CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

ADVANCE CONFLICT WAIVERS

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MANAGING EXPECTATIONS OF IMMIGRATION CLIENTS THROUGH SMART ETHICAL PRACTICES

Only a fool of an attorney would not set out the parameters of the representation in advance and decide how to handle clients in the event of a conflict of interest between them. This is particularly so when a client embarks on a green card sponsorship through an employer under one of the backlogged Employment-based Second (EB-2) or Employment-based Third Preference (EB-3) preferences. Some of the backlogs for people could easily take over a decade to result in permanent residency, and thus the attorney may have these clients for a very long time.

Since the goals of both the employer and employee are common at the outset, which is to obtain permanent residence, it is ethically possible for one attorney to represent both the clients. Indeed, it is more efficient and cost effective to have one attorney when both clients have the same objective. But over the course of a decade or more things are bound to change, and in the employment context, termination is bound to occur where one party may choose not to sponsor or seek sponsorship for the green card. What is the role of the immigration attorney when the employment relationship has been severed? If there is an irresolvable conflict, the attorney representing both parties may need to withdraw from the representation, and each of the parties will need new counsel. But this may not necessarily be the case if the representation is structured from the very outset that contemplates predictable conflicts. Under the Golden Mean approach, it may be ethically possible to continue to represent one client even after termination through the use of advance waivers and limited representation. You can learn more about the Golden Mean by reading about my debate with Bruce Hake who asserts,

without legal foundation, that advance waivers are unethical in immigration practice, *Counterpoint: Ethically Handling Conflicts Between Two Clients Through The "Golden Mean*,"http://www.ilw.com/articles/2007,1009-mehta.shtm.

The Golden Mean enables the attorney to represent the client who most needs this attorney. One can predict in advance that there will be conflicts down the road, and the most obvious and predictable is termination of the job opportunity that is the basis for the sponsorship. How will the attorney handle the foreign national's ability to "port" to a new employer under INA section 204(j) when the sponsoring employer still wants this employee? It is this employee that initially sought advice from the attorney, introduced the attorney to the employer who embarked first upon the H-1B visa sponsorship and then green card sponsorship, and is now looking to exercise portability to a more secure job. The foreign national client would feel betrayed if the attorney withdrew at this point. If the attorney cannot obtain the consent of the employer client to continue to represent the employee, this might become inevitable. Under the Golden Mean approach, the attorney may have been able to indicate to the employer, at the start, that this employee was a long standing client, and while he or she would vigorously represent both during the green card process, the attorney would continue to represent the employee in the event of termination. It is inevitable that an attorney may be more in contact with one client than another client, but that does not mean that the attorney provides differential services to each client during the representation. The attorney must represent each client competently during the dual representation. Yet, like it or not, the notion of the primary and secondary client exists in case law, *Allegaert v. Perot*, 565 F.2d 246 (2d Cir.1977), and in immigration practice, a lawyer's contacts may either be more extensive with the employer or the employee. If an employee's services are terminated, it may be still possible to represent the employee. Likewise, an attorney may also continue to represent the employer even after the employee has left.

Of course, one needs to get informed consent of clients for advance conflict waivers, limited representation and even in assuming the joint representation of the employer and the employee client. The standard for obtaining informed consent is the same for all of these situations. Clearly, the informed consent standard is heightened when the attorney takes a potentially adverse position against the former client, and in many cases, some conflicts cannot be consented to if the lawyer is unable to provide competent and diligent

representation to each affected client. Also, the sophistication of the client will be taken into consideration in determining whether there was truly informed consent. In immigration practice, a lawyer does not advocate termination. If it happens upon the volition of one or both parties, the lawyer's representation of the other client may not be so adverse in the same sense when clients turn against one another in the litigation context. Moreover, in *Rite Aid Corporation Securities Litigation*, 139 F. Supp. 2d 649 (E.D. Pa 2001), the court held that the informed consent standard may be dropped to its lowest point when there is an "accommodation client." There the same law firm represented Rite Aid and the CEO, and in the engagement letter, the law firm indicated that in the event of a conflict, the firm would continue to represent Rite Aid while CEO would retain separate counsel. The conflict waiver was upheld because the CEO was an accommodation client as he agreed to engage counsel through the corporation.

In immigration practice, the employee often times is represented by counsel that the employer engages to prepare and file an employment-based nonimmigrant visa petition for a limited duration of time. If the employee, who may be the accommodation client here, chooses another objective, such as seeking another employer and different immigration strategy, he or she may seek other counsel while the attorney for the employer can continue to represent the employer. Similarly, at times, the employer could also be an accommodation client with respect to the employee client. A well known artist, who has consulted with the attorney previously, can be sponsored by Agent A for an extraordinary ability O visa for a limited engagement. The attorney representing the O visa national can seek an advance waiver indicating that should the artist, his long standing client, obtain another engagement, he can continue to represent her in pursuit of another O visa or permanent residency. This way the foreign national client won't feel let down who may have more invested in the attorney-client relationship than the agent if she obtained an exciting prospect through Agent B.

Immigration attorneys can learn a lot from decisions such as *Rite Aid* and *Allegaert* in ethically structuring dual representation engagements so as to manage the expectations of the clients, effectively represent them jointly, and if there is a conflict, where ethically permissible, continue to represent the client that most needs the attorney to champion his or her interests.