

## Must Attorneys Always Ask Their Clients About FGM?

In a strongly-worded [dissenting opinion](#) Judge Harry Pregerson of the U.S. Court of Appeals for the Ninth Circuit Court wrote that an immigration attorney provided ineffective assistance of counsel for failing to ask her client about whether the client had been subject to female genital mutilation ("FGM").

In [Teczeghi v. Holder, Nos. 07-70661 & 07-71463 \(9th Cir. Jan. 4, 2011\)](#) Judge Pregerson writes:

An attorney representing an asylum seeker has a duty to investigate all grounds upon which an applicant may be entitled to relief... [and must] inquire as to whether her female client has suffered female genital mutilation when (1) nearly 90 percent of women in the client's home country endure such a brutal procedure, and (2) it is well-settled that female genital mutilation constitutes persecution sufficient to warrant a grant of asylum.

The Judge concludes by rejecting the majority's reasoning that an attorney should not be required to inquire about something as personal as FGM:

The panel majority fails to recognize that most political asylum applications are intensely personal, often painful, and may involve questions of sexual torture, rape, and humiliation. It is entirely expected that clients may not want to readily reveal such circumstances to their attorneys. It is precisely because the subject matter of an asylum claim based on female genital mutilation is so intensely personal and our immigration system so complex that an attorney has a special responsibility to adequately explain to her female clients their rights to asylum and diligently investigate all grounds for relief. The panel majority's decision allowing attorneys to forego investigating intensely personal facts in an asylum claim diminishes the attorney's role in the asylum process. Our precedent tells us that competent attorney performance requires more. I believe that our court should instill a greater sense of professional responsibility in attorneys who represent asylum seekers.

It's a powerful argument--and a cautionary tale for those of us who represent women from countries where FGM is widespread. If Judge Pregerson's position were adopted, attorneys would be required to ask about FGM not just in asylum cases, but also for clients seeking other forms of relief. And we would--I suppose--be required to file FGM-based asylum applications for all clients who have been victims of the practice. I have mixed feelings about this.

[caption id="" align="alignleft" width="298" caption="An anti-FGM poster in Kenya."]



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One problem is that it takes considerable time to develop an asylum case; particularly a case based on FGM. For private

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attorneys, we would need to charge money for this time. For non-profit attorneys, more time on one case means taking fewer cases overall. Thus, fewer asylum seekers would be represented.

Another problem is that adding an additional claim for relief may weaken the overall case. It's a question of strategy, but generally, if I have a strong basis for relief, I would rather not include a second, weaker claim for relief. The weaker application tends to distract from the stronger, and increase the odds that both applications will fail. Under the regime outlined by Judge Pregerson, I might feel obliged to include the FGM claim, even if I felt it would distract from the main focus of the case (if only for CYA--cover your ass--purposes).

On the other hand, if asylum might be available to a client based on FGM, the lawyer has a duty to at least explore that option. I think it goes too far to label an attorney "ineffective" for failing to file an FGM asylum claim, especially where the attorney determines that such a claim is not the best strategy for the case. However, where the attorney fails to ask about FGM when the client hales from a country where that practice is prevalent, there is a good argument that the attorney has provided ineffective assistance of counsel.