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US IMMIGRATION & NATIONALITY LAW

ETHICS FOR IMMIGRATION LAWYERS DURING COVID-19

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Based on my video presentation at a Practising Law Institute One Hour Briefing entitled Ethics and Immigration: Spotlight on Select Rules and Client Representation during Covid-19, I drew up some frequently answered questions (FAQs) that might be helpful to immigration lawyers. Immigration lawyers have adapted to work remotely from home during the Covid-19 pandemic, which may require the lawyer to pay attention to ethical issues. Even if many parts of the country are reopening, remote work is likely to continue into the foreseeable future.

Remote work does raise potential conundrums for immigration lawyers as some of the work might still need to be performed at the office. Although USCIS has relaxed some deadlines, voluminous paper based filings may still be required to be printed from commercial copying machines at a lawyer's office to be filed by a deadline to preserve status. Mail from immigration agencies is being sent to the office too. Filing fees are mostly drawn on checks and attached to the petition or application. What are the ethical implications for immigration lawyers in this new era?

My PowerPoint puts a spotlight on select ethical issues and citations to the relevant ethical rules, http://blog.cyrusmehta.com/andromeda/wp-content/uploads/2020/06/05-19-20_1500_124921_Mehta-003v1.pptx. The PLI program, which got excellent reviews, is available on demand and there will be no charge for registration if done before June 30, 2020.

1. Are lawyers bound by ethical rules even during disasters?

Ethical rules are in full effect and have not been relaxed or suspended for

lawyers. For a useful overview, see Michigan Bar Ethics Guidance during Covid-19, https://www.michbar.org/opinions/ethics/COVID-19 . Lawyers have been through other disasters such as 9/11, Hurricane Katrina, Hurricane Sandy and are essential during crises to help clients with their changing legal needs. As part of competent representation under ABA Model Rule 1.1, lawyers must stay abreast of all changes in immigration policy relating to Covid-19 that may impact their clients. Lawyers must still provide diligent representation under ABA Model Rule 1.3 notwithstanding the hardships and challenges they might face. Under ABA Model Rule 1.4, the lawyer must also communicate with the client even if both lawyer and client are remote, and must keep the client reasonably informed about the status of the matter.

Lawyers are also required to have disaster preparedness plans. See ABA Formal Ethics Opinion 482, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_482.pdf

2. How are immigration lawyers working remotely during Covid-19?

Immigration lawyers have learned how to work from home since the Covid-19 crisis. Many forms, supporting letters and briefs can be prepared remotely. Some work performed by administrative staff may still have to be performed at the office, such collecting mail and printing and dispatching voluminous submissions. Client communications can mostly take place over video or the telephone. Staff meetings and supervision can also take place remotely. USCIS has allowed for scanned signatures so long as the wet signature exists and can be produced when required**.**

3. What is the USCIS Wet Signature Policy?

The USCIS has announced that for forms requiring an original "wet" signature, per form instructions, USCIS will accept electronically reproduced original signatures for the duration of the national emergency. This temporary change only applies to signatures. All other form instructions should be followed when completing a form.

Individuals or entities that submit documents bearing an electronically reproduced original signature must also retain copies of the original documents containing the "wet" signature. USCIS may, at any time, request the original documents, which if not produced, could negatively impact the

adjudication of the immigration benefit.

It is advisable for lawyers to instruct their clients to preserve the wet signature, or alternatively, to send the form containing the wet signature to their offices even after the application has been submitted.

Further details of the USCIS signature policy are available at https://www.uscis.gov/news/alerts/uscis-announces-flexibility-submitting-required-signatures-during-covid-19-national-emergency

4. Are there any confidentiality concerns while working from home during Covid-19?

ABA Model Rule 1.6 provides that 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 under one of the exceptions under 1.6(b). For recent guidance regarding working from home, see Pennsylvania Bar Association Formal Op. 2020-300, https://www.technethics.com/pennsylvania-bar-association-formal-opinion-2020-300-ethical-obligations-for-lawyers-working-remotely

The lawyer must be vigilant regarding protecting client confidentiality when working from home. Here are some pointers:

- Ensure that client communications remain private – especially when family members are around or when Amazon's Alexa may listen in!
- Client related work paper product should be shredded rather than placed in the recycling basket with newspapers.
- Use Virtual Private networks rather than Free Wi-Fi.
- Use strong passwords and 2 factor authentication.
- Ensure that Zoom Video Conferences are secure.

5. What are some of the ethical considerations regarding supervision of non-lawyers?

Under New York Rule 5.3:

- A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

Non-lawyers who print out and dispatch submissions at the office must be carefully supervised, whether onsite or remote, as documents and exhibits can get left out or not be collated in the intended format. Printers can stop printing during the middle of big print jobs. Moreover, mail from USCIS and other agencies must be carefully reviewed and accounted for, and deadlines recorded.

6. What if I missed a deadline to file an extension of status for a client for a Covid-19 related reason?

UCIS has indicated that it will excuse untimely filings for extension of status pursuant to 8 CFR 214.1(c)(4) and change of status pursuant to 8 CFR 248.1(c) for Covid-19 related reasons.

In order to successfully invoke USCIS's discretion to excuse a late filing, one must demonstrate that the delay was due to extraordinary circumstances beyond the control of the client and the delay was commensurate to the circumstances. If the attorney or the client got corona virus, or had to quarantine because they were in close contact with someone who contracted the virus, this could potentially constitute an extraordinary circumstance for failing to file timely. A lawyer's inability to file timely due to a shutdown order that prevented him or her from accessing files or the mail may also constitute an extraordinary circumstance.

8 CFR 214.1(c)(4) is reproduced below:

Timely filing and maintenance of status. An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed,

except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:

> **(i)** The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
>
> **(ii)** The alien has not otherwise violated his or her nonimmigrant status;
>
> **(iii)** The alien remains a bona fide nonimmigrant;
>
> **(iv)** The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

7. What sort of conflicts of interests should I be concerned about between clients when the salary is reduced and working conditions change?

Immigration practice often involves representing two or more clients such as the employer and employee. If the employer wishes to reduce the salary of an H-1B worker, care should be taken that the employer is still complying with H-1B rules regarding meeting the required wage, and that the advice given to the employer will not adversely impact the employee client, unless both clients give informed consent. For example, if the employer wishes to reduce the wage below the prevailing wage, the position may have to become a part time position. The employer will have to obtain a new Labor Condition Application reflecting the part time wage and hours, and then the employer must file an amended H-1B petition. Since the H-1B worker will be adversely impact as a result of a reduced wage, the lawyer who represents the employer and H-1B worker must get the informed consent of both clients before undertaking the amendment from full time to part time employment.

For further scenarios regarding changes in working conditions, see http://blog.cyrusmehta.com/2020/03/faq-on-changes-in-salary-and-other-working-conditions-for-h-1b-workers-during-the-covid-19-crisis.html

8. What if I fall sick or die upon contracting the corona virus?

If the lawyer is part of a firm with other lawyers, it would be less problematic for other lawyers in the firm to take care of the lawyer's matters. If the lawyer is a sole practitioner, Comment 5 to ABA Model Rule 1.3, Duty of Diligence, requires the lawyer to prepare a plan that would designate another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protection action.