ETHICAL DIMENSIONS OF BUSINESS IMMIGRATION PRACTICE

Immigration lawyers are confronted frequently by ethical issues, particularly in the context of representing employer and employee clients in business immigration matters that involve dual representation. As immigration lawyers progress into the broader role of advising companies on compliance issues, a whole host of new ethical issues arise. This is especially true where the lawyer has consulted with employees at the request of the employer and learned adverse information which could be damaging to the employer.

This article analyzes two typical ethical problems encountered by the business immigration lawyer from the perspective of both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility. The two problems deal with situations common to immigration lawyers practicing in the business arena and advising employers as to immigration compliance:

(1) An immigration lawyer is paid by a company to obtain a visa for an employee or potential employee. In the course of the representation the lawyer learns facts—such as the employee's long term career plans or minor criminal history—which are adverse to the new employer's interests. What should the lawyer do? Can he or she tell the employer? Whom does the lawyer actually represent?

(2) An employer consults an immigration lawyer about the immigration status of a key, valued employee whom the employer fears may be undocumented, although the employer doesn't know for sure. The employer wants the lawyer to do whatever can be done to assist the employee. The lawyer then interviews the employee, who admits to working under a false name, using someone else's identity. If the employer were to have knowledge of this it could face fines for engaging in a knowing, unlawful hire. Whose interests does the lawyer represent? What should the lawyer tell the employer?

The Model Rules of Professional Conduct drafted by the American Bar Association (ABA) have now been adopted by more than three-fourths of the jurisdictions in the U.S., including Washington, D.C., either completely or with relatively minor changes. While the Model Rules constitute the predominant approach to legal ethics, there are other relevant standards. Immigration lawyers are subject to the ethical rules of practice before the Department of Homeland Security. Also, there are still some states (*e.g.*, New York) that apply the Model Code of Professional Responsibility, which was the ABA-drafted predecessor of the Model Rules. Both the Model Rules and the Model Code have influenced the drafting of the American Law Institute's Restatement of the Law Governing Lawyers.

This article discusses three sources of ethical constraint on the immigration lawyer. The first source is the Model Rules adopted by the ABA in 1983. The Model Rules include aspirational goals, rules of permissible conduct, and mandatory rules. In the Model Rules, the word "should" expresses an aspirational goal and the word "may" expresses other permissible conduct that lawyers are not necessarily required to follow. Almost all of the rules, however, mandate a minimum level of conduct for the lawyer. Should the attorney's conduct fall below

this minimum level he or she may be subject to sanction. The Model Rules use the words "shall" and "shall not" to identify rules for which lawyers may be disciplined.

The second source derives from the regulations governing the conduct of lawyers who appear before the Department of Homeland Security. In 1996, the Code of Federal Regulations listed fifteen nonexclusive reasons for suspending or disbarring the immigration lawyer, some of which overlap the Model Rules and some of which are unique to immigration practice. 8 C.F.R. § 292.3. In 2000, the grounds for suspension or disbarment were moved to 8 C.F.R. § 1003.102. 65 Fed. Reg. 39513-01. The grounds for punishment remain largely the same as those originally listed in 1996. 8 C.F.R. § 292.3 also lists the general rules and procedures for disciplining a practitioner.

The third source is the Model Code adopted by the ABA in 1969. The Model Code identifies ethical considerations that the lawyer strives to achieve. Should the lawyer fail to abide by ethical considerations, however, there are theoretically no sanctions in most states. The Model Code also contains disciplinary rules that mandate a minimum level of conduct for the lawyer. Should the attorney's conduct fall below this minimum level he or she may be subject to disbarment, suspension, or other sanctions.

WHOM DOES THE LAWYER REPRESENT?

Both scenarios described at the beginning of this article deal with an immigration lawyer who is retained by an employer to assist with the possible immigration needs of a present or prospective non-citizen employee. In the first instance, consider an engineering company that hires a lawyer to obtain an H-1B visa for a non-citizen engineer. Although the employer retained the lawyer, the lawyer is also going to be representing the interests of the employee. The employee may become a "client" during the visa application process because it requires the lawyer to obtain confidential information from the employee. The lawyer is rendering legal advice regarding the employee's visa eligibility, which benefits both the employer and the employee.

The lawyer in this situation is most commonly perceived to be in a dual representation situation because he or she is seen as representing two co-clients in a single matter. Having each party represented by a different attorney is expensive and impractical, particularly because the objective of both parties is mutual. The lawyer forms an attorney-client relationship with both parties and often proceeds with representation on the assumption that their interests will not become adverse.

But what happens when the parties' interests DO become adverse, as they can from time to time? Lawyers in dual representation situations must take special care at the outset, before any conflicts occur, to consider important ethical concerns. First, the lawyer must consider whether the interests of each client can normally be represented without conflict. The Model Rule 1.7 states that:

> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the

> representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

In most cases the interests of the non-citizen employee and the employer will coincide in that the employer needs the skills of the individual and the employee wants to work for the employer in the United States. Nonetheless, in representing both parties, the employer's interest could end up being directly adverse to the employee's interest. For example, the possibility exists that in discussing the employee's ultimate career goals, the lawyer learns that the employee plans eventually to open his or her own engineering firm. Or the lawyer could learn of a criminal conviction that could cause complications and greater expense for the employer. The employee's interests have therefore become adverse to the employer's interests. To complicate matters further, the lawyer now faces a separate conflict of interest. Client confidences are protected under both the Model Rules and the Model Code. Rule 1.6 of the Model Rules provides that the "lawyer shall not reveal information relating to the representation of a client" except in a limited number of circumstances such as to prevent the commission of a very serious crime. DR 4-101(B) of the Model Code provides:

> [A] lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.

The Model Code also adopts the position under EC 4-5:

> A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes.

It appears that the lawyer cannot reveal the non-citizen's statement to the employer, but at the same time the lawyer has a duty to keep the employer informed. Model Rule 1.4 states that "[a] lawyer shall . . . (3) keep the client reasonably informed about the status of the matter."

These potential conflicts of interest and confidentiality problems are not insurmountable. The Model Rules provide more guidance than the Model Code in this dilemma. Rule 1.7 allows a lawyer to represent clients with conflicting interests if the lawyer reasonably believes that the representation of each client will not adversely affect the relationship with the other and that each client consents to the arrangement after consultation. According to the Comment to Rule 1.7, the lawyer should consider "the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." The lawyer also should consider whether each client is willing to accommodate the other interest involved. Because of their common interest in allowing the employee to work for the employer, each may be willing to accommodate the other's interests.

With full disclosure of the potential for conflict and the consent of the parties to the lawyer's role in representing them both, the lawyer can represent the employee and the employer, sharing relevant information between the two. Hence, dual representation is ethically possible, but lawyers must take the proper action from the *beginning*. Before representation, lawyers need to obtain consent from both clients after full disclosure. Lawyers may also seek consent to limit the scope of representation. Model Rule 1.2(c) states "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." For example, the lawyer and the two clients could agree that the scope of representation for the employee is limited to obtaining the visa and that the lawyer will not disclose confidential information given by either the employer or the employee unless it impacts the case or is required by law.

As stated above, the lawyer will have to make adequate disclosure to both clients to obtain effective consent. Model Rule 1.6, pertaining to confidentiality of information, states that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ." Similarly, Model Rule 1.7, concerning conflicts of interest, states that "[n]otwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if . . . (4) each affected client gives informed consent, confirmed in writing." The level of disclosure required will vary, but enough information should be provided to allow each client to make an informed decision on whether to continue with representation. Model Rule 1.0(e) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Certain disclosures particularly relevant to the first employer-employee hypothetical include: (1) potential problems during the application process; (2) specific conflicts of interest that may arise, including disclosures that must be made to the immigration authorities; (3) full or limited waivers of confidentiality; and (4) ethical constraints of dual representation and why the lawyer is obtaining written consent. Disclosure and written consent can be accomplished on a single consent form. This form should be drafted with care and tailored to each client's circumstances. The form should also be explained to each client before signing.

In the event that a conflict of interest or confidentiality issue arises without the lawyer obtaining written consent at the start of dual representation, the lawyer will likely be forced to withdraw. The lawyer must withdraw from representing both clients in that matter if the lawyer cannot use independent judgment on each client or cannot assure each client that his or her confidences will not be breached. Alternatively, the lawyer may attempt to obtain consent when the conflict arises, but the duties of loyalty and confidentiality will often make this nearly impossible.

Some attorneys try to avoid the dual representation scenario by declaring at the off-set that they only represent the employer and do not ever represent the employee. Whenever employees call for information or with questions about the process, they are reminded that the attorney does not represent them and ONLY represents the employer. They are sometimes advised to seek outside counsel to protect their own interests.

There is an on-going debate within the immigration bar as to whether attorneys can successfully hold themselves out as representing only the employer. Immigration attorney Bruce Hake, who is known as an expert on ethics and has written and spoken on the topic extensively, calls this the "Simple Solution" and argues vehemently against it.[1] He states that a lawyer always develops a dual representation regardless of which party is paying the fee, and that an attorney-client relationship automatically forms with both parties, except in situations where both have engaged separate legal counsel. By way of example, he recounts a situation in which a prominent immigration attorney was forced to pay $250,000 in damages to an employee the attorney claimed was not his client.[2]

Another well respected ethics expert and immigration attorney, Cyrus Mehta, takes a position he calls "The Golden Mean", that would allow an attorney to limit representation or waive certain conflicts in advance, provided that it is in writing.[3] This position, however, could be perilous in situations where the employee is considered to be unsophisticated or inadequately advised in waiving his rights. The bottom line is that dual representation rules must be carefully taken into consideration at the beginning of representation and conflict waivers or mutual representation agreements should be executed. Ignoring the rules on ethics could lead to serious disciplinary action and expensive judgments.[4]

WHAT SHOULD A LAWYER DO WHEN AN ACTUAL CONFLICT ARISES?

From time to time, even with conflict waivers, the mutual clients' interests will become adverse. For example, an employer may decide that it needs to lay off an employee in the middle of the immigration application process, which would obviously impact the employee's immigration future in the U.S. The employer may try to tell the lawyer this information in confidence and may seek to have the lawyer withdraw the immigration application, which would be to the employee's detriment. In this instance, even with a conflict waiver, the lawyer must instantly recognize that an actual conflict has arisen that makes the parties' interests adverse.

The Model Rule 1.7 states that a lawyer shall NOT represent a client if the representation involves a concurrent conflict of interest, as it would in this instance because the parties' have become directly adverse to one another. In such a situation, the attorney MUST advise both clients that a conflict has arisen and that he or she must withdraw from representation as to this particular matter. The lawyer can continue representing the employer as to other immigration matters if it has been clarified in the mutual consent agreement that this may occur in the event of an actual conflict.

In some instances, a lawyer may know at the beginning of representation on an immigration matter that there is a high probability of an actual conflict occuring between the parties, and should carefully consider whether to proceed with mutual representation, even where there is a mutual consent agreement. The second hypothetical at the beginning of this article is one that is very likely to lead to such conflicts. When an employer asks its immigration lawyer to confer with an employee who may be undocumented, there is a rather high probability that the lawyer will learn that the employee is, in fact, undocumented. If that information is revealed to the employer, then the employer is immediately put in a situation of

liability, and is subject to fines and penalties for a knowing unlawful hire. The lawyer's best advise to the employer at that point would be to terminate the employee, which is obviously not in the employee's best interest.

An interesting question is whether it would be acceptable to draft a conflict waiver agreement in such a way as to clarify in the beginning that the employer wants the lawyer to assist the employee as much as possible, but does not want to be told about the employee's immigration status. In fact, this scenario doesn't really involve dual representation at all, but is merely a situation in which the employer is paying the lawyer to maintain a confidential relationship with the employee, who is the true client. The situation becomes very tricky, however, if the lawyer also represents the employer as to other immigration matters. For example, if the lawyer assists in an I-9 audit and discovers information that is adverse to the employee client, then an actual conflict has arisen. Does the lawyer want to be in a position where it would have to withdraw from representation of the employer as to its I-9 matters? While it would be adviseable to obtain a written agreement as to the scope and nature of representation whenever an employer asks a lawyer to represent an individual employee, that lawyer has to be extremely wary of the possibility of conflicts. The most prudent thing may be to recommend outside counsel who can assist with the representation of a company's employees in the scenario given above.

From time to time it may be possible for the employer to file a petition for an undocumented employee, which presents additional complex issues. In such an instance the undocumented status is brought directly to the attention of the immigration authorities, which not only jeopardizes the employee but could also subject the employer to fines and sanctions. It could also open the door to an I-9 audit. Both parties would need to be carefully apprised in writing of the possible adverse consequences of such an application. While a mutual representation would still be the norm in such a situation, the attorney should prepare a special, detailed conflict waiver that explains all of the possible consequences and have it signed by both parties before proceeding.

A further ethical issue arises in the lawyer's representation of an undocumented employee on behalf of an employer, and that relates to the lawyer's duty when there is client fraud. Rule 1.2(d) of the Model Rules refers most directly to this situation: "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ." The Model Code contains similar prohibitions. According to DR 7-102(A) of the Model Code:

> (A) . . . a lawyer shall not:
>
> (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
>
> (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

It is common in the course of such representation to learn that the employee has used false or fraudulent documents in order to fulfill the I-9 requirements. Under the rules a lawyer is

clearly prohibited from advising a client to engage in conduct that is fraudulent. It could be argued that a lawyer is therefore violating the ethical rules if he or she does not advise against continuing employment that is based on the use of fraudulent documents. The situation is made all the more complex when the lawyer has been engaged by the employer, who may really want the employee to continue working and does not really want to know the truth about the documentation. The employer who has hired an attorney to represent a critical employee who turns out to be undocumented is not likely to be happy if the lawyer advises the employee to terminate employment, and as a practical matter the lawyer could lose the employer as a client on all other matters. It is much easier to counsel an undocumented employee regarding his past history and future immigration needs when the lawyer has no particular relationship with the employer. This is another reason why a company's immigration lawyer should consider seeking outside counsel for the employee in such a situation.

As to the ethical problems inherent in independently representing a known undocumented employee, the Model Rule 1.2(d). EC 7-8 of the Model Code provides that "[a] lawyer should advise his client of the possible effect of each legal alternative." In this situation, the lawyer is not urging the client to adopt one course of action over another. Rather, he or she is merely discussing the client's legal alternatives—to proceed with employment and risk removal, to quit work and risk removal, or to depart the U.S. as soon as possible — and risk never being able to legally return. Without advising that the employee engage in further fraud, the lawyer explains the consequences, and the client makes the decision about his or her future course of action.

DOES THE LAWYER HAVE ANY OBLIGATION TO REPORT HIS OR HER CLIENT TO THE IMMIGRATION AUTHORITIES?

A situation that frequently confronts the immigration lawyer is when the attorney becomes aware, through discussions with the client, independent investigation, or other outside sources, that the client has not been observing the immigration rules and regulations. What if the lawyer is representing the employer and employee mutually in an immigration application and the application requires revealing prior immigration infractions? Under such circumstances, what is the lawyer's obligation to report the employee's violation of immigration status?

a. Reporting the Client's Activities

Under the provisions of both the Model Rules and the Model Code, the lawyer appears to face competing mandates concerning whether to report the client. On the one hand, the Model Rules require the attorney not to reveal a confidence except in a limited number of circumstances. Model Rules of Professional Conduct Rule 1.6 (1983). The Model Code says that the lawyer has a duty to preserve the client's confidences and secrets. DR 4101(B) of the Model Code provides that the lawyer shall not reveal confidences and secrets of his or her client. In addition, Rule 1.6 prohibits any use of the confidence that disadvantages the client. In the above example, the information about an employee's immigration violation is a client confidence or secret because it was obtained in the course of representing the employee. If the attorney informed the immigration authorities of his or her client's violation, that client would likely be prosecuted, fined, removed, and/or subject to a bar for readmission. Hence, it appears clear that

the lawyer cannot disclose the information to the immigration authorities without violating either the Model Code or the Model Rules.

The Model Rules, the Model Code, and the applicable C.F.R. provision, however, prohibit the lawyer from making false statements to the immigration authorities. According to the Model Rules, the lawyer shall not "knowingly . . . make a false statement of material fact or law to a third person." Model Rules of Professional Conduct Rule 4.1(a)(1983). Likewise, according to DR 7-102(A) of the Model Code, the lawyer "shall not ... (3) conceal or knowingly fail to disclose that which he is required by law to reveal." The Code of Federal Regulations contains similar language. 8 C.F.R. § 1003.102. On certain applications, therefore, the lawyer is required by law to reveal incriminating information about his or her client. If the lawyer knowingly makes a false statement on these forms, he or she is subject to substantial penalties. *See, e.g., United States v. Lew* (9th Cir.1989) (immigration attorney convicted of making false statements to Department of Labor).

Attorneys who knowingly make false statements can also be criminally liable for their unethical conduct. In *United States v. Maniego*, the court affirmed the conviction of a lawyer whom a jury found to have knowingly prepared immigration documents that were based on fraudulent marriages in violation of 18 U.S.C.A. §§ 371 and 1546. *United States v. Maniego* (2d Cir.1983). Similarly in *United States v. Zalman*, the court affirmed the conviction of a lawyer who failed to disclose a fraudulent marriage in violation of 18 U.S.C.A. § 1001. *United States v. Zalman* (6th Cir.1989).

In circumstances where a lawyer is preparing an application to the immigration authorities where known adverse information will seriously harm the employee, a lawyer faces either violating the mandate regarding client confidences or violating the mandate regarding false statements. This immigration lawyer's dilemma, however, is not without resolution. The lawyer is charged with preserving client confidences only within the bounds of the law. Hence, while a lawyer cannot volunteer information about the client's activities to the immigration authorities, he or she must advise the client to answer truthfully. The lawyer does not impermissibly violate a client confidence when he or she proceeds with an application at a client's request and truthfully answers a direct question, because to make a false statement would violate the law.

b. Advising the Client

Under the circumstances of this problem both the Model Rules and the Model Code apparently require the lawyer to discuss the probable consequences of the client's actions with the client. Rule 2.1 of the Model Rules requires the lawyer to render candid advice in his or her role as advisor to the client. In a comment to the rules, the Committee notes:

> [W]hen a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client . . . may require that the lawyer offer advice. . . .

The ethical considerations of the Model Code contain essentially the same substance. EC 7-8 of the Model Code provides:

> A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so.

In addition, EC 7-5 of the Model Code notes that "[a] lawyer as advisor furthers the interest of his client by giving his professional opinion" about the consequences of his or her client's decision. In the case of the employee with a negative immigration history, the employee may suffer such adverse consequences as removal and detention, as well as debarment from further immigration benefits.

The employee may not have realized the adverse consequences of his or her decision to violate the U.S. immigration laws. Therefore, the lawyer's obligation to his or her employee client is to inform the client of the negative consequences of proceeding. The lawyer will need to make it clear to both the employer and employee (in cases of dual representation) that the lawyer cannot proceed with an application that contains any false information. In many cases that means that the lawyer will inform the client that he or she cannot advise that the parties proceed. The lawyer should withdraw from representing any client who persists in presenting an untruthful application for immigration benefits. Some clients will dismiss the attorney and proceed with another lawyer who either does not know the true facts or who will disregard them. Such are the consequences of being a truly ethical immigration lawyer.

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[1] Bruce A. Hake, *Dual Representation in Immigration Practice*, Ethics in a Brave New World 28 (John L. Pinnix, et al. eds., AILA 2004)
[2] Id.
[3] Cyrus Mehta, *Finding The "Golden Mean" In Dual Representation -- Updated,* 06-8 Immigr. Briefings (Aug. 2006)
[4] See *Saraswati v. Wildes*, No. GIC742835 (Sup. Ct. San Diego County [CA], Feb. 15, 2001), in which a foreign national employee was awarded $365,000 in a malpractice claim against an attorney who represented an employer who terminated its employee while an adjustment of status claim was pending.

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