Walking the Line – Approaches to Dual Representation in the Immigration Context

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Dual representation is far from the only ethical dilemma in the practice of immigration law,[1] but it is one of the most intractable because all employment-based and family-based immigration matters, and, therefore, also many immigration matters that end up in litigation, involve dual representation of two client parties to the same legal matter.

INTRODUCTION TO DUAL REPRESENTATION

Representing two clients in the same legal matter raises fundamental challenges to the lawyer's professional and ethical duties of loyalty,[2] confidentiality,[3] competent representation,[4] and zealous advocacy.[5] However, dual representation is an unavoidable part of both employment-based and family-based immigration practice, and in most such matters it is both highly impractical and unnecessarily costly for a U.S. petitioner and foreign beneficiary to have separate counsel.

A key concern in considering the ethical risks of dual representation and assessing how to mitigate them is identifying when an attorney-client relationship begins. "The relationship begins

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[1] Other significant ethical issues in immigration practice but outside this sphere include: application of attorney advertising rules and the U.S. Citizenship and Immigration Services (USCIS) G-28 rule to postings on social media, websites, and online forums; disaster and succession planning, sale of a practice, and dissolution of a partnership, with the attendant problem of disposition of files; file storage, retention, retrieval, and disposal issues—*e.g.*, paper v. digital, consumer v. commercial cloud storage; and supervision of paralegals, outsourcing, and preventing the unauthorized practice of law by non-lawyers.

[2] American Bar Association (ABA) Model Rule of Professional Conduct 1.7.

[3] ABAModel Rule 1.6.

[4] ABA Model Rule 1.1.

[5] ABA Model Rule preamble, ¶2.

when the client acknowledges the lawyer's capacity to act on his or her behalf and the lawyer agrees to act for the benefit and under the control of the client … No express contract is needed if there are good reasons to find that the client believed that the lawyer was acting on his or her behalf."[6] The relationship can be established through informal confidential communications by telephone or letters, even if the lawyer never meets the client, never bills the client, and is never formally retained.[7]

In New York, the disciplinary rule regarding dual or simultaneous representation is spelled out at DR 5-105, subparagraph C: "a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved."

FOUR APPROACHES TO DUAL REPRESENTATION – SOURCES

A number of thoughtful immigration practitioners, including Bruce Hake, Cyrus Mehta, Austin Fragomen, and Nadia Yakoob, have attacked the "dual representation" dilemma, but have not defeated it. Four approaches to the problem have emerged.

1. *Simple Solution* – The paying & agreement-signing client = only client: will likely lead to costly malpractice awards if a conflict arises and a client is aggrieved.

2. *Golden Mean* – Advance waiver of specific conflicts is permissible in limited-scope matters and ability to continue representing one client is thereby preserved. Advance waiver may give priority to specified interests of one client.

3. *Hake approach*– All advance waivers are per se unethical; attorney must resolve all conflicts when they arise and get waivers when the conflict occurs, or else withdraw from representation of both clients.

4. *Continuum approach* – An attorney may treat different conflicts with different degrees of advance waivers vs. real-time resolutions/waivers/withdrawal, depending on the: relative complexity of the matter that is subject of the representation; relative sophistication of both clients as consumers of legal services; disparity or parity of negotiating strength/weakness between the two clients; and predictability of the nature of the conflict. Adopts the *Simple Solution* for corporate clients who do not allow direct communication between immigration counsel and employees.

You may find references to these sources useful in reviewing the analyses of these four approaches:

- C. Mehta, "Finding the 'Golden Mean' in Dual Representation," *Immigration Briefings* (Thomson West, Aug. 2006).

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[6] H. Vyas, "Ethical Issues for Immigration Lawyers," *Forms and Fundamentals, 2012-13 Ed.* (AILA 2012).
[7] *Bays v. Theran*, 418 Mass. 685, 639 N.E.2d 720 (Mass. 1994).

- C. Mehta, "Emerging Issues in Dual Representation & Unauthorized Practice of Law," *available at www.cyrusmehta.com.*
- C. Mehta, "Counterpoint: Ethically Handling the Conflict Between Two Clients through the 'Golden Mean'," 12 *Bender's Immigr. Bull.* 1147 (Aug. 15, 2007).
- B. Hake, "Dual Representation in Immigration Practice," *Ethics in a Brave New World* (AILA, Jun. 7, 2005), updating previous versions.
- B. Hake, "Advance Conflict Waivers are Unethical in Immigration Practice: DeBunking Mehta's 'Golden Mean'" (ILW.com, Jun. 27, 2007).
- A. Fragomen & N. Yakoob, "No Easy Way Out," 21 Geo. Imm. L.J. 621 (2006–07).

THE FOUR APPROACHES – ANALYSIS

The Simple Solution

This approach posits that the client with whom the attorney or law firm has a formal agreement to provide legal services—typically also the one paying the bills—is the only client. This approach has been explicitly rejected by a variety of courts and bar committees, and may result in ethical sanctions and liability for substantial malpractice awards, as it violates the attorney's duty of loyalty to the nonpaying client, who is often the sponsored foreign employee or spouse, and thus, in an inherently weaker bargaining position. Bruce Hake says, "Loyalty to clients is the foundation of legal ethics. The Simple Solution, a strategy for evading that principle, is clearly unethical." He notes that belief in the Simple Solution is often based erroneously on corporate representation rules, which are typically qualified by explicit exceptions where a company provides legal services for its employees. Under such rules, (he gives an example under from the D.C. bar rules), each new institutional employee for whom the entity's lawyer commences a legal matter is a new client.[8]

The Golden Mean Approach

Cyrus Mehta's "Golden Mean" approach[9] posits that conflicts of interest arising between two clients in the same legal matter can be ethically waived in advance, per Model Rule 1.7 and ABA Formal Opinion 05-436, assuming the scope of representation is effectively limited to a specific type of immigration matter, the potential areas of conflict are identified, and how the attorney will address such conflicts should they arise is clearly identified at the outset and agreed upon by all parties, in writing. He urges that representation of one of the clients may continue after such a conflict has arisen, pursuant to an advance waiver and informed written consent.

ABA Formal Opinion 05-436 says, in pertinent part:

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[8] See B. Hake, "Dual Representation in Immigration Practice," *Ethics in a Brave New World* (AILA, Jun. 7, 2005), updating previous versions; B. Hake, "Advance Conflict Waivers are Unethical in Immigration Practice: DeBunking Mehta's 'Golden Mean'" (ILW.com, Jun. 27, 2007).

[9] C. Mehta, "Finding the 'Golden Mean' in Dual Representation," Immigration Briefings (Thomson West, Aug. 2006).

> The Model Rules contemplate that a lawyer in appropriate circumstances may obtain the effective informed consent of a client to future conflicts of interest. General and open-ended consent is more likely to be effective when given by a client that is an experienced user of legal services, particularly if, for example, the client is independently represented by other counsel in giving consent, and the consent is limited to future conflicts unrelated to the subject of the representation. Rule 1.7, as amended in February 2002, permits a lawyer to obtain effective informed consent to a wider range of future conflicts than would have been possible under the Model Rules prior to their amendment. Formal Opinion 93-372 (Waiver of Future Conflicts of Interest) therefore is withdrawn.

The three Cyrus Mehta articles listed above point out that a prudent course of action is to limit the scope of representation to the specific immigration matter. In addition, the articles suggest outlining an array of potential conflicts predictable in such a case and how they would be addressed, requesting advance waivers from both parties with respect to the proposed manner of handling those specific enumerated conflicts, so that the waivers obtained thereby are neither general nor open-ended. Mehta notes that a client's consent to future conflicts is subject to special scrutiny, and that the potential conflict must be described "with sufficient clarity so the client's consent can reasonably be viewed as having been fully informed when it was given."[10]

Mehta discusses the possibility of limiting the disclosure of confidential information between two co-clients, such as an employee's consideration of sponsorship opportunities with other employers, or the employer's desire not to disclose company financial information to the worker. This leads to examples where the viability of Mehta's Golden Mean approach starts to break down, where he appears to support limiting representation of one party more than the other—*e.g.*, in the sample language where he proposes obtaining consent from an H-1B candidate that the employee's disclosures will not be kept confidential from the employer, but that the employer's disclosures will be kept confidential from the employee. He is on firmer ground when proposing advance waivers of specific and predictable conflicts of interest, such as termination of an H-1B employee, where both parties may consent in advance to the attorney advising an H-1B employer of its regulatory obligations to notify U.S. Citizenship and Immigration Services (USCIS) and to pay the reasonable cost of return transportation; or where both parties consent in advance to the attorney representing the terminated employee in maintaining valid visa status and seeking residence sponsorship through another employer.

Given the language of Model Rule 1.7(b), it seems likely that any advance conflict waiver that gives the confidences and objectives of one co-client clear priority over those of the other co-client might ultimately be struck down, if challenged in court or before a state bar ethics committee.

ABA Model Rule 1.7

> (b) Notwithstanding the existence of a concurrent conflict of interest under

[10] ABA Formal Opinion 93-372. Yes, this is the withdrawn earlier ABA opinion, but its language remains helpful in considering whether consent was fully informed).

paragraph (a), a lawyer may represent a client 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 in the same litigation or another proceeding before the tribunal; and
4. Each affected client gives informed consent, confirmed in writing.

The Hake Approach

Bruce Hake notes that in all dual representations, the attorney owes equal loyalty to both clients, and that duties of loyalty, along with competent and zealous representation, persist with equal force to both clients regardless of what conflicts of interest arise. Hake further states that all advance waivers of conflicts are per se unethical in immigration practice, across the board in all cases except where both parties have independent counsel. He posits that whenever an actual conflict of interest arises between two clients, the lawyer must either resolve that conflict, or must withdraw from representing both parties if either client refuses to waive the conflict.

Hake notes that distinctions between clients and non-clients may be oversimplified in the Model Rules and state codes of professional conduct, but giving legal advice to non-clients is clearly prohibited (per Model Rule 4.3). He goes into considerable detail listing many factors other than payment or a formal written agreement that may be considered to establish the existence of an attorney-client relationship, such as accepting confidential information from or on behalf of an individual, filling out forms, performing any legal services or contacting any government agency on behalf of such a party. Any party to whom the attorney provides such legal services may reasonably believe themselves to be a client, and from the perspective of the courts, an individual's belief that he or she *is* a client gets accorded considerable weight, whereas the attorney's belief or statements that such an individual is not a client are regarded as irrelevant.

Hake argues that while limiting the scope of representation is common practice and has always been a part of dual representation, advance waivers are "unethical, reckless and destructive." He goes on to specify that continuing to represent one party in the same matter, even under limited circumstances spelled out in an advance waiver, is reckless and wrong, and to that end he cites both the duty of loyalty to former clients (Model Rule 1.9) and the $365,000 judgment in Saraswati v. Wildes, No. GIC742835 (Sup. Ct. San Diego County [CA], Feb. 15, 2001), as an example. In that case, a worker terminated by his employer during a pending adjustment of status application won a $365,000 malpractice claim against his immigration counsel.

Hake notes that even where dual representation ends in success of the matter rather than due to a conflict, the attorney is still not free thereafter to represent one client (the employer) against the interests of the other, former client (the employee). Hake then dispatches the notion of the "primary client," noting that the lawyer's duties of loyalty to both clients are equal, and cannot

be accorded uneven weights, regardless of which client contacted the lawyer first, and regardless of which one signed the engagement letter or retainer agreement, etc.

While his criticisms of the Golden Mean's apparent bias in favor of using advance waivers to accord one of two co-clients a position of priority over the other still hold water, Hake is at his weakest when picking apart the use of ABA Formal Opinion 05-436 as a basis for the use of advance conflict waivers in any business immigration matters.[11] First, he claims that "in appropriate circumstances" really means, "not across the board in business immigration matters," even though business immigration matters offer fruitful ground for an attorney to routinely identify specific and predictable conflicts of interest, where both the employer and employee have potential advantages to secure through advance waivers, particularly in the wake of AC21.[12]

In addition, Hake ignores the "general and open-ended" language in the ABA opinion as if it were surplusage. This leads to some unsupported leaps of logic:

1. He claims that advance conflict waivers in business immigration matters must all be deemed ineffective, tacitly assuming that all advance waivers are general and open-ended;

2. Most sponsored foreign workers are unsophisticated consumers of U.S. legal services, for which proposition he cites a bunch of inapposite cases about undocumented workers, who are as a class much less well-positioned to negotiate with their employers than those employed lawfully under work visas. Yet, in the long run it is a safe assumption, to avoid 66
3. Although the ABA opinion is framed in positive language embracing the "most appropriate," Hake takes the inverse as a given in all scenarios, and assumes that advance waivers are inappropriate in any situation where a client lacks independent counsel, even when the waiver is fact-specific and clearly defined in plain language. In other words, while he succeeds in debunking general and open-ended advance waivers, he does not debunk the validity under ABA Formal Opinion 05-436 of limited advance waivers to particular enumerated potential conflicts of interest, which may be spelled out with great specificity in many types of business immigration matters.

Continuum Approach

An article by Austin Fragomen and Nadia Yakoob reviews the approaches to the problem of dual representation in business immigration matters proposed by both Mehta and Hake. It also discourages acceptance of a one-size-fits-all solution, and claims to offers a synthesis in the form

[11] B. Hake, "Advance Conflict Waivers are Unethical in Immigration Practice: DeBunking Mehta's 'Golden Mean'" (ILW.com, Jun. 27, 2007) at 9.
[12] American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, §§101–16, 114 Stat. 1251, 1251–62.

of a flexible, case-by-case "continuum" approach to solving this intractable problem.[13]

While they acknowledge its dangers, Fragomen and Yakoob offer a limited defense of the Simple Solution in scenarios where the corporate client maintains exclusive control over all communications, the attorney never has direct contact with sponsored worker, and the worker never sends a request for advice via the employer. In this context, they claim that forwarding a list of required documents to the employee does not rise to the level of legal advice (Note that Hake takes the opposite position). In support of their position, they cite *Dalrymple v. National Bank & Trust Company of Traverse City*, 615 F. Supp. 979, at 982 (D.C. Michigan 1985), which says the focus in determining formation of an attorney-client relationship is on the subjective belief of the putative client, and his or her intent to seek legal advice, and *DerKevorkian v. Lionbridge Technologies*, WL 898142, at 3 (D. Colorado 2006), where the court found that an implicit attorney-client relationship did not exist where the employee never sought a legal opinion from immigration counsel, and only asked for legal advice through her employer. Reliance on that case may be misplaced even though it did not result in a malpractice claim, as Isabelle DerKevorkian ultimately won a $1.3m judgment against the employer for failing to pursue permanent residency on her behalf as translation manager, a job to which she was promoted after having initially entering the employer's residence sponsorship program while employed as a translator. Lionbridge abandoned the residence case on her behalf based on refusal to meet the higher prevailing wage obligation attached to the translation manager job. Their sponsorship program entailed a formal written agreement, creating a contractual obligation for the employer to go forward with the residence process. As noted by Mehta, the finding that there was no attorney-client relationship in the *DerKervorkian* case hinged at least in part on the fact that the immigration lawyer had not yet filed anything on the worker's behalf. In light of *Saraswati v. Wildes*,[14] even where the employer controls all communications back and forth, wherever a lawyer prepares and files petitions and applications with the government on behalf of an organization's employees, the safer course is to consider each of those employees as clients, who may have a viable claim to an attorney-client relationship depending on the facts and the jurisdiction. Exclusive contact through and under control of the corporate client remains a thin rationalization for the Simple Solution.

Perhaps Fragomen and Yakoob rely on the fact that there is no state-specific corollary in New York to the D.C. disciplinary rule 1.13(c) cited by Hake as evidence of exception to the exclusive duty of loyalty to an organizational client where legal services are provided on behalf of its employees. There is no subparagraph or exception to New York DR 5-109, which says that when the organization is a client, if its interests differ from those of its directors, officers, employees, members, or shareholders, the lawyer shall make it clear that he represents the organization.

In discussing the Golden Mean approach, Fragomen and Yakoob identify its cardinal flaw as openly favoring the corporate client, and abridging duties of loyalty and confidentiality to the employee. They do not dismiss the validity of advance waivers, but they note that "Advance

[13] A. Fragomen & N. Yakoob, "No Easy Way Out," 21 *Geo. Imm. L.J.* 621 (2006-2007).
[14] *Saraswati v. Wildes*, No. GIC742835 (Sup. Ct. San Diego County [CA], Feb. 15, 2001).

waivers that are too general in scope are potentially incompatible with the requirement that the consent be informed," under Model Rule 1.7, and later they reiterate that consent should be voluntary, informed and based on knowledge of the implications, risks and advantages.

Fragomen and Yakoob note that Hake's more recent articles strictly urge withdrawing from representation of both co-clients in the matter if a conflict cannot be resolved once it has arisen, even though the attorney may continue to represent one client in other matters. As to ending representation in a given matter, they observe, "Often, in the course of immigration representation, when a conflict emerges, the relationship that serves as the basis of the sponsorship ends and no immigration benefit remains to be pursued. As such, there is no further representation in the matter for which consent must be obtained." This oversimplifies what occurs when the employment that serves as a basis for sponsorship ends: the employer may seek advice about how and when they must notify USCIS of the termination, how to end H-1B wage obligations, and what constitutes compliance with the return transportation obligation; the ex-employee may seek advice about maintenance or change of nonimmigrant status, H-1B portability and whether there is a "grace period", permanent portability or retention of priority date, and interim work and travel authorization for themselves and/or a spouse.

Fragomen and Yakoob recommend proactively outlining the regulatory obligations in advance, and seeking an advance waiver and consent to allow continued representation of the employer with respect to fulfillment of those regulatory obligations; but if such consent cannot be obtained, the lawyer may not assist the corporate client in withdrawing the petition. They also observe that even where a written advance waiver of conflicts has been obtained with the appropriate informed consent, the attorney must re-evaluate that waiver in light of the facts once an actual conflict of interest arises.

In addition, Fragomen and Yakoob propose a Continuum Approach, tailoring both the type and content of any advance waiver and the mode of real-time conflict resolution to the nature of the clients, the type of matter, and the process of communication. They acknowledge that no two clients are alike, and that the Model Rules and state codes of professional responsibility are often inadequate to resolve the dilemmas that arise in dual representation settings. However, the Continuum Approach as detailed in their article is marred by their embrace of the Simple Solution at the end of the continuum where a corporate client has exclusive control over all communications, claiming that employees in that situation are non-clients, and downplaying the need for careful disclosure of potential conflicts except in employee-driven situations.

All of these approaches have flaws. Ultimately it is up to each firm, and each immigration lawyer, to determine the best way to protect against the risks of malpractice claims, tort claims, disciplinary proceedings, fines, suspension, or disbarment, all of which may result from dual representation whenever a conflict of interest between two co-clients arises, and is not resolved to the satisfaction of one of them.

SOURCES

Generally

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