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Walking A Tight Rope: Ethical Considerations and Pitfalls in Representing both Employer and Employee

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There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it. *Stockton v. Ford*, 52 U.S. (11 How.) 232 (1850).

As the Supreme Court, legislatures and courts across America have made abundantly clear, lawyers owe their clients ethical duties. Foremost among them are the fiduciary duty of undivided loyalty and the duty to maintain confidences. While the specifics in state ethical provisions regulating the attorney-client relationship vary, the essential mandate in Maryland and elsewhere is that the attorney must not adopt a position that conflicts with the client's interests or divulge confidential information disclosed by the client in the course of the relationship contrary to the client's wishes.

Although The Maryland Lawyer's Rules of Professional Conduct ("Maryland Rules") allow for representation of multiple clients, ethics codes generally discourage and often prohibit dual representation. Yet, family and employment-based immigration cases illustrate the impracticality of single client representation. For the most part, it just does not make sense for a U.S. citizen and his or her alien spouse to retain separate counsel when they share a mutual interest in the final outcome. Similarly, the interests of a U.S. employer and its prospective foreign employee generally coincide often, making single representation impractical.

Immigration attorneys confront ethical issues regarding the

stringent standards of loyalty on a regular basis. This is so because joint representation is the common paradigm in immigration law, where at least two parties can lay claim to being the immigration attorney's client - that is, the petitioner (U.S. spouse /relative; U.S. employer) and the beneficiary (alien spouse/ relative; foreign employee).

The prevalence of joint representation in immigration law poses a variety of ethical dilemmas for the immigration lawyer who might be retained by a corporation to handle the initial visa petition for a prospective foreign employee, to extend the non-immigrant employment status of a current foreign-born worker, or to assist in the company's internal Employment Verification, or I-9, audit. In these and other situations, the first question the attorney must answer is: Whom do I represent? In other words, is the paying corporation the sole client? Or, does the lawyer also represent the would-be employee waiting abroad for a determination regarding the visa petition?

Business immigration lawyers work zealously and capably on their clients' behalf, believing that their grasp of the ethical provisions in the code of professional responsibility will generally keep them from crossing the line and putting their practice in jeopardy. The fact is that rendering advice regarding the petition process and obtaining confidential information from the foreign individual establishes a professional relationship between the lawyer and the beneficiary, despite the fact that no express legal representation contract exists. Further, the attorney's duty of loyalty and confidentiality attaches to the employee, notwithstanding the fact the attorney receives payment from the employer. The immigration lawyer who violates her legal duties to either client faces potential ethics sanctions and the threat of liability for malpractice.

One of the first ethics rules the immigration attorney must consider when the corporation retains her for the purpose of filing an employment visa extension on behalf of a current employee, establishes that "[a] lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7." Md. Lawyer's Rules of Prof'l Conduct R. 1.13 (e) (2005), Further, this provision stipulates that "[i]f the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders."

In such a case, whether or not the employer wishes to know the details of the employee's immigration case for which it hired counsel, the attorney must heed Rule 1.8(f), which proscribes accepting "compensation for representing a client from one other than the client unless: (1) the client gives

informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6." Md. Rules (2005). Moreover, never forget that Maryland Rule 2.1 requires the lawyer to "exercise independent professional judgment and render candid advice."

In addition to the Maryland Rules, as well as other applicable state ethics rules and codes of conduct (being a federal administrative practice, immigration law attorneys are able to practice across jurisdictional lines), the business immigration lawyer must be mindful of rules and provisions in the Immigration and Naturalization Act ("INA") that sanction frivolous behavior by suspension and disbarment, INA §240 (b)(6)(C); 8 CFR §§103.2(a)(3), 292.3 and 1003.102, and those that prohibit preparing, filing or assisting - with knowledge and reckless disregard - another in the preparation or filing of any application or document falsely made in whole or in part. INA §274C(a)(5).

Duty of Loyalty

It is clear that seeking an employment visa is not a unilateral affair - the employer and the employee must be willing to cooperate in their common quest of a visa. This mutuality of interest is presumed to exist from the onset. Yet, differing or adverse interests can and do arise within the employer-employee dynamic. Ethical pitfalls can also arise if the attorney becomes overzealous on behalf of one of the parties, when both co-clients are equally entitled to her loyalty.

Conflict of interest rules provide an ethical baseline regarding the fiduciary duty of loyalty attorneys owe clients. Generally, when a current client holds a differing or adverse interest to another current client, the attorney must, at least, make full and fair disclosure of the conflict to both clients.

Maryland Rule 1.7 (a) requires that an attorney "not represent a client if the representation involves a concurrent conflict of interest," and, in paragraph (b), the rule calls for each client affected by a conflict to knowingly waive the attorney's duty of full confidentiality and loyalty if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal and

> (4) each affected client gives informed consent, confirmed in writing.

Duty of Confidentiality

Specific ethics rules mandate that a lawyer not use confidential information disclosed during the course of the representation to the disadvantage of the client without the client's informed consent, unless permitted or required by the Maryland Rules. R 1.8 (b). Maryland Rule 1.6 (b) provides exceptions to the general duty of confidentiality, allowing the attorney to reveal information "to the extent the lawyer reasonably believes necessary":

> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules, a court order or other law;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (6) to comply with these Rules, a court order or other law.

As Maryland Rules 1.6 and 1.7 make clear, except in few instances, the client's informed consent is key to resolving ethics problems in a dual representation. To effectively consent, the client must be aware of the nature of the representation, how the attorney will treat confidential information, and what to expect in the event a conflict of interest arises. Ideally, at the onset of the lawyer-client relationship, the attorney will follow up her explanation with a

recapitulation in writing of this discussion.

In the face of an actual and material conflict emerging from the joint representation, the attorney needs to assess whether her ability to represent both clients would be so impaired that she should withdraw from the case. However, when continued dual representation seems appropriate, the attorney must discuss the conflict at issue with both co-clients and obtain their written consent in accordance with Model Rule 1.7. Full disclosure should help the attorney avoid a variety of pitfalls - e.g., one co-client revealing potentially conflictive information.

Once authorized by the would-be-joint clients to do so, counsel can engage in simultaneous representation provided no irreconcilable case-related issue exists between the parties. For instance, if the foreign employee's agenda and the U.S. employer's business purpose inherently contain widely different and distinct objectives from the outset, single representation of only one would, of course, be advisable.

Dual Representation and I-9 Audit Conflicts

The Immigration Reform and Control Act of 1986 and the Immigration Act of 1990 (collectively, "IRCA"), 8 U.S.C. §§ 1324a, 1324b, 1324c, serve to prevent unauthorized individuals from becoming part of the American workforce. Through IRCA, Congress imposed on employers the responsibility for (1) verifying the employment eligibility and identity of employees hired and (2) overseeing employee compliance by completing Form I-9 for all employees, including U.S. citizens. IRCA provides that *actual* and *constructive knowledge* can be imputed to the employer who possesses information indicating an employee is ineligible to work in the United States. Heavy civil and criminal penalties can be imposed on the employer who *knowingly* employs such an individual.

All employers are subject to I-9 audits by Immigration and Customs Enforcement ("ICE"), a branch of the United States Department of Homeland Security ("DHS"). Given a certain set of parameters, such audits are effected on the basis of discrepancies between the information submitted by the employer in the foreign employees' W-2 form and the information stored in the Social Security Administration database. To rectify the problem, the SSA sends requests for corrections, known as "No-Match" letters, to employers who have more than 10 discrepancies in the W-2 forms they submit, provided also that each employer's number of unmatched W-2 forms represents more than 0.5 percent (one-half of one percent) of its total W-2 forms.

To avert an ICE audit, a company that relies on foreign-born unskilled workers (building contractors, landscapers or poultry processing plants, for example), may at some point engage the business immigration attorney to conduct an

internal review of its I-9 forms. During such process, it is probable that the attorney may come across information about an employee's immigration status that could be adverse to the company's interests. What is the attorney to do with that information if the corporate client had previously also engaged her or to assist that same employee with his employment visa needs? The simple answer is that, short of withdrawing from representing both co-clients, the attorney would be well-advised to recommend the employee seek other legal representation.

An agency I-9 audit may be triggered by submitting a visa petition at the behest of the employer for an employee who is eventually found to lack legal immigration status. And once the red flag goes up during the petition review process, ICE may find the employer *knowingly* hired an undocumented individual and levy heavy sanctions and fines against the company. To prevent such scenario, the prudent attorney would inform both co-clients, in writing, of the potentially prejudicial results that would be occasioned by such filing and, while the attorney may obtain a waiver in order to continue representing the employer and the employee, absent redeeming factors in the employee's case, the better path would be to recommend that the employee co-client obtain separate counsel.

Moreover, if no immigration relief is available to the employee and he or she has been unable to provide satisfactory documentation in response to an SSA "No-match" letter, or other revelatory circumstance, the attorney is obligated to advise the company terminate employment of that worker, regardless of whether or not the employer, who might heavily depend on that worker, wants to hear this news. The business immigration attorney would thus stand on solid ethical ground, as Maryland Rule 1.2 (d) mandates that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." On the basis of this ethics guidance, it would be safe for the business immigration attorney to discuss with the employee-client the legal alternatives available in his or her case, including all possible risks (e.g., removal, 3- or 10-year bar from re-entry into the U.S., etc.), leaving it up to the client to make a decision regarding the desired course of action.

Proposed Models to Avoid Ethics Problems in Dual Representation

Many business immigration lawyers attempt to avoid conflict of interest issues that arise in joint representation by regarding one of the parties in the case - most likely, the employer - as the sole client. The rationale behind this controversial approach, known as the "Simple Solution,"

hinges on the fact that only the employer signs the petition and the attorney's Notice of Entry of Appearance or G-28 form, and it is the employer with whom the attorney has sole or greater contact. However, this simple approach does not resolve the attorney's fiduciary duty of loyalty to the foreign employee.

The foreign employee (or beneficiary) may rightfully harbor an expectation of equal representation on the basis of exchanges with counsel during the preparation of the relevant filings, legal advice received prior to applying for a visa at an American consulate and, subsequently, guidance on how to maintain lawful non-immigrant status once in the United States. This expectation may find a heightened expression, for instance, during the preparation of an employer's subsequent Immigrant Visa Petition, which requires that both parties sign a Labor Certification. The employment documents in some circumstances may be filed concurrently with the *employee's* Application to Adjust Status to Permanent Residence (I-485).

Filing the I-485 application requires that the employee also sign an attorney's Notice of Entry of Appearance. Providing legal advice or accepting confidential information is enough for a lawyer-client relationship to exist. Moreover, a court is likely to side with the client who reasonably perceives the relationship has been created.

Neither does the "Simple Solution" resolve issues related to the attorney's duty of confidentiality. The expectation of loyalty and confidentiality can be particularly strong when the party who has the most contact with the attorney is also the one who pays the professional fees. If the paying client is the employer, the attorney may be expected to protect the company's proprietary or financial information, including earnings, from the foreign national employee. Yet, disclosure of the company's earnings may be inevitable if the beneficiary needs to carry a copy of the employer's petition bearing such information in order to re-enter American soil after a trip abroad at any time during the period of lawful employment, as can be the case with H-1B visa holders.

If it is the employee who pays the lawyer's fees, he or she may expect the attorney to engage in an aggressive strategy in pursuit of permanent residency (*i.e.*, on the basis of an I-140 Petition). In such an instance a conflict of interest would inevitably arise should the employer wish, instead, to pursue a more conservative strategy or to transfer the employee to an overseas branch at the expiration of the relevant non-immigrant employment period. What should the attorney do in situations such as these? Is it enough that the attorney regard one or the other party as the sole client?

The answer to these questions may be found in Rule 4.3, which addresses the matter of dealing with unrepresented

persons - the inevitable status one of the parties would acquire under the "Simple Solution" model. This rule prescribes that "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." Furthermore, the lawyer should not give legal advice to an unrepresented person, "other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." Md. R. 4.3 cmt. 2 (2005).

Some business immigration lawyers use the "Golden Mean" approach, a middle ground between the aforementioned simplified representation and actual dual representation, as a way to limit representation to one party in immigration cases, as well as to limit the disclosure of confidential information. According to its proponents, the attorney would determine ahead of time the potential conflicts of interest that might arise in pursuit of a non-immigrant employment visa. Then, before commencing work, she would obtain advance waivers allowing for limited representation of the foreign national (*e.g.*, to the H1B or L1 petition), or to set forth that the employee would need to seek another attorney to represent him if he or she should desire a visa status different from the original petition. Attorney disclosure and advance waivers could run, instead, in favor of the employee, insofar as her representation of the employer might be limited, for example, to work related to the H-1B petition only, with the attorney continuing to represent the employee in his or her pursuit of employment elsewhere on the basis of the same or a different visa option.

Advocates of this middle-of-theroad approach suggest implementing a professional engagement strategy to avoid running afoul of statutes, rules and regulations that control attorney ethics. They suggest the attorney adapt the retainer agreement, depending on whether the employer or the employee is the main contact, to include a reference to the joint representation and an explanation of her general duties of loyalty and confidentiality to each client. The agreement would also include a description of the proposed limitations in scope of representation of one client over the other, the parameters of the immigration strategy, what the attorney will do if a conflict arises that should preclude dual representation or, if employment termination should ensue, whether or not she would continue to represent either party, and what actions she would take regarding whatever filing might be in process at the time. The purpose of such disclosure is to obtain an agreement and advance waiver, preferably in writing, from both co-clients on the basis of their informed consent.

Conclusion

First, any dual representation alternative arrangement that contemplates a limited representation of one of the parties must comply with the American Bar Association Model Rules of Professional Conduct. To avert the possibility of malpractice claims, it behooves the immigration practitioner to heed the general admonition echoed in the Maryland Rules, requiring that each prospective co-client give "informed consent, confirmed in writing" to a dual or multiple representation. Maryland Rule 1.7(b)(4).

Second, there are no shortcuts to dealing with the ethical issues inherent in dual representation. The business immigration lawyer will have established an attorney-client relationship *vis á vis* a prospective foreign worker soon after the U.S, employer-client decides to go forth with a viable petition. Under the legal principles of contract, agency and tort law, which underlie the attorney-client relationship, an implied contract may be construed to exist between the attorney who (1) has the capacity to act and does act on behalf of a prospective client or (2) renders legal advice to a person who reasonably relies on that advice. The lack of an express contract does not relieve the attorney from fiduciary responsibilities owed to the individual who rightfully believes himself to have entered into an attorney-client relationship with counsel.

Third, one cannot overemphasize the importance of being proactive about reducing risks and protecting immigration business clients; establishing safeguards beforehand; becoming thoroughly familiar with the ABA Model Rules, the Maryland Rules and as many state bar counterparts (which may substantially differ from the former); keeping up with changes and comments to the provisions; regularly reviewing cases that deal with ethics issues; and, accessing reliable law-related sites online for answers to and discussions on ethical problems.

Fourth, it is crucial to avoid even the appearance of impropriety by not engaging in conduct that could be construed to have established an attorney-client relationship that cannot be disclaimed, remembering that some state rules prohibit dispensing legal advice to non-clients (e.g., D.C. Rule 4.3).

Fifth, and most important of all, the lawyer should learn to listen to her own ethical voice and, when all else fails, contact the state bar and local or national immigration bar - many offer an ethics mentor.

The bottom line: Established rules of ethics guide all attorneys, including business immigration lawyers, to engage in the zealous representation of co-clients, with whom they are obligated to maintain on-going communication, share decision-making and determine the limits of confidentiality.

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