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Dual Representation

Introduction

The path to legal status in the United States is in most cases is based upon the dependence of one party upon another, whether in employment or family based situations. Self-sponsorship in immigration matters is the exception and not the rule; thus, dual representation is for most immigration practitioners a necessary evil.

In the daily life of an immigration lawyer, most cases involving dual representation continue to their happy conclusion without a glitch. Every day, the majority of our clients receive their H-1B, labor cert, visa petition, or permanent residency with a minimum of heartache; however, when problems in a dual representation situation do arise, they can bring to bear devastating consequences for the attorney and client alike.

Rules of professional conduct do not directly address dual representation except in the context of conflict of interest. Dual representation is not outright prohibited under most rules, in recognition of the myriad of legal transactions in which two or more parties can proceed with one legal counsel toward a common end: partnerships, adoption, family wills, joint ventures, and, of course, visa petitions. Rules of professional conduct do treat conflict of interest seriously and expect that attorneys faced with a conflict of interest be able to immediately recognize the conflict and take remedial action.

Dual Representation and Professional Responsibility

There are certain basic duties that a lawyer owes the client. These responsibilities are common to most professional conduct codes and form the foundation of the attorney-client relationship. A lawyers professional responsibility to each client may be affected by the nature of the multiple-party representation in that the duty owed to each client may be complicated or, in some cases, compromised when more than one client is represented in a single matter. The professional responsibilities that are most obviously affected are:

- **Loyalty** The duty of loyalty is mentioned foremost in the comments to the conflicts rule in both the ABA Model Rules and the Texas Rules of Professional Conduct. A duty of loyalty to a client demands that the attorney remain faithful to the interests of the client above all others. When a conflict of interest develops in a dual representation, it is the duty of loyalty that requires an attorney to forego the representation of either client. When the clients' interests become directly adverse or even detrimental to each other, rather than betray the loyalty to one client over the other, the attorney must withdraw and refer each client to a separate lawyer who can remain completely loyal to thee client's new interests.
- **Confidentiality** Every attorney is bound to safeguard client confidences. Because of the presence of another client in the traditional attorney-client relationship, the confidentiality of communication in a dual representation is no longer a guarantee. The attorney may continue to keep the information confidential, but each client may use any information garnered during the representation however he or she sees fit.

- **Privilege** The privilege associated with attorney-client information belongs to the client and can only be waived by the client. The matter of privilege is greatly complicated with dual clients, each claiming privilege over information gathered in the course of the representation. The potential exists in a dual representation for an attorney to one day be called to testify about the representation, to the benefit of one client and the detriment of the other, while privilege is properly waived by the one of the clients.
- **Communication** An attorney must keep a client reasonable informed about the status of the case. In many dual representation scenarios, however, the temptation is ever-present to deal exclusively with one party over the other. In addition, it is often more time-efficient to relay information to one client with the expectation that he or she will in turn relay the information to the other client. Regardless of the best intentions of an attorney to streamline communications, the end result can be that one client is vastly more informed about the proceedings than the other. The less informed client may feel aggrieved, as was the situation in the attached case, *DePape v. Blumenfeld*, 242 F.Supp 2d 385 (N.D. Iowa, 2003).

Other Considerations in Dual Representation

Other factors complicating the dual representation situation are not directly related to the lawyer's professional responsibilities. These factors should nonetheless be kept in mind when undertaking cases where dual representation will be necessary so as to understand and anticipate points where conflict can arise:

- ***Sophistication of the parties*** Not every case involves two clients with the same level of familiarity with the U.S. legal system. In employment-based cases, especially, it is probable that the U.S. employer has had extensive experience in immigrating non-citizen employees. In the situation where one client is clearly more savvy about immigration proceedings, it may be necessary to devote more attention to explanations to the less experienced client to avoid any misunderstanding about the process.
- ***"Power balance" between the clients*** Whether in family-based or employment-based cases, there may be a perception between the clients that one party (usually the petitioner) is in a better position than the other (usually the beneficiary). This inherent imbalance of power in the relationship, whether real or apparent, may be further complicated by the matter of who is paying the fee for the attorney's services. It is best practice to assure each party in the representation that the attorney gives each client equal importance in the matter at hand.
- ***Inability to understand the lawyer's role in the representation*** Clients involved in a dual representation, even if experienced and educated, may not be able to comprehend the lawyer's restricted options in the event of a conflict of interest. The nature of dual representation, the possibility of conflict of interest, and the lawyer's responsibility to each client should a conflict arise must be explained to each client at the outset of the representation. If caught unawares after a conflict has arisen, a client may feel confused and aggrieved at the remedial actions taken by the attorney.

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