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ETHICAL DIMENSIONS TO FEDERAL COURT LITIGATION IN IMMIGRATION MATTERS

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In light of the higher possibility of denials of routine H-1B and L-1 petitions, immigration lawyers may want to consider stepping out of their comfort zones. They should consider thinking about representing the client beyond the motion to reopen or appeal to the Appeals Administrative Office (AAO) in the event of a denial. Seeking judicial review of a denial under the Administrative Procedures Act is a very viable route to challenge a denial. Immigration lawyers may wish to structure the engagement to contemplate federal court action too, and also discuss this possibility with clients at the very outset. Sure enough, not all lawyers, especially business immigration lawyers, may wish to become federal court litigators. Even if they do not wish to do so, they must still provide that option to the client and be willing to refer the federal court matter to another firm.

Before representing a client in federal court, immigration lawyers must be mindful of some key ethical rules, which will be discussed in greater detail below: ABA Model Rule 1.1 – a lawyer must provide competent representation. ABA Model Rule 1.2(a) - a lawyer shall abide by client's decisions concerning the objectives of representation, and shall consult with client as to means by which they are pursued. ABA Model Rule 1.2(c) – a lawyer may limit the scope of the representation. ABA Model Rule 1.3 – a lawyer shall act with reasonable diligence and promptness in representing a client. ABA Model Rule 1.4 – lawyer is obligated to communicate with client with respect to which the client's informed consent is required (e.g. lawyer must communicate pros and cons of administrative v. judicial review). ABA Model Rule 1.7 – a lawyer may represent two clients even if there is a conflict of interest if the lawyer reasonably believes that he can provide competent and diligent representation to both affected parties.

Immigration lawyers should have federal court litigation in their sights at the very outset of the representation as it is possible to altogether bypass the AAO upon denial and seek review in federal court. Under *Darby v. Cisneros*, 509 U.S. 137 (1993), exhaustion of administrative remedies is not required when the agency's regulation does not mandate it, which is the case with AAO appeals. Still, judicial review may not always be the optimum strategy. If the administrative record is not adequately developed, then seeking administrative review may also allow the lawyer to supplement the record on behalf of the client. The lawyer must competently advise on the pros and cons of seeking judicial review over administrative review, which has been addressed in Administrative Review Versus Judicial Review When an Employment-based Petition is Denied. The lawyer may then proceed based on the client's wishes, and in immigration cases there will generally be two clients, after obtaining informed consent.

The immigration lawyer normally undertakes dual representation of the employer and the employee. Representing both employer and employee is permissible so long as the goals are aligned, which they normally are in the pursuit of an H-1B or L-1 petition by the employer on behalf of the foreign national employee. Under ABA Model Rule 1.7, even if there is a potential for conflict of interest, lawyers may represent both client so long as they provide competent and diligent representation to both. The risk for conflict may become more acute after a denial when one client may wish to seek judicial review while the other client doesn't. The lawyer must be able to manage such a conflict or withdraw from the representation of both clients.

Lawyers should objectively evaluate the pros and cons of federal court litigation with their clients. They must adequately communicate with the client, in accordance with ABA Model Rule 1.4, so that the client can give informed consent regarding whether to litigate in federal court or not. Most employer clients are hesitant to litigate because they may fear government retaliation. The lawyer should assure the client that the government does not have a policy of retaliating if the employer chooses to litigate. An employer may also be dissuaded from litigating because of potential adverse publicity. If the employer is gun shy about litigating, and the employee desires to litigate, a lawyer can resolve the conflict by having the beneficiary as plaintiff so long as the employer supports litigation and keeps the job open. Of course, the lawyer must research the case law in the circuit regarding whether the beneficiary can

serve as a plaintiff and also be prepared to face more resistance from the government if the beneficiary as opposed to the employer is the plaintiff.

One aspect of managing conflicts at the time of federal court litigation is determining who can pay fees involved in litigation? As noted, there are times when the foreign national beneficiary may wish to sue while the employer takes a back seat. In such cases, the employee wishes to pay the fee rather than the employer. As the APA potentially gives the beneficiary standing to seek review over a denied labor certification and H-1B, fee restricting rules such as 20 CFR 656.12(b) (concerning labor certifications) and 20 CFR 655.731(c)(9)(ii) (concerning H-1Bs) cannot thwart the foreign national's right under the APA to challenge the denial. Therefore, it may arguably not be a violation of these rules prohibiting the foreign national from paying the fee in the context of a law suit filed under the APA. This has been addressed in Can the Beneficiary Pay the Fee in Federal Court Litigation Challenging an H-1B or Labor Certification Denial?

Lawyers may also claim fees under the Equal Access Justice Act, which may give them the incentive to take on a case on behalf of a client who may not be able to afford to pay the fees. The EAJA authorizes the payment of attorney's fees to a prevailing party in an action against the United States absent a showing by the government that its position in the underlying litigation "was substantially justified." The engagement agreement should be able to address how fees under the EAJA will be addressed. A lawyer may have the client pay all the fees and then let the client get the EAJA fees if victorious in the action. Alternatively, the lawyer may charge no fee or a low fee, but the client agrees to give the EAJA fee to the lawyer. It must be clearly indicated in the engagement agreement when the lawyer will claim the EAJA fee and when lawyer will give back EAJA fee to client.

Here are some other nuggets regarding the ethics of financing litigation that might be useful for immigration lawyers. Pursuant to DC Bar Ethics Opinion 375 lawyers are generally free to represent clients who pay for legal services through crowdfunding. However, the lawyer must be mindful of the source of the funds because of the heightened risk in the event that the funds are obtained through illegal means. The lawyer may also wish to counsel the client about the risk of sharing confidential information to third parties funding the litigation. But when the lawyer directs the crowdfunding, the lawyer must be aware of the ethical rules relating to payment of fees by third parties,

management of client funds, communications with third parties, and fee agreements. Also note that under ABA Model Rule 1.8(e), a lawyer is prohibited from providing financial assistance to a client in contemplation of pending or contemplated litigation, except with respect to advancing court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter. With respect to indigent clients, lawyers may pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

The lawyer must be mindful of ABA Model Rule 1.1 regarding competence. If a lawyer knows that she is not competent to handle a federal litigation matter, she should associate with a lawyer who is competent to handle it. Rule 1.1, however, does not preclude new lawyers from handling a matter for the first time provided they become competent. Comment 2 to ABA Model Rule 1.1 is worth noting:

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Moreover, part of being a competent lawyer is to also be prepared to carry forward federal court litigation to completion. While most lawyers have been able to reverse an adverse decision through settlement with the Assistant US Attorney, some have had to be litigated to conclusion. While there are many reported cases of a district court judge overturning a denial, many district courts have also upheld USCIS denials. The lawyer should not take the position that because she is comfortable with only seeking administrative review with the AAO, she will not litigate, consider litigation or provide any advice regarding litigation. While a lawyer may stay within his comfort zone by not litigating, and can also limit representation under ABA Model Rule1.2(c), it is incumbent upon this lawyer to recommend client(s) to another counsel who will be able to

litigate the matter.

The lawyer may also have to get pro hac vice admission or get admitted in new jurisdiction. The lawyer must then not subsequently become administratively ineligible by failing to pay annual fees, either intentionally or inadvertently, or complying with CLE requirements in that jurisdiction. The lawyer can be sanctioned under 8 CFR 1003.102(f) for knowingly misstating his/her qualifications on a G-28 or EOIR 27/28.

There are other considerations prior to undertaking federal court litigation. The lawyer must check whether underlying basis of denied H-1B petition still exists. Has the job site changed so that the LCA is no longer valid (as one cannot do a Simeio amendment on a denied H-1B)? Is there still a job offer? Otherwise, the lawyer could be sanctioned under ABA Model Rule 3.1, non-meritorious claims, or Rule 11of Federal Rules of Civil Procedure (FRCP) if the factual contentions in a pleading do not have evidentiary support. However, if the facts change after litigation has commenced, such as the loss of the job, it may still be ethical to proceed with litigation as a successful outcome can impact positively impact the ability of the beneficiary to change status or to port to a new employer.

Finally, since immigration lawyers started filing APA actions in the past two years, most of the cases have settled favorably. After filing a complaint in federal district court, the case has often settled through the USCIS reopening the case and outright reversing the denial or through the issuance of another Request for Evidence. Still, it is not prudent to undertake federal court action with the objective to solely to settle as FRCP 42 only allows withdrawal if defendant has not filed any pleading. Otherwise, an action may be dismissed upon the plaintiff's request only by court order and on terms that the court considers proper. The lawyer must manage the expectations of the client in this regard, and charge appropriate fees to cover the entire duration of the court action rather than just the first phase in the hope that the case will settle.

While undertaking judicial review of denials, immigration lawyers must not just learn new rules, skills and procedures, but must also be cognizant of the ethical dimensions. This blog provides some pointers.