CHAPTER 10
ETHICAL ISSUES IN FAMILY-BASED IMMIGRATION LAW

Introduction

Attorneys are bound by a code of professional responsibility in their representation of clients. While nonattorney representatives accredited by the Board of Immigration Appeals (BIA) are not bound in the strict sense by this code, nonprofit agencies would be advised to adopt and apply the same standards for all staff members who participate in assisting clients in immigration matters. It is in the interests of all practitioners—attorneys and nonattorneys—to conform their behavior to the standards established by the American Bar Association (ABA). No staff member or nonprofit agency wants to be held liable for the consequences of unethical behavior.

Ethical issues arise in many aspects of family-based immigration law. For example, if the attorney is simply giving advice on which immigration form to fill out or how to answer certain questions on the form, a threshold issue is whether an attorney-client relationship has been established. If so, what duties and responsibilities does the attorney owe the client? If the attorney is representing both the petitioner and the beneficiary in a visa petition, and the parties’ interests later come into conflict, how can the attorney avoid being caught in the middle? Or, if the attorney discovers that the client has provided false information on an immigration form, what must the attorney do with this information to avoid committing a fraud upon the immigration court or agency while at the same time preserving client confidentiality?

This chapter will cover some of the basic ethical problems that arise in representing clients in family-based immigration cases, and provide direction for meeting current ethical standards. The requirements imposed with the affidavit of support involve many potential ethical issues, especially conflicts of interests. Therefore, we will deal with the potential ethical issues related to the affidavit of support in some detail.

Sources of Ethics Rules

There is no single comprehensive authority to which immigration lawyers can turn for guidance when confronted with ethical dilemmas. U.S. Citizenship and Immigration Services (USCIS) and Executive Office for Immigration Review (EOIR) regulations at 8 CFR parts 292, 1003, and 1292 address, in part, the discipline of attorneys and nonattorney representatives. But the regulations do not provide guidance on some of the most important and vexing ethics issues faced by immigration lawyers, such as conflicts of interest. Generally, the ethics rules applicable to immigration lawyers are the rules of
ethics for the state in which the lawyer is licensed to practice. In addition, most states have statutes regulating business and professions. Of course, state and federal laws regarding fraud apply to all lawyers, irrespective of their area of practice.

This chapter will focus on the American Bar Association (ABA) Model Rules of Professional Conduct. In 1983, the ABA adopted the Model Rules, which have undergone several subsequent amendments. The Model Rules replaced the prior Model Code of Professional Responsibility, which had been adopted by the ABA in 1969. Since 1983, 48 states and the District of Columbia have adopted some version of the Model Rules as their state ethics rules. Illinois, New York, North Carolina, Oregon, and Virginia have adopted ethics rules incorporating provisions from both the Model Code and the Model Rules.

**Establishment of the Attorney-Client Relationship**

Lawyers must beware of solicitations to render informal legal advice no matter how simple the issue may seem. Giving advice, even in the most casual of circumstances, may create an attorney-client relationship and subsequent liability for any advice relied upon. The fact that no contract was signed and no fee paid will not necessarily protect a lawyer from liability. In addition, the amendments to the Immigration and Nationality Act (INA) made in 1996 have so complicated immigration law and imposed such severe consequences for even innocent mistakes that it is unwise to render advice without an in-depth review of the facts directly with the client and a close analysis of the law.

Principles of agency and contract law generally determine whether and when an attorney-client relationship has been established. The relationship begins when the client acknowledges the lawyer’s capacity to act on the client’s behalf and the lawyer agrees to act for and under the control of the client. Thus, the question of whether an attorney-client relationship exists is one of fact, usually decided using a contract analysis. Typically, the agreement to form an attorney-client relationship is express. The client consults the lawyer. The lawyer agrees to take the case. The parties sign a contract. However, it is possible that the agreement to establish the attorney-client relationship can be implied from the lawyer’s actions on the client’s behalf or by the client’s reasonable reliance.

Whether a person relied on the attorney is a subjective test that focuses on the person’s belief that an attorney-client relationship exists. Evaluation of the reasonableness of the client’s subjective belief depends on the facts of the case.

**Example:** Penelope retains an attorney to represent her to petition her husband to immigrate to the United States. Penelope’s sister, Theresa, also agrees to complete the Form I-864 and act as a joint sponsor because Penelope cannot meet the income requirements. Penelope brings Theresa to her attorney’s office. The attorney proceeds to explain the affidavit of support and all of its lia-

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1 Gadda v. Ashcroft, 377 F.3d 934 (9th Cir. 2004) (holding federal disciplinary framework for immigration attorneys and representatives does not preempt state laws regulating attorneys).
ibilities to Penelope while Theresa listens. The attorney then explains to Penelope how the Form I-864 should be completed. The attorney hands the blank Form I-864 to Penelope and instructs her to complete it with Theresa and return it to him.

The attorney in the above example may have impliedly established an attorney-client relationship with Theresa. By rendering legal advice in front of Theresa regarding the potential liability under the affidavit of support, Theresa may reasonably believe that an attorney-client relationship exists. Furthermore, by explaining how to complete the Form I-864 the attorney may have led Theresa to believe that the attorney is representing her.

The Attorney Client Relationship and the Affidavit of Support

As the above hypothetical suggests, immigration lawyers face many vexing ethical issues when advising persons regarding the new affidavit of support requirements and liabilities. The affidavit of support, Form I-864, purports to be a binding contract. Persons signing the Form I-864 are liable to the immigrating alien for maintenance and support and to government entities for reimbursement of any means-tested public benefits provided to the alien. Thus, where an immigration lawyer represents a husband and wife to obtain a family-based visa and the couple brings to the office a kind uncle to serve as a cosponsor due to the couple’s low income, it is critical that the lawyer clearly explain, if he or she does not wish to represent the uncle, that the lawyer is not representing the uncle and advise him to seek counsel regarding liability and obligations under the contract.

However, attorneys representing persons in completing the affidavit of support often face the question of whether they ethically may represent the petitioner, the beneficiary, and other cosponsors in the same transaction.

In taking on representation of persons subject to the new affidavit of support provisions, the attorney must decide which parties he or she will represent. If representing both the petitioner and sponsored immigrant, the attorney should be very clear with both parties about the potential conflict of interest problems that may arise. If not representing both parties, the attorney also must take pains to explain this to each party. If a joint sponsor is signing a separate affidavit of support, or a “household member” is executing a Form I-864A, the attorney also must be clear regarding whether or not he or she has taken on the sponsor or household member as a client.

The other less clear question in the above hypothetical is whether the lawyer has established an attorney-client relationship with Penelope’s husband, the beneficiary of the immigrant visa. It may be extremely difficult for a lawyer to avoid establishing an attorney-client relationship with the beneficiary when representing the petitioner, due to the amount of cooperation and exchange of information that is necessary to complete the immigrant visa petition process. However, if the attorney intends to establish an attorney-client relationship with the petitioner only, and not the beneficiary, the attorney must be very careful to make sure this is clear to both parties, and
to advise the beneficiary to obtain separate counsel, preferably in writing. This chapter will discuss the implications of representing a petitioner, beneficiary, and cosponsor in the same transaction in subsequent sections.

When a lawyer does not wish to take a case he or she must make this clear to the person seeking counsel. The attorney should notify the person through a nonengagement letter stating specifically that the lawyer is not representing him or her.

Fiduciary Duty Even to Nonclients After Initial Consultation

Rule 1.18 Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Even when the lawyer decides not to take a case, certain fiduciary duties arise at the first consultation. Model Rule 1.18 outlines an attorney’s fiduciary duties to a “prospective client.” A prospective client is anyone who has consulted with the lawyer about possible representation, even if no attorney-client relationship was formed. With important exceptions, this rule prohibits a lawyer from representing a “client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective
client that could be significantly harmful to that person in the matter.” The rule states two exceptions. First, representation is allowed if the client and prospective client both give informed, written consent. Second, another lawyer in the same firm can represent the new client if the lawyer who consulted with the prospective client is “timely screened” from the matter, and took “reasonable measures to avoid exposure to more disqualifying information than was ... necessary to determine whether to represent [him or her].” In this case, the firm must give the prospective client prompt written notice, and must not pay the disqualified lawyer for this matter.

This rule raises the awkward question of what to do if a prospective client innocently discloses harmful information relating to the case of a current, longtime client. Comment 5 to the Model Rule suggests that “[a] lawyer may condition conversations with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the case.”

The lawyer also has an ethical obligation to preserve confidences gained from a preliminary consultation.

Example: Paul Petitioner consults Ann Attorney regarding a visa petition and adjustment of status application he filed for his wife, Benicia. He tells Ann that although he believes Benicia married him for love, she is now leaving him. He confides that they recently had a fight during which he slapped Benicia. He seeks Ann’s assistance to withdraw the petition and inform USCIS that he will not appear at the scheduled adjustment of status interview. Ann gives Paul no advice and informs him that she is not interested in taking his case. A week later Benicia walks into Ann’s office and asks for assistance in filing a battered spouse self-petition.

Although Ann was never retained by Paul and, arguably, no attorney-client relationship exists, she has obtained confidential information from Paul that she has a fiduciary duty not to disclose. Ann’s fiduciary duty to Paul may interfere with her duty of zealous advocacy to Benicia in convincing USCIS that Benicia is a battered spouse. Thus, Ann would be wise to decline representation of both Paul and Benicia.

Immigration lawyers must understand when an attorney-client relationship exists and must communicate clearly with potential clients about the parameters of the relationship for several reasons. First, a lawyer may be disqualified from representing a potential client if the lawyer had an initial consultation with another party regarding a matter adverse to the potential client. Second, the existence of an attorney-client relationship is the threshold element that a plaintiff must prove in a malpractice suit. Most important, a lawyer’s ethical obligations and duties are triggered by the establishment of the attorney-client relationship.

_Competence and Diligence_

_Rule 1.1 Competence_
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Immigration lawyers are under more pressure than ever to keep abreast of changes to the law, new regulations, and USCIS or Department of State (DOS) policy memoranda. Although the Model Rule seems simplistic and obvious in its requirement of competence, maintaining the level of knowledge and thoroughness necessary to advise clients adequately regarding immigration issues is an increasing challenge. The complexity of immigration law, along with increased penalties for even innocent violations of the law, makes it critical that practitioners research and study the law. The duty of competent representation in matters involving immigration issues attaches to criminal defense attorneys as well. The Supreme Court decision, Padilla v. Kentucky, requires criminal defense attorneys to competently advise clients in criminal proceedings of the immigration consequences of a plea in a criminal case.

A lawyer is expected to be familiar with well-settled principles of law as they relate to the client’s case. But what are an attorney’s ethical obligations when the law is not well settled and changes rapidly, as is the case currently in immigration law? When rules of law are not commonly known, the lawyer has an ethical obligation to conduct legal research to discover such rules. Thus, it is not enough in immigration law to have access to the statutes and regulations and case law. A competent attorney must have quick access to interpretations of the laws from the agencies with which the lawyer deals, whether it be USCIS, DOS, or the Department of Labor. In addition, an immigration lawyer must keep informed of the status of legislation that may affect a client’s case.

The ethical duty of competence requires thoroughness and adequate preparation in handling a client matter, particularly considering the drastic consequences of removal on the lives of clients and their families. For the clients of many immigration lawyers, there are often huge matters at stake. A pregnant woman with two young children may seek counsel regarding the risks of leaving the United States and attending a consular interview after accruing one year of unlawful presence in the United States. The level of thoroughness and preparation required after the 1996 changes to the INA has increased due to the stricter deadlines and penalties involved.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

The ethical duty of diligence is, simply put, a lawyer’s obligation to perform the work for which the lawyer was hired. Neglect of a client’s case is one of the most frequent reasons for complaints to lawyer discipline tribunals. Neglect in the immigration law context can cause serious harm to clients because the mere passage of

time can cause a missed filing deadline, a visa overstay or violation, or inadmissibility due to accrual of unlawful presence.

Typically when a lawyer has failed to act diligently, the lawyer aggravates the misconduct by avoiding contact with the client, and often fabricates reports on how the case is proceeding. This results in additional ethical violations involving misrepresentation and failure to communicate with the client. These ethical violations deny the client an opportunity to take other steps to preserve his or her rights.

The ethical obligation of diligence requires the lawyer to carry through to conclusion all matters undertaken for a client. Diligence is required in a case even though the case may become more difficult or relief less likely due to the client’s conduct or a change in the law. The duty to complete matters diligently continues until the matter is complete or the relationship has been terminated. For this reason, it is important that lawyers be clear with clients regarding the scope of the representation and when representation has ceased. Otherwise, a client mistakenly may believe that the lawyer is pursuing the client’s affairs.

It is good practice to send the client a nonengagement letter to clarify when representation ends. Where the scope of the lawyer-client relationship has been expressly limited to particular legal services, the lawyer has no duty to act promptly or diligently toward matters outside those defined.

Obviously, an immigration lawyer is ethically required to meet all deadlines imposed by the immigration courts, the BIA, or federal courts. The failure to timely file an adjustment application when visa number retrogression is approaching may be as significant to an immigrant’s life as the failure to meet a deadline to timely file a Notice of Appeal. However, even without a deadline, a lawyer may be disciplined for lack of diligence for taking too long to complete a matter. The ethics rules require not only that a lawyer actually do the work for which the lawyer was hired, but that the lawyer do the work within a reasonable time. Quite often poor office management may cause the lawyer to neglect his duty to the client. Although such an excuse may prevent a court from finding a lawyer guilty of fraud, it will not prevent disciplinary sanctions.

The fact that a client is not actually injured by the lawyer’s lack of diligence will not necessarily protect the less-than-diligent lawyer from discipline. In In re Roche, the lawyer failed to take any formal action on a client’s case for four months after being retained. The court acknowledged that the client had not actually suffered any injury, but suspended the lawyer for 30 days, holding that “[r]espondent’s negligent conduct provoked anguish in his client and overall tarnishes the reputation of the legal profession.”

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3 678 N.E.2d 797 (Ind. 1997).
In immigration law, disciplinary tribunals may place a higher duty on lawyers to be careful in management of their offices and staff due to the fact that the clients are often unable to speak English and unfamiliar with the American legal system.

**Rule 1.4 Communication**

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The obligation to communicate with the client has been recognized throughout the history of the legal profession. The duty to communicate is rooted in the common-law duty of communication imposed on all agents, including lawyers, and in the lawyer’s fiduciary duty of utmost good faith to the client.

While the duty to communicate with the client is an independent ethical obligation, a client who is happy with the outcome of the case is not likely to file a complaint for lack of communication. Complaints against lawyers for failure to communicate usually are triggered by the client’s unhappiness with the case results, and often allege other ethics violations such as incompetence, lack of diligence, or conflict of interest.

A lawyer has an affirmative duty to keep clients informed of the status of their legal affairs. The duty is personal; thus, the lawyer must communicate directly with the client. Immigration lawyers face the unique problem of having to explain often exceedingly complex legal issues to clients who do not speak or understand English. In some cases, the client may be illiterate or have limited education. But the fact that an immigration lawyer cannot communicate with the client in a common language does not permit the lawyer to delegate all communication with the client to a nonlawyer employee. The lawyer should be present with the interpreter and ensure that he or she provides a full explanation of the client’s rights and duties. This includes the scope of the representation, the plan of legal action, filing deadlines, case status, and any and all matters that may affect the client’s rights and ability to make informed decisions on legal matters. When the immigration attorney communicates with the client
through a family member over the telephone, all significant information should be followed up with a letter in the client’s language confirming the conversation.

One of the most difficult things for a lawyer to communicate is the fact that the lawyer has made a mistake in the client’s case. This is particularly true in immigration law, where a missed filing deadline may result in years of separation for family members.

Model Rule 1.4(b) states that a lawyer must explain a matter to a client to the extent reasonably necessary for the client to make informed decisions. If a lawyer advises a course of action that may result in adverse consequences to the client, the lawyer also must advise of the risks and of any other options available and their risks. A lawyer must become sufficiently educated regarding a case to be able to offer the client meaningful advice about the options. Lawyers must resist the temptation simply to make decisions for the client because the law is “too complicated” to explain or because the law is in flux.

Confidentiality

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client 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;
(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 other law or a court order.
Lawyer-client confidentiality is founded on the principle that a lawyer can best advise a client when the client feels free to discuss all information relating to the legal matter, even if embarrassing, without fear of reprisal. Information an attorney learns about a client during representation is presumed to be confidential, without regard to whether the client has requested expressly that the information not be disclosed. Model Rule 1.6 embodies this policy, stating that a lawyer must not reveal information relating to representation of a client, with very limited exceptions, unless the client consents after consultation or the disclosure is impliedly authorized in the representation.

The ethical duty of confidentiality is broader than the protections of communications under the attorney-client privilege. While the attorney-client privilege only protects communications from the client, the ethical duty of confidentiality applies to all information relating to the representation, regardless of its source. Additionally, the ethical obligation of confidentiality applies in all contexts, not just when information about client communications has been subpoenaed.

A lawyer’s duty of confidentiality clearly attaches when the lawyer-client relationship begins.

**Duty of Confidentiality to Former Clients**

The duty of confidentiality does not terminate with the lawyer-client relationship. The lawyer has an ongoing obligation to maintain confidences of the lawyer’s former clients. Model Rule 1.9(c), a provision of the conflicts of interest rules, forbids a lawyer from using information relating to a former client’s representation to the former client’s disadvantage or from revealing a former client’s confidential information except as permitted by the rules.

An attorney who once represented parties to obtain an immigrant visa and complete an affidavit of support may face issues of confidentiality later. For example, if a sponsored spouse seeks to enforce the affidavit of support after immigrating, the couple’s lawyer may not disclose confidential client information to one former client to use against another former client. However, should litigation erupt between the parties, the prevailing rule is that the attorney-client privilege does not attach between commonly represented parties and will not protect such attorney-client communications if subpoenaed.

**Implied Authorization to Disclose**

Model Rule 1.6(a) allows a lawyer to disclose client information “impliedly authorized in order to carry out the representation.” When authorization is implied, a lawyer need not obtain express consent from the client. However, how does a lawyer know when disclosure is “implied?” The comment to Model Rule 1.6 states that a disclosure is authorized when it is “appropriate in carrying out the representation,” such as when a fact that cannot properly be disputed is admitted. The ABA has set forth a foreseeability analysis to permit “impliedly authorized” disclosures that are
“necessary to the representation [and that], therefore, must be deemed to have been agreed to when the client hired the lawyer.”4

Issues of implied authorization may arise with the affidavit of support. Lawyers who counsel persons who agree to be sponsors by signing the Form I-864 or Form I-864A obviously need not get express consent from the sponsor to disclose the sponsor’s financial information to USCIS or DOS. Since the form obviously has to be reviewed by USCIS or DOS officials for the visa even to be considered, disclosure should be considered impliedly authorized. In addition, both forms state that USCIS may provide information regarding the sponsor’s name and address to any federal, state, local, or private entity providing a means-tested benefit to the sponsored immigrant.

Between the sponsor and sponsored immigrant, there is no requirement that the contents of the Form I-864 be disclosed. In fact, the instructions to the I-864 state that the form may be submitted in a sealed envelope. Thus, it appears that a sponsor may be entitled to request confidentiality of the contents of the I-864 from the sponsored immigrant. If the lawyer is representing the sponsor, the lawyer should discuss any limitations on disclosure that the client may desire.

Practically speaking, though, immigration lawyers often represent both the sponsor and the sponsored alien together, and many sponsors have no objection to the sponsored immigrant being privy to the information in the I-864. In fact, when the sponsor’s income and assets barely meet the required guidelines, the attorney should discuss with the parties whether the sponsored immigrant may be in a better position to convince the consular or USCIS officer that he or she is not likely to become a public charge if the immigrant understands the contents of the affidavit.

In addition, if the sponsored immigrant’s income is to be included in the I-864, the sponsor and immigrant will have to share information regarding their respective incomes and assets. The I-864A also requires both the sponsor and sponsor’s household member to sign the contract. Thus, the best practice is for the attorney to explain to the client the need to file the affidavit and/or household member contract, the information required by the forms, and the parties entitled to access to the contents of the forms. In this way, the client will understand what information must be disclosed necessarily as part of the representation, and to whom it will be disclosed. The client also can discuss with the lawyer whether he or she should share confidential information with other parties, such as sponsor, cosponsor, or beneficiary.

**Client Fraud and Confidentiality**

What does the lawyer do when protecting client confidences may result in the lawyer unwittingly being used by the client to commit fraud or perjury?

**Example:** An immigration lawyer represents a client before USCIS. The client has overstayed his tourist visa by one year, but apparently qualifies under

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INA §245(a) to adjust status through his U.S. citizen son. The lawyer files an adjustment of status application. However, on the way to the adjustment interview, the client informs the lawyer that he recently left the United States and re-entered illegally. He admits not disclosing the information previously for fear that the lawyer would not pursue the adjustment of status application. The client insists that the lawyer not disclose the information to USCIS due to the fact that the client will be put into removal proceedings and prevented from adjusting status by the 10-year bar under INA §212(a)(9)(B).

Whether a lawyer may reveal client confidences to rectify a client’s crime or fraud is one of the most controversial issues in legal ethics. Model Rule 1.6 permits disclosure of a client confidence only: (1) to prevent imminent death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that will cause substantial injury to the financial interests or property of another, or to rectify such an act; or (3) for the lawyer’s own benefit in certain kinds of controversies over the lawyer’s conduct.

The ABA has said that a lawyer who discovers that the client has used the lawyer’s services to perpetrate a fraud must withdraw, and may disavow his or her work product to prevent its use in the fraud even though this may involve disclosing confidential information. Moreover, the withdrawal must be accomplished in a matter which limits prejudice to the client’s case. “[W]here silence would result in a violation of the lawyer’s duty... not to assist a client’s ongoing or intended future fraud, ... [t]he duty to keep client confidences must give way....” However, disclosure should be made only to the extent necessary to avoid assisting the client’s fraud, and then only as a last resort.

With respect to how a lawyer should disavow his or her work product, the lawyer must decline to reveal anything about the disaffirmed work product “beyond the simple fact that she no longer stands behind it.” It may be necessary for the attorney to request an opinion letter from the state bar concerning the tension between the duty of confidentiality and the need to disavow a client’s fraud.

While lawyers may worry that they may be found to have violated the rules of ethics for revealing client confidences in cases involving client fraud, the lawyer must also consider whether the failure to disclose a client’s fraud will result in discipline, a charge of contempt, damage liability, accessory criminal liability, or criminal misconduct charges.

**Conflict of Interest**

**Conflicts of Interest Between Existing Clients**

**Rule 1.7 Conflict of Interest: Current Clients**

(a) Except as provided in paragraph (b), 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under 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 by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

One of the most common ethics questions asked by immigration lawyers is whether the lawyer may represent both “sides” in an immigration case. For example, may a lawyer ethically represent both spouses in a family-based visa petition? May a lawyer represent both the sponsor and the sponsored immigrant with respect to the affidavit of support? What are the lawyer’s obligations if the relationship between the parties sours?

Although Model Rule 1.7, which prohibits conflicts of interests between current clients, appears to be very broad, representation of both “sides” does not necessarily mean that a conflict exists. With some exceptions, Model Rule 1.7(a) prohibits representation of a client only if the representation of that client will be directly adverse to another client, or will be materially limited by the lawyer’s responsibilities to another.

The prohibition against concurrent conflicts of interest is based on two policy considerations. First, the vigor of a lawyer’s representation of one client may be diminished in an effort to avoid antagonizing another client. Second, a client must be able to expect the undivided loyalty of the lawyer. As the ABA has expressed it, “[l]oyalty is an indispensable element of a lawyer’s relationship with a client.”

A lawyer may not terminate one client in favor of another in order to characterize a client as a “former” client and enjoy the looser conflicts test. If clients were ever represented concurrently, they are treated as concurrent clients for the purpose of a disqualification motion.

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6 ABA Informal Ethics Opinion 1495 (1982).
The prohibition against concurrent conflicts of interest is not limited to clients suing each other. It prohibits any representation adverse to an existing client. For example, a lawyer represents a man who has filed a visa petition for his wife. During the course of the representation, the man’s 15-year-old son consults the lawyer about representing him to obtain a special immigrant juvenile visa due to the fact that his father has abandoned and abused the boy. Although the boy’s case does not involve filing a complaint or suit directly against the father, pursuit of the boy’s case will be adverse to the interests of the father. Thus, the prohibition against conflicts of interest should prevent the lawyer from taking the boy’s case.

Important Exceptions: Concurrent Conflicts of Interest Sometimes Allowed

The general prohibition against concurrent conflicts of interest is subject to a significant exception. Model Rule 1.7 permits a lawyer to represent adverse clients concurrently if: (1) the lawyer reasonably believes that he or she can provide competent, diligent representation to each client, (2) such representation is not illegal, (3) the clients are not opposing parties in a lawsuit, and (4) they give informed, written consent.

Multiple Representation Can Be Appropriate When Conflicts Are Only Potential, Not Actual

In immigration law, conflict of interest issues arise more frequently from representation of multiple parties in the same transaction, rather than with clients whose separate cases are adverse. Multiple representation typically does not involve a situation in which a lawyer’s responsibilities to one party will “materially limit” the lawyer’s responsibilities to another. Both the petitioner and the beneficiary of the desired visa want the same thing: issuance of a visa. No actual conflict of interest exists. However, there is often potential for conflict between the parties. For example, under the new affidavit of support, the sponsoring immigrant is liable for support and maintenance to the sponsored immigrant until the time the immigrant naturalizes or works 40 quarters. A sponsored immigrant may sue the sponsor for this support.

A determination of whether multiple representation is proper when a conflict is only potential is made on a case-by-case basis after consideration of the interests involved. A fact-specific analysis accommodates the general reluctance on the part of courts to disqualify counsel for conflicts that are merely potential.

Cases Involving an Affidavit of Support Raise Conflict of Interest Issues

The affidavit of support will raise potential conflicts of interest in every multiple representation, as it provides the sponsored immigrant with a means of legally forcing financial support from the petitioner. Cosponsors or household members signing the Form I-864A may have to share such liability with the petitioner. Even if the sponsored immigrant does not seek enforcement of the contract, the petitioner, cosponsor, or household member may be jointly and severally liable to a federal, state, or private entity seeking reimbursement for certain benefits paid to the sponsored immigrant. Under the Model Rules, it is permissible for an attorney to represent par-
ties whose interests are generally aligned, such as a petitioner, beneficiary, and even cosponsors, because they are all seeking to obtain a family-based visa for the beneficiary, even though there exists some difference of interest among them.

_Informed Consent Requires Full Disclosure of Pros and Cons of Common Representation_

**Rule 1.0(e)**

“Informed consent” denotes 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.

Model Rule 1.7 only allows concurrent conflicts of interest between a lawyer’s clients if they give their “informed consent.” For a client to give informed consent, the attorney must make full disclosure of the advantages and risks of multiple representation. The attorney has the highest duty to disclose all facts necessary for the parties to make an informed decision regarding the representation, including areas of potential conflicts and the possibility and desirability of obtaining independent legal advice.

For immigration practitioners assisting clients with the new affidavit of support requirements, full disclosure includes informing the petitioner, sponsored immigrants, and any cosponsors and sponsoring household members of all potential obligations, penalties and liabilities in completing and submitting the I-864 and the I-864A. This should include an explanation of the following:

- The sponsor may be required to support the sponsored immigrants at 125 percent of the current poverty income guidelines.
- The affidavit will be legally enforceable by the sponsored immigrants, the federal government, a state, or “any other entity” that provides a means-tested benefit for 10 years after provision of such benefit.
- The sponsor’s financial information may be disclosed to other entities seeking enforcement of the affidavit.
- The duration of liability on the affidavit
- The address reporting requirements and civil fines for failure to comply

Full disclosure also requires that the attorney explain the existence of any potential conflict of interest among the petitioner, sponsored immigrant, and cosponsors. This includes an explanation that the sponsors and household members signing the Forms I-864 and I-864A, respectively, may be sued by the sponsored immigrant to enforce the affidavits. The attorney also must explain the ethical limitations of multiple representation. Such limitations include the possibility that the attorney may have to withdraw from representation of all parties should the conflict grow to such

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7 See also Comment 18 to Rule 1.7.
an extent that it interferes with the attorney’s ability to render adequate representation.

*Obtaining Clients’ Consent*

Once full disclosure has been rendered and the attorney has determined that the representation will not result in an adverse effect on the representation of any of the clients, the attorney must obtain all the clients’ consent. Although written consent is not required in all states, consent should be in writing. An attorney’s consent form should be tailored to the client’s level of sophistication and should include, at least, the following information:

- an explanation of the legal work that will be performed
- advantages and disadvantages of multiple representation
- an explanation of the attorney’s obligations regarding client confidences
- a recommendation that the parties seek other counsel before agreeing to multiple representation

If the client is not in a position to know whether he or she will be vulnerable to disadvantage as a result of the representation, consent cannot be valid. In the case of clients who speak limited English, lack familiarity with the U.S. legal system, or are of limited means, the validity of consent may be suspect. In all cases, the lawyer should make full disclosure in writing in the client’s native language.

*Duty to Withdraw from Representation of All Clients in Case if, in the Course of Representation, One Client’s Interests Become Adverse to Another Existing Client*

If it becomes evident during such multiple representation that the attorney cannot adequately represent the interests of each party, or should any party revoke consent, the attorney must withdraw and thereafter may not represent one party against another on the same matter.8

**Example:** Attorney Smith represents a U.S. citizen mother filing a visa petition for her son. The mother is elderly and not working, so her U.S. citizen daughter agrees to act as a cosponsor. The mother, son, and daughter all consent, after full disclosure, to permit Attorney Smith to represent each of them. While Attorney Smith is in the process of preparing the visa petition, the daughter and son have an argument. The daughter calls Attorney Smith and states that she does not want her brother to immigrate to the United States. She states that she revokes her consent to the multiple representation and demands that Attorney Smith immediately return her signed and completed I-864 to her.

At the outset of representation in the above hypothetical, Attorney Smith’s clients shared an interest in a particular outcome, although there existed a potential conflict in that the daughter could become liable to the son on the Form I-864. Thus, it was rea-

8 See Comment 29 to Model Rule 1.7.
sonable for Attorney Smith to believe that none of the parties would be adversely affected by the multiple representation. However, due to the potential conflict of interest, Attorney Smith properly obtained consent from each client after full disclosure.

After Attorney Smith took on the multiple representation, the position of the son and daughter became fundamentally antagonistic. Courts presume that an adverse effect occurs when an attorney represents an interest adverse to an existing client. Consent has been revoked. Attorney Smith therefore cannot continue representation of the parties. If Attorney Smith seeks to pursue the daughter’s interests, she will not be able to represent the son and mother competently and diligently, as Model Rule 1.7 requires. Furthermore, Attorney Smith is not permitted simply to drop the daughter as a client and continue representing the mother and son. Otherwise, an attorney could convert a present client into a “former client” by choosing when to cease to represent the disfavored client.

Since continued representation in the above hypothetical will result in violation of Model Rule 1.7, Attorney Smith must withdraw from representing all three parties. Model Rule 1.16 governs withdrawal in situations in which a conflict arises after the representation has commenced. The hypothetical demonstrates the importance of full disclosure from the outset to each of multiple clients regarding the potential hazards of multiple representation. In addition to full disclosure, the attorney should reach an agreement with each party from the outset regarding to whom original client papers and documents will be returned in the event withdrawal is required.

Should an attorney proceed with representation of adverse interests in violation of the ethics rules, a client may file a motion to disqualify the attorney from the case. Such disqualification may be used as a basis for the imposition of disciplinary sanctions.

Conflicts Between Existing Client and Former Client: Allowed Unless Subject Matter Is “Substantially Related” to Former Case

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Model Rule 1.9 governs conflicts of interest between former clients and new or existing clients. A lawyer may not represent a client adverse to a former client if the subject matter is “substantially related” to the former case, unless there is written, informed consent. The standard to determine conflict between an existing client and a former client is not as strict as between two existing clients. Disqualification due to conflict of interest is actually more common when the conflict is between an existing client and a former client. This is probably due to the fact that conflicts between existing clients are more obvious to lawyers.
Duty of Continuing Loyalty to Former Clients

Although it appears that an immigration lawyer may represent both petitioner and visa beneficiary concurrently as long as the requirements of Rule 1.7 are satisfied, what happens when one of the clients returns to the lawyer after the representation has ended seeking further representation that may affect the other party?

Example: A lawyer represents a husband, Peter, and wife, Benita, to obtain conditional lawful permanent residence for the wife. Two years later, Benita comes to the office of the lawyer informing the lawyer that Peter has been battering her and she wishes to file for a waiver to remove the condition on her lawful permanent resident status. She also wants advice regarding enforcing the affidavit of support against Peter.

In addition to the lawyer’s obligation not to use a former client’s confidences against him or her, a lawyer has a duty of continuing loyalty, even after the representation has ended. Clients would feel abused by the legal system if lawyers could later turn against them. Thus, Model Rule 1.9(a) prohibits a lawyer from representing another person in a substantially related matter that is materially adverse to the lawyer’s former client, unless the client consents after consultation.

In the above example, Benita may argue that pursuit of the waiver of the condition on her permanent residence is not directly adverse to the interests of Peter and, therefore, poses no conflict. Although a definition of what makes a client’s interests adverse is difficult to pin down, generally, the test is whether the former and current client’s interests are differing. The interests need not be totally adversarial; it is enough that the two positions are not exactly aligned. It may be a close call whether pursuing the waiver of the condition is adverse to Peter’s interests or will cause him detriment. However, enforcement of the affidavit of support against Peter clearly would be. As sympathetic as Benita may be, the best practice for a lawyer in this situation is to decline representation and refer the case to another lawyer. Doubts should be resolved in favor of finding that the representations would be adverse.

Unrepresented Third Party

Rule 4.3 Dealing with an Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When 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. The lawyer shall 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.

Where an attorney, for any reason, declines to represent any of the parties involved in the process of obtaining an immigrant visa and completing an affidavit of
support, the attorney has certain ethical obligations when dealing with an unrepre-
sented third party.

The issue of unrepresented third parties will arise when the immigration practi-
tioner is not representing the third-party sponsor signing the Form I-864 or the
household member signing the Form I-864A.

Example: Attorney Athena represents a U.S. citizen, Ulysses, in preparing the
appropriate consulate documentation to immigrate his mother. Ulysses does
not have income or assets sufficient to demonstrate that he can maintain his
mother at 125 percent of the poverty income guidelines. However, Ulysses in-
tends to include his son’s income on the Form I-864, since his son has lived
with him for the last six months. Ulysses asks Attorney Athena for the Form I-
864A and requests that Attorney Athena explain the form to him so that he can
can pass on the instructions to his son.

In the above hypothetical, assuming Attorney Athena does not wish to represent
Ulysses’ son, she must exercise care not to establish an attorney-client relationship im-
pliedly by rendering legal advice, and must avoid giving Ulysses’ son the impression
that she is disinterested. An unrepresented person, particularly one who is unsophist i-
cated, might assume that an attorney is a disinterested authority on the law, particularly
if the attorney attempts to explain the obligations and liabilities of the Form I-864 or
affidavit of support. Thus, although the attorney can explain the contents and liabilities
of the affidavits to her own client, the attorney should make clear that she does not
represent the third party and is not disinterested. The attorney should give no advice to
the unrepresented third party other than to advise the person to obtain counsel.

Meritorious Claims

Rule 3.1: Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue
therein, unless there is a basis in law and fact for doing so that is not frivolous,
which includes a good faith argument for an extension, modification or reversal
of existing law. A lawyer for the defendant in a criminal pro-
cceeding, or the res-
pondent in a proceeding that could result in incarceration, may nevertheless so
defend the proceeding as to require that every element of the case be established.

The 1996 immigration law9 included several provisions sanctioning “frivolous”
applications, appeals, or claims. Although the apparent policy behind these provi-
sions was to limit frivolous claims, the practical effect may be to chill lawyers’ abili-
ty to push novel or creative theories in immigration law. Of course, discouraging fri-
volous claims is important and such attempts are not limited to immigration law.

9 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-
Model Rule 3.1 states that a lawyer shall not advocate a claim, defense, or appeal unless there is a basis for doing so that is not frivolous. Infractions of the rules on meritorious claims can result in professional discipline ranging from a reprimand to disbarment. Federal courts may impose monetary sanctions through the use of various statutes, court rules, and the inherent judicial power of the court.

The immigration statute, INA §240(b)(6) charges the attorney general with defining by regulation what constitutes sanctionable “frivolous behavior” in immigration proceedings before the administrative tribunals. The statute also charges the attorney general with specifying the circumstances in which an administrative appeal would be considered frivolous and summarily dismissed. Possible sanctions under the statute include suspension and disbarment.

There is no uniform definition of a “frivolous” claim, defense, or appeal. The primary difference among the jurisdictions is whether the lawyer’s conduct must be judged by a subjective or objective standard. Comment 2 to Model Rule 3.1 requires that lawyers “inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions. Such action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument for an extension, modification or reversal of existing law.”

DOJ and DHS Rules on Professional Conduct for Immigration Practitioners

On June 27, 2000, legacy Immigration and Naturalization Service (INS) and EOIR published a final rule on professional conduct for immigration practitioners, adopting much of the language from the Model Rules.10 The rule modified 8 CFR parts 3 (now 1003) and 292. The regulations are controversial for a number of reasons, not the least of which is that sanctions may be levied only against immigrant advocates and not against Department of Homeland Security (DHS) district counsel.

The rules not only outline the authority EOIR has to investigate and impose disciplinary sanctions against practitioners, but also the authority of DHS to investigate complaints regarding practitioners who practice before it. The rules state that a practitioner may be subject to disciplinary proceedings if he or she engages in frivolous actions that he or she “knows or reasonably should have known … lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to harass or to cause unnecessary delay.”11 However, they also include the proviso that “[n]othing in this regulation should be read to denigrate the practitioner’s duty to represent zealously his or her client within the bounds of the law.”12

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11 8 CFR §1003.102(j)(1).
12 8 CFR §1003.102.
In addition, the rules make engaging in “contumelious or otherwise obnoxious conduct which would constitute contempt of court in a judicial proceeding” grounds for sanction. The rules do not define or provide examples of such behavior.

The rules further provide that by signing any document, motion, appeal, or application, the practitioner certifies that he or she has read the document and, after reasonable inquiry, believes that the document is “well-grounded in fact and is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.” A petitioner is also subject to sanction if he or she “knowingly or with reckless disregard [offers] false evidence. If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures.”

Sanctions that can be imposed under these rules include expulsion or suspension from practice, or public or private censure. Appeal of an order disciplining an attorney can be made to the BIA.

**Document Fraud**

The 1996 immigration law also provided penalties for submitting false documents to the EOIR or USCIS. The document fraud provisions under INA §274C impose civil and criminal liability on immigration lawyers preparing forms or documents that are falsely made, or failing to disclose that the lawyer assisted in preparing such documents or forms. Submission of such documents is sanctionable not only if it is knowingly done, but also if such documents are submitted “in reckless disregard” of the fact that the document is falsely made.

The definition of “falsely made” under INA §274C(f) is troubling in that it does not necessarily require the lawyer to have any intent or knowledge of the falseness of the document offered. A lawyer may be found to have “falsely made” a document if the lawyer prepares a document or application that “has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted.”

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14 8 CFR §1003.102(j)(1).
15 8 CFR §102(c).
16 8 CFR §1003.101(a).
17 8 CFR §1003.106(c).
18 IIRIRA, supra note 9.
19 Although Walters v. Reno does not specifically address immigration attorney liability, the Ninth Circuit held that 274C notice forms and procedures violate due process. Walters v. Reno, 145 F.3d 1032 (9th Cir. 1998), cert. denied, 119 S.Ct. 1140 (Mar. 8, 1999). Thereafter the parties reached agreement on the use of a new, revised form to give notice to individuals who are charged with civil document fraud.
What constitutes “reckless disregard” that a document was “falsely made” under INA §274C(a) is not clear. At least one court has stated, however, that an attorney does not have an affirmative duty to investigate the veracity of client representations. In *In re Grand Jury Subpoena*, a private law firm received a grand jury subpoena for files of two clients pursuant to an investigation regarding a sham-marriage conspiracy. The district court quashed the subpoena, holding that the attorney-client privilege and the work product doctrine protected the client files from disclosure absent government proof that any attorney-client communications were made in furtherance of a crime, fraud, or other misconduct.

The district court held that “[a] lawyer is under a professional obligation to represent a client zealously within the bound of the law.... It is fundamentally inconsistent with this obligation to require an attorney to ascertain the truth or falsity of his client’s assertions. So long as the attorney does not have obvious indications of fraud or perjury, the attorney is not obligated to undertake an independent determination before advancing his clients’ position.”

Although an attorney is under no obligation to investigate the truth of a client’s assertions, an attorney may not consciously avoid learning the truth when it is obvious the client is engaging in fraud. In *U.S. v. Sarantos*, the defendant attorney instructed clients to sign blank visa petitions that the attorney would later complete and file with legacy INS. Each petition falsely claimed that the parties were living together as a married couple. The evidence indicated that several of the couples had to communicate with each other through an interpreter at the attorney’s office. In other cases, the attorney would execute divorce petitions simultaneously with the INS applications. The district court found that the attorney acted with a reckless disregard for the truth and with a conscious effort to avoid learning the truth, which supported a conviction for aiding and abetting the making of false statements.

Model Rule 3.3 also requires that a lawyer not “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.” This duty applies “even if compliance requires disclosure of information otherwise protected by Rule 1.6.” However, comments to the Model Rule specify that the obligation to rectify false evidence or false statements of law or fact ends with the conclusion of the proceeding.

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21 455 F.2d 877 (2d Cir. 1972).
22 ABA Model Rule of Professional Conduct 3.3(a)(3).
23 ABA Model Rule of Professional Conduct 3.3(c).
24 ABA Model Rule of Professional Conduct 3.3, Comment 13 (the conclusion of the proceeding occurs when a final judgment has been affirmed on appeal or the time for review has passed).
**Terminating Representation Due to Fraud or Other Reasons**

When a lawyer must withdraw from representation of a client due to the client’s insistence on committing fraud, or for whatever reason, the lawyer must follow certain rules of ethics in accomplishing the termination of the relationship. In certain cases, the rules of ethics require withdrawal. Model Rule 1.16 states that a lawyer must withdraw from representation when: (1) the representation will result in violation of the law or rules of ethics; (2) the lawyer’s health materially impairs the lawyer’s ability to represent the client; and (3) the lawyer is discharged.

Some of the most common violations of the mandatory withdrawal provisions include violations of the Model Rules. These include: Model Rule 1.1 (attorney competence), Rules 1.7 and 1.8 (conflicts of interest), Rule 1.9 (representation adverse to former clients), Rule 3.1 (limits on frivolous claims), and Rule 3.3 (false evidence, client perjury).

What happens, however, when a lawyer wants to withdraw for a reason that does not fall under one of the mandatory bases? All lawyers have faced the exasperating problem of the client who fails to provide the lawyer with necessary documents and information, neglects to return the lawyer’s phone calls, withholds material information, and is chronically late to appointments or fails to show up at all. Although a client can discharge a lawyer at any time and for any reason, lawyers often must provide a justification to “fire” a client. Model Rule 1.16 lists eight circumstances under which a lawyer may seek to withdraw. These are when:

- withdrawal can be accomplished without a material adverse effect
- the client persists in actions the lawyer reasonably believes are criminal or fraudulent
- the client has used the lawyer’s services to perpetrate crime or fraud
- the client insists on taking action that the lawyer considers repugnant or with which he or she has a fundamental disagreement
- the client fails substantially to fulfill an obligation to the lawyer and the client has received a warning that withdrawal may result
- the representation will result in an unreasonable financial burden on the lawyer
- the representation has been rendered unreasonably difficult by the client, or
- there is “good cause”

Thus, the Model Rules do provide for withdrawal when the client’s conduct renders representation unreasonably difficult. Rule 1.16 recognizes that lawyers should not be forced to continue to represent a client when effective representation is made impractical by the client’s refusal to communicate or cooperate.

*Withdrawing from Representation in Affidavit-of-Support Case*

During the course of representing a party or parties to obtain an immigrant visa and complete the affidavit of support and/or household member contract, it may be-
come apparent to the attorney that continued representation is not possible due to a conflict of interest that will adversely affect one or more of the represented parties. The most common scenario facing the immigration attorney is one in which the relationship between the spouses sours and the petitioning spouse no longer wishes to pursue the immigrant visa. With the new affidavit of support requirements, however, additional ethical issues may arise.

**Example:** Attorney Tao represents Peter and Benita in filing an I-751 petition to remove the conditions on Benita’s residence. After filing the I-751 but before the interview, Benita calls Attorney Tao and states that she still wants to proceed with the I-751 interview, but she has fallen in love with another man and wants to know about the enforceability of the affidavit of support should she decide to leave Peter.

In the above hypothetical, it would appear that Attorney Tao must withdraw from her representation of both Peter and Benita, since continued representation of Benita’s interests will be directly adverse to Peter, in violation of the rules regarding conflict of interest. Also, as noted above, Attorney Tao may not simply drop one client in favor of another to eliminate the conflict, since she owes both Peter and Benita a duty of undivided loyalty. There is an exception to this rule if a client consents in advance to the lawyer’s continued representation of the other party. However, the lawyer has the burden of proving that the client consented and that such consent is valid. Validity of consent will depend on whether the attorney raised the conflict issue at the earliest possible time and the client is relatively sophisticated in legal or business affairs.

**How to Protect Interests of Client During Termination**

To terminate representation, an attorney is obligated to take special steps to protect the interests of the commonly represented clients. Model Rule 1.16(d) states that, upon termination of representation, an attorney must take reasonable steps to protect the client’s interests. Such steps include the following:

- Give reasonable notice to the clients of termination.
- Allow the clients sufficient time to retain other counsel before ceasing work.
- Cooperate with replacement counsel.
- Surrender all client papers and property and refund any advance payment of fees that have not been earned.

Even if an attorney has been discharged by the client unfairly, the attorney must take all reasonable steps to mitigate the consequences to the client. If the attorney is representing clients before a judicial or administrative tribunal, the attorney must comply with local court rules regarding withdrawal, which often require obtaining court approval to withdraw.
Conclusion

Lawyers representing immigrants who may be new to the United States and unfamiliar with its language, customs, and legal system have a special duty to ensure that their immigrant clients are fully informed and aware of their rights. Immigration lawyers should require the highest ethical standards, not just of themselves, but of their colleagues and of lawyers representing the government. With long-term bars for unlawful presence, multiple grounds of inadmissibility, and other severe consequences for failing to comply with immigration laws, practitioners bear a greater responsibility to stay current in immigration law and maintain tight office filing systems. Noncitizens may face severe consequences, including life-long separation from family members and the loss "of all that makes life worth living." Delivery of high-quality and ethical legal services will ensure that justice will be served to this often vulnerable and targeted population.

The affidavit of support requirements under INA §213A raise complex ethical concerns for immigration practitioners, particularly when multiple representation of parties is involved. Practitioners should take the time before establishing such attorney-client relationships to think through the various ethical issues. As the contractually binding nature of the affidavit raises the possibility of at least a potential conflict of interest in any multiple representation, attorneys must consult their relevant state rules of ethics and, at a minimum, prepare disclosure and consent forms so that clients are fully aware of the implications of such representation. Additionally, attorneys must maintain the confidentiality of client information in the affidavit of support, but make clear to the client that disclosure of the information will be made to USCIS or DOS. Finally, the attorney must be vigilant about the existence of actual conflicts of interest and take the necessary steps to terminate the representation when undivided loyalty to the client has become impossible.

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