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

PERSONAL CONFLICTS OF INTEREST ARISING OUT OF THE ISRAEL-HAMAS WAR

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By Cyrus D. Mehta and Kaitlyn Box*

The escalating war between Israel and Hamas presents unique challenges for immigration lawyers who represent noncitizens from impacted areas.

One such ethical conundrum arises when a lawyer comes to know that a current or prospective client holds views about the conflict that the lawyer strongly disagrees with or even finds repugnant. A lawyer whose family member was killed in the October 7th attack might not wish to represent a client who expresses support for Hamas, while a lawyer whose relative was killed or injured in the recent Israeli Defense Force (IDF) airstrikes in Gaza may not feel comfortable representing a former IDF soldier who expresses a lack of regret at the loss of lives of children and wants to apply for adjustment of status. Under some circumstances, a lawyer will have a personal conflict of interest if there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected because of the opposing views between the lawyer and the client.

Because immigration lawyers are responsible for bringing in a client into the US or allowing the client to remain in the US, the personal conflict becomes more enhanced if they find the client's views or conduct objectionable.

Pursuant to Model Rule 1.7(a)(2) of the American Bar Association (ABA), a lawyer shall not represent a client if a concurrent conflict of interest exists because "there is a significant risk that the representation of one or more clients will be materially limited by…a personal interest of the lawyer". While the ABA provides model rules of professional responsibility, lawyers should refer to the analog of these rules in their own state bars that are binding on them.

Thus, a lawyer who feels uncomfortable representing a client due to the client's views on the conflict need not do so, and can decline the representation. On the other hand, a lawyer need not shy away from representing a client, however objectionable the conduct may be, so long as there is a legal basis to represent the person.

If a lawyer realizes that a personal conflict of interest of this type exists with a current client, the lawyer can still withdraw from the representation of a client whose views or activities she finds reprehensible under ABA Model Rule 1.16(b)(4), which permits withdrawal if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement". Alternatively, a lawyer may withdraw from representation under ABA Model Rule 1.16(b)(7) if "other good cause for withdrawal exists", which could include a fundamental disagreement with a client's stance on, or activities related to, the conflict.

In other circumstances, though a lawyer may wish to represent, or continue representing a client, even though a personal conflict exists. A lawyer who finds herself in this situation may seek a waiver of the conflict under ABA Model Rule 1.7(b), provided that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law....", and the client provides consent. For example, a lawyer who finds protests opposing Israel objectionable may be representing a foreign student in F-1 status who has vehemently protested against the Israeli invasion of Gaza without expressing any sympathy for the victims of the Hamas attack on October 7, 2023. If the student client was involved in a protest that resulted in a physical altercation with an opposing group of protestors, he could be charged with assault, potentially a removable offense under INA § 237(a)(2)(A)(i). The lawyer can inform the student that she finds the student's conduct repugnant but may still be able to competently and diligently represent the student by advising his criminal defense lawyer to negotiate the assault charge to a disorderly conduct offense, which will likely not have deportation consequences. On the other hand, the lawyer can inform the client that she will not be able to justify the student's conduct in a press briefing or interview on behalf of the client because she disagrees with his conduct and finds it repugnant. If the client agrees to this sort of limited representation, the lawyer can represent the client competently and diligently notwithstanding this limitation. However, if it is important for the lawyer to be

available to defend the student's actions in the media as that might get the client a better deal with the prosecutors, and the lawyer is unable to handle media interviews on behalf of the client, then this potentially creates a non-waivable conflict and the lawyer must withdraw.

Immigration lawyers may also find themselves representing noncitizen students in F-1 visa status who are facing other immigration-related consequences as a result being involved in protests or making statements about the conflict. University of Pennsylvania President Liz Magill recently resigned after appearing to evade a question asking whether students who called for a "genocide of Jews" should be punished. This episode demonstrates terminology can be misunderstood, and how easily it could potentially ensnare a foreign student in F-1 status. While the term 'intifada' could mean an 'uprising' or 'shaking off' (see here and here), it could also be understood as violent resistance tantamount to "genocide", as illustrated by the Congressional hearing before Congresswoman Stefanik during which Magill and other university presidents testified. As we explained in our prior blog, there is a potential for troubling consequences for a noncitizen leader of a student organization who speaks out about the conflict in a way that seems to endorse terrorist activity. A student who is on an F-1 visa could be found inadmissible under INA § 212(a)(3)(B)(i)(IV)(bb) as a representatives of "a political, social, or other group that endorses or espouses terrorist activity". INA 212(a)(3)(B)(v) defines "representative" as "an officer, official, or spokesman of an organization, and any person who directs, counsels, or induces an organization or its members to engage in terrorist activity". INA 237(a)(4)(B) also renders a noncitizen who is described in INA §212(a)(3)(B) and INA § 212(a)(3)(D) removable. Similarly, INA § 212(a)(3)(B)(i)(I) renders inadmissible noncitizens who "have engaged in terrorist activity", which can include commission of "an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training" to a terrorist organization. If a student who has been ensnared under these provisions seeks the assistance of an immigration lawyer, the lawyer must first examine whether they would be able to objectively represent this individual. An attorney who has relatives still being held hostage by Hamas, must evaluate whether his objectivity in representing the client would be

compromised under ABA Model Rule 1.7(a)(2).

Immigration lawyers should also be aware that not all personal conflicts can be waived. If the representation will result in a clear violation of the rules of professional conduct or other law, ABA Model Rule 1.16(a)(1) obliges the lawyer to withdraw. Regardless of whether a lawyer wishes to withdraw from representation under ABA Model Rule 1.16, or is required to do so, the lawyer must seek the permission of the tribunal to withdraw when the matter is before the tribunal. Moreover, upon termination of representation the lawyer must take all reasonable steps to protect the client's interest including giving reasonable notice, allowing time for the client to retain another counsel, surrendering papers and property to which the client is entitled to and refunding any unearned fees.

In screening for potential personal conflicts, immigration lawyers should be mindful of ABA Model Rule 8.4(g), which sanctions conduct that constitutes harassment or discrimination based on certain protected grounds related to the practice of law including race, sex, religion, national origin, ethnicity, disability. Age, sexual orientation, gender identity, marital status or socioeconomic status.

A lawyer who broadly declines to represent clients of a particular nationality or ethnicity, or applies additional screening procedures to only these clients, faces the risk of being sanctioned under Rule 8.4(g). Lawyers who engage in discriminatory conduct can also be sanctioned under the state analogs to Rule 8.4(g). Rule 8.4(h) of New York's Rules of Professional Conduct, for example, broadly allows for the discipline of a lawyer who "engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer". A New York lawyer who threatened to report restaurant employees who were speaking Spanish to ICE in 2018 was censured under NY Rule 8.4(h).

*Kaitlyn Box is a Senior Associate at Cyrus D. Mehta & Partners PLLC.