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EMERGING ISSUES IN DUAL REPRESENTATION AND UNAUTHORIZED PRACTICE OF LAW

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This outline addresses emerging issues in two important areas affecting immigration practice: Dual Representation and Unauthorized Practice of Law. Although the two areas are unrelated, they are both very relevant to immigration practitioners, who may be interested in keeping abreast with recent developments.

A. DUAL REPRESENTATION

The practice of immigration law invariable involves dual representation. Immigration attorneys represent the employer and employee, or the spouses in a marriage. Each time there is a new law or rule, it must be viewed through the prism of dual representation. So long as the objectives of the co-clients are aligned, it is ethical for a lawyer to represent multiple clients provided that he or she obtains the informed consent from the co-clients regarding the limitations of dual representation. Dual representation implicates the lawyer's fiduciary duty of loyalty toward the client. It also implicates the lawyer's duty to keep all information confidential. In dual representation, unless previously agreed upon, there can be no secrets between the two clients.

ABA Model Rule 1.7 titled *Conflict of Interest: Current Clients,* provides the ethical basis for representing multiple clients:

a) 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:

- the representation of one client will be directly adverse to another client; or
- 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.

b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- 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;
- the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- each affected client gives informed consent, confirmed in writing.

In contrast, New York Code of Professional Responsibility Disciplinary Rule 5-105 (C) states:

….. a lawyer may represent multiple clients if a disinterested lawyer would believe that a lawyer can competently represent the interest of each and if each consents after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

Theories on Dual Representation within the Immigration Bar

Dual representation is generally the favored approach within the immigration bar. While it may be ideal for each co-client to be represented by a separate attorney, it would be impractical and unworkable in immigration practice as both clients generally share a common objective. The immigration attorney forms a lawyer-client relationship with both the petitioner and beneficiary.[1] The lawyer is expected to remain loyal to both clients. If a conflict develops, the lawyer could attempt to resolve the conflict, and if it cannot be resolved, he or she is expected to withdraw from the representation of both clients. Some attorneys attempt to avoid dual representation by assuming one of the parties, frequently the employer, to be the client, by what has come to be known as the "Simple Solution." The Simple Solution may not always be so simple since a lawyer client relationship can start so long as there is an expectation that the

individual is being represented.[2]

This writer has proposed a third approach, called the "Golden Mean."[3] While acknowledging dual representation, the Golden Mean assists the lawyer in recognizing conflicts in advance of the representation. A careful evaluation of potential conflicts enables the lawyer to limit representation or waive conflicts in advance. Limiting the representation may minimize the potential for conflict. If a conflict does arise, the fact that the lawyer has contemplated the conflict in advance may ethically enable him or her to continue to represent both, or one of the clients, rather than completely withdraw from the representation.[4]

Examples of Dual Representation in Contemporary Immigration Practice

Employer must pay the costs of labor certification

Pursuant to 20 CFR § 656.12(b), employers must pay the costs of labor certification, including preparing, filing and obtaining certification. Under this provision, the sponsored beneficiary for labor certification cannot pay the attorneys' fees from July 16, 2007 onwards. Nor can the beneficiary pay any of the costs associated with a labor certification application, such as advertisements.

The rule also states, "An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, except that were the same attorney represents both the alien and the employer, such costs shall be borne by the employer. "This should not be viewed as a green light for the attorney to only consider himself/herself to be representing the alien. A DOL FAQ on the rule clarifies that "attorneys may represent aliens in their own interests in the review of a labor certification (but not in the preparation, filing and obtaining of a labor certification, unless such representation is paid for by the employer), and may be paid by the alien for that activity."[5] Unless the employer corporation has its own independent attorney representing it specifically for purposes of preparing and filing the labor certification, the alien cannot pay the fee towards the attorney, who in a dual representation situation, will also be implicitly representing the employer. For purposes of this rule, payments include, but are not limited to monetary payments; wage concessions, including deductions from wages, salary, or benefits, kickbacks, bribes, or tributes; in kind payments; and free labor.

Although 20 CFR § 656.12(b) insists that the employer pays the attorney's fees, it does not eliminate the attorney's ability to also represent the foreign national employee. Indeed, the sponsored beneficiary will need to be advised on the various issues and pitfalls of the labor certification. Yet, the joint representation is fraught with conflicts, and it is important for the attorney to advise the co-clients about the various conflicts. One commentator has wryly observed: "Joint representation of the employer and employee in a search for a U.S. worker to fill the foreign national's position suggests, if not a conflict of interest, a contortion of interest, although by now the immigration bar is used to the contortions undertaken by all parties in order to appropriately manage the labor certification process."[6]

Representation after job termination

Recently, in *Amtel Group of Florida v. Yongmahapakorn*,[7] the DOL Administrative Review Board underscored the importance of the employer's obligation to effectuate a "bona fide termination" through formal notice to the USCIS[8] and payment for return transportation home. Otherwise, the employer would be liable for back wages and other penalties until the bona fide termination took effect.[9] At issue is whether the attorney can continue to represent the employer after the termination of the H-1B employee, including informing the USCIS about the termination, which might result in the revocation of the H-1B approval. While the H-1B status of beneficiary lapses at the point of termination, revocation of the petition might hinder the beneficiary's ability to "port" to another employer.[10]

If the Simple Solution approach was successfully adopted, only the employer would be considered as the client and there might not be any conflict if the attorney continues to advise the employer about its obligation under *Amtel Group of Florida*.[11]

Under the dual representation approach, this could be viewed as a conflict and another attorney may have to step in each time the employer client terminates an employee. Under the Golden Mean, if this conflict was predicted in advance, it might not be necessary for the attorney to withdraw from representing the employer, with whom it has extensive contact, if both the co-clients had been informed of this situation and their consents had been obtained.[12]

Representing Both a Petitioning Employer and a Beneficiary Employee When An Employee "Ports" To New Employer Off An Unadjudicated I-140 Petition

A unique ethical conundrum arises when the foreign national employee leaves and "ports" to another employer while the I-140 petition is still unadjudicated and the adjustment application has been pending for more than 180 days.[13] If the USCIS issues a Request for Evidence (RFE) on the employment-based I-140 petition, the original employer would still need to respond even though the employee has left, and perhaps, the employer has no interest in hiring him or her back. In the event that this employee left the employer acrimoniously, the employer would not have any incentive to respond to the RFE, while the employee would clearly have a deep interest in the employer responding to the RFE.

The attorney who has represented the employer and employee will truly be caught in a conflict. A complete withdrawal will likely make matters even worse, especially for the employee. The new attorney for the employer (who has never had the employee as a client) will have every reason to even more rigidly refuse any cooperation to the departed employee. The employee, through the new attorney, may aggressively assert an interest in the unadjudicated I-140 petition and demand that the employer continue to assist in the "portability" endeavor.

On the other hand, if the original attorney, who may be more in contact with the employer as a client, had predicted the conflict in advance, the employee would have less of an expectation for continued representation after the termination. In fact, the prudent way to handle this conflict would have been to obtain advance or contemporaneous waivers from both the employer and employee client and also limit the representation with respect to both. The waiver with the employee would allow the attorney to cease representation upon termination and provide no assistance with regards to the portability endeavor, and require the foreign national to seek new counsel in that regard. The waiver with the employer would allow the attorney to provide limited cooperation with the employee's new attorney in providing the notification of the RFE, if requested. The attorney, who is now only representing the employer, will have minimal involvement since the Yates Memo on AC21 portability, most fortunately for the employee, indicates that the examiner needs to adjudicate the I-140 from an employee-centric analysis rather than an employer-centric analysis.[14] Thus, the employer's ability to pay, or the existence of other

corporate changes, will no longer be considered in determining whether the I-140 is approvable and the analysis will focus more on the employee's qualifications for the position stated on the labor certification. The original attorney thus becomes an intermediary in the dispute.

By staying with the employer client, the original attorney may have safeguarded the employer's interests (and benefited the employee) – in anticipation of a novel claim from the employee of having an interest in the unadjudicated I-140 – by providing limited cooperation to the employee's new attorney in responding to an I-140 RFE focusing on the employee's qualifications, and still cease representation of the employee client. Unlike the H-1B situation, there is no obligation for an employer to withdraw the I-140 petition upon termination, especially when the employee may be eligible for portability, and yet if the employee held H-1B visa status, the original attorney would have also effectuated a bona fide termination by withdrawing the H-1B petition pursuant to *Amtel Group of Florida v. Yongmahapakorn*.[15]

Representation when spouses are in conflict

In the family immigration context, the attorney may be approached by a foreign national spouse to file an I-751 petition to remove the conditions on her permanent residence. She informs the attorney that the marriage, although bona fide, is shaky and that her U.S. citizen spouse may be initiating divorce proceedings against her. He remains willing, however, to file a joint I-751 petition to remove the two year conditional requirement on her permanent residence. She is concerned that if her conditional residency expires, she would lose her job. Since there is no cruelty involved, her best chance to file a waiver of the joint filing requirement is if the marriage has already terminated.[16] She can only file such a waiver after the marriage has been terminated. The final divorce will take many months, long after her conditional residency status has expired.[17] The attorney may undertake to jointly represent both the husband and the wife in a joint I-751 petition to remove the wife's conditions on permanent residence, and inform the husband that should the marriage dissolve the attorney will continue to represent the wife in a second waiver of the joint filing requirement to remove the conditions on her permanent residency.[18]

Below are two New York bar opinions pertaining to handling conflicts between

spouses, which may be applicable to other dual representation conflicts too:

N.Y. State Bar Op. 761[19]

New York State Bar Opinion 761 suggests the Simple Solution, where a lawyer can structure the relationship in such a way that the wife is considered the sole client from the outset on an I-130 petition. The citizen or permanent resident spouse sponsors an alien spouse by filing Form I-130 with the United States Citizenship and Immigration Services (USCIS). Although the petitioning spouse signs off on the I-30 petition, this opinion allows the alien spouse to be treated as the sole client so long as the lawyer explains to both the husband and the wife that the wife is the sole client and the his loyalties are to the wife alone. In the event that the wife then shares confidential information about abuse by the petitioning spouse, and wishes to proceed in filing a battered spouse self-petition (Form I-360), the lawyer would be under no obligation to reveal this information to the husband.

The opinion also explores the possibility of the attorney taking on joint representation similar to the Golden Mean, but the attorney sought consent from the husband to future conflicts, and it would then be possible to represent only the wife in filing the I-360 battered spouse petition. While this opinion, based on the facts presented, acknowledges that it was not possible to terminate the representation of the abusive husband unless he understood that the future conflict would include an allegation of abuse to support the wife's self-petition, the following extract, which supports advance waivers among non-experienced users of legal services, is worth noting:

A client's consent to future conflicts is "subject to special scrutiny" (citation omitted). The clients' advance consent must be to a conflict that is consentable and the consent must be informed. The future conflict must be described "with sufficient clarity so the client's consent can reasonably be viewed as having been fully informed when given" (citation omitted).

NY City Bar Op. 1999-7[20]

In a dispute, where the wife accuses the husband of domestic violence, the husband cannot ask for the "entire file" concerning the wife's immigration status. According to this opinion, since the attorney is bound by a duty of loyalty toward both clients, absent any prior agreement designating only one

spouse as the client, [21] one co-client cannot use the lawyer against the other co-client in the event of a dispute.[22]

B. UNAUTHORIZED PRACTICE OF LAW

There are several unique issues pertaining to immigration practice that can lead to the Unauthorized Practice of Law (UPL). This section focuses more on the pitfalls that licensed attorneys that may unwittingly subject them to accusations of UPL.

Attorneys in non-profits

A recent decision from the Texas Court of Appeals, *Raul Garcia v. Commission for Lawyer Discipline*, No. 03-05-00413, slip op., 2007 WL 2141246 (Tex. App. July 26, 2007) (unreported) could impact immigration attorneys employed by nonprofits, especially if they charge fees. In *Raul Garcia*, the immigration attorney, a member of the Texas bar, was found to have engaged in a fee-splitting arrangement with a non-lawyer and practicing under a trade name. If a non-profit obtains recognition or accreditation from the Board of Immigration Appeals under 8 C.F.R. § 292.2, it will likely escape scrutiny.[23] The non-profit in *Raul Garcia* was not accredited with the BIA. *Raul Garcia* was also limited to the narrow facts of the case since the nonprofit was previously investigated for UPL. Furthermore, the issue of whether legal services could be performed under the supervision and control of a member of the Texas bar was not considered relevant in the context of the summary judgment issued by the court below, which was upheld by the Texas Court of Appeals.

The key to understanding the impact of this decision is to read *Touchy v. Houston Legal Foundation*, 432 S.W.2d 690 (Tex. 1968), cited in footnote 8 of *Raul Garcia*, which contrasts a non-profit corporation that is "directly representing clients as an attorney by signing pleadings in its name, or by appearing for such clients through its employees," which would constitute UPL, with "a legal aid society which acts merely as a conduit or intermediary to bring the attorney and client together," which would not.

In *Azzarello v. Legal Aid Society of Cleveland*, 117 Ohio App. 471, 185 N.E. 2d 566 (1962), discussed in *Touchy v. Houston Legal Foundation*, a legal aid society organized as a corporation was challenged on the grounds that it engaged in the unauthorized practice law in providing legal aid to the indigent in criminal

cases and legal services to the poor in civil cases. The following extract from the court's opinion is worth noting:

We come, therefore, to the question of whether or not the Legal Aid Society and its Legal Aid Defender Department in referring indigents to lawyers working on a retainer or under a salary arrangement with the Society is engaging in the unlawful practice of law. At the very outset it must be observed that no benefit can be or is expected by or can possibly result from the legal service rendered to indigent persons to the Society, nor is any such benefit intended. The procuring of counsel in a proper case is the performance of a needed public service. The Society does not act as an intermediary in procuring the services of a lawyer for a person in need of such service who is unable to pay therefore or to respond to the full extent in payment of the value of the services rendered. The lawyer who renders the service for the indigent person is his lawyer, the relationship is that of attorney and client to whom the lawyer owes the same fidelity as if the client was able to pay the proper fee and the client had engaged the services of the lawyer himself.

Another line of judicial rea soning provides limited protection to bona fide nonprofit public benefit corporations under the First Amendment of the U.S. Constitution. *Frye v. Tenderloin Housing Clinic, Inc.*, 38 Cal.4th 23 (Cal. 2006). Relying upon the U.S. Supreme Court's decision in *NAACP v. Button*, 371 U.S. 415, 428-431, 83 S.Ct. 328 (1963), *Frye* held that the First Amendment limits a state's ability to curb the associational and expressive rights of attorneys, members and supporters of these groups to employ litigation to pursue their objectives. *Frye*, 38 Cal.4th at 42-43. The *Frye* court noted that the public policy underpinning of making justice accessible to all of society trumped state rules prohibiting UPL, which were traditionally aimed at preventing those who maliciously sought to use the legal process for private gain. *See also In re Community Legal Services, Inc.*, 43 Pa. D. & C.2d 51, 61-62, 71 (1967) (relying on the First Amendment to protect the incorporation of a non-profit corporation that was dedicated to protecting the interests of the disenfranchised, particularly low income individuals).[24]

Multi-Jurisdictional Practice

One of the thorniest issues involves the ability of an immigration lawyer who is licensed in one state to practice federal immigration law in another state. While different states have grappled with this issue, the following two cases exemplify

what California and New York consider to be the unauthorized practice of law. In *Birbower, Montalbano, Condon & Frank P.C. v. Superior Court, 17 Cal. 4th 119, as modified at 17 Cal 4th 643a, cert. denied,* 119 S. Ct. 291 (1998), a New York law firm was not entitled to recover part of its fees for services rendered to a California client because the firm had engaged in the unauthorized practice of law in California. The New York law firm advised a California client regarding California laws in connection with arbitration proceedings to be held in California without involving local California counsel. This was in violation of §6125 of California Business and Professional Code.

In contrast, the New York Court of Appeals held in *El Gemayal v. Seaman,* 72 N.Y.2d 701 (1988) that the lawyer in question did not engage in the unauthorized practice of law. In that case, a Lebanese lawyer rendered advice to a New York client only by telephone and never traveled to New York except to return some personal items and discuss fees. The court held that he was not engaged in the unauthorized practice of law because his physical presence in NY was "incidental and innocuous". Conversely, a New York attorney may represent a client residing in Florida to draft estate planning documents in association with a Florida counsel to ensure that the documents comply with Florida law.[25] While the Nassau County Bar in New York stated that it had no jurisdiction to answer the questions of Florida law regulating the "practice of law," the attorney's conduct passed muster under New York's DR 3-101(B)[26] in light of " in light of (1) the implicit understanding that the Inquiring Attorney is not extensively consulting with and advising while meeting the client in Florida to perform these services, (2) the attorney is consulting with duly admitted Florida counsel to review the documents for compliance with Florida law, (3) the attorney will fully disclose these facts and arrangements to the client who is paying for these services, and (4) our view of New York law and ethics on this subject."[27]

In 2002, the ABA adopted Model Rule 5.5, which focuses on the unauthorized practice of law and multi-jurisdictional practice, and makes it easier for lawyers to practice in other states if their practice there is temporary. So long as the lawyer does not hold him/herself out as a licensed attorney in the jurisdiction, the lawyer can provide temporary services if: (1)he/she provides them in association with a lawyer admitted in that jurisdiction; (2) the services are related to a pending proceeding in which the lawyer or an associated lawyer

are authorized to appear; (3) the services are related to arbitration or mediation, are related to his/her practice and do not require *pro hac vice* admission; or (4) the services arise out of or are related to the lawyer's current practice.[28] Model Rule 5.5 also provides leeway to lawyers working in-house for corporations or working on federal matters.[29] The jurisdictions that have adopted ABA Model Rule 5.5 are Arizona, Arkansas, Colorado, Delaware, the District of Columbia, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Utah and Washington.[30]

The best argument for immigration lawyers is that state restrictions ought to yield to federal law. According to 8 CFR §§ 292.1(a)(1) and 1.1(f), an immigration lawyer who "is a member in good standing of the bar of the highest court of any State, possessing territory, Commonwealth, or the District of Columbia, and is not under any order of any court suspending enjoining, restraining, disbarring or otherwise restricting him in the practice of law" to represent a person before the relevant federal agencies responsible for administering or enforcing federal immigration law.[31]

The only analogous decision is *Sperry v. Florida*, 373 U.S. 379 (1963). There, the Supreme Court held that Florida may not prohibit a non-lawyer from performing within the state tasks which are incident to the filing and the prosecution of patent applications before the US Patent Office. Although *Sperry v. Florida* involved a non-lawyer, the Court held that 35 U.S.C. § 31, explicitly permitted a non-lawyer to practice before the Patent Office.

In 2002, a New York licensed lawyer who had set up a solo immigration law practice in Houston was targeted by Texas' UPL committee. This attorney argued that even though she did not have a Texas license, her practice was limited to immigration and nationality law before the former Immigration and Nationalization Service and US immigration courts. The Houston UPL sub-committee argued that the practice of immigration law was commingled with other areas of state laws such as divorce and criminal law.[32] It was subsequently reported that the UPL committed dropped the law suit against this attorney, who in turn dropped a counter-suit in federal district court against the UPL committee for violating her civil rights.[33]

A few states have published opinions on UPL in the context of immigration law, which are excerpted below:

Virginia UPL Opinion 55[34]

It is not the unauthorized practice of law for an attorney, not licensed in the Commonwealth of Virginia, to maintain an office in Virginia for a practice limited exclusively to United States Immigration and Nationalization matters. *See* Rule 6.1 – 9 of the Rules of the Supreme Court of Virginia.

With regard to the attorney's stationary, the UPL Committee is of the opinion that so long as the descriptive limitations with regard to the extent of the practice are contained on the letterhead, the letterhead is appropriate.

Texas Opinion 516[35]

It is assumed that representing clients in Texas solely on issues or matters before the US Immigration and Naturalization Service and in federal courts would not constitute the unauthorized practice of law in Texas. However, any such representation that also involves advice or other legal services relating to matters of Texas law would not be within the scope of this assumption and may, depending on the circumstances, constitute the unauthorized practice of law in Texas.

A licensed Texas attorney who employs an out-of-state attorney is subject to discipline under Texas Disciplinary Rule 5.05(b) if he or she aids or assists an out of state attorney in providing legal services to clients in Texas that would constitute the unauthorized practice of law.

Article on 'federal law only' exception in Oregon

In an insightful article by an Oregon bar counsel, George Riemer, *Limited Practices – Is there a 'federal law only' exception to the Oregon bar examination*,[36] the following tips to setting up a 'federal practice' without being admitted in the state are worth noting:

1. Carefully review the legal basis for a claim of right to practice 'federal law.' Is it bankruptcy law, federal tax law, Social Security law, patent and trademark law, immigration and naturalization law or some other area of federal law? Each category of a claimed 'federal practice' has its own set of governing statutes, rules and regulations. If a lawyer seeks to rely on the holding in *Sperry*

v.Florida, 373 U.S. 379, 10 L.Ed.2d 428, 83 S.Ct. 1322 (1963) to establish a 'federal law' practice in a state he or she is not licensed in, the lawyer needs to comply with and stay within the parameters of the applicable federal law, rules and regulations.

2. Carefully review the courts' rulings in *In re Desilets*, 247 B.R. 660 (Bankr. W.D. Mich 2000), aff'd, *Rittenhouse v. Delta Home Improvement, Inc.*, 255 B.R. 294 (W.D. Mich. 2000). These cases are a strong basis for concluding that an out- of-state lawyer cannot set up a bankruptcy practice in a state he is not licensed in even if the lawyer is admitted to the bar of the federal court in that state.

3. Eschew consideration of any state law issues in a contemplated 'federal law' practice. As pointed out in the cases cited in 2, above, that may not be possible. If it is not, the lawyer needs to take and pass the bar examination in that state. If it is, the lawyer should consider making full disclosure and obtain each client's consent to this limitation on the advice and assistance the lawyer intends to provide. The disclosure should include the recommendation that the client consult a lawyer licensed in the state in question for advice on any applicable state law issues.

4. Scrupulously avoid any misleading advertising or other practice identifiers such as office signs, business cards and letterhead. 'Practice limited to U.S. Immigration and Naturalization matters only; Licen