus not just a specific duty to be honest, truthful and straightforward in all professional work, but a deeper professional obligation to particular values. Legal advisors have a duty of candor, but more importantly they had a duty to "at all times maintain the honour and dignity of their profession"20 by displaying integrity.21 The proposed rules extend this professional obligation

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20 International Bar Association, supra note 3, Rule 2.
21 See also Council of the Bars and Law Societies of the European Union, Code of Conduct for Lawyers in the European Union 2.2 (6 December 2002) (“Relationships of trust can only exist if a lawyer’s personal honour, honesty and integrity are beyond doubt. For the lawyer these traditional virtues are professional obligations.”).
to include a prohibition on making abusive statements to others (Rule 7.4).\textsuperscript{22}

There is little controversy about the basic rule that lawyers must “adhere to the truth” (in the words of the Canadian Organization of Professional Immigration Consultants) in all communications and therefore cannot actively assist a person to make an abusive refugee claim, for instance by advising clients about how to invent a more convincing story or by helping to prepare an application that the lawyer knows for certain to be false (see Rules 7.1, 7.2).\textsuperscript{23}

But the duty of candor leads to more challenging ethical dilemmas in several other circumstances, especially the following:

- A client “confesses” to the adviser that s/he has submitted false statements to UNHCR in the past, before the beginning of the advisor-client relationship.
- A client makes statements that the adviser knows to be false, but after the beginning of the adviser-client relationship (i.e in oral testimony during the RSD interview).
- An adviser has doubts about the veracity of a client’s testimony, but cannot be certain about their truth, and must decide whether to assist in submitting the claims to UNHCR.
- An adviser has doubts about the genuineness of a document offered by a client to support a refugee claim, and must decide whether to include it in submissions to UNHCR.

In these situations, confidentiality and integrity/candor are directly in conflict.

Refugee-specific codes that have been examined for this working paper are noticeably silent about how to resolve these dilemmas. There is scholarly commentary on the subject, which helps to identify the issues involved, and thus can help to determine how to balance an advisor’s competing duties in the UNHCR RSD context. However, no scholarly commentary was found that specifically addressed these issues in the context of refugee status determination.

As a starting point, it is important to recognize that legal advisors are not RSD decision-makers, and thus it is not their job to screen out false refugee claims (Rule 7.3). Were legal advisors to play this role it would make asylum-seekers less likely to trust them, and thus discourage them from

\textsuperscript{22} See also Id. at Rule 4 ("Lawyers shall treat the professional colleagues with the utmost courtesy and fairness.").

\textsuperscript{23} See Id. at Rule 6 ("Lawyers shall never knowingly give to the Court incorrect information or advice which is to the knowledge contrary to the law.").
seeking professional advice. This would in the end actually erode both the effectiveness and the integrity of the RSD system, because legal advisors would be less able to persuade clients to be honest in their applications to UNHCR.

Instead of attempting to screen out weak or fraudulent refugee claims, legal advisors need to be concerned that their services are not used to assist in the abuse of the RSD system. As one commentator explains:

> We tolerate attorney-client privilege because we suppose that without it, fear or ignorance would cause clients to omit, slant, or falsify information when consulting attorneys. Perhaps unwittingly, clients would forfeit the opportunity to obtain sound legal advice.\(^{24}\)

Confidentiality is intended to protect only those attorney-client communications that would not have been made absent the privilege.\(^{25}\)

Ideally, asylum-seekers should feel comfortable telling advisors that they either lied to UNHCR in the past, or are considering doing so in the future. By hearing this, an adviser may be able to convince a client to either avoid committing fraud, or to correct misstatements that have already been made. By the converse, if asylum-seekers perceive that advisors automatically report damaging information to UNHCR, they may be less likely to reveal it to their advisers, who will in turn not be able to persuade them to adopt a better course of action.

However, there are several aspects of refugee status determination that should be considered as well.

First, unlike other areas of law, there is no party directly harmed if a person succeeds in fraudulently obtaining refugee protection. Such incidents erode the legitimacy of the RSD system, but this danger is diffuse in individual cases. By contrast, the dangers of a person in danger of persecution being denied protection are immediate and severe.

Second, credibility is uniquely central to RSD, while at the same time being subject to particular uncertainty. Research has indicated that a majority of RSD rejections by UNHCR offices are for reason of lack of credibility, while at the same time it is impossible to know with certainty whether an applicant is being truthful in many cases. For this reason, UNHCR has adopted a much lower standard of credibility than would be used in most other areas of the law.

\(^{24}\) Leslie, *supra* note 19

\(^{25}\) *Id.*
Third, RSD typically involves issues on which conclusive evidence is not available. It is often not possible for an advisor to know for sure whether a client has been honest. It is thus essential that wherever an advisor has an obligation to breach confidentiality, the level of knowledge required must be defined strictly and narrowly. Otherwise, given that nearly all refugees require the benefit of the doubt in RSD, the right to counsel and right to seek asylum could be imperiled.

A balance between confidentiality and candor can be seen in the American Bar Association’s MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

...

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false. (emphasis added)

As this text shows, there is a major exception made to the duty of confidentiality where a lawyer knows his or her client has given false information. In this situation, the lawyer is actually required to correct the misstatements so as to preserve the accuracy of the justice system. But this obligation applies only to misstatements made after the beginning of the lawyer-client relationship. A lawyer’s services are not implicated in fraud committed by a client in the past. In this situation, the legal system wants to encourage people to seek legal advice, and therefore protects their confidentiality. But when a client makes misstatements after the beginning of the lawyer-client relationship, the lawyer becomes indirectly implicated. If the lawyer remains silent but continues to represent the client, the lawyer is implicitly acting on statements that s/he knows to be false.

I have set out several alternative proposals for dealing with difficult situations that put confidentiality and integrity in conflict. In all of these proposals, the conference should consider what level of knowledge of falsehood an advisor must have before s/he is prohibited from assisting a
refugee applicant. Given that there is almost always doubt surrounding the factual basis of refugee claims, it may be problematic to prohibit representation where an adviser believes but does not know a client’s statements to be false. I have generally proposed the standard of actual knowledge, a relatively strict test that would not be met simply because a client's account is subject to doubt or is weak in terms of credibility. However, this test would be met where a client tells an advisor that the information is false, or where the advisor obtains reliable documentary or other evidence that conclusively shows the information to be false.

RULE 7.5 (Past misstatements by current clients): The difference between alternatives A and B is essentially one of emphasis; Alternate B would effectively use the offer of legal assistance as leverage to pressure clients to correct past misstatements to UNHCR. Alternate A, by contrast, puts more emphasis on giving advice and counseling, but still prohibits representing the client without correcting the past misstatement.

RULE 7.6 (Future fraud and abuse): Alternatives A and B suggest different phrasings of the general prohibition on assisting directly in misstating facts. Alternative B suggests a much lower standards (knows or believes), that would effectively require an advisor to actually believe a client's account before submitting it to UNHCR. I do not personally recommend this approach, but I suggest it for purposes of discussion.

RULE 7.7 (Misstatements by current clients): Perhaps the most difficult dilemma for a legal advisor comes when a client makes statements in a UNHCR interview that the advisor knows to be false based on otherwise confidential interviews with the client. I propose two basic alternative rules to govern this situation. Alternative A would call for the advisor to try to persuade the client to correct the misstatement voluntarily, but would require the advisor to cease representation if the client refuses. Alternative B would require advisors to go a step farther; following the American Bar Association's Model Rule 3.3 this measure would require the advisor to correct the misstatement to UNHCR, even against the client's will.

POSSIBLE RULE 7.8 (Inquiry into documents): Advisors sometimes are asked by clients to submit documents that on their face are of doubtful authenticity. If the advisor checks the origin of the document and finds it to be fraudulent, s/he would be prohibited from assisting the client to submit it (Rule 7.1, 7.2, 7.6). It is therefore important to know if an adviser is obligated to make reasonable checks into a document’s origin before submitting it. The conference may wish to consider whether to impose such a duty, though it is not recommended here.

Any document that raises doubts for an advisor is likely to do so for UNHCR as well. As a matter of good client counseling and advocacy, an
advisor often should check the validity of the document if possible. However, requiring these checks as an ethical standard would put legal advisors in the role of decision-makers. For this reason, this rule is suggested here for consideration, but is not recommended. Instead, it is recommended that submission of documentary evidence be handled under the same rules that govern assistance in future fraud.

Duty to avoid exploitation (Rule 8)

The last Rule in the draft proposal concerns measures designed to prevent any exploitation or abuse of power by advisors over clients. This is especially important in the RSD context because clients in this field are unusually marginalized, relatively powerless, and highly dependent on those to whom they turn for assistance. These power disparities are compounded by the fact that most reputable legal aid providers in this context do not charge for their services, which can unintentionally create a sense of obligation and indebtedness.

Because of the vast risks of exploitation, the proposed rules prohibit many types of interactions between advisors and clients, especially financial exchange (Rule 8.2, 8.5), employment (Rule 8.4), and sex (Rule 8.3). This includes a prohibition on receiving services from a client that might otherwise be performed for money (Rule 8.4), because of the risk that a client may feel undue pressure to provide the services for free.

The proposed rules prohibit sexual relationships with clients because of the particular risks of exploitation. However, the rules allow a mechanism by which legal advisors may avoid sanctions for an ethical breach, by promptly revealing the relationship to superiors and ending the professional relationship. This is a nod to the reality that intimate relationships develop between people even when prohibited. The mechanism proposed would attempt to prevent exploitation while providing people an incentive not to simply keep a relationship with a client secret.
3) **Standards of competence**

Ethical standards prohibit providing legal services beyond an advisor’s competence. As the Code of Conduct for Lawyers in the European Union states:

> A lawyer shall not handle a matter which he knows or ought to know he is not competent to handle, without co-operating with a lawyer who is competent to handle it.\(^{26}\)

**UNHCR rule 4.3.3**

UNHCR has established a general framework regarding who may be qualified to act as a legal representative in UNHCR RSD. According to Rule 4.3.3 of UNHCR’s *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate*:

Before proceeding with the RSD interview, the Eligibility Officer should make appropriate inquiries to ascertain whether the individual proposed as the necessary training or experience to perform this role. While a formal law degree or current legal accreditation should not be required, persons proposed as legal representatives who do not have formal accreditation should, as a general rule, possess the following:

- A working knowledge of refugee law and RSD procedures
- Experience assisting refugee claimants
- A thorough understanding of the Applicant’s claim

Rule 4.3.3 allows UNHCR eligibility officers to exclude a proposed legal representative if there is "good reason to believe that the third party is not qualified, or otherwise suitable."

As a general framework, Rule 4.3.3 has a number of features that are useful starting points and are well-fitted to the way many legal aid NGOs operate. The rule clarifies that a person need not have a law license to provide legal aid in RSD; this is essential in practice because most UNHCR-related legal aid programs have relied extensively (and often by necessity) on both foreign lawyers and on non-lawyers. The rule states instead that a legal representative should have a general working

knowledge and related experience. It is also understandable that UNHCR retains for itself the authority to exclude unqualified representatives; no other authority is available to regulate legal aid providers, and UNHCR has an interest in protecting the effectiveness of its RSD procedures.

However, Rule 4.3.3 on its own is very vague, and this ambiguity raises concerns that it could be applied arbitrarily, especially since not all UNHCR field offices (and eligibility officers) have been supportive of the right to counsel in RSD. The rule does not define its key criteria, such as "working knowledge," and "necessary training or experience." This ambiguity leaves NGOs without guidance about the standards that their personnel must meet, and depends on largely subjective assessments by UNHCR eligibility officers.

NGOs should take UNHCR’s Rule 4.3.3 as a foundation, but develop more specific criteria of their own to compensate for the Rule’s ambiguity. More specific guidelines could initially be used by NGOs voluntarily, but could also be proposed to UNHCR as an amendment to Rule 4.3.3.

Education and training

Rule 4.3.3 appears to contemplate that a legal representative may demonstrate his/her qualifications through one of two alternative routes. First, s/he may be formally accredited as a lawyer, either locally or in another country. Second, s/he may have other training and experience that provide a "working knowledge" of refugee law. Formal accreditation is quite easy to apply; a person is a licensed lawyer in a jurisdiction, or s/he is not. The only ambiguity would be whether foreign accreditation as a lawyer would suffice, but the open-ended wording of Rule 4.3.3 should allow any person with legal accreditation in any jurisdiction to be a legal adviser in UNHCR RSD. This conclusion is supported by the international nature of UNHCR RSD, in which UNHCR itself relies on foreign protection officers and often operates in English or French rather than the language of the local jurisdiction.

For non-lawyers, much more specificity is necessary in order to define the level of training/experience necessary to have a "working knowledge" of refugee law. In order to define such criteria, it is important to recall the distinct services that a legal representative might offer:

- Advice and counseling on a person's individual circumstances
- Preparation of testimonies and collection of evidence to prepare a refugee claim
• Preparation of legal memoranda and other petitions advocating a person's interests under applicable law
• Attendance at RSD interviews

These activities do not all rely on the same skill set. As a result, a legal aid NGO may choose to have a division of labor among its staff, with not all of its staff qualified to provide all of the services. Providing individualized advice, attending RSD interviews, and preparation of advocacy memoranda will normally require not just basic knowledge of refugee law and UNHCR procedures, but also analytical skills. By contrast, preparation of personal testimonies requires sensitivity and interviewing skill and competence in written communication. However, all legal aid activities require significant intellectual maturity and capacity to bear responsibility, beginning with the importance of confidentiality.

It is suggested that NGOs may wish to define two different tiers of legal representatives, as follows:

**Tier 1: Legal aid trainees competent to compile testimonies and evidence only**
- Post-secondary education
- Basic training in refugee law (5 hours)
- Extensive training in interviewing techniques and testimony writing (10 hours)
- Training in ethical responsibilities (2 hours)

**Tier 2: Legal advisors competent to perform all tasks related to RSD (including providing individualized advice, preparation of advocacy memoranda, and attendance at interviews)**

Formal accreditation as a lawyer in a member state of the United Nations

*or*

- Undergraduate degree, equivalent to a bachelor's degree
- Extensive training in refugee law (15 hours)
- Extensive training in interviewing techniques and testimony writing (10 hours)
- Training in ethical responsibilities (2 hours)

Training requirements may be met through hands on work under the supervision of a Tier 2 representative; this flexibility recognizes the role of law school clinic models in training new legal aid providers. Indeed, some form of supervision in real casework should be required in order to complete training.
Many jurisdictions require continuing legal education for lawyers, so that advocates continue to refine their skills and stay informed about legal developments. Given the uneven resources available for such training for legal aid NGOs, it may be premature to make continuing education a formal requirement. However, it is certainly a best practice. NGOs should consider taking the following steps:

- Arranging regular advanced training sessions in refugee law and advocacy for legal aid personnel
- Sending completed cases for confidential external feedback
- Sending staff for external training programs and courses.

**Good character**

UNHCR rules do not include any requirement of demonstrated good character for legal representation, but NGOs may wish to consider establishing their own requirements on this point. Because of the heavy responsibility born by legal representatives, it may not be enough to merely require a certain level of education and training. At the same time, "character and fitness" requirements are often quite subjective, and in the past have been used in some countries as a mask for discrimination.

At a minimum, NGOs may wish to prohibit any person who has a past criminal record or a past record of ethical lapses that indicate either a propensity for dishonesty or willingness to exploit less powerful people. Such a requirement would necessitate asking any new legal and personnel to provide evidence of good standing with a professional association that has similar concerns for good character, or evidence of non-criminal record.
4) Implementation and accountability

The need for accountability

Perhaps the greatest challenge facing legal aid NGOs concerned with UNHCR RSD is not to set standards of ethics and accountability, but to enforce them. Standards are meaningless if there is no mechanism of holding people accountable to them. But accountability confronts two main challenges. First, it requires legal advisors and NGOs to subject themselves to scrutiny. Second, it requires some ongoing mechanism by which to actually apply standards.

Accountability has positive and negative aspects. By establishing a means of recognizing people who have the qualifications to take on the responsibility of being legal advisors to asylum-seekers, it should promote the professionalization of legal aid providers. Professionalization carries advantages in terms of prestige and recognition, which can help in expanding legal aid programs and raising funds. But accountability also requires a means of penalizing (i.e., removing professional recognition) from advisors who are found to have violated codes of conduct.

UNHCR's Rule 4.3.3 suggests, but does not require, that UNHCR offices may wish to develop an accreditation system for legal advisors. Those UNHCR offices where legal aid is most well established have in fact not taken this step. Instead, some UNHCR offices have attempted to use their power to decide who may represent asylum-seekers punitively and without an established hearing mechanism. At least one UNHCR has tried to block an NGO it accuses of ethical lapses from providing legal aid without giving the organization an opportunity to rebut the accusations in front of a neutral decision-maker. That UNHCR field office has further imposed requirements that legal aid providers must be members of the local Bar, which actually violates Rule 4.3.3.

It is in the interests of legal aid NGOs to develop their own mechanism for maintaining professional accountability, one that will meaningfully enforce standards fairly in a way meant to promote the development of high quality legal aid programs.
Basic elements of accountability

Application and registry

The normal foundation of accountability in any professional field is the maintenance of a public registry of those people recognized as members of the profession. Normally, before beginning work, a new service provider would apply to join the registry. As a professional marker, membership in a registry should be a credential that a service provider advertises to the public in order to indicate that s/he has met minimum qualifications and is bound by standards of conduct. In the UNHCR RSD context, this would mean establishing a registry of recognized legal advisors in the UNHCR RSD process.

Complaints

In order for legal advisers to be accountable to standards of conduct, there must be an accessible means by which complaints can be filed against them alleging ethical breaches. The complaint process would need to be accessible enough so that relatively uneducated refugees can effectively access it. UNHCR would also have the capacity to file complaints against legal advisors, just as courts can refer possible ethical breaches to professional regulatory bodies.

Right to hearing

A complaint against a legal advisor should not lead to any punitive action until the accusations are investigated, the advisor in question has the opportunity to respond and defend him/herself, and the matter is assessed by a neutral decision-making body.

The need to receive and assess complaints against legal advisors represents the biggest logistical challenge confronting legal aid NGOs in the context of UNHCR RSD. This requires a neutral body capable of investigating and assessing complaints.

Discipline

Complaints may lead to several actions as means of professional discipline:

- Complaints may be struck down for lack of evidence of ethical breaches
- An advisor may receive a private warning (not noted in the public registry)
- An advisor may received a public warning (noted in the public registry)
- An adviser may be suspended from the registry for a set period of time
- An adviser may be banned from the registry permanently
Practical strategies

The elements of accountability identified here can be met through either local or global strategies, both of which carry different advantages and disadvantages.

The most ambitious strategy would be to create a global registration of legal advisors who provide legal aid in the context of UNHCR RSD, to be managed by the nascent network of legal aid programs. The registry could be accessible on the internet. New legal advisors would make an application to join the registry. Complaints of ethical misconduct would be transferred to the network for investigation, hearing and discipline.

The advantage of such a global system is that it would establish a mechanism of maximum consistency and visibility, promoting the professionalization of legal aid, while maintaining uniform standards. But it would also encounter major logistical and resource constraints in terms of enforcement. Not only is an international legal aid network only now coalescing, there is no international secretariat with the resources to actively investigate and judge ethical complaints.

The main alternative would be a locally-based accountability system, where each legal aid NGO would establish its own mechanisms for enforcing professional codes of conduct. This would resolve the logistical problem inherent in a global system, but would carry a different set of disadvantages. A locally-based system would likely be implemented unevenly, undermining the goal of establishing universal minimum standards. It would also not offer the visibility necessary to promote the growth of professional-quality legal aid. By depending on the infrastructure of local NGOs, independent legal advisors (who are not associated with an NGO or who work in countries where no NGO exists) would be excluded. More gravely, the accountability system may lack independence and the necessary perception of integrity, because small legal aid NGOs would be left to investigate themselves.

The best approach may thus be a hybrid of local and global systems. The system proposed here would establish a global system, but one that depends on existing local NGO resources. It would not require any significant additional monetary resources to operate.

- The global legal aid network would establish a global, public registry of legal advisors, which could be viewed through the internet and maintained with relatively minimal resources.
• UNHCR would be urged to accept any person whose name appears on the registry as a qualified legal advisor.
• New legal advisors would in most cases submit their credentials to the local NGO with which they work, which (as a member of the network) would then arrange their addition to the global registry.
• There would be an option for individuals to apply if there is no NGO in their country. In this case, the individual would be asked to form a liaison association with an known NGO in another country for the purpose of receiving their initial application and any future complaints against them.
• Each NGO would be required to set up a complaints procedure, which would be advertised to all clients and to the local UNHCR office.
• Independent providers would be required to inform all clients, in writing, how they can make complaints (most likely by mail to the liaison NGO).
• When complaints are filed, the local NGO would notify the global network; the network would attempt to identify a locally available, independent and qualified person who would be able to investigate the complaint and compile a dossier describing its factual basis.
• The accused legal advisor would have the opportunity to respond to the dossier and to all evidence against him or her.
• The global network would appoint a hearing board composed of three legal advisors at other NGOs (i.e. not the NGO involved in the complaint) which would assess the dossier, would have the option of hearing the complainant, investigator and legal advisor via teleconference, and would then issue a disciplinary decision.
5) *Annex 1: Model Rules of Ethics for Legal Advisors in Refugee Status Determination by UNHCR (draft text)*

**PROPOSED TEXT**

1. **SCOPE AND PURPOSE**

1.1 These rules are intended to guide legal aid providers in the context of refugee status determination procedures (RSD) conducted by the UN High Commissioner for Refugees (UNHCR).

1.2 These rules are sub-ordinate to any applicable domestic rules governing the provision of legal services, and are intended only to supplement such rules.

1.3 These rules do not apply to the provision of generalized information to refugees, asylum-seekers, or migrants, so long as such information does not involve providing any of the services as defined in Rule 2.2.

2. **DEFINITIONS**

2.1 The term “legal advisor” refers to any person providing advice and/or representation to people seeking recognition as refugees by UNHCR, or to people who have been recognized as refugees and are seeking other assistance from UNHCR.

2.2 The term “services” refers to the advice, document preparation, and/or representation that a legal adviser may provide.

2.2.1 “Advice” includes providing an opinion about how law or policy applies to a particular person’s circumstances.

2.2.2 “Document preparation” includes assisting a person in preparing written documents in the person’s own name, including but not limited to personal testimonies, that are
intended for submission to UNHCR in support of an RSD or other application.

2.2.3 “Representation” includes acting on behalf of another person either orally or in writing, including the submission of memoranda arguing that a person meets legal criteria for refugee status or communicating with UNHCR or other bodies on a client's behalf about his or her case.

2.3 The term “client” refers to a person to whom a legal adviser has agreed to provide services and who voluntarily accepts those services.

2.4 The term “prospective client” refers to a person who has sought services from a legal adviser but to whom the adviser has not yet agreed to provide services.

3 ADVISOR-CLIENT RELATIONSHIPS

3.1 Advisors shall in all cases clearly explain to prospective clients whether they can officer services of any kind, and shall provide clear explanations of the type of service they offer. The objectives and scope of any advisor-client relationship shall be explicit before the advisor begins to conduct any work on the case, and before the client is asked to agree to the representation.

3.2 In order to maximize impact, legal aid providers may limit their services, for instance by providing only advice or document preparation, or may focus their services on particular types of clients who either have particularly acute needs or whose cases raise especially important legal issues. However, advisors must inform clients of any limits in the services to be provided at the beginning of the advisor-client relationship.

3.3 Notwithstanding Rule 3.4, a legal adviser is under no obligation to provide services to a prospective client, and may decide to decline to provide assistance unless prohibited by Rule 3.4.

3.4 Legal advisers shall not deny services to any person on the basis of race, gender, sexual orientation, nationality, political opinion, religion, age, family status, wealth or membership in a particular social group.
3.5 Advisor-Client relationships may begin only with the voluntary, informed consent of the client, and may continue only if this consent continues. A client may end his or her relationship with a legal advisor by clear and explicit communication, orally or in writing. An allegation by a client of ethical misconduct against an advisor shall be presumed to indicate that the client no longer consents to continuing the advisor-client relationship.

3.6 Clients shall be entitled to view and obtain copies of all materials in their files. Legal advisors shall provide copies of the materials to the client upon the client's request, during or after the end of the advisor-client relationship. However, advisors may maintain records of their work on a client's case, and are not required to destroy files, even if requested by a client.

4 DILIGENCE

4.1 An advisor will act responsibly and with due diligence in the handling of a client's case and shall act within the bounds of the law and these rules to obtain the best results possible for the client.

4.2 Advisors shall complete all work as agreed with clients. Advisors shall complete all required documents for a client by any deadline applicable.

4.3 Advisors are responsible for maintaining regular access to published UNHCR materials and country of origin information as necessary to assist clients in refugee status determination applications.

4.4 Advisors shall maintain a filing and records system in order to record their work on a client's case.

5 CONFLICTS OF INTEREST

5.1 Advisors shall not provide services to any prospective client where the advisor has a direct financial or personal interest that is opposed to the client’s interests.
5.2 Advisors shall not offer services to any prospective client where another client of the same advisor has interests that are opposed to the prospective client's interests.

5.3 Where two clients of the same advisor develop a conflict of interests after the beginning of an advisor-client relationship, the advisor shall seek to refer one or both of them to alternative advisors immediately.

5.4 Where advisors have a personal relationship with the client that could interfere with his or her exercising objective judgment, the advisor shall seek to refer the client to an alternative legal advisor, if available.

5.5 Where Rule 5.3 or 5.4 applies and alternative legal advisors are unavailable, an advisor may assist clients where a conflict of interest exists only after clearly and explicitly notifying the clients of the conflict and its potential consequences, and after seeking ways to limit the scope of representation so as to minimize conflicts.

6 CONFIDENTIALITY

6.1 Clients and prospective clients are entitled to confidentiality of the information obtained from them or others by their advisors. The confidentiality privilege is owned by the client, not by the advisor. Except as provided for in these rules, confidentiality may be waived only with a client’s explicit consent.

6.2 An advisor will protect the confidentiality of all information that is gathered regarding a client’s affairs, except as specifically provided for in these rules. Advisors must maintain files and records in a manner designed to protect their clients' confidentiality.

6.3 Confidentiality shall not apply to information that has entered the public domain with the client's consent. When a client voluntarily allows a piece of information to enter the public domain, the client will be presumed to have waived confidentiality on that piece of information. However, advisors may not reveal information that has entered the public domain against the wishes of the client, or without the client's consent.

6.4 An advisor may reveal confidential information about a client to other legal advisors for the purpose of professional consultations, so long as the other advisors will be bound by the same duty of
confidentiality and so long as the other advisors do not have a conflict of interest as described in Rule 5.

6.5 Where an advisor believes a client is likely to inflict bodily harm on another person in the imminent future, the advisor must take prompt steps to inform the appropriate authorities, and may reveal confidential client information if necessary to prevent bodily injury.

6.6 An advisor may reveal confidential client information as minimally necessary to defend him or herself from any formal accusation or breach of these ethical rules.

6.7 A legal advisor or organization employing a legal advisor may use information collected from client’s cases in publications and writings without the consent of affected clients only if the publication is sanitized of any unique details that would allow an interested person to identify the person involved.

7 DUTY OF INTEGRITY

7.1 An adviser shall adhere to the truth in all communications, shall urge his or her clients to do the same, and shall not encourage, advise, or assist any person to make false or misleading statements to UNHCR or any other person or institution.

7.2 While an adviser owes his or her first duty of loyalty to the client, the advisor is also obligated to ensure that his or her services are not used to undermine the integrity of the refugee status determination system.

7.3 Notwithstanding Rule 7.1, the advisor is not the decision-making body regarding the validity of applications for refugee status recognition, and has no duty to screen out or turn away prospective clients who have relatively weak claims.

7.4 An advisor shall conduct his or her interactions with other parties in a courteous, professional manner, consistent with principles of respect

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27 This phrasing borrowed from Canadian Organization of Professional Immigration Consultants Code of Ethics R. 6.
28 This text adapted from UNHCR, Code of Ethics for UNHCR Partners Providing Legal Assistance to Refugees and Asylum-Seekers, marked draft dated 30 August 2004, field office origin unknown.
for other people and principles of human rights and non-discrimination. It shall be a breach of these rules to make statements or engage in actions that create an atmosphere of hostility toward any person on the basis of race, gender, sexual orientation, nationality, political opinion, religion, age, family status, wealth or membership in a particular social group.

7.5 Past misstatements by current clients

**ALTERNATIVE PROPOSAL A**

7.5 When an advisor knows that a client has made misstatements of fact to UNHCR before the beginning of the advisor-client relationship, the following shall apply:

7.5.1 The advisor may not reveal the past misstatements to any person or body without the client’s explicit consent.

7.5.2 The advisor should attempt to persuade the client to correct the statements to UNHCR.

7.5.3 The advisor may not proceed in making any communications to UNHCR or any other body that are founded on the past misstatements, and shall not take any actions likely to lead UNHCR or any other body to rely on the past misstatements.

**ALTERNATIVE PROPOSAL B**

7.5 When an advisor becomes aware that a client has made misstatements of fact to UNHCR before the beginning of the advisor-client relationship, the following shall apply:

7.5.1 The advisor may not reveal the past misstatements to any person or body without the client’s explicit consent.

7.5.2 The advisor may continue assisting the client only on the condition that the client agrees to correct the statements to UNHCR.
7.6 Prohibition on assisting in future fraud and abuse

**ALTERNATE PROPOSAL A**

7.6 An advisor will not knowingly sign or otherwise be associated with any letter, report or other documents submitted with respect to a client which contains false or misleading information. An advisor will not submit to UNHCR any document which the advisor knows to either be a forgery or to contain false or misleading information.

**ALTERNATE PROPOSAL B**

7.5 An adviser will not make any statement or submissions in support of any application to UNHCR which the adviser knows or believes to be misleading or inaccurate.

7.7 Misstatements by current clients

**ALTERNATIVE PROPOSAL A**

When a client makes statements to UNHCR after the beginning of the advisor-client relationship that the advisor knows to be false, the advisor shall cease all further representation of the client unless the client consents to correct the misstatement. However, the advisor may not reveal the misstatements to UNHCR without the client’s consent.

**ALTERNATIVE PROPOSAL B**

When client makes misstatements to UNHCR after the beginning of the advisor-client relationship that the advisor knows to be false, the advisor shall take reasonable remedial measures, including, if necessary, disclosure to UNHCR.

**ALTERNATIVE PROPOSAL C**

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29 This text based on Canadian Organization of Professional Immigration Consultants Rules of Professional Conduct R. 4.
30 This text based on Migration Institute of Australia Code of Conduct R. 16.
31 Text based on American Bar Association Model Rules of Professional Conduct Rule 3.3.
When client makes statements to UNHCR after the beginning of the advisor-client relationship that the advisor knows to be false, the following shall apply:

7.7.1 The advisor may not reveal the misstatements to any person or body without the client’s explicit consent.

7.7.2 The advisor should attempt to persuade the client to correct the statements to UNHCR.

7.7.3 The advisor may not proceed in making any communications to UNHCR or any other body that are founded on the misstatements, and shall not take any actions likely to lead UNHCR or any other body to rely on the misstatements.

7.8 Inquiry and verification of documents (OPTIONAL, NOT RECOMMENDED) When a client has documents that support his or her claims, an advisor may submit them to UNHCR only after making reasonable checks into the validity of the document, so long as the checks do not violate the client’s confidentiality or place the client or any other person in danger.

8 DUTY TO AVOID EXPLOITATION

8.1 In all of their conduct vis-à-vis clients, advisors shall take due regard of the fact that asylum-seekers and refugees are typically vulnerable to exploitation, especially for financial gain, labor, or sex.

8.2 Financial or intimate relationships between advisors and current or recent clients are problematic because they involve a potentially abusive power disparity, obscure the professional relationship between an advisor and client, and obstruct objective judgment by a staff member about a client’s case.

8.3 Sexual relationships between advisors and clients are prohibited during the advisor-client relationship. Any sexual relationship that occurs during this period shall be presumed to be an abuse of power by the advisor and will be presumed to be a breach of these rules.
8.3.1 An advisor shall not be disciplined for breach of Rule 8.3 if s/he takes the following actions immediately after the beginning of any sexual relationship with a client:

- Notify his or her superiors in any legal aid organization, if any, of the relationship.
- End all legal services to the client.
- Refer the client to alternative legal advisors.

8.4 Advisors shall not solicit or receive any services, products, or labor for which a person might normally be compensated in money or other exchange from any current client or for six months after the end of an advisor-client relationship, except as permitted by Rule 5.4 where a relationship pre-existed the need for legal services and no alternative legal advisors are available.

8.5 Advisors shall not enter into any financial relationship with any current client or for six months after the end of an advisor-client relationship.
6) **Annex 2: Model Minimum Standards of Qualifications for Legal Advisors in Refugee Status Determination by UNHCR (draft text)**

**Qualifications of a UNHCR Legal Adviser:** A person may be recognized as a UNHCR RSD legal advisor if they meet either criteria A or B:

- **Criteria A:**
  - Current license issued by the relevant authority of a member state of the United Nations as a lawyer, solicitor, attorney, barrister, counselor-at-law or equivalent professional designation.

- **Criteria B:**
  - Undergraduate degree, equivalent to a bachelor's degree
  - Extensive training in refugee law (minimum 10 hours)
  - Extensive training in interviewing techniques and testimony writing (10 hours)
  - Training in ethical responsibilities (2 hours)

A person who is recognized as meeting either of these criteria may offer the full services of a legal adviser to applicants in the UNHCR RSD process, including:

- Advice and counseling on a person's individual circumstances in terms of eligibility for refugee status
- Preparation of testimonies and collection of evidence to prepare a refugee claim
- Submission of legal memoranda and other petitions on a client's behalf
- Attendance at RSD interviews as a legal representative

**Qualifications of a UNHCR Trainee Adviser:** A person may work under the supervision of a UNHCR Legal Adviser as a trainee adviser if s/he meets the following minimum criteria:

- Post-secondary education of at least one year
- Basic training in refugee law (5 hours)
• Extensive training in interviewing techniques and testimony writing (10 hours)
• Training in ethical responsibilities (2 hours)

A person who is recognized as a Trainee Adviser may offer only the following service, and only under supervision by a full Legal Adviser:

• Preparation of testimonies and collection of evidence to prepare a refugee claim

Trainee Advisors may not offer individualized advice about a client's circumstances, may not attend UNHCR RSD interviews as a legal representative, and may not submit any petitions or legal memoranda on a client's behalf. This does not prohibit a Trainee from assisting a Legal Adviser in preparing legal memoranda and other documents, on the condition that the Legal Adviser sign and take responsibility for the actual submission.
7) **Annex 3: Proposed mechanisms establishing a system of professional accountability for legal aid providers in UNHCR refugee status determination (draft text)**

**Application and registry**

The Southern Refugee Legal Aid Network (SRLAN) shall establish a registry or legal advisors and trainee advisors recognized as qualified to provide services to clients in the context of UNHCR refugee status determination.

The register shall be available electronically for viewing by the public.

The names of recognized Trainees and Advisers shall be submitted to the registry by member organizations, which shall collect and maintain records confirming that the people registered comply with the applicable criteria.

**Complaints**

All member organizations and any individuals registered as Legal Advisors shall inform all clients and prospective clients in writing that they may make complaints against legal advisors for violation of the ethical standards, and must provide information about how to submit complaints.

Complaints may be filed by clients, former clients, prospective clients, or by an attorney authorized to act on behalf of a client. UNHCR may also file a complaint against a legal advisor.

Legal advisors are obligated to file a complaint if they know that a fellow advisor has committed a serious breach of the ethical rules.

Complaints must be in writing, but can be submitted in any language. They may be submitted either to the organization, or by e-mail or fax to the SRLAN.

In order to be acted upon, complaints must include sufficient detail to allow a follow-up investigation. This detail will include the name and location of the complainant, the name of the accused legal advisor, and a description of the alleged offending conduct.

Legal advisors will be presumed innocent of any accused ethical breach. Both legal advisers and complainants may be represented by counsel.
through the process; attorneys may act on their behalf except where it is necessary for either of them to give direct evidence.

Investigation

Any member organization or legal advisor must notify the SRLAN within 7 days of receipt of any ethical complaint. SRLAN will then identify a locally available person who is generally familiar with refugee issues and who is institutionally independent from by the complainant and the accused advisors to act as an independent fact-finder.

The fact-finder will conduct an investigation of the complaint, and will produce a report and dossier. The fact-finder will also have the discretion to recommend that the allegation be dismissed if it either is not remotely related to these ethical standards, or if the complainant is unable or unwilling to cooperate in the investigation.

The fact-finder's report and dossier will be provided to the complainant and the accused advisor. The complainant will have the opportunity to add additional statements as an appendix to the fact-finder's report.

The accused will have the opportunity to add rebuttal evidence or arguments to the dossier, and will also have the opportunity to cross-examine any witnesses, including the complainant, in front of the fact-finder. The fact-finder will include an objective transcript of the cross-examination in the dossier.

The investigatory dossier will not be published or allowed to enter the public domain, but will be shared with specific parties as provided for herein.

Hearing

SRLAN will arrange by teleconference a panel of at least three legal advisors in good standing who are institutionally independent from the accused. The panel will review all contents of the investigatory dossier. The complainant (or authorized representative), the accused advisor, and the fact-finder shall all have the opportunity to make oral statements to the panel.

The panel may request the fact-finder provide additional information if needed.
If the fact-finder recommends dismissal of a complaint, the recommendation will be reviewed by one legal advisor in good standard who is institutionally independent from the accused. If the reviewing advisor ratifies the recommendation, the complaint will be dismissed. However, the reviewing advisor may direct the fact-finder to compile a complete dossier to be referred for a full hearing.

**Discipline**

After reviewing all available evidence and arguments, the panel will decide on one of the following actions:

1. Complaints may be struck down for insufficient evidence to prove ethical breaches, or because the facts proven do not constitute a breach of ethical rules (acquittal)
2. An advisor may receive a private warning (not noted in the public registry)
3. An advisor may receive a public warning (noted in the public registry)
4. An adviser may be suspended from the registry for a set period of time, after which s/he may apply for re-instatement without the suspension being noted in the public registry
5. An adviser may be suspended from the registry for a set period of time, after which s/he may apply for re-instatement with the condition that the past suspension must be noted in the registry
6. An adviser may be banned from the registry permanently

The panel may choose options 3 through 6 only if the predominance of the evidence indicates that the legal advisor's conduct breached ethical standards.

The panel must issue a written, reasoned decision if it chooses any of options 2 through 6. If the panel is split, dissenting or concurring opinions may be issued.

Any acquittal (option 1) will be final (no double jeopardy). Any decision for disciplinary options 2 through 6 may be appealed by the accused advisor. In the event of an appeal, SRLAN will appoint a differently constituted panel to consider the case. However, the decision of the first panel will go into effect on an interim basis until the appeal panel makes a final decision.

The decisions of the first instance and appeal panels will be given to both the legal advisor and the complainant, and to the organization that employs the legal advisor. The decisions will be marked "Confidential; Copyright held by SRLAN; Publication or re-distribution prohibited."