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THE ETHICS OF LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS IN LIGHT OF THE FAIRNESS FOR HIGH SKILLED IMMIGRANTS ACT

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The Fairness for High Skilled Immigrants Act has divided the immigrant community as well as immigration attorneys. The bill seeks to eliminate per-country caps without expanding the number of visas in the EB categories. The House version, HR 1044, has already passed with an overwhelming majority on February 7, 2019. The Senate version, S. 386, has not yet passed through unanimous consent. A Senator has objected each time it has come up for unanimous consent. Senator Durbin is the latest Senator to object.

If the country caps are eliminated, the queue for Indian EB-2 and EB-3 beneficiaries will lessen substantially, which currently is several decades long. One Cato Institute study anticipates that the wait time could be 150 years. The elimination of the per-country limits will allow visas to be taken up on a first come first served basis. Those backlogged in the EB-2 and EB-3, mainly Indian nationals, are fervently hoping for S. 386 to pass. By eliminating the per-country limits, Indian nationals may ultimately face a wait time of just a few years as compared to several decades. On the other hand, those from the Rest of the World (ROW) may face waiting times under the first come first served basis. Many are opposed to the passage of S. 386 as even waiting a few years will make them worse off than now. At present, they do not have any wait time in the EB-2 and EB-3 while Indians may wait for several decades.

Most immigration attorneys have clients from India and the rest of the world. Some attorneys are torn and are taking a neutral position. Other attorneys are opposing S. 386 while some are in support. Given the division among its members, AILA has taken a neutral position on the bill.

At issue is whether an attorney can ethically support or oppose S. 386, or take a neutral position, even though under any of these positions, some clients may benefit while others may not.

The starting point is ABA Model Rule 6.4 entitled *Law Reform Activities Affecting Client Interests*, which provides:

> *A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.*

Note that ABA Model Rule 6.4 is non-binding, and an attorney needs to also consult the analog of 6.4 within their state rule of professional conduct. Model Rule 6.4, which provides the analytical framework for this blog, explains that a lawyer can be a member of an organization, such as a bar association or a trade association, that is advocating for law reform even though it may affect the interests of the lawyer's client, positively or adversely. While Model Rule 6.4 allows the lawyer to take a position even though it may affect the interests of the client, the lawyer is nevertheless required to disclose to the organization whether any decision materially benefited the client, but there is no need to identify the client. The requirement to disclose any material benefit to a client ought to be interpreted in a reasonable manner. AILA, for example, takes many positions that benefit the lawyer's client, but if each lawyer were to make disclosure, it would become too impractical. Therefore, the reference to benefits in Model Rule 6.4 is, implicitly, to benefits unlikely to be obvious to the rest of the organization or leadership. Most of the time, the client benefits we deal with in AILA are obvious and widespread, such that repeated disclosure would be both pointless and unwieldy.

Let's suppose a lawyer is a member of a trade association that advocates for an increase in visa numbers for the EB-5 category. This organization, which we will call "EB-5 Trade Association" is actively lobbying for an increase in the annual 10,000 limitation in the EB-5 by suggesting that some of the numbers can come from the 50,000 visas reserved under the Green Card Diversity Lottery Program. This lawyer, who has mainly EB-5 clients, also has clients who may

benefit if they win a lottery under the Diversity Program. By advocating that the visa numbers in the Diversity Lottery Program be reduced and given to EB-5, if Congress amends the law, it will reduce the chances of this lawyer's clients to win the lottery. Still, under Model Rule 6.4, this lawyer can ethically advocate for the reduction in visa numbers in the Diversity Program in favor of the EB-5 category.

What if EB-5 Trade Association also advocates for a reduction in visa numbers in the family fourth preference category (F4) and the lawyer has clients who have I-130 petitions for some clients under the F4? Under Rule 6.4, a lawyer can even advocate for a reduction in the F4 too in favor of an increase in visas under EB-5 as a member of EB-5 Trade Association. As a practical matter, any advocacy of this sort will most likely include a proviso that existing F4 beneficiaries be protected and that the abolition of F4s would only occur for new applicants. Still, there is no way to predict the end result of such advocacy. In most instances, advocacy efforts do not result in a change of law. Or if there is a change in law, the end result may be very different from what was essentially advocated by the organization.

The next question is whether the lawyer's advocacy efforts could create a conflict of interest? Let's examine the Comment to Model Rule 6.4:

> *Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.*

The key take away from the Comment to Model Rule 6.4 is that a lawyer does not have a lawyer-client relationship with EB-5 Trade Association by virtue of being a member. Even if the lawyer is the head of a task force within EB-5 Trade

Association actively putting forward position papers, it does not result in a lawyer-client relationship with the organization. However, the Comment to Model Rule 6.4 still cautions that "a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7."

Rule 1.7(a) states;

> *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:*
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> *(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.*

In the context of the lawyer's membership in the EB-5 Trade Association, there is no question of the representation of one client being directly adverse to another under Rule 1.7(a) (1). EB-5 Trade Association is not the lawyer's client. However, under Rule 1.7(a)(2), there is a possibility that the lawyer's representation may be materially limited to the F4 client by a personal interest of the lawyer. Let's assume that the lawyer is so passionately involved in the EB-5 reform effort to take numbers from the F4 and give them to the EB-5 that the lawyer begins to abhor the F4 client and loses interest in representing the F4 client. The lawyer's representation of the F4 client is now materially limited by the lawyer's passionate zeal in bringing about EB-5 reform.

On the other hand, even if the lawyer is consumed by zeal in the EB-5 reform effort, under Rule 1.7(b)(1), the lawyer can still represent the F4 client if the lawyer reasonably believes that she will be able to provide competent and diligent representation to the affected client. In most cases, that will be so, but if the lawyer develops an abhorrence toward the F4 client and fails to represent the client competently and diligently, the lawyer clearly has a personal interest conflict and must withdraw from that representation.

Model Rule 6.4 only speaks to reform efforts of the lawyer within the context of an organization. What about personal capacity lobbying or advocacy efforts by a lawyer? AILA is not taking a stand with respect to S. 386 and most lawyers are

advocating one way or the other in their personal capacities. There is no comparable ethical rule like Rule 6.4 governing a lawyer's personal capacity lobbying or advocacy efforts. However, one can use the same framework of Rule 6.4 in arguing that just as a lawyer can engage in law reform efforts as a member of an organization even if it materially affects the interest of a client, a lawyer can do so even in a personal capacity. The lawyer by virtue of doing so in a personal capacity would not have a disclosure requirement, as under Rule 6.4, if the reform effort materially benefitted a client. Regardless, the lawyer must still be mindful of personal interest conflicts under Rule 1.7(a) (2) as illustrated above.

With respect to S. 386, whatever position one adopts, it is likely to adversely affect the interest of a client in the event that the lawyer has both Indian and rest of the world clients. By lobbying against S. 386 in favor of ROW clients, the lawyer's advocacy adversely affect the interests of Indian clients who will not benefit if S. 386 does pass. Conversely, when the lawyer advocates for S. 386, the lawyer's ROW clients could get adversely affected. Of course, the evaluation of harm to the client is not black and white. A lawyer who opposes S.386 is doing so in the hope that the bill will improve and include more visa numbers for all, although the likelihood of S.386 passing will lessen in today's polarized environment and Indians will continue to remain backlogged in the per country caps with their children also likely to age out. A lawyer who favors S.386 realizes that while the bill is not perfect, this is an incremental first step where discriminatory per-country quotas get eliminated with the possibility of creating a fair system for all in the long run. Given other failed reform efforts over the past 10 years, this bill has the best chance of passage with the hope that it will serve as down payment for further reform such as adding more visas through not counting derivatives in the future (in the interest of full disclosure, this has been my reason for supporting an otherwise imperfect bill).

In the end, all of these positions that the lawyer may take with respect to the Fairness in Immigrant Worker Act are ethical – for, against or remaining neutral. In addition to any potential personal conflict of interest, the lawyer would also need to take business and reputational considerations into account, which are quite separate from the ethical consideration. Restrictionist organizations are also not supporting S. 386 for different reasons, and if the lawyer relies on the positions of these organizations in also advocating against S. 386, such as retweeting Breitbart twitter posts against the ill effects of Indian immigration,

the lawyer should be mindful of any reputational damage that may result through such tactics, including motivating USCIS to view H-1Bs from Indian IT firms more harshly. If S. 386 passes, then all lawyers must come together to further improve the law (and there will surely be such an incentive when people other than Indians are in a waiting line), and if it does not pass, then all lawyers should still come together to improve the law for Indians. Note that even if the EB-2 and EB-3 ROW are current, the EB-1 for India, China or ROW are not current. The EB-5 too for China, Indian and Vietnam are not current. The present system is broken and is badly in need for reform.

In conclusion, a lawyer can adopt different positions regarding the Fairness for High Skilled Immigrants Act even if it may not immediately benefit all their clients. If a lawyer is constrained in undertaking law reform efforts either through an organization or in a personal capacity, it would surely chill the lawyer's ability to take positions on proposed legislation as well as undermine the lawyer's exercise of free speech under the First Amendment.