DUELING PIANOS: ETHICAL ISSUES IN REPRESENTATION AND DEFINING "CONFLICT OF INTEREST" WHEN THE PARTIES CANNOT GET ALONG

By Gary Frost and Kimberly Sutton
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- Setting the ground rules for the attorney-client relationship before being retained

A. When does Representation begin and who gets to decide this?

Surprisingly, the ABA Model Rules and the Texas Disciplinary Rules do not explicit define when representation begins. It is generally accepted that when representation begins is the result of basic contract and agency principals. Thus, it usually takes a "meeting of the minds" between the attorney and the client: the attorney agrees to represent the client and the client agrees that the attorney can represent them. As in most other contractual or agency relationship, this "meeting of the minds" does not require any particular form or personal contact during a consultation. The agreement can be made by actions taken by both parties whether in person, by mail, by telephone or other electronic communication.

Obviously, having the terms of the representation memorialized in a written contract is much preferable, especially in instances in which the scope of the representation is limited. For example, instead of being hired to represent a detained client from the beginning to the end of removal proceedings, a lawyer might be hired to do nothing more than prepare and file a bond application with the immigration court and then attend the bond hearing. Even the most recent version of the E-28 recognizes this limited representation.

It is important to ensure that the client understands the nature of your representation, the process of seeking the immigration benefit sought by the client, an estimate as to the amount of time the process will take and a realistic expectation of an outcome. But equally important for the client to understand is the notion that ***they do not get to set the expectation on how the ultimate goal is achieved***. Clients get to set what they expect the outcome to be – not how it is achieved. For example, a client may hire you to help them get resident status or prevent their deportation, but only you get to decide how to reach that goal. If a client begins to dictate how the case will be handled or if a client even gives you the impression that they intend to dictate the handling of the case, stop such conduct immediately. Politely, but firmly, explain to the client that they have hired you to accomplish a particular goal, but they do not get to decide how that goal will be accomplished. If this is not acceptable to the client, you should seriously consider whether continued representation is a good idea.

B. Who's my client?

In many cases, it is more than obvious who your client is. If you have been hired to represent someone in a naturalization case, that individual is your one and only client. But in other cases, the answer may not be so obvious. What about a removal case where there are multiple family members in proceedings? What about employment based case where you are dealing with both the employer and the prospective employee? What about simple marriage based adjustment or removal of conditions cases? The concern in cases where there appears to be more than one potential client involves the attorney's ethical duty to zealously represents their client.

Certainly in the vast majority of cases, even if there is potentially more than one client, the goal of all involved is the same. For example, a husband petitioning for his spouse opens the door to two potential clients (maybe even more if there are children are involved), but it is all but certain that there is no conflict of interest since each of them wants the same outcome. The same could probably be said for representing multiple family members in removal proceedings. However, it becomes more problematic in employment cases where the goals of the employer and the employee may not be identical.

The Texas Disciplinary rules state that a conflict of interest exists when you represent someone in a "substantially related matter in which that person's interest are materially and directly adverse to the interest" of another one of your clients or a client of the law firm. In addition, a conflict can exist when the representation of that person "reasonably appears to be or becomes adversely limited by the lawyer's or the law firm's responsibilities to another client or to a third person . . . ." Finally a conflict of interest will exist when your interest or your firm's interest adversely limits the representation of the client.

In cases where a conflict exists, you may continue to represent both parties but only if you reasonably believe that representation of each party will not be effected and each party consents to the continued representation after you provide full disclosure of the "existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved." It should be noted that the Texas Disciplinary rules do not require the parties to provide this consent in writing, but that it would be prudent to do so.

Consider a relatively common case in which you represented a husband and wife in an adjustment of status case. It is safe to say that you have more than one client, but there is little chance that there is conflict of interest since they both want the same thing: the wife to be granted permanent resident status. Does the situation change if the couple separates or divorces, and now the wife would like to hire you for the removal of condition application? Not necessarily.

My experience is that most attorneys take the safest approach and politely decline such representation. Such attorney's may even refer them to a colleague. But what if the couple agrees that the dissolution of the marriage is amicable and the husband

even hopes to see the conditions on his wife's status removed? It would seem difficult to envision a conflict arising, particularly if the couple is willing to acknowledge this in writing. On the other hand, if the husband asserts that he believes his wife married him just to gain resident status, he's probably not too keen on seeing her benefit from what he sees as fraudulent conduct. Is this a true conflict of interest? Regardless, this is a case in which might be a good idea to pass. What if the wife wants to hire you to file the removal of condition application based on an assertion of abuse? Does her desire to be granted a 10 year resident card materially conflict with the interest of her husband or would your representation of the wife somehow be limited because her husband had been your past client? As you can see, the answer is rarely black and white. Regardless of the amount of evidence the wife presents you of the abuse, this also might be a case in which you should pass.

- What to do when one party confides and says "don't tell"

Let's continue with the example of above in which the wife seeks to hire you for a removal condition application based on the assertion that she has been abused. At this point, the couple has not divorced and while a divorce is not necessary for her claim, she tells you that she intends to leave her husband. Further, she tells you that she does not want you to tell her husband about her plans. Of course her concerns about her husband becoming aware of her plans are justified, but can you agree to her request and still represent her? As stated above, without full disclosure to the husband and consent by him, you could not represent her. Where you represent two clients, what one communicates to you is open information between the clients regardless of an instruction by one to keep certain information confidential.

- Separation and impending divorce while adjustment is pending vs. after adjustment

If you haven't already, eventually you will be faced with a case in which a couple has filed an adjustment application, but while the application is pending, they separate. One spouse may even file for a divorce. How you handle these types of cases with regard to the clients and to the Immigration Service depends on the circumstances.

Where the couple has separated, but has not filed for a divorce, your responsibilities to your client are different than they are to your responsibilities to the Service. The fact that the couple is separated does not mean the adjustment can't be approved. In many states (like Texas) a person is either married or not married. There is no such thing as a "legal separation." As a result, a couple that is merely separated is still legally married. This is even true where a divorce petition has been filed. The couple remains married up until the moment a judge signs the divorce decree. Further, an application for adjustment of status may not be denied solely because the marriage is no longer viable and the parties are no longer living together so long as the marriage was initially entered into in good faith. *See Matter of Boromand*, 17 I. & N. Dec. 450 (BIA 1980); *Hernandez v. Ashcroft*, 345 F.3d 824, 845-49 (9th Cir.

2003)(the nonviability of a marriage cannot alone be the basis to deny adjustment of status even if the immigration judge characterizes its decision to deny as discretionary).
With regard to your responsibility to the Service, if the separation occurred before the adjustment of status is adjudicated, there is no duty to report it the Service as the couple's status might be resolved before the adjudication. If the couple's status is not resolved before they reach the adjustment interview, it will probably be evident. If the separation occurs after the interview, there still doesn't appear to be any duty to inform the Service since, *Boromand* makes clear that the nonviability of the marriage is not dispositive.

With regard to the couple, if the couple separates, that may cause you to have to consider your continued representation. In addition, it is important for the clients to understand that the Service takes an extremely dim view on approving adjustments where the couple has separated, regardless of what *Boromand* says. Legally the separation may not mean that the application can't be approved, but for practical purposes, the beneficiary faces an uphill battle in gaining approval.

What if the couple divorces prior to the final adjudication of the adjustment of status? The answer seems to be one of timing. If the couple divorces prior to the decision on the adjustment of status, then the basis of the application has no legal basis: the couple is no longer married as required by INA 245. In this scenario, the couple could abandon the application process and the adjustment will die on its own. You could also notify the Service that the couple has divorced and request that the application be withdrawn. It should be noted that if the beneficiary has no other legal status, she needs to understand that she is subject to being placed into removal proceedings.

Compare the above scenario to a case in which the divorce occurs after the adjustment has been approved. Under these circumstances, your responsibilities lie solely with the couple as your clients. If the couple was not subject to the restrictions of conditional resident status, whether the couple divorces after the approval is immaterial. If the beneficiary wife was granted conditional resident status, then the divorce puts her in the position of filing a removal of condition waiver application based on the assertion that she entered into the marriage in good faith. By such application, the Service will necessarily be informed of the divorce and the only question will be whether she can provide evidence that she did, in fact, enter into the marriage in good faith. From your perspective, the only question will be whether you can continue to represent the wife as discussed above.

- Withdrawal of representation and/or notify USCIS

At some point in every practitioner's career, a situation presents itself which clearly requires withdrawal of representation by the attorney. Most states have a rule which is the same or similar to ABA Model Rule 1.16, providing (among other

things) that a lawyer must withdraw if continuation would result in a violation of the rules of professional conduct or other law.

Sometimes, though, withdrawal may not be enough. Model Rule 3.3(a)(3)(a) states,

> "A lawyer shall not knowingly 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. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

Model Rule 3.3(a)(3)(b) covers a lawyer "who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding," and also calls for remedial measures.

It is important to note the term "knowingly" with regards to the lawyer's actions. There are a multitude of cases addressing what "knowingly" means. The US Attorneys' Manual at Title 9, Criminal Resource Manual §910 "Knowingly and Willfully" provides the fairly simple guideline, "to commit an act 'knowingly' is to do so with knowledge or awareness of the facts or situation, and not because of mistake, accident or some other innocent reason."

We have all looked into a client's eyes at one point or another and believed they were lying. If you haven't yet, you will one day. Just as you have had or will have suspicions about documents which are provided to you as evidence. Your gut feeling is not knowledge. If you find yourself somewhere between instinct and actual knowledge, however, Rule 3.3 may give you some leeway to make that call. If you have *reasonable belief* that the evidence is false, you *may* refuse to offer it, other than the testimony of a defendant in a criminal matter. In Tennessee, that allowance is extended to evidence which you reasonably believe to be false, misleading, fraudulent, or illegally obtained.

This is, of course, assuming that you have a best-case scenario, in which you discover (or reasonably believe) the falsehood before it is offered to the agency or the court. Again, this is where it is very important to read your state's rule. The Model Rules and comments provide instructions for handling the situation as it escalates, but Tennessee, for example, has rules that are more specific. The Rules address testimony and evidence differently. Tennessee in particular addresses actions of persons other than the client, and improper conduct toward or by a juror.

The rule is actually fairly simple when the falsehood is solely involving documents. If you come to know that the document you submitted is false, you must withdraw or disaffirm the evidence. Although the rule itself appears simple, and can

be accomplished without revealing confidential information, you need to make your client understand that such an action may raise red flags with the adjudicator or judge, and could have drastic consequences on the case.

Withdrawing evidence does not necessarily mean you need to withdraw as the attorney, although it may cause a rift between you and your client that leads to the end of the attorney-client relationship on its own. A client's false testimony, however, may require not only withdrawal as attorney, but disclosure to the tribunal.

The Rules instruct an attorney to first try to talk the client out of lying, and to refuse to present false evidence and testimony (with certain exceptions for defendants in criminal proceedings). I find myself giving clients the "don't lie" speech even if I have no indication that they intend to lie on the stand. I want them to be sufficiently aware that I will not risk my license for their lie.

If that doesn't work, the Rules then instruct that the attorney should seek to withdraw, informing the tribunal that withdrawal is required under the Rules of Professional Conduct. The most difficult situation occurs when permission to withdraw is denied and you must continue as attorney without using the false testimony or evidence either directly or indirectly.

This last situation is rare, but not at all difficult to contemplate. Imagine that you have prepared your case, reviewed every document and interviewed and prepared your client for testimony, as well as several witnesses. On the stand, your client suddenly tells a giant whopper, which you clearly know is untrue. You are now required to try to withdraw from the case without revealing protected information.

In any situation, you must weigh your duty to disclose against your Rule 1.6 duty of confidentiality. The Model Rule Comment 3.3(11) cites the need not only to prevent the attorney from "subverting the truth-finding process," but also to avoid allowing the client to simply instruct the attorney to remain silent. Tennessee's Comment 3.3(10) contains similar language and reasoning, and expands on the steps which must be taken to try to remedy the situation. Tennessee's Comment 3.3(11) instructs a lawyer to "resist disclosure of information protected by RPC 1.6" to the extent that there is "a non-frivolous argument that the information sought is privileged."

The final piece to this puzzle is determining when your duty of candor ends. The Model Rules and Tennessee Rules agree that your obligation ends at the conclusion of proceedings, interpreted as the final judgment and appeal. Although the comments to the Model Rules appear to merely end the obligation, Tennessee goes as far as to prohibit an attorney from reporting a client's misconduct after the conclusion of proceedings.

- I-864 ethical obligations to a "joint sponsor"

There is an ongoing disagreement among attorneys whether it is possible to ethically advise a joint sponsor regarding the I-864 obligations, and there are very good arguments on both sides.

First you must look at your state's Rule 1.7 governing conflict of interest. Your concern here is not so much with any current conflict, but with a potential conflict which may so great that it is not waivable. You must also review your state's Rule 1.2 regarding limited scope of representation.

If you feel like it is less risky not to directly represent Joint Sponsors, then you must still take steps to protect yourself from inadvertently creating an attorney-client relationship. One way to handle this is to provide a complete package to the client with Form I-864, the form instructions, and a short cover letter in which you give a brief explanation of the Affidavit of Support and advise the Joint Sponsor to seek independent legal advice. In this situation, you do not sign the I-864 at all, although you have an obligation to your client to review it for completeness and accuracy compared to the documents, as well as to make sure that it meets the poverty guidelines. If there is any issue with the document, you should return it to the client and explain the problem, treating it as you would any other piece of evidence.

Others feel that representation for the Affidavit of Support is perfectly acceptable, and even preferable to maintain control over the case. In such a case, it is important to get written consent limiting the scope of your representation, and waiving the potential conflict (if allowed in your jurisdiction). USCIS has helpfully changed the I-864, allowing an attorney to limit representation of a sponsor solely to the preparation of the form. It is important to remember the joint sponsor(s) when you send your completion of representation letter to your clients, and send a separate one to the joint sponsor to make sure that everyone is clear that your representation has ended.