

Dual Representation of Spouses and Ethical Pitfalls

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Miki Matrician is Partner at WR Immigration and is Co-Managing Partner of WR's Boston office. Her practice focuses on managing all aspects of employment-based immigrant and nonimmigrant cases for multinational corporations, high tech companies, startup entities, hospitals, and nonprofit organizations. Having experienced the immigration process herself, Miki strongly believes that educating clients and providing transparency regarding the labyrinthian process is empowering for her clients and is as important as executing a comprehensive and carefully considered immigration strategy. Miki is a frequent speaker at American Immigration Lawyers Association (New England). She has also presented at the Alliance of Business Immigration Lawyers (ABIL), Massachusetts Continuing Legal Education Center (MCLE), and Japanese business groups in Boston. She has also spoken at Boston College Law School and Suffolk University in forums relating to immigration law careers. She is a contributing author to MCLE's Immigration Practice Manual. Miki has been selected for inclusion in Best Lawyers in America® distinction in 2023. Previously, she was also selected as Best Lawyers' Ones to Watch distinction for 2021 and 2022 and Super Lawyers Rising Stars from 2013 to 2021.

Immigration law is an area of law that is unique in many ways – one of which is that dual representation is a fairly common model. Dual representation makes sense in immigration practice because it is practical for both petitioner and beneficiary to be represented by one attorney when their objective is the same. For each party to engage separate counsel is impractical, expensive, and inefficient when both clients' interests are aligned.

At the core of professional ethics are the duties of loyalty and confidentiality that attorneys owe to each client. In the dual representation arrangement, it is critical that attorneys proceed with sensitivity to the potential conflict of interests that may arise between the petitioner and the beneficiary. Here, we focus on conflicts of interest in the family-based immigration context.

The attorney owes the highest duty of loyalty to *current* clients.

American Bar Association (ABA) Model Rule 1.7: Conflict of Interest:

Current Clients covers any client matter to which representation of another client is directly adverse, or any situation that presents a substantial risk that the lawyer's representation of one

client would be materially limited by the lawyer's duties to another client, former client, third party, or lawyer's personal interests.

- (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:
 - (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.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) 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
 - (4) each affected client gives informed consent, confirmed in writing.

As compared with the duty to current clients, the duty to former clients is less stringent under ABA Rule 1.9: Duties to Former Clients. For former clients, the attorney is conflicted out of a case only if the conflict is for the same or a substantially related matter.

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Often in conflict situations, ABA Rule 1.6: Confidentiality of Information comes into play. That rule provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
- (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 - (4) to secure legal advice about the lawyer's compliance with these Rules;
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - (6) to comply with other law or a court order; or
 - (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

If a conflict cannot be resolved in accordance with ethical rules, the attorney must withdraw from representing either client.

We provide some practice pointers in dealing with ethical conundrums in family immigration practice.

REPRESENTATION WHEN SPOUSES ARE IN CONFLICT

In a family immigration situation, the attorney may first be approached by a foreign national spouse who is in a troubled marriage with a U.S. citizen spouse. While there may be marital discord, let us assume there is no cruelty that would render her eligible to file an I-360 self-petition as a battered spouse. Even though the marriage is shaky, it was still bona fide at its inception, and so long as both spouses continue to share a common immigration objective, it may be ethically

permissible for the attorney to represent both husband and wife in filing an I-130 petition and a concurrent I-485 application for adjustment of status.¹

Various outcomes can be predicted. The marriage may break down and terminate prior to the grant of adjustment of status, which would result in the invalidity of the I-130 and I-485 applications. The spouse would then need to be advised of other options independent of the US citizen spouse's involvement. The parties, on the other hand, may continue to be married and the spouse may successfully obtain permanent residence, and if the marriage remains intact, the spouses will file the I-751 jointly. Or the marriage may break down and terminate (and there might now be instances of cruelty) at some point after the spouse gets conditional residence, which might require her to file the I-751 as a waiver of the joint filing requirement. Generally, in the case of marriage breakdown and termination, the rule of thumb is for the attorney to withdraw from the representation of both parties as there is a significant risk that the lawyer's representation of one client may become adverse to the other, or that the representation will become so materially limited because of the lawyer's responsibilities to the other client.

Can the attorney who previously represented both the spouses as clients, still represent the foreign national spouse who may be indigent and lacks resources to afford a private attorney or is unable to easily find new pro bono representation? If the attorney obtains informed consent from the US citizen spouse to continue representing the spouse, there may be an ethical basis to only represent the foreign national spouse under limited circumstances.² The US citizen spouse might have even given advance informed consent to a future conflict that would enable the attorney to only represent the foreign national spouse, given that the marital discord was known and openly discussed. Note, though, that not all conflicts can be waived since the attorney still owes a duty of loyalty towards the US citizen client and cannot act in a way that would be adverse to that petitioner's interests. A client's consent is more likely to be upheld in a situation where the divorce does not involve allegations of cruelty (that might harm the client giving consent in the context of an I-751 waiver), and the US citizen spouse, even if the relationship has worsened, may still be

¹ As long as the parties had a bona fide intent to enter into a marriage, subsequent conduct after marriage, no matter how unconventional, does not prove lack of marital intent. *See Matter of McKee*, 17 I&N Dec. 332 (BIA 1980); *Bark v. INS*, 551 F.2d 1200 (9th Cir. 1975).

² Readers would profit from studying N.Y. State Bar Op. 761, available at www.nysba.org, which dealt with a situation where the attorney filed an I-130 petition, and after the marriage broke down as a result of cruelty, wanted to know whether he could represent the battered spouse in an I-360 self-petition. The NY State Bar ethics committee opined that the representation could have been structured in such a way that the foreign national spouse could have been the attorney's sole client at the time of filing of the I-130 petition. Alternatively, if there was joint representation, the ethics opinion advises that the U.S. citizen spouse could have consented to future conflicts, with the following caution: "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)."

While this is an interesting opinion, it would be difficult or impossible to assist the petitioner without representing that person. Rule 4.3 might allow for preparation of the form and signing as preparer, but would USCIS tolerate the lawyer not filing the G-28? If the G-28 is filed, then under the Restatement 3rd definition widely cited in case law, an attorney-client relationship would very likely be formed between the petitioner and lawyer. On the other hand, without a G-28, the repeated failure to submit a notice of appearance violates 8 CFR 1003.102(t). The second part of the opinion, though, regarding obtaining an advance waiver can be followed if the US citizen spouse has given informed consent to a future conflict.

interested in supporting his former spouse, especially when there are children involved. Even if the US citizen spouse becomes a former client, the practitioner should be mindful of Model Rule 1.9, which precludes an attorney from representing a client who had previously represented a client in the same or substantially related matter whose interests are materially adverse to the former client, unless the former client gives informed consent, confirmed in writing.

WHEN THE DERIVATIVE SPOUSE IS IN CONFLICT WITH THE PRINCIPAL SPOUSE

There may be situations in which the principal beneficiary of an I-130 or I-140 petition may not want the other spouse to file the I-485 application as a derivative. If the lawyer represented both spouses, the lawyer would be in conflict and should not exclude the other spouse from filing the I-485, or if the derivative's I-485 has already been filed, the lawyer should not seek to withdraw the derivative spouse's I-485. The derivative spouse may be able to file the I-485 or pursue the already filed application even without the consent of the principal spouse.

At the same time, the lawyer need not always withdraw from the representation of both spouses. In a situation where the principal is the employee who was sponsored by the employer on the I-140 petition, and the lawyer has also been representing the employer, the spouse may be advised to seek the assistance of independent counsel to file the I-485 application or pursue the application if already filed. The USCIS can be notified that the spouse is living separately from the principal and USCIS should send all notification relating to this spouse's application to separate counsel.

In a situation when the derivative makes contact with an attorney who was not representing the principal spouse, counsel would be able to file the I-485 even if the principal spouse has not consented. There may be challenges in obtaining information regarding the receipt number of the already filed I-485 application. Oftentimes, the derivative spouse may have access to some information regarding the filing of the principal's spouse, such as the receipt number, based upon which further information could be retrieved from the USCIS online case status portal. If the spouses are going through a divorce, immigration counsel can work with the client's matrimonial counsel to see whether proof of the principal spouse's I-485 filing can be obtained through discovery. If there is evidence of a pending I-485 application of the principal spouse, counsel representing the derivative spouse can file the I-485 even if the principal is not in contact with the derivative spouse.

The attorney has to evaluate the situation on a case-by-case basis. For instance, in the U visa context, a derivative spouse can remain as a derivative on a U visa even if the marriage has terminated.³ Thus, so long as the goals are aligned, the attorney can also represent the U derivative even if the relationship has terminated. Conversely, if the principal U visa applicant does not desire the derivative to have an application, the attorney should not be notifying the USCIS to withdraw the derivative's application. It would be more prudent for this attorney to refer the derivative U visa applicant to independent counsel who can then continue the representation and this attorney can notify USCIS that he or she has terminated the representation. But if the marriage is terminated prior to the issuance of U status, then the derivative spouse is no longer eligible for U visa status.

³ Pursuant to 8 CFR §214.14(h)(2)(D), U visa status is not automatically terminated if there has been a termination in the relationship, and the USCIS may revoke U visa status if the relationship has been terminated.

Major problems arise due to the long processing times. If the goals are aligned even if the marriage is no longer viable, but was bona fide at the outset, it may be appropriate to advise the spouses to delay the termination of the marriage until they get U visa status. This scenario can also occur when the marriage between the principal and derivative I-485 applicant is no longer viable. So long as the marriage was bona fide at the outset, and the goals of the clients remain aligned even if the marriage is not viable, it would not be unethical for the attorney to advise that the termination be delayed until the spouses obtain permanent residence.

RETURNING THE FILE WHEN THERE IS CONFLICT

ABA Model Rule 1.16(d) provides:

“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.”

If the lawyer has withdrawn from representation or been discharged by the client, it is imperative that the lawyer promptly return the file to the client. As the lawyer generally undertakes dual representation, and the lawyer is withdrawing from representing both clients, the lawyer provides the file to both clients. In *Sage Realty Corp v. Proskauer Rose Getz & Mendelsohn*, 91 N.Y.2d 30 (1997), the New York Court of Appeals held that a client has presumptive access to the attorney’s entire file except for two narrow exceptions, which include: (1) documents which might violate a duty of nondisclosure to a third party; and (2) “firm documents intended for internal law office review and use,” such as the attorney’s assessment of the case or preliminary impression for internal purposes.

If the two spouses are in conflict at the time of withdrawal, NY City Bar Op 1997-7 provides an interesting teaching moment. In a dispute, where the wife accuses the husband of domestic violence, the NY City Bar opines that the husband cannot demand the “entire file” concerning the wife’s immigration status. According to this opinion, since the attorney is bound by a duty of loyalty towards both clients, absent any prior agreement designating only one spouse as the client, one co-client cannot use the lawyer against the other co-client in the event of a dispute. Thus, where there is a dispute, an attorney may decide to provide documents that are essential to the client requesting them and may withhold others, such as the tax returns of one party, especially where there is a domestic dispute between the two spouses. While the rule of thumb is to hand over the entire contents of the file to both clients, an attorney may use his or her judgment in the event of a dispute by withholding the documents that are not germane to the other party, though Rule 1.15(d) might apply in such a situation. This opinion puts the onus on the attorney to decide what is appropriate to give to each of the clients, which might force the attorney into an untenable predicament between warring clients. The best practice is to set forth in advance of the representation that both parties will be handed over the entire file in the case of an irreconcilable conflict, and where the attorney has to withdraw from the representation. Attorneys need not be forced into a position where they need to be making subjective determinations regarding who

should be getting bits and pieces of the file.⁴ To the extent that the lawyer’s file constitutes client property and the matter has not been addressed in advance, a safer course of action might be for the lawyer to follow the requirements of ABA Rule 1.15(e): “When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.” And keep in mind that certain items—green cards, passports, for example—might actually be government property that a client is entitled to possess. Preventing the client from accessing these documents, even when the lawyer has a lien on the file, is a dangerous practice for the lawyer and should be avoided.

The following article by professional ethics experts Craig Dobson and Nathan Crystal provides additional helpful guidance in varying conflict situations in the family-based immigration context.

- C. Dobson and N. Crystal, “Conflicts of Interest in VAWA Cases – a Case Study,” State Bar of Texas Immigration & Nationality Law Section, Immigration Bulletin (Spring 2021)

In addition, New York State Bar Opinion 761 sheds light on whether a lawyer may continue to represent a foreign national wife based on her alleged abuse by her U.S. citizen husband.

- New York State Bar Opinion 761 (Feb. 16, 2023)

⁴ In NYSBA Op 1249, the ethics committee opinion that in a joint representation there is a presumption that the lawyer will share confidential information received from each co-client with the other co-client, but that presumption does not extend to confidential information the lawyer received prior to the inception of the joint representation. However, in immigration practice, a document given by the client prior to the joint representation may still be used to support an I-130 or I-140 petition when the attorney takes on joint representation such as the employer’s tax return or the spouse’s tax return. One could argue that under such circumstances, there is a presumption that co-clients have agreed to share confidential information.